LEGAL ALERT

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Current Legal Developments Critical to Corporate Management

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Laws and principles are not for the times when there is no temptation: they are for such moments as this, when body and soul rise in mutiny against their rigour ... If at my convenience I might break them, what would be their worth?

~ Charlotte Bronte (1816 – 1855)

COMMERCIAL PROPERTY AND LEASES

Adverse possession does not require inconsistent use

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The Supreme Court of Canada has affirmed that proof of inconsistent use is not necessary in British Columbia to establish a claim of adverse possession.

In its decision in *Nelson (City) v. Mowatt* ("*Nelson*"), the Supreme Court of Canada traced the history of adverse possession in English law and found that the "inconsistent use" requirement was never imported into the law of British Columbia (B.C.).

The Court left open the question of whether proof of inconsistent use is still a necessary element of adverse possession in other provinces.

Application across Canada

To make out a claim of adverse possession, a claimant must prove that his or her possession was "open and notorious, adverse, exclusive, peaceful, actual, and continuous" for the duration of the applicable limitation period within which the true owner must commence an action to recover the land from the trespasser.

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INTELLECTUAL PROPERTY

Interlocutory injunction granted in trademark case

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The Federal Court may now be more willing to issue interlocutory injunctions in intellectual property cases.

In its recent decision in *Sleep Country Canada Inc. v. Sears Canada Inc.*, the Federal Court granted a rather rare interlocutory injunction prohibiting the use of a slogan, pending the final determination of a trademark infringement action.

Sears Canada Inc. ("Sears") was enjoined from using their newly adopted slogan that stated, "There is no reason to buy a mattress anywhere else." The slogan was found to be confusingly similar to Sleep Country Canada Inc.'s ("Sleep Country") trademarked slogan, "Why buy a mattress anywhere else."

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This limitation period varies from province to province. For example, the limitation period is 10 years in Ontario — with the exception of Crown land, for which the limitation period is 60 years (see ss. 4, 13, and 15 of the *Real Property Limitations Act*) — but it is 20 years in British Columbia.

Inconsistent use

In some provinces, the claimant must also establish that the adverse possessors' use of the land was inconsistent with the true owner's intended use. This "inconsistent use" requirement is recognized in the jurisprudence of Ontario, Nova Scotia and Prince Edward Island.

Note that there are some exceptions to this requirement in Ontario, such as in cases of mutual mistake. For example, in its recent adverse possession decision in *Pepper v. Brooker*, the Ontario Court of Appeal recognized that inconsistent use is *not* a requirement in the case of mutual mistake as to ownership.

This requirement has been rejected in Alberta, and restricted in Newfoundland and Labrador as a relevant (but not required) factor in determining whether adverse possession has been established.

In *Nelson*, the issue before the Court was whether adverse possession in British Columbia requires proof of inconsistent use. The Court noted that the House of Lords' 2002 decision in *J. A. Pye (Oxford) Ltd. v. Graham* had traced the origins of the inconsistent use requirement to the pre-1833 English law of adverse possession.

At the time, that law required that there be a squatter on the land whose use of the property was clearly inconsistent with the intent of the land's paper owner. This requirement was effectively removed from English law by the passage of the *Real Property Limitation Act, 1833* (U.K.).

That Act codified adverse possession and required only proof that "the squatter had been in possession in the ordinary sense of the word." The Act was received into the law of British Columbia in 1858. Successive B.C. limitation statutes have reproduced the 1833 codification of adverse possession.

Since the inconsistent use requirement was not part of English law at the date of its reception into the law of British Columbia in 1858, inconsistent use was never a necessary element of adverse possession under British Columbia's subsequent limitation legislation.

The Supreme Court of Canada held that to now import the inconsistent use requirement into the law of British Columbia would be to revive the pre-1833 law of adverse possession and subvert legislative intent.

No continuous possession

Despite the claimants' relief from not having to prove inconsistent use, their adverse possession claim was still unsuccessful: they were unable to establish continuous possession throughout the applicable limitation period.

Chain of ownership

The claimants owned a parcel of land (the "registered lot") and claimed adverse possession of an adjacent lot (the "disputed lot") that had escheated to the Crown in 1930 or 1931. To succeed in their claim, the claimants had to establish that prior occupants had possessed the disputed lot continuously for the 20-year period prior to the escheat, pursuant to s. 14(5) of the 1996 *Limitation Act*.

The claimants adduced evidence that the Cooper family lived on the disputed lot from 1909 until 1916, when the family emigrated; but, their son remained in the region until 1918. A second family, the Gouchers, then lived on the disputed lot as early as 1919 or 1920 until 1922.

At that time, a third family — the Thorpes — bought the registered lot and rented the disputed lot from the Gouchers until the residence on the disputed lot burned down in 1923. In

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1959, the Thorpes transferred the registered lot to their children, who sold the lot in 1992 to the claimants.

At first instance, there was some dispute as to whether the claimants could rely on s. 48 of the 1960 *Statute of Limitations*, under which they could acquire title from the Crown by establishing adverse possession for the 60-year period from 1915-1975.

Evidentiary gap

Ultimately, the chambers judge found that regardless of which limitation period applied, the claim could not succeed because of an "evidentiary gap" in the continuity of adverse possession from 1916 to 1920.

Specifically, the chambers judge held that there was insufficient evidence that the Coopers' son possessed the disputed lot from 1916 to 1918, or that the Gouchers possessed the disputed lot any earlier than 1919.

Court of Appeal

The B.C. Court of Appeal held that the chambers judge failed to draw reasonable inferences from the evidence or take into account the historical nature of the available evidence. The appeal court reversed the chambers judge's decision and substituted in its own factual finding that adverse possession of the disputed lot *was* continuous from 1909 to at least 1923.

Supreme Court of Canada

The Supreme Court of Canada overturned the B.C. Court of Appeal's decision and reinstated the decision of the chambers judge. The Court held that the standard of palpable and overriding error applied not only to the judge's findings of fact, but also to the inference-drawing process itself.

Absent such palpable and overriding error, the chambers judge's findings were owed deference.

Inconsistent use issue

The Court in *Nelson* observed that, outside of British Columbia, the extent to which the inconsistent use requirement applied in other provinces remains,

> An open question subject to examination of their respective legislative histories, the wording of their particular limitations statutes, and the treatment of these matters by the courts of those provinces.

Significance

On the heels of the *Nelson* decision, the Ontario Court of Appeal issued its decision in *Pepper v. Brooker*, holding (without any reference to the *Nelson* decision) that while the "inconsistent use" requirement does not apply in cases of mutual mistake, a claimant must still prove both intention to exclude and effective exclusion of the true owner.

It noted that "inconsistent use" is a facet of the "intention to exclude" criterion. Hence, even when proof of "inconsistent use" is not a requirement *per se*, such proof may help to establish other elements of the adverse possession test.

REFERENCES: *Nelson (City) v. Mowatt*, 2017 SCC 8, 2017 CarswellBC 400, 2017 CarswellBC 401 (S.C.C.); *Real Property Limitations Act*, R.S.O. 1990, c.L.15; *Pepper v. Brooker*, 2017 ONCA 532, 2017 CarswellOnt 9644 (Ont. C.A.) at para. 34; *J. A. Pye (Oxford) Ltd. v. Graham*, [2002] UKHL 30, [2003] 1 A.C. 419, [2002] 3 All E.R. 865, [2003] 1 P. & C.R. 10, [2002] 3 W.L.R. 221 (U.K. H.L.); *Limitation Act*, R.S.B.C. 1996, c. 66; *Statute of Limitations*, R.S.B.C. 1960, c. 370.

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Availability

Interlocutory injunctions have extraordinary power but have been rather uncommon in the Federal Court, except for cases in relation to counterfeit goods. However, it now appears that the Federal Court may be more willing to issue interlocutory injunctions in intellectual property cases where there is sufficient supporting evidence that irreparable harm may result otherwise.

Background

Sleep Country has been using its slogan since 1994 and has subsequently accumulated national acclaim for its popularity. The slogan is the subject of two trademark registrations which grant Sleep Country exclusive use thereof.

In July of 2016, Sears began advertising with the slogan, "There is no reason to buy a mattress anywhere else" in flyers, and on social media platforms such as Facebook and Instagram. Sleep Country brought an earlier motion for an interim injunction (pending the determination of the motion for an interlocutory injunction) in accordance with section 20 of the *Trademarks Act*.

Injunctions

Dismissing the interim motion, Justice Boswell acknowledged that a serious issue had been conceded by Sears, but found that irreparable harm had not been established. When considering the interlocutory injunction, the Federal Court did not find Justice Boswell's decision to be persuasive; the judgment lacked detailed reasoning, and the time period applicable to the irreparable harm was short (i.e., a few weeks until the determination of the interlocutory motion).

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