

Claim for adverse possession of land against an unknown owner

Adverse Possession | Commercial Real Estate | Land Registry | Land Title Act | Litigation | Litigation & Dispute Resolution | Real Estate

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A claim for title by adverse possession can grant property rights to a non-owner of land resulting from their use or occupation of the lands over an extended period of time. Where the land is occupied in an open and notorious manner to the exclusion of the rightful owner for the requisite number of years prior to conversion of the lands in the Land Titles registry system, the title of the former holder of the property may be extinguished.

Such claims of adverse possession may be brought against the estate of a deceased property owner. But what happens if the heirs or beneficiaries of the estate cannot be located? Or if there are no known heirs or beneficiaries? A recent decision of the Ontario Superior Court of Justice addressed a claim of adverse possession brought against the estate of a deceased where there were no apparent heirs or beneficiaries: *Jamnisek v. The Estate of Gordan A. Wyant*, 2021 ONSC 66 (CanLII).

More than 40 years ago, in 1978, the applicants purchased a large parcel of land (50 acres) in the Stayner area as tenants in common. In 2019, the applicants discovered that title to a strip of land on the edge of the property of about one-half acre was in fact held by the estate of Gordan A. Wyant and had been purchased in 1944. This came as a surprise to the applicants who had always treated the subject property as their own and maintained it as such. A survey was not obtained when the property was purchased and efforts by the applicants to obtain the relevant documentation were unsuccessful. Accordingly, they sought an order from the court that they were in fact the lawful owners of the strip of land.

In deciding the matter, the court first considered whether there were any heirs or beneficiaries who would have inherited the paper title to the subject property upon Mr. Wyant's death in 1972. He was survived by his wife and his entire estate was left to her. However, she had passed away in 1973 and no letters of probate were ever filed. It was unknown whether she had a will and the applicants were unable to discover whether she had any heirs.

The applicants took additional steps to locate any party with a claim to the strip of land including searching for other properties owned by Mr. Wyant at the time of his death, searching obituaries, and publishing a notice in a local online publication of their intention to apply for title to the property. All of their searches were unsuccessful.

The court found that the applicants had exhausted all reasonable efforts to locate any party with a claim to the subject property and thus permitted the application to proceed. The local municipality did not make a claim to the land and consented to the relief sought by the applicants.

To succeed in their claim for adverse possession, the applicants had to establish that their use of the subject property was "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner," for any 10-year period prior to 20 November 2000, when the lands were converted into the Land Titles system.

According to well-established criteria, this means that the applicants had to show that:

- i. They had actual possession of the property in issue;
- ii. They intended to exclude the true owner from possession of his property; and
- iii. They effectively excluded the true owner from possession of his property.

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The court noted the importance of context in its analysis and that what is sufficient to establish actual possession will vary depending upon the nature of the property, the appropriate and natural uses to which it can be put and the course of conduct which the owner might reasonably be expected to adopt.

With regard to actual possession, the adjacent lands were rural properties that had never been developed or built upon, cultivated, or harvested in any way for over 40 years. Typically, possession of rural land in that state is asserted by fencing, or the posting of “no trespassing” signs, or both. As such, the use made by the applicants of the strip of land – to walk upon it from time to time and to continuously maintain the “no trespassing” signs they had posted – provided evidence that they did what would have been reasonably expected, having regard to the nature and natural use of the land, in order to assert their possession of it. There was no evidence that anyone else had made use of the subject property since 1978, including the municipality, and the court was satisfied that the applicants’ acts of possession, while limited, were open, notorious, peaceful, adverse, exclusive, actual, and continuous.

Generally, adverse possession claimants must establish that their use of the claimed property was inconsistent with that of the paper title-holder. However, an exception to this rule exists in cases of mutual mistake. The court referred to an earlier decision where the Court of Appeal concluded that the inconsistent use requirement has no application where both the paper title holder and the party in possession mistakenly believe that the party in possession owns the property at issue: *2279088 Ontario Inc. v. Nisbet*, 2018 ONCA 897, at para. 19.

Here, and as is common in claims of adverse possession, the court found that mutual mistake between the parties had occurred. The applicants intended to exclude all others from the subject property in posting and maintaining the “no trespassing” signs and they appeared to honestly but mistakenly believe that the strip of land at issue was part of their large property. Conversely, Gordan Wyant, his estate and the beneficiaries of his estate did not deal with the strip of land in any way, and in fact, when a larger portion of his property was sold by his estate following his death, the strip of land was not included as part of that sale – the evidence permitted the court to infer that this was because of the assumed (and incorrect) boundaries of the property.

The court noted that even if mutual mistake had not occurred in this case, the applicants possessed the subject property in an open, notorious and continuous manner since 1978 and that it was their intention to exclude all others from possession of the subject property and therefore, the inconsistent use test should not be applied in any event.

Lastly, the court found that the true owner had been effectively excluded from the subject property since the time that the applicants purchased their adjoining property in 1978. Adverse possession claimants must effectively exclude the true owner from the claimed property – this applies even in cases of mutual mistake. The “no trespassing” signs posted by the applicants effectively asserted their possession and served to exclude others, including the title owner, and no one has challenged their entitlement to do so. There had been no evidence of anyone requesting the permission of the applicants to enter the subject property and everyone, including the true owner and his estate and beneficiaries, have been effectively excluded.

As the applicants had established that their possession of the subject property had been open, notorious, constant, continuous, peaceful and exclusive of the rights of the true owners for over 40 years, including over 20 years before the property was registered in the Land Titles system, the court ordered that all rights and title to the subject property held by the estate of Gordan Wyant were now extinguished and that the subject property would be declared vested in the name of the applicants as proportionate tenants in common.

This case demonstrates the tensions that may arise between property owners where property boundaries are unclear and there is no corresponding documentation to confirm, particularly for older purchases of rural property involving a transfer of a parcel’s registration into the land titles system. Additionally, it is important for applicants in cases of adverse possession to have taken steps to identify and track down potential parties who may have a superior claim to the title in question where there are no apparent beneficiaries or heirs. If a court is satisfied that all reasonable steps have been taken and no one is asserting a contrary claim, title may be acquired by adverse possession from an unknown owner. A PDF version is available to download [here](#).

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