

# Equity Rules the Day: The Supreme Court of Canada Clarifies the Tenets of Proprietary Estoppel

January 8, 2018

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In December 2017, the Supreme Court of Canada released its decision in *Cowper-Smith v. Morgan*, 2017 SCC 61, a case dealing with the issue of proprietary estoppel. While the facts of this case are borne out of circumstances relating to an estate, the law as set out by the Supreme Court can be equally applied in the context of commercial litigation in relation to promises made in a commercial context.

In *Cowper-Smith v. Morgan*, a husband and wife made it clear that, after their deaths, their three children would inherit their property equally. However, after the husband died, the wife, Elizabeth, changed her estate planning. She transferred title to the family home and all of her investments into joint ownership with her daughter Gloria. Further, pursuant to a Declaration of Trust, Gloria was entitled, upon her mother's death, to all of the assets absolutely. In addition, Elizabeth executed a new will appointing Gloria as executor and providing the estate assets to be divided equally among her children – despite the fact that the trust declaration ensured that there were no estate assets to bequeath.

Sometime later, when Elizabeth could not live independently, she asked her son Max to move in with her. He did so only after his sister Gloria agreed that he would be reimbursed for various expenses, have the use of their mother's car, be able to live in the house permanently and eventually acquire Gloria's one-third interest in the house. This arrangement worked for five years, until Gloria began to renege on her promises.

Over the years, Gloria's siblings discovered Gloria's trust declaration. However, Gloria assured her brothers that it was put in place to simplify the administration of their mother's estate and that each of them would still receive their one-third share of their mother's assets. However, eight months after their mother's death, Gloria announced her plans to put the house on the market with her brother Max still living in it.

At trial, the brothers sought an order setting aside the trust declaration as the product of Gloria's undue influence over their mother, and a declaration that Gloria therefore held the property and investments in trust for Elizabeth's estate, which was to be divided equally between her children. They also claimed – on the basis of proprietary estoppel – that Max was entitled to purchase Gloria's one-third interest in the house.

The trial judge held that Gloria had not rebutted the presumption of undue influence and resulting trust and she declared that the property belonged to Elizabeth's estate. She also held that the elements of proprietary estoppel had been made out. Gloria appealed. The British Columbia Court of Appeal unanimously upheld the trial judge's decision related to undue influence and resulting trust, but split on the issue of proprietary estoppel. The majority of the Court of Appeal held that since Gloria held no interest in the property, proprietary estoppel could not arise. That specific issue is what the Supreme Court of Canada heard on appeal: can proprietary estoppel arise when a person who makes the promise has no interest in the property at the time the promise is made?

The Chief Justice delivered the opinion for the Supreme Court's majority. Chief Justice McLachlin clarified the tenets of the law. To establish proprietary estoppel, one must first establish an equity of the kind that proprietary estoppel protects. This requires three things: (1) a representation or assurance on the basis of which the claimant expects to enjoy a right or benefit over property; (2) reasonable reliance on that expectation; and (3) detriment as a result of the reliance such that it would be unfair or unjust for the party who made the representation to go back on her word. When the owner of an interest in the property over which the claimant expects to enjoy a right or benefit is responsible for the representation or assurance, then the equity established by the claimant's reasonable reliance may be given effect by proprietary estoppel.

Having satisfied the remaining requirements, the only question in this case was whether Max's reliance was reasonable. The reasonableness of his reliance centered on the question of: "how can Max's reliance be reasonable when Gloria did not have an interest in the property or her interest was uncertain?" This is a question of mixed fact and law.

The Supreme Court held that it was sufficiently certain that Gloria would inherit a one-third interest in the property for her assurances to Max to be taken seriously. Gloria made the commitment to Max and Max's reliance on Gloria's representations were therefore reasonable. According to McLachlin C.J., the fact that Gloria did not own an interest in her mother's property at the time of Max's reliance was not dispositive of the issue. She stated: "An equity arises when the claimant reasonably relies to his detriment on the expectation that he *will* enjoy a right or benefit over property, whether or not the party responsible for that expectation owns an interest in the property *at the time* of the claimant's reliance." Therefore, if the person making the representation does not acquire an interest in the property, proprietary estoppel may never arise. In this case, proprietary estoppel attached or crystalized at the time that Gloria inherited her share of the house.

As a result, the Supreme Court made an order compelling Gloria to sell her share of the house to Max at one-third of the appraised value of the property as it was in 2011, which was when Gloria received an interest in the property from their mother's estate. The Court did not permit a sale at the fair market value of the property as of today, which had increased over time.

In the end, equity stepped in, as it was intended to do and still centuries later, it ruled the day.

As stated above, the importance of this decision is not limited to estates. While proprietary estoppel has been commonly applied to interests in land, it can also be used for other assets. In the context of commercial litigation, proprietary estoppel can be used in relation to, for example, chattels, intellectual property rights and commercial assets.

*The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.*

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