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Co-Owners and Adverse Possession — The Uniqueness of Alberta?

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Case Commented On: *Verhulst Estate v Denesik*, 2016 ABQB 668 (CanLII)

In an earlier post, I concluded that Master Schlosser was correct in finding that a co-owner will typically not be able to claim their co-owner's interest in the property through the doctrine of adverse possession. In this appeal upholding that decision, Justice D.L. Shelley queries whether a co-owner in Alberta can *ever* make a claim for adverse possession against a co-owner. This leads her on an interesting journey across Canada which suggests, but does not conclude, that Alberta might be unique in its treatment of co-owners and adverse possession.

Background

The land in question comprised of a 159-acre parcel (the "larger parcel") and two smaller river lots (the "river lots") totalling 96 acres. There was approximately 6 kilometres between the larger parcel and the river lots. The land had been acquired by Mr. Denesik and the late Mr. Verhulst as tenants in common as part of a joint venture. After logging operations ceased on the lands, Mr. Denesik moved a mobile home onto the larger parcel where he lived for more than 10 years. The late Mr. Verhulst lived in the city with his family, but continued to hold his interest in the lands for investment purposes. In 2014, the Estate of Mr. Verhulst brought an application for an order for partition and sale of the lands. In response, Mr. Denesik applied for a declaration that he was entitled to his co-owner's share through the doctrine of adverse possession.

Master Schlosser heard the applications together (see my earlier post). He granted the application for sale of the property and dismissed the claim for adverse possession. He noted that because tenants in common have equal rights to use and possess the entire property (and because possession is typically not adverse when it refers to lawful title), the burden on a co-owner to establish a claim for adverse possession is much heavier than in other cases. He concluded that the circumstances would have to be "exceptional" for one co-owner to dispossess another. On the facts, Master Schlosser concluded that at no time was Mr. Verhulst dispossessed of the lands, or dispossessed to the point where he should have realized that he had to seek an order to recover possession of the lands. He held that Mr. Denesik's decision to live in a trailer on a portion of the larger parcel was not enough to establish a claim in adverse possession to the entirety of the larger parcel, much less to the distant river lots.

Issues on Appeal

The main issue on appeal was whether Master Schlosser had erred in dismissing Mr. Denesik's application and granting the order for sale of the lands. But rather than simply deciding the case on this basis, Justice Shelley considered a sub-issue that had been raised by the parties (but not addressed in the Master's decision). That sub-issue concerned whether a tenant in common in Alberta *can* acquire another tenant in common's interest through adverse possession. (at para 12)

Although not ultimately necessary to decide the appeal, it is this sub-issue that took Justice Shelley on a journey through Canadian law, a journey which revealed some interesting differences between Alberta and the rest of the country.

Adverse Possession and Co-ownership in Alberta

Justice Shelley began her analysis by noting that adverse possession is really an aspect of limitation of actions legislation. Alberta's *Limitations Act*, RSA 2000, c L-12, bars an action to recover possession of real property after 10 years. Because an action to recover land is statute-barred at that time, someone who has taken possession may seek a declaration of title to that land. Sections 39 and 74 of the *Land Titles Act*, RSA 2000, c L-4 detail the process for registering an adverse claim in the Land Titles office. Once met, the title of the registered owner is extinguished and title is granted to the new (adverse) possessor. (at paras 14-17)

The case law on adverse possession in Alberta, reviewed by Justice Shelley in detail, is clear that to make out a good claim, the law does not require the adverse possessor to intend to oust or dispossess the owner. Adverse possession can be made out where: (a) the true owner is out of possession of the claimed lands; (b) the claimant is in actual use and occupation of the lands; and (c) the claimant's use and occupation is exclusive, continuous, open or visible and notorious for the requisite 10-year period. Further, the fact of use and occupation by the claimant is the only determinant while the belief, ignorance, mistake or intention of the claimant is immaterial (at paras 18-19; citing *Rinke v Sara*, 2008 ABQB 756 (CanLII) at para 19). Nonetheless, as the Court of Appeal in *Reeder v Woodward*, 2016 ABCA 91 (CanLII) has held, "a claim to 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'." (at para 23, citing *Reeder* at para 10).

Tenants in common are co-owners who hold interests in land that are separate and distinct from each other in shares that might not be equal. Nonetheless, any form of co-ownership is characterized in law by unity of possession. This means that each co-owner's share is undivided in the sense that each is entitled to possession and use of the whole property. As Justice Shelley noted, the fact that tenants in common (and joint tenants as well) hold undivided shares in the entire property makes it difficult to envision how one tenant in common might put the other tenant "out of possession" or claim "exclusive" possession for purposes of making out a claim in adverse possession. Moreover, there is a reciprocal implied permission of one co-owner for the other to be in possession. Justice Shelley's review of the case law in Alberta suggested "that an adverse possession claim by one tenant in common against another cannot succeed." (at para 24).

But Mr. Denesik relied on a comment by Professor Bruce Ziff to rebut this conclusion. In his *Principles of Property Law*, 6th ed. (Toronto: Thomson Reuters Canada Ltd., 2014), Professor Ziff suggests that such claims are indeed possible. He states that even a co-owner may make out a claim in adverse possession "against other persons with whom the right to possession is shared" (at para 25). He adds, however, that there is a "heavy onus" on a co-owner to show that the person in possession intends to exclude his or her co-owners.

Adverse Possession and Co-ownership in Other Jurisdictions

Justice Shelley noted that Professor Ziff's comments were supported by non-Albertan case law. She decided to see if the law in those jurisdictions was the same as in Alberta.

She traced the modern doctrine of adverse possession to an old English statute entitled *An Act for the Limitation of Actions and Suits relating to Real Property and for simplifying the Remedies for trying the Rights thereto*, (1833) 3 & 4 Will IV, c 27 (the *Real Property Limitation Act*). This Act provided for the extinguishment of a landowner's right in land once the limitation of actions barred his or her remedy for bringing a claim to recover possession of that land.

Significantly, section 12 of that Act dealt directly with co-owners, both joint tenants and tenants in common. As summarized by Justice Shelley (at para 29, emphasis added), it provided that:

> when any one or more of several persons entitled to any land as joint tenants or tenants in common were in possession of the entirety, or more than his or their undivided share or shares of such land, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land, such possession would *not* be deemed to have been the possession of or by any such last-mentioned person or persons.

But what does this convoluted language mean exactly? In *Bentley v Peppard* (1903), 33 SCR 444, relied upon by Professor Ziff and reviewed by Justice Shelley (at para 31), the Supreme Court of Canada explained the effect of this provision as follows:

> At common law […], the actual and exclusive possession of a tenant […] could not work to the detriment of his [*sic*] co-tenant […]. His possession was theirs and could be invoked not only as against the alleged title of a trespasser, but in aid of their own.
>
> (But this principle has long since been changed by statute both in England and Nova Scotia.)
>
> Since this change, therefore, exclusive possession by one of such co-owners is regarded as adverse against the others.

Given what we know about the unity of possession inherent in co-ownership, this last statement is odd and surprising. While Justice Shelley does not expose the rationale behind it, she does conclude that section 12 is a provision that was subsequently incorporated into the limitation of actions legislation of many Canadian provinces. All the Maritime provinces, as well as Ontario, have similar provisions, and the courts of those jurisdictions have allowed for successful adverse possession claims by co-owners against each other. Still, some of that case law has suggested that co-owners face a "higher standard than a typical squatter" (at para 36) and that exceptional circumstances must exist for one co-owner to be found to have excluded another.

The Uniqueness of Alberta?

Justice Shelley correctly observes that Alberta legislation does not have a similar provision to section 12 of the *Real Property Limitation Act*. Although it was received in Alberta in 1870, that Act was repealed in 1935 and replaced with Alberta-specific limitation of actions legislation which did not contain any analogous provision. Thus, she concludes that Alberta is the only common law province in Canada that "does not have a section 12 analogue in its statutory scheme but that also recognizes adverse possession" (at para 39). Although such a provision is also absent in other Torrens jurisdictions (such as British Columbia and Saskatchewan), she notes that those provinces do not allow for adverse possession claims at all. Alberta is unique in that regard as well.

This absence of a comparable statutory provision explicitly authorizing an adverse possession claim by one co-owner against another leads Justice Shelley to conclude that "there is little legal basis for an adverse possession claim by one tenant in common against another in Alberta." (at para 40). She states that, in Alberta, the "unity of possession inherent in a tenancy in common will generally preclude an adverse possession claim" and that "it is unlikely that a claim for adverse possession will succeed" (at para 50). More specifically, she says that

> [t]he fact that two tenants in common are both registered on title and have the right to undivided possession of the whole suggests that, by the very nature of a tenancy in common, one co-owner would never be on the property without the "knowledge" and "permission" of the other co-owner. As the Alberta Court of Appeal recently affirmed, adverse possession must be "adverse", and consent of the registered owner will preclude a claim. (at para 50)

Justice Shelley concludes that "it is extremely difficult, if not impossible, to establish such a claim in Alberta." (at para 51).

Commentary

With these words, Justice Shelley comes close, very close, to concluding that adverse possession is not available in Alberta amongst co-owners. Indeed, one expected her to reach this conclusion given her analysis. But the law is rarely that clear-cut.

Instead, at the end of her judgment, Justice Shelley abruptly changes direction and says that it is "not necessary" for her to "determine the broader issue of whether Alberta law precludes a successful adverse possession claim by a co-tenant in *all* cases." (at para 53; emphasis added). Were that so, one wonders why she bothered at all with the Canadian journey in the first place, unless the ultimate destination turned out to not be what she had expected.

In the end, she decides the case narrowly, stating that on the evidence Master Schlosser was correct in concluding that Mr. Denesik had failed to satisfy the burden of proving that he had adversely possessed his co-owner's interest for the requisite period. She said that even if an adverse possession claim is possible amongst co-owners in Alberta, for it to succeed "it is likely that the actions of one tenant in common would need to rise to the level of something akin to ouster" (at para 52). There was no evidence of that here. Although Mr. Verhulst had become indifferent to using the lands as an investment vehicle, there was no indication that he had given up either possession or an ownership interest.

As to whether Alberta is really unique from the rest of the country with respect to its law on co-owners and adverse possession, it may or may not be. While Justice Shelley's analysis certainly seems to point in that direction, it ultimately falls short of providing a definite answer. Even where a statutory provision explicitly allowing for adverse possession claims between co-owners exists, the case law suggests that the burden is high and exceptional circumstances must exist. Justice Shelley's ultimate conclusion in this case takes the same view for Alberta, signalling that it may not be that unique after all.

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