LexisNexis® Agricultural Law *NetLetter*

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditor rights, animals, grain, import/export and other matters in an agricultural context.

HIGHLIGHTS

* The Alberta Court of Appeal has considered and explained the law of adverse possession in relation to Alberta farm land. The case involved 9.5 acres of land which had been separated from other land owned by a registered owner when a highway was constructed in 1972. The separated parcel was subsequently farmed by a neighbouring farmer. The registered owner sold his land in 1999. The Court observed that the initial adverse possession could not be enforced against the purchaser from the registered owner because of the operation of the Torrens system of land registration in Alberta. However, the new registered owner delayed commencing a claim until 2011, after the 10 year limitation period under the Alberta Limitations Act expired. The Court considered and commented on the operation of a number of provisions in the Alberta Limitations Act concerning adverse possession including the effect of re-entry prior to the expiry of the 10 year limitation period, the type of evidence required to show possession was "adverse" and what would be needed to constitute a written acknowledgment of title prior to the expiry of the limitation period. (Reeder v Woodward, CALN/2016-009, [2016] A.J. No. 326, Court of Appeal of Alberta)

* The Ontario Court of Appeal has dismissed the appeal of Grain Farmers of Ontario from an October, 2015 decision which held that Grain Farmers could not challenge the authority of the Ontario Government to enact regulations which controlled the use of treated seeds. The Court held that although the regulations may well affect farmers' legal and property rights, this fact alone did not give the Court the right to interfere with the regulation, or "amend" the regulation by providing a declaration with respect to its interpretation. The Court concluded that the regulation was clear. (Grain Farmers of Ontario v. Ontario (Environment and Climate Change), CALN/2016-010, [2016] O.J. No. 2012, Court of Appeal for Ontario)

NEW CASE LAW

Reeder v Woodward;

CALN/2016-009,

Full text: [2016] A.J. No. 326;

2016 ABCA 91,

Court of Appeal of Alberta,

P.W.L. Martin, F.F. Slatter and J.D.B. McDonald JJ.A.,

April7, 2016.

Adverse Possession -- Alberta Limitations Act.

Robert Woodward and Lorraine Woodward (the "Woodwards") appealed to the Alberta Court of Appeal from the decision of a Queen's Bench Justice who concluded that the Woodwards had lost title to 9.5 acres of land to William Lynn Reeder and Pam Reeder (the "Reeders") by virtue of the Reeders' adverse possession of the Woodwards' land.

The Woodwards and the Reeders owned adjoining quarter sections of farm land. The Woodwards were registered owners of the subject land since May 5, 1999 when they purchased it. The Reeders had been registered owners of their land for several generations.

A disputed strip of land was created in 1972 when the County upgraded a highway. The highway was created a few feet south of the actual property boundary line between the Woodwards' land and the Reeders' land creating a 9.5 acre parcel registered in the name of the Woodwards' predecessor in title (the "Disputed Parcel").

The County also moved a fence from the property line to the boundary of a roadway.

At the time the highway was upgraded, the Disputed Parcel was not used and was of marginal value. The Reeders subsequently improved the Disputed Parcel and used it on a regular basis to grow hay and pasture cattle.

The Reeders' use of the Disputed Parcel was well known to the Reeders' precedecessors in title and would have been obvious to the Woodwards when they took title in 1999.

In 2011, the Reeders filed a Caveat asserting possessory title to the Disputed Parcel. The Woodwards asserted ownership by padlocking a gate and blocking access to the land with a truck. The Reeders then commenced an action to enforce their Caveat and the Woodwards counterclaimed seeking confirmation of their title.

The trial judge found that the Reeders' possession to the Disputed Parcel was exclusive and continuous, and was open, visible and notorious relying on Lutz v Kawa, 1980

ABCA 112 (CanLII), 13 Alta LR (2d) 8, 23 AR 9, and that the Reeders had a valid claim to the disputed parcel by virtue of adverse possession.

The trial Judge also found that the Reeders' adverse possession of the Disputed Parcel was discoverable by May 5, 1999 when the Woodwards took title, that "neighbourly attempts" to resolve the issue did not amount to an acknowledgement by the Reeders of the Woodwards' title and that the Woodwards' title was barred years later, on May 5, 2009. Since the Woodwards' action was not commenced until 2011, the Reeders were entitled to a declaration that they were owners of the Disputed Parcel.

The trial Judge also awarded the Reeders' damages of $20,280.00 arising from the Woodwards' alleged blocking access to their land in 2013 and 2014 and solicitor and client costs.

Decision: The Alberta Court of Appeal (Martin, Slater and McDonald, JJA) dismissed the Woodwards' appeal from the adverse possession judgment but allowed the Woodwards' appeal for a damage award and costs [at para. 36].

The Court considered the Woodwards' argument that they were in possession of the Disputed Parcel by virtue of a three-way oral contract and observed that if possession is claimed by virtue of a contract, there can be no claim based on adverse possession, stating at para. 10 and 11:

> [10] It should be observed that the claims pursued by the respondents at trial were inconsistent. A claim to land based on adverse possession must be "adverse". If the claimant is in possession of the land with the permission or consent of the registered owner, then that possession is not "adverse": Robertson v King Estate, 1999 ABQB 167 (CanLII) at paras. 36-8, 243 AR 201 affirmed, 1999 ABCA 314 (CanLII), 244 AR 379. If, as alleged, the respondents were in possession of the disputed parcel of land by virtue of a three-way contract, then that contract must be the source of their claim.
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> [11] If, on the other hand, there was no contractual or consensual basis for the occupation, then the claimant to the land might prove adverse possession under the test set out in cases like Lutz v Kawa. A finding that the respondents were entitled to the disputed parcel either because of a three-way contract, or alternatively because of adverse possession, would potentially be inconsistent. Where possession is taken on a consensusal basis, it can only become "adverse" if there is some clear repudiation of the contract by the occupant of the land, or some clear assertion of rights inconsistent with the title of the owner.

However, the Court observed that the trial Judge never found as a fact that there was a three-way agreement and did not decide the case based on this assumption [at para. 12].

The Court considered the factual basis which supported the finding that Reeders' possession of the disputed lands was adverse, stating, at para. 14:

> [14] The appellant Robert Woodward lived in the area, and knew that the respondents were occupying the 9.5 acre parcel even before the appellants

> purchased it. Robert Woodward testified that shortly after he acquired title in 1999, he told William Reeder he wanted to fence off the disputed parcel. William Reeder refused, and thereafter refused to cooperate with any suggestions about constructing that fence. The trial judge found at para. 23 that William Reeder consistently asserted his right to occupy the land in question. These are all acts of adverse possession, because they imply that the respondents believed they could occupy the disputed parcel notwithstanding the objections of the title holder. When the appellants allowed this state of affairs to continue for over 10 years without seeking a remedial order, their rights to the disputed parcel were extinguished.

At para. 16, the Court commented that

> "[16] .nothing can be more adverse than claiming property owned by another. The case law is clear that the knowledge of the claimant about the exact state of the title is not important; what matters is the intention of the claimant to possess the disputed piece of land: Lutz v Kawa at paras. 19, 28."

The Court then reviewed the provisions of the Alberta Limitations Act in relation to adverse possession claims, including the consequences of re-entry by a claimant prior to the end of the 10 year limitation period, and whether the requirement that an acknowledgement of a claim be "in writing" can be avoided by asserting an "implied license" stating, at para. 17 to 21:

> [17] In the end, the exact source of the respondents' occupation is not determinative because the limitation period had expired. It is not disputed that the respondents were in actual possession of the disputed parcel of land and rejected the appellants' claim to it. The appellants had to "seek a remedial order" within the time limits set out in s. 3 of the Limitations Act, RSA 2000, c. L-12. Under the Limitations Act, the time within which a claim must be pursued generally depends on "reasonable discoverability". Because of the operation of the Torrens system of land registration, the limitation period with respect to the occupation of land can start over again each time there is a new registered owner: Tooke v Eastern Irrigation District (1993), 1993 ABCA 39 (CanLII), 7 Alta LR (3d) 136, 135 AR 23 at paras. 21-2 (CA); Dobek v Jennings, [1928] 1 WWR 348 at p. 351 (Alta SC, App. Div). The earliest that the limitation could expire in this case would therefore be May 5, 2009, the 10th anniversary of the appellants' acquiring their title. Since Robert Woodward testified that William Reeder asserted his rights to the property very shortly after the appellants obtained title, the limitation period expired shortly after May 5, 2009.
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> [18] The precise situation presented by this litigation is contemplated by s. 3(6):
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> > (6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).

Thus, the appellants' actions of padlocking the gate and blocking access would only have been effective in stopping the respondents' adverse possession if they had occurred prior to May 2009. Whatever the original basis of the respondents' occupation of the disputed parcel, the appellants' claim to the land was barred by the passage of time.

> [19] Section 3(7) of the Limitations Act confirms that an acknowledgement of a claim to possession of land can restart the time for seeking a remedial order.
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> > (7) If a person in possession of real property has given to the person entitled to possession of the real property an acknowledgement in writing of that person's title to the real property prior to the expiry of the 10-year limitation period provided by subsection (1)(b),
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> > (a) possession of the real property by the person who has given the acknowledgement is deemed, for the purposes of this Act, to have been possession by the person to whom the acknowledgement was given, and
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> > (b) the right of the person to whom the acknowledgement was given, or of a successor in title to that person, to take proceedings to recover possession of the real property is deemed to have arisen at the time at which the acknowledgement, or the last of the acknowledgements if there was more than one, was given.

There is no evidence on this record of any acknowledgement "in writing" that would trigger the operation of this section. This provision cannot be avoided by asserting an "implied licence".

> [20] This section acknowledges that consensual occupation of land is not "adverse". If the occupant is in possesion of the lands through some sort of agreement with the owner (whether it be a tenant at will, licensee, lessee, or otherwise), the the occupant cannot claim title by adverse possession when the limitation period expires. Consensual occupation of this type can end a period of adverse possession, and thereby stop the limitation period from running, but consensual occupation requires the agreement of both the occupant and the owner. The owner cannot, after the fact, foist a licence on the occupant by unilaterally declaring that the owner will permit the occupation to continue. In order to change the character of the occupation from "adverse" to "permitted", both the occupant and the owner must agree that the possession of the land is consensual. The Limitations Act contemplates this sort of acknowledgment being in writing.
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> [21] In summary, the finding of the trial judge that there was no implied licence does not disclose any palpable and overriding error. It is clear that the respondents were in actual possession of the disputed parcel for over 10 years, and consistently asserted the right to be there notwithstanding the true

state of the title. The appellants' claim to the land was extinguished under the Limitations Act before this action was commenced.

The Court of Appeal also concluded that there was insufficient evidence to justify the damage award or an award of solicitor and client costs, which is an extraordinary remedy "generally reserved for cases of serious litigation misconduct" [at para. 29 to 35].

Grain Farmers of Ontario v. Ontario (Environmentand Climate Change);

CALN/2016-010,

Fulltext: [2016] O.J. No. 2012;

2016 ONCA 283,

Court of Appeal for Ontario,

J.I. Laskin, E.A. Cronk and B. Miller JJ.A.,

April 20, 2016.

Pesticide Regulation -- Judicial Authority to Delay Implementation of Regulations.

Grain Farmers of Ontario ("Grain Farmers") appealed to the Court of Appeal for Ontario from the decision of an Ontario Superior Court of Justice who dismissed the Grain Farmers' challenge to a regulation made under the Pesticides Act, RSO 1990, c. P-11 (the "Regulation") ([2015] OJ No 5662; 2015 ONSC 6581, CALN/2015-025).

Before the Superior Court, Grain Farmers argued that the implementation of the Regulation would cause irreparable harm to Ontario corn and grain farmers and asked for a stay of the Regulation until May, 2016, or such time as the requirements of the Regulation could be met.

The Ministry of Environment and Climate Change (the "Ministry") opposed the application and brought a cross application to strike out Grain Farmers' application.

Grain Farmers represents 28,000 producers of corn, soy bean and wheat in Ontario.

On July 1, 2015, Regulations under the Pesticides Act were enacted for the sale and control of neonicotinoid, an insecticide, which has a toxic effect on bees and other beneficial insects that pollinate plants.

The Regulation created a "transition year" during which farmers wishing to use neonicotinoid-treated seeds ("Treated Seeds") on more than 50% of their lands would be required to prepare a pest assessment report (a "Report") which had to be provided to seed vendors before the Treated Seeds could be purchased. After this transition year, farmers would be required to prepare reports to use Treated Seeds on any of their lands.

Two types of assessments can be conducted to obtain a Report: a soil pest assessment and a crop pest assessment. The results of either assessment may provide proof that Treated Seeds are required on a particular piece of land.

During the transition year, August 2015/16, any farmer can perform a soil pest assessment. In the following year a certificate demonstrating completion of a training assessment process is required before a soil pest assessment can be conducted.

After 2017, only a professional pest advisor is permitted to conduct a soil pest assessment in order to obtain a Report.

A separate stipulation was put in place for crop pest assessments. After March 1, 2016, crop pest assessments must be performed by a professional pest advisor.

Before the Superior Court Grain Farmers did not dispute that the Ministry had the right to pass and implement the Regulation. Grain Farmers argued that since the Regulation only came into force in July of 2015, after crops were already planted with Treated Seeds, those seeds would prevent pest damage, and any pest assessment report would not accurately disclose the amount of Treated Seeds needed to be ordered for the following year. Since farmers must place their orders for Treated Seed in the autumn, they would be placed at a financial disadvantage by having to wait until the next spring before they need to know how much Treated Seed they would be permitted to use. As a result, the amount of Treated Seeds they require might not be available to them. To avoid this situation, Grain Farmers asked that the implementation of the Regulation be stayed until May, 2016.

The Superior Court Justice concluded that Grain Farmers' application disclosed no reasonable cause of action and that it must be dismissed.

Before the Ontario Court of Appeal, Grain Farmers argued that the Regulation was ambiguous and that a declaration of what the Regulation requires is needed to ascertain a farmer's rights and obligations with respect to the use of treated seeds. Grain Farmers argued that in circumstances where a party's rights depend on the interpretation of an ambiguous regulation, a party is entitled to apply to Court for a determination of their rights.

Decision: Miller, JA (Laskin and Cronk, JJA concurring) dismissed the appeal [at para. 26] without costs.

Miller, JA concluded that the Regulation was not ambiguous and that Grain Farmers had not identified a genuine issue in dispute about farmers' rights and obligations, stating [at para. 4]:

> [4] .To grant the remedy that GFO seeks would be tantamount to amending a regulation through interpretation, a remedy well outside the court's discretionary power to order declaratory relief.

Miller, JA held that Grain Farmers' that the Regulation limited farmers' property rights did not give the Court the jurisdiction to issue a declaration, stating, at para. 13 to 15:

> (1) Does the Regulation affect property rights?

> [13] GFO submits that the motion judge erred by characterizing GFO's claim as "one of economic rather than property rights." It is unnecessary, however, to decide whether the Regulation affects property rights. It would be enough, for the purposes of GFO's argument, that the Regulation affect any of the farmers' legal rights. Nothing is added to GFO's argument by further specifying those rights as distinctly property rights.
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> [14] Although the motion judge concluded that the Regulation does not affect property rights, I do not interpret him as concluding that the Regulation does not affect the farmer's legal rights at all. In any event, in my view, it plainly does. Purchasing and using treated seeds is an exercise of a liberty. A liberty, to use the standard grammar of juridical relationships, is a species of legal right: it is the absence of any law that would constrain any particular action: MacDonald v. City of Montreal, 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460 (Wilson J., in dissent) at pp. 517-519. Because a liberty is only the absence of a legal restriction, and not a legal or constitutional right that government not create such restrictions, a liberty can be narrowed, or extinguished entirely, by a constitutionally valid statute or regulation.
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> [15] The Regulation narrows the farmers' range of legally permitted options, and so affects the farmers' rights in this sense. Little, however, turns on this. The limitation of a right does not, standing alone, create a justiciable issue. The problem that GFO cannot overcome is that there is simply no controversy as to the farmers' rights or obligations under the Regulation that could make the matter justiciable. As the motion judge held, and as I explain below, the exercise of the court's declaratory power is discretionary and is informed by the doctrine of justiciability: Canada v. Solosky, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 832; Green v. Canada (A.G.), 2011 ONSC 4778 (CanLII), [2011] O.J. No. 5615, at paras. 24-25.

Miller, J. held, at para. 19:

> [19] .But even if, as pleaded, the Regulation creates financial hardship is futile, and provides little environmental benefit, neither the wisdom nor the efficacy of a regulation is a justiciable issue."

and at para. 20:

> [20] Although its policy dispute with Ontario is real and may have significant consequences for GFO, the problem of legal interpretation alleged by GFO is artificial - the dispute between the parties does not turn on the interpretation of the Regulation. The regulatory preconditions that must be satisfied before a farmer can purchase and use treated seeds are clear.

CREDITS

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