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“Nine-Tenths of the Problem”: Abolishing Adverse Possession in Alberta

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Matter Commented On: [Alberta Law Reform Institute Survey Results re: Adverse Possession](#)

“Possession isn’t nine-tenths of the law. It’s nine-tenths of the problem.” – John Lennon

The phrase ‘adverse possession’ conjures an old-fashioned, sepia-toned image of outlaw land squatters stealing land from decent, law-abiding folks. Adverse possession has existed in Alberta since the province’s inception. However, the idea that adverse possession rewards a deliberate trespasser and penalizes a registered owner who is forced to give up some of their titled land without any compensation, continues to persist, despite the fact that successful cases are relatively rare.

In April 2020, the Alberta Law Reform Institute (ALRI) published [Final Report 115, Adverse Possession and Lasting Improvements to Wrong Land](#). The proposed reforms contained in the Final Report are based on ALRI’s recommendation that the law of adverse possession no longer has compelling policy reasons to continue in Alberta. Our consultation results confirm that there is significant support to expand a registered owner’s ability to recover possession of land from an occupier, regardless of how much time has passed.

In my previous [ABlawg post](#) on adverse possession, I set out our preliminary recommendations regarding how adverse possession can be effectively abolished in Alberta. These preliminary recommendations were affirmed through our consultation process, and reflect the proposed reforms contained in Final Report 115. In this post, I discuss our consultation results that favour abolishing adverse possession in Alberta. I also refer to the objectives guiding our law reform recommendations, as well as the most recent legislative attempts to abolish adverse possession.

Who Did We Hear From?

During the consultation period, which took place between July and October 2019, ALRI carried out a number of activities including media interviews, online publications, electronic newsletter distribution, MLA outreach, and meetings with the Ministers of Justice and Service Alberta. We had a number of fruitful conversations with the Alberta Land Surveyors Association (ALSA), as well as with some legal academics. We also conducted an online survey which generated 279 responses from the general public. Approximately 10% of survey respondents indicated that they had been involved in an adverse possession claim. Additional information about the survey demographics – such as where in Alberta respondents were located and the proportion of respondents who own urban or rural land - can be found in Final Report 115.

What Did We Hear?

Approximately 87% of survey respondents agreed that adverse possession should be abolished in Alberta. Some of the respondents' comments in favour of abolition included:

- Whoever holds title to the land should be entitled to keep it.
- No one should be able to take land from the person who paid for it.
- Adverse possession is theft - the law should not reward bad behaviour.
- Adverse possession is a relic from the past which no longer serves a useful purpose.
- Adverse possession undermines property rights.

Not everyone was in favour of abolishing adverse possession. Some of the comments against abolition included:

- Adverse possession promotes responsible land ownership and stewardship.
- Adverse possession protects long-standing occupiers of land from being ejected on a whim by absentee landlords.
- Adverse possession is a good way to adjust property boundaries – for example, if there is a surveying error – so that an occupier does not lose land they realistically believed they owned, or that they have occupied at length and in good faith.
- Adverse possession also provides a remedy in cases of multiple or overlapping titles and in situations where boundaries are uncertain.

Overall, the consultation results demonstrated strong support to abolish adverse possession in Alberta. There was a widespread view among respondents that adverse possession benefits deliberate trespassers who are able to acquire another person's land without paying any compensation to the registered owner. In addition, many people pointed out that boundary disputes are often not discovered until significant time has passed, which means that the registered owner's right to recover their land has expired before they became aware that they had a claim. Lastly, there was a strongly held belief that the land titles system ought to be the final word on ownership, and that registered owners ought not to be penalized for being good neighbours.

The consultation results are discussed in further detail in Final Report 115. Some additional survey results in favour of the proposed reforms include:

- 66.8% of respondents agreed that claims to recover possession of land should be excluded from the operation of the *Limitations Act*, [[RSA 2000, c L-12](#)] and
- 64.2% of respondents agreed that claims regarding lasting improvements should be excluded from the operation of the *Limitation Act*.

What are the Objectives of our Proposed Reforms?

The recommendations in Final Report 115 are guided by the following four objectives:

a. Protecting Future Ownership

Land titles legislation operates on a 'curtain principle' to protect future owners from prior claims. This means that a potential purchaser does not need to search 'behind the curtain' for any historical

interests in the land that are not otherwise indicated on the title. Limitations legislation acts in a somewhat similar fashion, as the passage of time prevents past claims from being litigated after the limitation period expires. The proposed reforms confirm the importance of protecting future ownership. They do not affect the registered owner's ability to transfer indefeasible title to a *bona fide* purchaser for value. If the proposed reforms are adopted, a registered owner would be able to take steps at any time to protect their title from trespassers and to preserve its integrity.

b. Ensuring Transferability

The 'mirror principle' is another feature of the Torrens system of land registration, and provides that the title reflects all current interests in the land. Coupled with the government's guarantee that the interests registered on title are correct, the mirror principle helps to ensure transferability. Eliminating an occupier's ability to acquire title through adverse possession is consistent with the mirror principle. A *bona fide* purchaser for value acquires title from the registered owner free and clear of the occupier's unregistered interest. If the proposed reforms are adopted, an occupier will not be able to bring a claim for adverse possession even if more than 10 years pass from the time the *bona fide* purchaser first acquired title.

c. Promoting Effective and Equitable Resolution of Disputes

If a registered owner is able to bring a claim to recover possession of land at any time, then there must be a mechanism in place in the absence of adverse possession to ensure that a long-time occupier is not unfairly displaced from the disputed land. Where lasting improvements have been made, an occupier may bring a claim under section 69 of the *Law of Property Act*, [RSA 2000, c L-7](#), to retain the land if fairness warrants it. Only a lasting improvement will ground such a claim, which is a higher threshold than would otherwise be the case in adverse possession.

If an occupier is able to establish the lasting nature of the improvement, then the court may consider whether the lasting improvement was made on land the occupier mistakenly believed they owned. If the occupier can establish these two elements of the claim, then the court can exercise its discretion to order a wide variety of remedies that balance the interests of both the occupier and the registered owner.

Currently, the wording of section 69 provides that the remedy is available to the person who made the lasting improvement or their assigns. There has been very limited judicial consideration of "assigns" in the context of claims regarding lasting improvements, and it is unclear if "assigns" is intended to include subsequent occupiers who maintain or continue to derive benefit from the lasting improvement. The proposed reforms are intended to clarify that a subsequent occupier, who believed that the lasting improvement was on land they purchased, would also be able to access a remedy through this provision.

d. Preventing the Case of the 'Deliberate Trespasser'

The cases of adverse possession that seem to provoke the most public outrage are those involving a 'deliberate trespasser' who knows that the disputed land does not belong to them. Currently, the law of adverse possession does not draw a distinction between a deliberate and an innocent trespasser. A bad neighbour who deliberately built their fence to steal their neighbour's land

benefits from adverse possession in the same way as a good neighbour who had no idea that the fence was in the wrong place. This lack of distinction creates a negative public perception that all adverse possession cases involve bad neighbours, a perception which is not supported by the reported case law.

Preventing any person from acquiring a title or interest in land through adverse possession may seem to unfairly penalize both the deliberate and the innocent trespasser. However, innocent trespassers would still be able to bring claims regarding lasting improvements under section 69 of the *Law of Property Act*. Eliminating claims rooted in adverse possession for deliberate trespassers is consistent with the legal doctrine that a person should not be able to benefit from an intentional wrong.

What's Happened in the Legislature since Final Report 115 was Published?

On October 28, 2020, Bill 206, entitled the [Property Rights Statutes Amendment Act, 2020](#), was introduced in the Legislature. Bill 206 is very similar to a bill introduced in 2017, which purported to abolish adverse possession as well as amend other statutes relating to certain kinds of land rights including expropriation and the *Alberta Land Stewardship Act*, [SA 2009, c A-26.8](#).

Unfortunately, Bill 206 included many of the same flaws that we had first identified in our [Report for Discussion 33](#). For example, the proposed amendments to the *Limitations Act* may inadvertently result in much shorter time periods for registered owners to bring claims to recover possession of land. Currently, section 3(4) excludes claims to recover possession of land from the two-year discoverability period set out in section 3(1)(a) of the *Limitations Act*. The proposed amendments would remove claims to recover possession of real property from section 3(4), so that only claims brought under section 69 of the *Law of Property Act* would be subject to the 10-year limitation period. Removing claims to recover possession of real property from section 3(4) does not necessarily mean that such claims can be brought at any time; instead, such claims would be subject to either the two-year discoverability period or the 10-year ultimate rule, whichever comes first.

The proposed amendments relating to adverse possession would also come into force retroactively if Bill 206 is passed. While the rest of Bill 206 would come into force on January 1, 2021, the adverse possession amendments would be retroactive to the date of first reading, October 28, 2020. One of the many challenges with retroactive legislation – and the reason why it tends to be rarely used – is the potential effect on parties who are in the process of having their claims litigated. This concern may be somewhat mitigated as the proposed amendments include a provision to allow claims commenced before the coming in force date to proceed under the previous version of section 74 of the *Land Titles Act*, [RSA 2000, c L-4](#). It is still unclear, however, how this provision in the *Land Titles Act* would interact with the other proposed amendments in the *Limitations Act* when it comes to pending or concurrent claims. Overall, the proposed amendments may lead to greater uncertainty and ambiguity that would ultimately require judicial interpretation.

Bill 206 passed second reading on April 12, 2021. It was then referred to the Select Special Committee on Real Property Rights, in accordance with [Standing Order 78.1](#). In addition to other property related issues, the Special Committee's mandate includes the issue of whether the law of

adverse possession should be abolished. The Special Committee is currently accepting written submissions on issues related to its mandate until August 15, 2021. It is required to report back to the Assembly with its recommendations by December 15, 2021.

What About Promoting Efficient and Cost-Effective Dispute Resolution?

Even if adverse possession is abolished in Alberta, claims regarding lasting improvements will still require resolution. Often, neighbours will resolve these claims between themselves with little outside intervention. However, neighbours who reach an impasse may find themselves engaging in a formal dispute resolution mechanism that requires the assistance of lawyers or a judge. Resolving disputes through a formal court process can result in significant costs to the parties, which may outweigh the actual value of the lasting improvement itself.

As discussed earlier, one of the primary objectives of our proposed reforms is to promote the effective and equitable resolution of disputes. During our consultation process, a number of individuals and survey respondents shared their concerns about the expense associated with resolving adverse possession claims, which can easily reach the tens of thousands of dollars. For example, one individual told us that while she knows that her neighbour is encroaching upon her land, she does not have the financial means to retain legal representation to help her recover her property.

As the Provincial Court of Alberta does not have jurisdiction to determine claims in which title to land is called into question, claims to quiet title or to recover possession of real property are heard by the Court of Queen's Bench. Similarly, claims regarding lasting improvements have also been determined at the Court of Queen's Bench. It may be worth considering whether the option of bringing a section 69 claim before the Provincial Court of Alberta ought to be available, particularly where the value of that claim is below \$50,000. Other potential solutions may include creating a provincial tribunal or appointing an ombudsperson as an alternative dispute resolution mechanism to the courts.

This post may be cited as: Stella Varvis, ““Nine-Tenths of the Problem”: Abolishing Adverse Possession in Alberta” (August 27, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/7-3-2018/Blog_SV_Ending_Adverse_Possession.pdf

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