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Proprietary estoppel is alive and well in Alberta (at least for the over fifties)

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Case commented on:

Parkdale Nifty Fifties Seniors Association v Calgary (City), 2012 ABCA 301

I confess that I don't find the name "Nifty Fifties" especially endearing, especially when associated with the term "seniors." Indeed, it is disconcerting to learn from this decision that the qualifying age for entry to the plaintiff's society is not some respectable, far-off, likely unattainable, age like 70, no, not even 65, but 50!! (the bar was apparently lowered from the 55 to 50 sometime post 1983). Quite why any self-respecting 50 year old would voluntarily associate (self-identify) with an organization trumpeting this name is quite beyond me. So, no sympathy with the plaintiff\respondent's name, but lots of sympathy with the cause, and lots of interest in the idea of proprietary estoppel – indeed, notwithstanding the advancing years I still recall, without prompting, one of the leading proprietary estoppel cases I came across at law school in the UK, a case which rejoices in the name of *Dillwyn v Llewelyn*, [1862] 4 De GF & J 517, 45 ER 1285 (a case that doesn't come to mind without also calling to mind Dylan Thomas', Llareggub in Under Milk Wood – and for those not in the know, try that backwards); and yes, I digress.

And now for the facts. The Parkdale Community Association (Parkdale), which holds a lease from the City for a nominal rent, "has always supported a community seniors' group" (at para 3). Parkdale's then lease was for a 15 year term expiring at the end of 2011. Parkdale built a dedicated area for seniors in the 1980s and the seniors of Parkdale in turn incorporated themselves as a society in 1983 as the Nifty Fifties Social Club (N50s). Needing more space (that's what happens when you drop the entry level), the N50s, with the permission of the City and Parkdale built a new building (the Seniors Centre) on the lands leased from the City. The N50s rented portions of the space to others. Later, the City began to question N50's legal status on the lands. While this was not pursued at the time, in May 2010 Parkdale served notice on the N50s that they needed to comply with Parkdale's rental policy and also advised those dealing with the N50s that they would need to become tenants of Parkdale. In response, the N50s commenced this action claiming a series of declarations and injunctions. In particular the N50s sought declarations that it had a beneficial interest in the Seniors Centre and that it was entitled to occupy the Centre subject only to paying a pro rata share of operating costs. The City supported Parkdale.

At trial, Justice McMahon concluded that both Parkdale and the City had met the elements of proprietary estoppel as laid out in the Ontario case of *Eberts v Carleton Condominium Corp No. 396* (2000), 136 OAC 317 and as such were (at para 15) "estopped from denying the right of

Nifty Fifties to the use and possession of the Founders Hall and the expansion on the same terms as existed before the litigation began." The three part test from *Eberts* is as follows (at para 12):

> 1. The owner of land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the owner's property,
> 2. In reliance upon this belief, the claimant acts to his detriment to the knowledge of the owner; and
> 3. The owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive.

The formal terms of the judgement roll went on to say that:

> 2. Parkdale is estopped from denying the right of the Parkdale Nifty Fifties Seniors Association ("Nifty Fifties") to the use and possession of Areas 4 and 5 of the Parkdale community hall … on the same terms as existed before the commencement of this litigation;
> 3. Parkdale is enjoined from interfering with the Nifty Fifties use and possession of Areas 4 and 5 for the term of its lease with the City;
> 4. The City is estopped from denying the right of the Nifty Fifties to the use and possession of Areas 4 and 5 on the same terms as existed before the commencement of this litigation, provided that the Nifty Fifties do not otherwise cause the PCA to be in default or in breach of the current lease;
> 5. The City is enjoined from interfering with the Nifty Fifties use of Areas 4 and 5 until December 31, 2011, being the expiry of the current Lease with Parkdale.

On the appeal (if not before) it became apparent that the N50s had made an important concession or at least clarification as to the scope of its claim. Thus the Court of Appeal at the outset of the "Analysis" part of its judgement records that (at para 19):

> … Nifty Fifties contend that their rights, as recognized by the trial judge, were derived under and through the lease granted by the City to Parkdale. We are satisfied that whatever limited right the trial judge found Nifty Fifties to have as a result of the estoppel, whether characterized as a equitable licence with an equity or an equitable sublease, was derived from the head lease and did not constitute an interest in lands that was independent of the lease.

In light of this concession any victory of the N50s may yet turn out to be pyrrhic.

In the Court of Appeal the discussion seems to have focused on two issues. First, the application of the third criterion from *Eberts* (taking unconscionable advantage) and, second, the application and relevance of section 609 of the *Municipal Government Act*, (*MGA*) RSA 2000, c M-26. In considering these matters the Court applied (at para 18) a standard of correctness to the questions of law and the deferential standard of palpable and overriding error to the application of the law to the factual matrix.

As to the first issue, the Court had little difficulty in concluding that the trial judge had not erred (at para 22):

> The trial judge held, on the evidence before him, that Nifty Fifties were induced and encouraged to develop and use the subject areas within the leased lands

> "exclusively for the purposes of their constituency" (para 30). Furthermore, he found that the building expansion was funded by Nifty Fifties on the expectation that they would have possession and occupancy by paying their proportionate share of the common costs. In these circumstances, the trial judge found it would be unconscionable for Nifty Fifties to be deprived of their interest in the lease estate – however one describes that interest. We agree.

The second argument was just as readily disposed of. Section 609 of the MGA provides that

> No person can acquire an estate or interest in land owned by a municipality by adverse or unauthorized possession, occupation, enjoyment or use of the land.

The short response to that is that the N50's possession of the land was not adverse to that of the City since it was with the consent of the City's lessee, Parkdale.

Commentary

This judgement provides a useful application of the doctrine of proprietary estoppel in Alberta. Other recent decisions of the Court of Appeal (e.g. *Nelson v 1153696 Alberta*, 2011 ABCA 203 and *Wilson v Benson Estate*, 2006 ABCA 287) have referred to proprietary estoppel but without analyzing it in detail. This case thus offers an important endorsement of the three part test adumbrated by the Ontario Court of Appeal in *Eberts*. But what is distinctive about the doctrine of proprietary estoppel (as to other forms of estoppel such as estoppel by representation and acquiescence and promissory estoppel) is that it can actually confer an estate on the claimant and in some cases a different and more extensive estate than to which the plaintiff (and yes, it may operate as a sword and not just as a shield) might otherwise have been entitled: see *Dilllwyn v Llewelyn*.

But while the decision resolves the particular dispute it is little if any help in relation to the potentially larger entitlement of the plaintiff. The Court of Appeal concludes its judgement by emphasising (at para 26), like the trial judge, that it was only settling the rights of the parties up until December 31, 2011:

> In these circumstances, whether the underlying facts will continue to support an estoppel *vis-à-vis* either, or both the City and Parkdale, depends upon future events, including whether Parkdale's lease is renewed, and upon what terms.

Given the concession made by the plaintiff\appellant one cannot fault the Court of Appeal for the limited scope of its conclusions but it does leave outstanding the question of what rights, if any, the plaintiff has against both parties, the City and Parkdale, post-2011 (i.e., now). If the City renews the head lease then it is hard to see why the estoppel should not continue to bind Parkdale – but for how long? Is it a reasonable amortization period for the building? Or longer? In other words, what estate does the N50s have by virtue of the estoppel? If the City fails to renew the head lease or excludes the seniors' facility from the head lease does the estoppel still bind the City? Arguably it should and for the same (uncertain) period outlined above for the simple reason that the trial judge concluded that the City was party to the representations made to the N50s. The old case of *Dilllwyn v Llewelyn* is interesting in this context. In that case T left property in what seems to have been a strict settlement to W for life remainder to his first and other sons for life (the first son being the plaintiff, P). Before T died and the will took effect T and W encouraged P to come and live near them and "and accordingly they selected a small

estate and determined to gift it to the son in order that he might build a proper dwelling-house for his residence thereon."

In reliance on this encouragement P built a substantial house. T having died without having altered his will the question became what estate did P have? Was it just a life estate or was it something more substantial? The Court concluded that P was entitled to an estate in fee simple: "The estate was given as the site of a dwelling-house to be erected by the son. The ownership of the dwelling-house and the ownership of the estate must be considered as intended to be co-extensive and co-equal. No one builds a house for his own life only, and it is absurd to suppose that it was intended by either party that the house, at the death of the son, should become the property of the father."

One of the unstated premises underlying the decision in *Dillwyn* is that the Court clearly thought that it had to decide the plaintiff's entitlement as between two possible estates, a life estate or the estate in fee simple. The fancy name for is the doctrine of *numerus clausus* i.e. the idea that the law jealously guards the forms of property that citizens can create, and thus that part of what we do as lawyers is to characterize messy arrangements within these pre-existing categories. In those cases where the category eludes us counsel (and the courts) need to be creative – a case in point is *Errington v Errington*, [1952] 1 KB 290 , where Lord Justice Denning resorted to the category of a contractual licence in order to explain the informal legal relationship that had developed between Mr. Errington and his daughter in law.