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.

Friday, September 7, 2018 - Issue 403

HIGHLIGHTS

* A Justice of the Alberta Court of Queen's Bench, in a carefully considered decision, has reviewed and explained the law of adverse possession in Alberta. The Court observed that in some aspects, Alberta law regarding adverse possession is unique from the law of other provinces. Alberta law has, since 1905, recognized the right of "trespassers" (sometimes referred to as "squatters") who have been in continuous, adverse and open possession of another person's land for more than 10 years, to obtain an Order "quieting" the title of the true owner, and to exclusive possession of the land. The Court observed that the Alberta Land Titles Act entitles adverse possession claimants to obtain a certificate of title to disputed land by filing a copy of the Court's judgment with the Registrar of Land Titles, unless the judgment relates to a portion of the land only, in which case the claimant must obtain subdivision approval before a new certificate of title can be issued. The Court observed that Alberta law presented difficulties but that these difficulties can only be resolved through legislative change. The Court also held that a claim of adverse possession could be defeated if the owner consented to the trespasser's occupation before the limitation period expired, but that a revocable "license to occupy" which arose from this consent could not arise from mere acquiescence. This case involved a dispute between the owners of two residential lots in the City of Calgary. The "trespassers" knew they were trespassing on their neighbour's land and were determined not to move unless they were required to do so. The land owners were aware the trespasssers were occupying their land, but were not aware of the risk of inaction and did not take action for more than 10 years because they wanted to avoid a confrontation. [Editor's note: Although this decision relates to urban residential lots, it is an important reminder to Alberta farmers who are at risk of losing substantial portions of valuable land if their fences do not lie on surveyed boundaries. Land owners can take steps to protect their ownership rights, provided that they do so prior to the expiry of Alberta's 10 year limitation period.]. (Moore v McIndoe, *CALN/2018-022*, *[2018] A.J. No. 384*, Alberta Court of Queen's Bench)

NEW CASE LAW

Moore v McIndoe;

Alberta Court of Queen's Bench,

Eamon, J,

March 28, 2018.

CALN/2018-022
[2018] A.J. No. 384 | *2018 ABQB 235*

Adverse Possession — Alberta.

Victor and Careen Moore (the "Moores") commenced proceedings against James McIndoe and Laurel McIndoe (the "McIndoes") for a Court Order directing that they are entitled to acquire a strip of the McIndoes' residential lot in Calgary (the "Strip") on the grounds that the Moores had adversely possessed the Strip of land for more than 10 years and that the McIndoes' title to the Strip was therefore extinguished under the Limitations Act, *RSA 2000, c L-12*.

The Moores bought their lot in July of 1989. The McIndoes purchased their adjoining lot in 2002. Both lots had existing developments on them including houses and fences.

The fence between the two lots had been built before both the Moores and the McIndoes purchased their lots.

Over the years the Moores exclusively occupied the Strip of the McIndoes' lot that was on their side of the fence. They poured a concrete pad on the Strip and maintained and occupied the Strip as part of their yard.

In 2003 the Moores extended the old fence towards the street. The extended fence also occupied part of the McIndoes' land.

The McIndoes knew that the Moores were occupying a strip of their land but decided not to approach them because they believed the Moores were difficult, aggressive and volatile neighbours, and that they wanted to avoid confrontation with them.

In 2014 the McIndoes approached the Moores to ask them to leave the McIndoes' land so that they could re-landscape their yard.

The Moores responded by filing this lawsuit, which claimed that a Strip of the McIndoes' land now belonged to them.

The McIndoes did not contest the fact that the Moores had openly and continuously occupied their Strip of land for more than 10 years. They defended the claim on the basis that:

1. The Court should infer from the Moores' knowledge of their trespass and the McIndoes' decision to avoid unnecessary confrontation, that there was an inferred revocable license to occupy running in favour of the Moores, which prevented the 10 year period from running.

2. The Court should decline to award adverse possession because permitting adverse possession would conflict with the goals of the highly regulated land development and planning regime that exists in urban Alberta.

Decision: Eamon, J granted a judgment in favour of the Moores for exclusive possession of the

disputed Strip of land, and which directed the preparation of a judgment for registration at Land Titles Office subject to Land Titles practice, which required subdivision approval before a new title could be issued. It was directed that if the parties could not agree on the land description the boundaries would be determined by survey [at para. 195 to 197].

Eamon, J considered at some length the Moores' evidence that they were not aware they had been trespassing upon the McIndoes' land until they were approached in 2014. She questioned their credibility and found on a balance of probabilities that the Moores knew they were occupying the McIndoes' land on their side of the fence and that they intended to stay there unless they were forced to vacate [at para. 26 to 90].

Eamon, J also found that the McIndoes' concerns about potential difficulties dealing with property line issues with the Moores were genuinely and reasonably held by them, and that they decided not to raise property line issues until it was necessary to do so [at para. 95 to 106].

Eamon, J also concluded that:

> (a) The McIndoes did not subjectively intend to permit the Moores to occupy the disputed strip of land and that their motivation in deciding to say nothing was "to avoid a difficult situation with the Moores". They decided to tough it out until they needed to deal with the issue; and
>
> (b) The Moores did not think they had permission from the McIndoes to occupy the disputed strip of land. They intended to occupy it until they were forced to leave.

(a) The Alberta Law of Adverse Possession

Eamon, J then reviewed the Alberta law of adverse possession in detail at para. 109 to 118, stating, at para. 110 and 111:

> [110] Adverse possession of real property has been a feature of Alberta land law since inception of the Province in 1905 and earlier. It derives from the Real Property Limitation Act, 1833 (UK), 3 & 4 Will 4, c 27 and subsequent United Kingdom statute law of 1887 (Lutz v Kawa, *1980 ABCA 112*, *1980 ABCA 112* *13 Alta LR (2d) 8*, *23 AR 9*, *23 AR 9* at paras 17-18 Dobek v Jennings, *[1927] A.J. No. 50* *[1928] 1 DLR 736* (AB SCAD) at p. 737; Alberta Law Reform Institute ("ALRI"), Limitations Act: Adverse Possession and Lasting Improvements, Final Report No 89, May 2003 at pp 6-7).
>
> [111] Alberta's present statutory backdrop is contained in three statutes: the Limitations Act, the Land Titles Act, and the Municipal Government Act, *RSA 2000, c M-26*.

Eamon, J then quoted s. 3 of the Limitations Act (Alberta), the key provisions of which provide as follows:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within.
>
> ***
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant on pleading this Act as a defence, is entitled

to immunity from liability in respect of the claim.

(3) For the purposes of subsections (1)(b) and (1.1)(b).

***

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

(4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 69 of the Law of Property Act.

Eamon, J concluded, at para. 113 to 118:

[113] As appears from ss 3(1)(b), 3(3)(f), and 3(4), exclusive possession of a piece of land over a sufficient time (presently 10 years) by a trespasser or squatter may extinguish the rights of a true owner.

[114] Subsections 3(3)(f), 3(6) and 3(7) were added to the statute in 2007 (SA 2007, c 22, s 1). The background to those amendments was a concern expressed by ALRI in 2003 that the new Limitations Act (which came into force March 1, 1999) inadvertently postponed the running of the limitation period until the adverse possessor went out of possession because of the wording of subsection 3(3)(a) (Report No 89 at pp 18-20). Although ALRI recognized the proposition was absurd, they recommended amendments to remedy this concern and took the opportunity to consider whether adverse possession should apply to Alberta real property under the Torrens land titles system at all. ALRI recommended the law of adverse possession continue to apply to land under the Alberta Torrens system (ibid at pp xix, 73). The Legislature obviously chose to clarify the matter in 2007.

[115] The parties did not contend that the timing of the amendments to s 3 had any bearing in this case. I mention them merely to highlight that the Legislature appears to have re-affirmed in 2007 the long standing legislative intention to apply adverse possession in the context of land under the Torrens system.

[116] The law of adverse possession in Alberta is well defined. The essentials are that the claimant be in possession and that the true owner be out of possession (Lutz at para 27). The possession must be exclusive, continuous, open or visible and notorious for the requisite period. As Madam Justice Paperny stated in Condominium Plan No 7810477 (Owners) v Condominium Plan No 7711723 (Owners), *[1997] A.J. No. 1121*:

> [31] In her article "Something for Nothing: The Law of Adverse Possession in Alberta" *(1992) 30 Alta. L. Rev. 1291*, Sandra Petersson stated at 1306:
>
> In addition to possession over time, adverse possession requires a certain quality of possession. The classic requirement is that possession be "an actual possession, an occupation exclusive, continuous, open or visible and notorious . [which] must not be equivocal, occasional, or for a special or temporary purpose." (Citing from Sherren v. Pearson (1887), *(1887), 14 S.C.R. 581* (SCC), *14 S.C.R. 581* at 585).

[117] It is unusually immaterial whether the adverse possessor was or was not aware that they were in possession of another person's land. The actual attributes of the possession and the adverse possessor's intention to possess are what count. An intentional

> trespasser may adversely possess the true owner. An unintentional trespasser may adversely possess the true owner. The fact both parties were mistaken as to the location of the true boundary between their lands does not preclude adverse possession (Lutz at paras 17-19, 27-28, 31 (CanLII version); Revelstoke Companies Ltd. v. Lindsay, *[1981] A.J. No. 691* (AB QB), *17 Alta LR (2d) 339* (QB) at para 44 (CanLII version); Rinke v Sara, *2008 ABQB 756*, *[2008] A.J. No. 1437* at para 19; 1215565 Alberta Ltd v Canadian Wellhead Isolation Corp, *2012 ABQB 145*, *[2008] A.J. No. 1437*at para 12; Reeder v Woodward, *2016 ABCA 91*, *2016 ABCA 91* at para 16).
>
> [118] ALRI expressed the view that where a claimant goes into possession knowing their conduct is wrongful the claim is likely to fail (ALRI Report No 89 at pp 32-33). That should not be taken as implying that a knowing trespasser cannot succeed in a claim for adverse possession. The cases cited by ALRI in support of that proposition turn on the nature of possession, including whether the possession was continuous or exclusive. If the possession is sufficient, then the time starts to run. In Lindsay, the adverse possessor knew it did not have title to the lands and openly pursued a course of action calculated to be the least likely to alert the true ownwer to the fact of its possesion. Waite J of this Court held it was entitled to pursue that course of action and refused to apply the fraud exception in the limitations legislation.

(b) The Defence of a "License to Occupy"

Eamon, J observed [at para. 119 to 121] the owner's consent to a trespasser's occupancy of land may defeat a claim of adverse possession, stating:

> [119] The required possession must be adverse in the sense that the occupation must be without consent of the owner. Consent precludes adverse possession (Reeder at para 10; JA Pye (Oxford) Ltd v Graham, [2003] 1 AC 419 (HL) at para 37).
>
> [120] In Alberta, consent may arise from a personal license or a tenancy at will. Unlike some other jurisdictions, no legislated time limitation runs on a tenancy at will that could eventually convert permissible occupancy to adverse possession. There is no time limitation on the duration of a consent which can be asserted in defence to a claim of adverse possession in Alberta.
>
> [121] In appropriate cases the court may infer consent from the parties' conduct, words and circumstances (Robertson v King Estate, *1999 ABQB 167*, *1999 ABQB 167* *243 AR 201*, aff'd *1999 ABCA 314*, *1999 ABCA 314* *244 AR 379*; Lehr v St Mary River Irrigation District, *[1993] AJ No 1411* (QB) at para 40).

However Eamon J disagreed with one of the conclusions of McBain J in Lehr with respect to his proposition that what mere acquiescence is sufficient to infer a license, stating at para. 123 and 124:

> [123] Lehr is frequently cited for the general principle that consent may be inferred from the circumstances. I do not agree that the seventh proposition described by McBain J, if it suggests that mere acquiescence without more is sufficient ground to infer a license, accurately states the law of Alberta.
>
> [124] Typical examples of a personal license to occupy or consent are a verbal agreement or permission, family arrangements, acts of friends, generosity or charity, caretaker arrangements, or occupation by servants or employees (Ryan v Ryan *(1881) 5 SCR 387*;

> Cobb and Another v Lane, [1952] 3 All ER 1199 (CA); Errington v Errington Woods, [1952] 1 TLR 231 (CA); Robertson v King (Estate; Pollo v Taylor, *2004 ABQB 173*, *2004 ABQB 173*; MacKinnon v MacKinnon, *2010 ONCA 170*, *2010 ONCA 170*; Law v Lau, *2015 ABQB 423*, *2015 ABQB 423* In Lehr, the local irrigation board gave verbal permission to an adjacent landowner to farm on the board's lands associated with an irrigation reservoir. That arrangement continued with the claimants, who had purchased lands belonging to that prior owner and knew about the arrangement, as evidenced by the conduct of the claimants and the board (Lehr, at paras 11-13, 23, 25, 71). These cases are highly fact specific and include factual elements beyond mere acquiescence between strangers.

and concluded at para. 142:

> [142] .There is no basis to infer a license in cases of mere acquiescence. That would amount to a fiction to avoid the Legislature's intention in section 3 of the Limitations Act.

(c) The Torrens System and Land Use Planning Considerations

Eamon, J referred to the provisions of the Alberta Land Titles Act and the Municipal Government Act at para. 143 to 179.

With respect to the Torrens system she stated, at para. 143:

> [143] Alberta is unique among Canadian provinces in recognizing adverse possession under a Torrens land titles system. The Legislature passed legislation recognizing the operation of adverse possession in the Torrens system in 1921 (Lutz at paras 11-12).

Eamon, J then quoted section 74 of the Land Titles Act which allows a person who has obtained a judgment quieting title pursuant to the Limitations Act to file a certified copy of the judgment at Land Titles Office, and which requires the Registrar to enter a memoranda cancelling the old certificate of title and issuing a new certificate of title in accordance with the judgment.

She also observed [at para. 144 and 145] that Alberta law permitted a claim for adverse possession be made against a portion of a parcel with respect to which a certificate of title had been issued.

Eamon, J next considered the issue of whether the land use planning provisions under the Municipal Government Act must be complied with before a new certificate of title can be issued. She rejected the Moores' argument that subdivision approval was not necessary and concluded, at para. 156, 158 and 160 to 161:

> [156] Therefore, a successful claimant who established adverse possession against a part only of a lot in a certificate of title must obtain subdivision approval before the Registrar of Land Titles may accept the judgment for registration.
>
> [158] .The statutory objective of s 652 requires that instruments which subdivide a lot in a certificate of title be subject to subdivision approval.
>
> [160] What is the status of an adverse possession judgment if there is no subdivision approval? Unless and until the subdivision approval is granted, the judgment is effective between the litigants.
>
> [161] The history and context of subdivision regulation suggests that merely prohibiting

> registration does not necessarily affect the enforceability of the transaction between the original parties to that transaction.

Eamon, J observed, at para. 166 that this form of unregistered ownership, although effective between the parties, is subject to being extinguished should a bona fide purchaser for value acquire the title of the true owner.

In response to the argument of McIndoes' counsel that the Court should consider the implications of land use in exercising whether or not to order adverse possession, Eamon, J observed that these concerns were "not insubstantial" indicating [at para. 173] that concerns with respect to the size of sideyards could present a planning issue and that the order might require the original owner to reconfigure other parts of the property to restore access to the remainder without financial contribution from the adverse possessor, and that liability for payment of property taxes may cause uncertainty in that the registered owner may still have to pay the taxes until title is split, subject to a potential quantum meruit claim against the adverse possessor. However she reiterated her decision at para. 172, stating:

> [172] .Although any Order I make in this case allowing the adverse possession claim cannot be registered in the land titles office without subdivision approval, the Order is immediately and permanently effective between the original parties to the law suit. By precluding the true owner from physically accessing certain portions of the lot, some of the purposes of land planning could be defeated for an indeterminate period, perhaps many years.

and concluding, at para. 192 that "under the law as it currently stands, there is no basis to refuse the judgment or infer a license to occupy".

CREDITS

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.