

Robertson v. Wallace, 2000 ABQB 1020

Date: 20000508
Action No. 9701-10813

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PHYLLIS ROBERTSON

Plaintiff

- and -

DONNA JEAN WALLACE, THE REGISTRAR OF THE SOUTH ALBERTA
LAND REGISTRATION DISTRICT, CLARK & ASSOCIATES SURVEYS, A
DIVISION OF CHALLENGER SURVEYS & SERVICES LTD., AND THE SAID
CHALLENGER SURVEYS & SERVICES LTD., WILLIAM MINTZ, JOSEPH
MATWYCHUK-GOODMAN AND SANDRA LEE MATWYCHUK-GOODMAN

Defendants

AND BETWEEN:

JOSEPH MATWYCHUK - GOODMAN AND
SANDRA LEE MATWYCHUK-GOODMAN

Plaintiffs by Counterclaim

-and-

PHYLLIS ROBERTSON and DAVID POPE

Defendants by Counterclaim

-and-

DONNA JEAN WALLACE, THE REGISTRAR OF THE SOUTH ALBERTA
LAND REGISTRATION DISTRICT and CLARK & ASSOCIATES SURVEYS, a
division of CHALLENGER SURVEYS & SERVICES LTD., and the said
CHALLENGER SURVEYS & SERVICES LTD., JOSEPH MATWYCHUK-
GOODMAN and SANDRA LEE MATWYCHUK-GOODMAN

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE ROSEMARY E. NATION

APPEARANCES:

E. Bruce Mellett
for the Plaintiff

Michael E. Mestinsek
for the Defendant, Mintz and Clark etc.

Edward Bresky
for the Defendant Mrs. Wallace

Randal S. Van de Mosselaer
for the Defendants, Mr. and Mrs. Matwychuk-Goodman

David W. Kinloch & Esther Schwab
for the Defendant the Registrar

INTRODUCTION

[1] In 1890, a Dominion Land Surveyor James MacMillan surveyed the West bank of the High River in s. 7-19-28-W4M. As he stood in the Prairie sun, he could hardly have anticipated what a keen interest would be shown more than one hundred years later in his field notes and his work. His survey was incorporated into the Township Plan of 1893. The West bank of the river was used in the N.E. 1/4 of s.7 as the natural boundary to divide land owned by the Wallace family to the north and west, and the Robertson family to the south east. A dispute arose over the true boundary between the lands, as the river changed its course.

[2] In 1994 Mr. Mintz surveyed the boundaries of the Wallace lands. The Registrar filed his plan and issued a new title to Mrs. Wallace, which on its face increased her lands by over 20 acres, and created overlapping titles to some lands. Mrs. Wallace sold her interest in s.7 to the Matwychuk-Goodman's. When Mrs. Robertson's use of some land in section 7 was challenged by those purchasers in 1997, she brought this lawsuit. It deals with issues of accretion, avulsion, riparian rights and the true boundary between the lands. It also deals with the alleged negligence of Mr. Mintz in registering his plan and helping Mrs. Wallace get a revised title, as well as the liability of the Registrar of the Land Titles office.

ISSUES

1. Was a conventional line boundary agreed to by the Wallaces and the Robertsons? If so, can such an agreement to a boundary stand in the face of a third party purchaser?
2. Does the description of the Robertson and Wallace lands mean the boundary is frozen as at 1893, or does it change with the course of the river?
3. If riparian rights apply to the boundary, where is the boundary today?
4. Was Mr. Mintz negligent in registering his plan at the Land Titles Office or in assisting Mrs. Wallace to obtain a new certificate of title without notice to Mrs. Robertson?
5. What is the position of the Matwychuk-Goodman's? Are they bona fide third party purchasers? If so, do they keep all the land seemingly described in their current title?
6. Is the Registrar of the South Alberta Land Registration District liable for allowing registration of the Mintz plan and issuing the new title without the consent of Mrs. Robertson?
7. Has there been a trespass? If so, by which parties, on which land?

FACTS

[3] The relevant facts which are not disputed are as follows:

1. In 1890, Mr. James MacMillan, a surveyor with the Department of the Interior, surveyed the west bank of the High River as it travelled through the NE 1/4 of Section 7, in township 19, range 28, West of the 4th Meridian (the quarter).
2. His survey was incorporated into a 1893 Township Plan issued by the Department of the Interior.
3. The original patent on the west and north portion of the quarter was issued in 1902 to a John Sullivan described as:

All that portion of the North East quarter of Section Seven of the said Township which lies to the West and North of the West Bank of the High River, as shown on a plan of Survey, of the said quarter Section, made by James A. MacMillan, Dominion Land Surveyor, approved and confirmed at Ottawa on the 30th day of May, A.D. 1893, by Edouard Deville, Surveyor General of Dominion Lands and on record in the Department of the Interior containing by a measurement 111.78 acres more or less . . .

4. This land was transferred to the Wallace ancestors in 1914 and the title to the property held by Donna Wallace, the Defendant in these proceedings reads:

That portion of the North East Quarter which lies to the North and West of the High River as shown on the township plan dated 30th May 1893 containing 111.78 acres more or less

5. The original Fiat for Patent for the East and South portion of the quarter was issued in 1902 to the Calgary and Edmonton Railway and stated:

All that portion of the North East quarter of Section Seven of the said Township which lies to the East and South of the West Bank of High River, as show with a map or plan of Survey, of the said quarter Section, made by James A. MacMillan, Dominion Land Surveyor, approved and confirmed at Ottawa, on the 30th day of May, A.D. 1893, by Edouard Deville, Surveyor General of Dominion Lands and of record in the Department of the Interior.

6. The title did not issue until 1909, and was transferred to the Robertson ancestors that same year. The title to the property held by Phyllis Robertson, the Plaintiff in these proceedings reads:

That portion of the North East Quarter which lies to the South East of the North Westerly Bank of the High River shown on Township Plan dated 30th of May 1893 containing 48.22 acres more or less.

7. In 1905, a road plan was surveyed by Albert Talbot which shows the N. W. 1/4 of Section 8, and includes a depiction of the Highwood River as it runs through that quarter-section.
8. In 1918 another Township Plan was published based on a 1917 survey, which shows the path of the Highwood River as it meanders through the quarter. There were numerous floods between the surveys of 1890 and 1917. The course of the river in the quarter had changed significantly during this time frame.
9. In 1984, Mrs. Wallace's mother owned the Wallace lands. Mrs. Wallace hired a surveyor, Mr. Dharamshi of Clark, Swanby & Company (1979) Ltd. who gathered information on the river boundary and the existing fences. A letter written to Mrs. Wallace dated August 28, 1984 referenced a substantial movement in the Highwood River between the two surveys of 1890 and 1917. It referenced that the river course in 1984 was more or less following the course of the 1917 survey. The letter referenced a meeting with a lawyer to review the boundary situation. This letter was reviewed by Mr. Mintz in 1994 before he undertook his survey.
10. In 1994, Mrs. Wallace wished to sell her portion of the quarter along with other lands she held. She retained Mr. Mintz, a surveyor, employed by Clark & Associates Surveys, a

division of Challenger Surveys & Services Ltd. He was to survey the boundaries of and measure the area of her interest in the quarter.

11. Mr. Mintz was aware Mrs. Wallace wanted to sell the quarter. He was aware there was a historical disagreement between the Robertson and the Wallace families as to where the true boundary was. He was also aware there was a fence across the Wallace lands which was used to contain the Wallace cattle to the higher land and the Robertson cattle to the river and lower land.
12. Mr. Mintz delivered to the Robertson residence a letter indicating he would be doing a survey of the boundaries of the Wallace lands and would be on the Robertson lands to do the survey. He also had a telephone conversation with Mrs. Robertson's adult daughter, Catherine.
13. Mr. Mintz surveyed the west bank of the Highwood River, came to the conclusion that accretion (slow and gradual movement) had changed the banks of the river and surveyed the present day bank of the river as the boundary of the Wallace lands. Mr. Mintz then registered the plan as Plan 9412624 at the Land Titles office.
14. Mr. Mintz prepared a letter to be signed by Mrs. Wallace requesting a new certificate of Title referencing his filed survey, now a filed plan. That new certificate was issued on December 12, 1994, describing Mrs. Wallace's portion as:

That portion of the North East Quarter as shown on plan 9412624 containing 132.87 acres more or less.
15. Mrs. Wallace sold her interest in the quarter to Mr. and Mrs. Matwychuk-Goodman. That sale closed on March 30, 1995. They took possession of the land soon afterwards.
16. The Registrar of the South Alberta Land Registration District conceded at trial that the new title should not have been issued to Mrs. Wallace without the consent of Mrs. Robertson.
17. Mrs. Robertson continued running cattle as she had in the past until 1997, when a disagreement arose about the boundary between her husband, Mr. Pope, and Mr. Matwychuk-Goodman. As a result she involved counsel and discovered the registration of the plan and change to the Wallace title, which on the face of the title had increased the acreage of the Wallace lands by 21.09 acres.
18. On August 13, 1997, Mrs. Robertson applied for and was granted an injunction, allowing her to restore the fence that is illustrated on exhibit four and referred to as the injunction fence. This is the fence that runs across the Wallace lands and physically separates the cattle on the Wallace lands from the river and the Robertson cattle.
1. CONVENTIONAL BOUNDARY ISSUES

a. Background

[4] The law relating to conventional boundaries is enunciated by Ritchie, C.J. in *Grasett v. Carter* (1883), 10 S.C.R. 105 at p.110 as follows:

I think it is clear law, well established at any rate in the Lower Provinces where I came from, and I believe it must be established everywhere, that where there may be a doubt as to the exact true dividing line of two lots, and the parties meet together and then and there determine and agree on a line as being the dividing line of the two lots, and, upon the strength of that agreement and determination, and fixing of a conventional boundary, one of the parties builds to that line, the other party is estopped from denying that is the true dividing line between the two properties.

[5] This principle has been enunciated and approved in several other cases: *Kaneen v. Mellish* (1922), 70 D.L. R. 327 (P.E.I C.A.), *Piers v. Whiting*, [1923] 3 D.L.R. 879 (N.B. C.A.), *Phillips v. Montgomery* (1915), 43 N.B.R. 229 (C.A.) and *Flello v. Baird* an April 20, 1999 decision of the B.C.C.A. in action CA 024227 in Vancouver. The principles set out in these cases illustrate that the necessary elements to prove a conventional boundary are: there must be adjoining land owners, they must have a dispute or uncertainty about the location of the dividing line between the properties, they must agree on a division line, and then recognise it as a common boundary.

[6] Conventional lines are discussed in some detail by N. Siebrasse, in an article entitled "The Doctrine of Conventional Lines" (1995), 44 University of New Brunswick Law Journal 229. The policy aim is to reduce the expense of determining boundaries and grew out of the historical reality of the Maritime provinces, where surveyors were not readily available, and few of the early descriptions of properties were based on actual surveys. It carries over today in these circumstances, and also where the doctrine of estoppel would operate, when parties have agreed on a boundary, and one party has relied on that agreement to build, or take steps, and it would be unfair to now insist on a proper or other determination of the boundary.

[7] The recognition of the line can be oral, or in writing or by conduct, but the evidence to support the conventional line must be clear and definite. The onus of proof is on the party claiming ownership by virtue of the conventional line.

b. The Evidence

[8] Both Mrs. Wallace and Mrs. Robertson testified that they gathered there was a dispute in their families about the location of the boundary between their respective parcels in the quarter. Mrs. Robertson was on the ranch periodically from the mid 1950's. She moved onto the ranch in 1957 with her first husband. She always had the understanding that the land east of the injunction fence was the Robertsons'. She has no direct knowledge of when the fence was built or by whom, but the Robertsons since the 1950's had grazed their cattle for a few months a year on the lands across the river from their other land holdings. She was aware of instances when the

injunction fence was repaired by both the Wallaces and the Robertsons. The fence was used to divide the cattle: cattle of the Wallaces if found on the east side of the fence were pushed back, just as Robertson cattle that got on the west side of the fence were pushed back. Mrs. Robertson felt that around the time her husband passed away, the Wallaces intentionally placed cattle on the east side of the injunction fence, for periods from 1969 to 1973. The evidence of Catherine Robertson and Mr. Dale Pope, both related to Mrs. Robertson, confirmed Mrs. Robertson's understandings.

[9] Mrs. Wallace testified that as a child she would cross the injunction fence to pick berries, swim in the river, and access a gravel pit through the disputed lands on the east side of the injunction fence. She lived on the ranch until 1954. She always understood the fence separated the cattle, and confirmed it was in her personal knowledge that members of her family and the Robertson family would at times fix the fence. She acknowledged an understanding of a dispute between her father and Mrs. Robertson's father about the boundary between the lands. She knew the Robertsons claimed land on the "Wallace" side of the river, but she did not know how much or the basis for their claim. She acknowledged her brother ran cattle to the west of the injunction fence from the 1950's to 1989, and she was aware he felt the Robertson family owned the lands to the east of the fence. Mrs. Wallace did not reside on the quarter, and took title from her brother in 1989, when her mother's estate was settled. She was aware a surveyor did some work on the boundary in 1984 as her mother was upset about the Robertson cattle being on the disputed land. Mrs. Wallace testified her mother was in poor health and chose not to pursue boundary issues then. When she and her brother had appraisals of the quarter done in 1988, both acknowledged there was an issue about the boundary with the Robertsons. After 1989, Mrs. Wallace rented her land out to others who pastured their cattle there.

[10] It is clear from the evidence that Mrs. Wallace and Mrs. Robertson never discussed with each other the fence or the boundary of their lands from the 1950's up to this lawsuit. It is also clear that the location of the injunction fence does not follow the course of the river as it was in 1890 or any subsequent time for its whole distance, it is conveniently placed to keep the Wallace cattle on the highland and away from the river, and the Robertson cattle on the lowland. It is also clear from the evidence that the flooding of the Highwood River means that fences closer to the river or in the flood plain will not last.

[11] There is evidence to suggest a disagreement about the boundary. There is no direct evidence of an express agreement as to the boundary, if made it was not written, and no admissible oral evidence about it is available. The conduct of the parties may allow the court to infer an earlier agreement, however, the conduct must be clear to show the parties intended and implicitly agreed the fence should be the boundary.

[12] The Plaintiff, Mrs. Robertson, bears the onus of proof. Without direct evidence of an agreement, I must carefully look at the evidence of conduct. The establishment of the fence, its maintenance, and use allows the Robertson cattle to use the east side of the fence. From that one can certainly infer an agreement on the use of the fence to separate the cattle in a geographically feasible way. However, on the evidence, I am not able to say this conduct and use of the land infers an agreement that the fence was to be the actual boundary between the lands. The

acquiescence or conduct must be sufficient to establish the line was meant to be the boundary between the lands. I am left having heard all the evidence with the perception of an uneasy truce about the use of the lands, but I do not consider that evidence to prove on the balance of probabilities that there was an agreement to the boundary or ownership of lands.

c. Conventional Line Theory in the Torrens land system.

[13] In reviewing the conventional lines doctrine, I had a great deal of concern as to whether this doctrine can be imported into the Alberta Torrens based land titles system. Atlantic Canada, where the principle arose, has a registry land system. Mr. MacMillan was out surveying the lands in 1890 before most of it was owned by anyone other than the Crown. Alberta was set out in a township and plan system, and boundaries are not generally so susceptible to question, as in the Maritimes which was colonized without prior survey. Further, the basic tenant of the Torrens system is that the title as registered is absolute, and a third party purchaser for value should be able to rely on the title, and not go behind it to see if there any items such as a conventional line agreement by previous owners.

[14] On the other hand, there are exceptions to the concept of the title standing absolute in the Torrens system in Alberta. Also, the concept of two landowners who have a natural boundary, or a boundary that is not easily ascertainable settling their own boundary has sound social policy reasons in any system.

[15] A concern about conventional lines and the Torrens system was raised in the case of *Hawkes v. Silver Campsites Ltd.* (1991), 55 B.C.L.R. (2d) 145 (C.A.) where the issue was alluded to in passing by the Court of Appeal. Gibbs J.A. seems to suggest at paragraph 34 that under the statutory system in British Columbia, the court has no power to override the indefeasibility of title by invoking estoppel to enforce a finding of a conventional boundary. Locke J. A. suggests that the enforcement of a conventional boundary established by agreement or estoppel is possible in a case supported by cogent evidence. He, as did the majority, found the evidence in that case insufficient to impeach a Torrens title.

[16] A paper by Sandra Petersson “Something for Nothing: The Law of Adverse Possession in Alberta,” (1992) *Alta. Law Rev.* 30:4 p. 1291 is instructive. It looks at the place for adverse possession in the Alberta land titles system. Although adverse possession and conventional lines are not the same thing, they have similar attributes. The question of their place in the Torrens system in Alberta raises similar considerations. It is interesting that although adverse possession receives express statutory recognition in the *Alberta Land Titles Act*, an unregistered right to land by adverse possession will be lost to a bona fide purchaser for value. Authority: *Boyczuk v. Perry* [1948] 1 W.W.R. 495 (Alta C.A.) and *Nessman v. Bonke* (1979) 1 W.W.R. 210 (Alta. S. Ct.). This makes sense when considering the philosophy that as between two owners in possession, a claim of adverse possession or conventional boundary may have acceptable policy reasons but to extend that to bind a third party purchaser may do more damage than good to the Torrens System.

[17] Plaintiffs' counsel argued that s. 66 of the *Land Titles Act* excepts from the concept of the conclusive proof of the title, "any portion of land by wrong description of boundaries." I do not think this exception in s. 66 is aiming to deal with a concept such as conventional lines, which could be perfected on title by agreement.

[18] As a result I hold a conventional line agreement can be established in Alberta between two land holders currently holding title, but if unregistered it cannot be enforced against a third party purchaser for value.

[19] If I am incorrect in my conclusion that there is insufficient evidence to support a conventional line agreement here as to the boundary between the properties, I would hold that the claim of Mrs. Robertson fails, as an unregistered claim to title by a conventional line agreement would be lost to the Matwychuk-Goodmans as bona fide purchasers for value.

2. DOES THE DESCRIPTION ON THE TITLE FREEZE THE BOUNDARY IN 1893?

[20] The Plaintiff argues that the wording of the description of the Wallace and the Robertson titles means that the boundary between the lands is frozen at that time. The argument is that the words on the Robertson title reference everything south east of the northwesterly bank of the High River on a specific plan with a specific date, thus the river is not the boundary, and the rules of riparian rights otherwise applicable where a river is a boundary between two parcels of land do not apply. The Plaintiff relies on the cases of *Rockland Holdings Ltd v. 309458 Alberta Ltd.* (13 Feb. 1987), Calgary # 8601-23704 (Alta Q.B.), and *Hawkes Estate v. Silver Campsites Ltd.* (1951), 55 B.C. L.R. (2d) 145 (C.A.).

[21] The Defendants all oppose this interpretation, saying there is nothing about the wording of these titles that would suggest that the river was not the natural boundary. They argue the rules that apply to riparian rights govern. They rely largely on two cases from the Supreme Court of Canada, *Chuckry v. The Queen* (1973), 35 D.L.R. (3d) 607 and *Clarke v. the City of Edmonton*, [1930] S.C.R. 137.

[22] In the *Clarke* case, the Supreme Court of Canada held that the law of riparian rights does apply to properties which have a river as a boundary, and that all accretions become the property of the riparian owner to whose land they attach was the law in Alberta. There the court was contemplating land described as:

All that portion of River Lot Twenty-one of the Edmonton Settlement, in the said Province, lying North of the North boundary of the Dowler Hill Road, as the said Road is shewn on Plan 7258X, of record in the Land Titles Office for this Land Registration District.

[23] The plan shows Dowler Hill Road running along the Saskatchewan River. The patent conveyed:

Lot numbered twenty-one, in Edmonton Settlement aforesaid, as shown upon a map or plan of the said Settlement, signed by Andrew Russell, for the Surveyor General of Dominion Lands, dated 25th May, 1883, and of record in the Department of the Interior, containing by measurement, one hundred and sixty-three acres, more or less.

[24] The Court there found the east and west boundary lines ran to a line which marks the river, and construed that as meaning the river was a boundary and applied riparian rights despite the specific reference to a lot, shown on a map of a specific year.

[25] The Supreme Court of Canada in *Chuckry* dealt with accretion to property bordering on a river in Manitoba. The Supreme Court of Canada adopted the reasoning of the Dickson J.A, then with the Manitoba Court of Appeal. The exact description of the land is not ascertainable from the reported case, but it is clear it referenced a plan on file from 1875 which showed the Assiniboine River to be the northern boundary of the wood lots.

[26] Dickson J.A. discusses the issues of set acreages and descriptions referenced in a plan at pp.176-177 of 27 D.L.R. (3d). He states:

During argument a question was raised whether the doctrine of accretion could apply in circumstances such as being present here, namely, the former boundaries of the land are related to a defined line on a plan, i.e., the plan of 1875, and the lot acreages are stated on the plan. At one time it was doubtful whether the doctrine of accretion applied when the former boundaries of the land concerned were defined or ascertainable. The law now seems clear, however, that so long as the change is gradual and imperceptible the doctrine applies.

[27] Although in the *Rockland* and *Hawkes* cases, it was held that those titles, which referenced a particular plan, meant that where the river was depicted in that plan remains the current boundary, I am persuaded by the higher authority of the Supreme Court of Canada that the correct law to apply in reading these titles is that the bank of the river is the boundary, and subject to the laws of accretion. This means the boundary may change as the river changes course over time. Neither the *Rockland* or the *Hawkes* cases referenced or considered the *Clarke* or the *Chuckry* decisions, so it is difficult to tell if they were considered by the Justices who decided those cases.

3. IF RIPARIAN RIGHTS APPLY, WHERE IS THE BOUNDARY TODAY?

[28] Having found that the boundary was not frozen in time by the 1890 survey referenced in the 1893 plan, a determination must be made as to the present boundary between the Robertson and Wallace lands.

[29] The parties agree that the gradual deposition of land accrues to the riparian owner, but a quick change in the river course (avulsion) means the boundary does not change with the river.

[30] There is no issue with the South West part of the river in this quarter, all parties agree that the bank as surveyed today is the appropriate boundary. The contention arises in an area where there clearly was an oxbow, and an area in the North east portion of the quarter where at one time there was a large island, with a west and east channel flowing around it.

[31] The Plaintiff takes the position that the proper way to determine the boundaries at this time is to go back to the 1890 survey, consider the principles of avulsion and accretion from that time, and to arrive at the boundary today. The defendant Mintz argues that the relevant time to decide the state of the river is the time at which the parties took title. It is clear that the patent and title to the Wallace lands were issued in 1902 to the predecessor in title of the Wallaces. Although the fiat for the patent for the Robertson lands issued in 1902, the title did not issue until 1909. No evidence was lead to explain the delay. The importance of this point can be seen in reviewing the evidence.

[32] All parties by the close of trial, were willing to adopt the evidence of Mr. Osbourne about the oxbow area. Mr. Osbourne was qualified as an expert in the field of surficial geology, and able to give expert evidence in relation to the history of movement of river channels and changes in meandering rivers. He testified that the oxbow that is visible on the aerial photo would have been cut off by an avulsive process prior to the 1890 survey. However, at the time of that process, there would be a neck of land that would be on the east side of the river and as a result of a chute cutoff (an avulsive process), the river would have moved to close to its current course putting that neck on the west side of the river. This avulsive process would have happened between the surveys of 1890 and 1917. He cannot be any more specific of the timing of that event.

[33] In relation to the island area, there was a large island between the west and east side of the river in the north east portion of the quarter in 1890. It was the evidence of Mr. Osbourne that sometime between the 1890 and 1917 surveys, the west channel of the river became inactive, and the channel on the east side became the only channel. Mr. Osbourne then looked at the mechanisms that could cause the west channel to be abandoned, and all the flow to be in the east channel. He pointed to numerous floods between 1890 and 1917 and said in his opinion a flood likely enlarged the east channel, and it would be a perceptible event at the time the west channel dried up. In his opinion the process was likely not slow and gradual, but he conceded it was possible that the east channel could be scoured deeper and the west channel gradually dried up (the theory of Mr. Allred).

[34] In relation to the island portion, the Defendant Mintz called Mr. Allred, who was qualified as a professional surveyor, and an expert to give evidence in the field of land surveying and the standard of practice of land surveyors in the province of Alberta. He was the witness who raised when the actual titles were issued on these lands, as he had done historical searches of title. He testified that by reading the surveyor's notes, he determined the west channel was smaller than the east channel in the 1890 survey. He also testified that by the time the 1917 survey was done, a small nub of an island is shown where the much larger island had been. He testified that "on the balance of probabilities" the left channel merely dried up. He felt the corrosive action in the larger east channel meant the west stream eventually stopped running.

[35] Mr. Allred put great stock in a road right of way survey, the Talbot plan (exhibit 13, tab 4). That is a survey of the NW 1/4 of section 8, the quarter section to the immediate east of the quarter. It shows a small nub of an island with a channel on the west and east side. Mr. Allred expressed the opinion that he felt it was unlikely the larger island was in existence at the time of this 1905 survey, as Mr. Talbot would have shown the channel going off to the left. Mr. Allred puts great stock in this plan as “the best evidence,” and suggests one can then narrow the disappearance of the large island down to between 1890 and 1905. In his cross examination it was correctly pointed out that Mr. Talbot was not surveying the N.E. 1/4 in which the large part of the island and the west channel would be, if it still existed.

[36] It must be noted that Mr. Allred initially felt that accretion and not avulsion was the force at work in the oxbow area, he changed his opinion in relation to this at trial, after hearing Mr. Osbourne’s evidence. In his report of October 1999, exhibit 30, his opinion was that the island in the Highwood River was vested to “Greenacre” (or the Robertson land) by virtue of it being to the east and south of the west bank of the river. He backtracked somewhat on this opinion in subsequent reports and at trial, stating that he now realizes the importance of the 1905 Talbot plan and the size of the island, and the uncertainty of when the Robertson title issued.

[37] I accept the evidence of Mr. Osbourne as to the movement and the cause for the movement of the Highwood River from 1890 to today. As a result I hold the oxbow was cut off before 1890 and an avulsive neck cutoff later occurred to move a nub of land from the east to the west side of the river. I find on the balance of probabilities that the west channel around the island in the Highwood river in 1890 dried up as a result of flooding, not as a result of a slow erosional process on the east channel, or a slow drying up of the west channel. Here I accept Mr. Osbourne’s evidence over Mr. Allred’s, largely as his qualifications are more suited to this assessment.

[38] In relation to the relevant time of these events, it cannot be said with certainty, or even on the balance of probabilities exactly when they occurred, other than it was between the survey of 1890 and the next conducted survey of 1917. The exact timing does not matter, as the law in relation to riparian rights is clear that when the river or a bank is a boundary, the boundary changes with the river as it relates to accretion, but remains static if an avulsive force is at work. It is not necessary to prove exactly the situation of the river when the title issues, the law determines the changes of the boundary as the river moves, and those changes apply to successive landholders.

[39] A distinction was argued at trial that the Robertson’s by description only got the land to the east and south of the west bank in 1909, as their title did not issue until that date. This argument of the Mintz defendant suggested Mrs. Robertson would have the onus to prove that the neck cutoff and the island were to the east and south of the river in 1909, which she cannot do due to the uncertainty of when the cutoff happened and when the west channel dried up. The argument is that if the avulsion occurred before 1909, or the west channel dried up before 1909, the Robertsons do not get the island or the neck cutoff areas, as those lands were not physically east and south of the river course in 1909. I do not agree with these arguments. The law of

riparian rights starts with the river as described in the plan, clearly here in the 1893 plan from the 1890 survey, and then follows the history of the river to determine the boundary. That determination is not frozen at a particular time. The changes in the course of the river from 1890 may or may not affect the boundary, but the description is fluid and meant to continue so, whether or not a title is granted from the fiat for patent. To rule otherwise would lead to an absurd situation where the Crown would own the neck cutoff area and possibly the island if the avulsions occurred before 1909. Also, from a social policy point of view, to rule otherwise would mean that at the time of the title being issued, a survey would be required to know where the natural boundary was at that time. This was and is not traditionally done, and does not accord with the underlying tenants of a Torrens land holding system. The reference to the river in the plan is a baseline, and the movement of the river is taken from that point. The baseline is not where the river was at the time the title issued.

[40] Here, the grant to the Wallace predecessors defined their land as that land to the north and west of the West Bank of the High River. By 1890 the oxbow area was cut off and had become part of that grant. The west bank of the river at that time is best illustrated on exhibit 16. Both Mr. Mintz and Mr. Deyholos when plotting (on exhibit 16 and tab 15 of exhibit 13), the bank of the river from the 1890 survey, extended a similar arm westward between stations six and seven to plot the “backwash” noted by James MacMillan. In that area, the river changed from that position to where it is today by avulsion, so the nub of land affected by the chute cutoff does not accrete to the Wallace lands.

[41] In relation to the island between stations eight and ten of the MacMillan survey, it did not accrete to the Wallace lands, as accretion did not occur to join it to the west bank of the river as it was in 1890. It was a quick drying out of the west channel of the river due to flooding. Thus the boundary of the Wallace lands is affected by erosion and accretion between stations one and five as shown on exhibit 16, and it is the Mintz plan that sets the present day boundaries there. From station five to 10, the boundary of the Wallace lands is the Macmillan survey as mapped by Mr. Deyholos in exhibit 16.

[42] In terms of the boundaries of the Robertson lands, I find the boundary of their lands is the same line, subject of course to the Crown’s ownership of the riverbed of the Highwood river.

[43] The land to the east of the lines between stations five and ten on exhibit 16 fall under the description of land to the east and south of the west bank of the High River, and were included in the Robertson lands by the fiat in 1902 and in the title of 1909 and because of the application of the law of riparian rights they do not accrete to the Wallace lands.

[44] The boundary between the Wallace and Robertson lands is shown in red on Schedule A to this judgment.

4. WAS MR. MINTZ NEGLIGENT?

[45] The allegation that is made in this case is that Mr. Mintz was negligent not in the preparation of his opinion and the survey of where he thought the current boundary was, but

rather when he proceeded to register this plan at the land titles office and assisted Mrs. Wallace by preparing the request for a new certificate of title, which changed the description of her boundary and increased her landholding by approximately 22 acres. It is alleged he breached a duty of care he had to: Mrs. Wallace; the adjoining land owner, Mrs. Robertson; and the third-party purchasers, Mr. and Mrs. Matwychuk-Goodman.

[46] Actionable negligence requires a duty of care to exist, a breach of that duty and damage to be caused as a result of the breach. I will first outline the facts as I find them in relation to Mr. Mintz's knowledge and situation. Then, I will discuss any duty of care owed and whether his conduct was a breach of that duty or duties. The damages issues were not addressed in this liability portion of the trial.

a. Facts

[47] Mr. Mintz was contacted by Mrs. Wallace, who had been advised by her realtor she needed a survey of the property. Mr. Mintz reviewed the file in his employer's office, which included the file of the work done by Mr. Dharamshi in 1984. Mr. Mintz was aware from Mrs. Wallace in a general sense that there was a disagreement between her family and the Robertson's about the exact boundary between their property, and that the property line was in dispute. He was aware that Mrs. Wallace wanted to sell the land, a realtor was actively working on that sale and she needed to know the exact acreage of the land. Mr. Mintz talked to Mr. Dharamshi, and was aware Mr. Dharamshi in 1984 had surveyed the injunction fence, and had been gathering information to discuss with a lawyer. He was aware of Mr. Dharamshi's statement that the river had undergone substantial movement between 1890 and 1917, and the present river followed more or less the course of the 1917 survey.

[48] Mr. Mintz ordered the titles to the property, he reviewed some aerial photos, and he went out to the property three times. On one occasion he was there with Mrs. Wallace, and she talked about the injunction fence being there to separate the cattle, and pointed out that the Robertson cattle did cross the river and use the area east of the fence. Mr. Mintz had a survey crew do a complete traverse of the bank of the river. He considered issues of accretion and avulsion. He came up with a survey, tab 24 in exhibit 13. His opinion was that the changes in the land were due to the slow and gradual process of accretion, and the present boundary was the present path of the river.

[49] Mr. Mintz made a calculation of the area of land between the injunction fence and his boundary (32.39 acres) and was aware that his survey of the boundary had the effect of increasing the acreage in Mrs. Wallace's land by 21.93 acres from the area referenced on her title. He acknowledged that he was aware that this 21.93 acres was land Mrs. Robertson may feel she owned.

[50] Mr. Mintz testified that he contacted the land titles office as he was not sure how he should entitle the plan. He intended to register it at land titles, and to assist Mrs. Wallace in getting a new certificate of title referencing the river boundary he had set out in the plan, and

amending the acreage. He was given the advice to entitle the plan as he did: "plan showing survey of boundary affecting the N.W. 1/4 Sec7 and part of N.E. 1/4 of Sec 7".

[51] Once he had signed off the plan on December 1, 1994, Mr. Mintz contacted Alberta Environment. He wrote a letter (tab 22, exhibit 13) that enclosed the plan of the survey of "what we believe is our client's property", copies of the certificates of title, the 1893 township plan and a blueprint of that plan superimposed over Mr. Mintz's survey. The letter requested that they review the plan and title descriptions with respect to riparian rights and to endorse the plan if they agreed. Alberta Environmental Protection sent a letter dated November 30, 1994 indicating they had no objections to the registration of the plan of survey. Mr. Mintz in his direct evidence explained that he notified Alberta Environment as the Crown would have an interest in the bed of the river. That the Crown in the Right of Alberta owns the beds and shores of all naturally occurring rivers is set out in s. 3 of the *Public Lands Act*, R.S.A. 1980, c. P-30, is not disputed in this trial.

[52] Mr. Mintz acknowledged in cross examination and I find as a fact that he knew from the examination of the boundary issue that there was evidence on which another surveyor may take a different position than he had as to avulsion and the legal boundary that resulted.

[53] Mr. Mintz delivered a letter to the Robertson home on October 11, 1994 to say that Clark and Associates were performing a survey of the property boundaries for Mrs. Wallace and that they would be required to set up instruments on survey monuments on the Robertson property. He recalls Catherine Robertson called him about the letter. He testified he told her that he would need to use monuments on their property and he would keep her informed of the project. Mr. Mintz testified that sometime in early December before registering the plan, he called Catherine Robertson and advised her he had completed the plan, and was sending it for registration. She asked him how she could get it, and he told her it would be a public record and she could get it from the Land Titles Office.

[54] On December 5, Mr. Mintz sent the plan to the Land Titles Office and it was registered as plan 9412624, bearing instrument number 941312650. He then submitted a request for an updated title, amending the description of the Wallace property to conform with his plan. Mr. Johnston, an employee at the Land Titles Office called him and told him he needed a letter from Mrs. Wallace. He prepared this letter, had her sign it and submitted it to Land Titles. The letter is tab 26 of exhibit 13, and requested an amendment of the certificate of title to reflect the information shown on the plan 9412624. The description requested was:

Those portions of the NW 1/4 as shown on plan 9412624 containing 54.68 has (135.11 acres).

This title was issued.

[55] Mr. Mintz was aware the updated title was required in the context of a sale of the property from Mrs. Wallace to another party.

[56] S. 80 of the *Land Titles Act* provides:

The registration of a plan under this Act does not relieve the Alberta land Surveyor who conducted the survey and prepared the plan from any liability for damages suffered by any person as a consequence of the survey or the registration of the plan.

b. The Duty of Care

[57] There is an issue as to who Mr. Mintz, a professional surveyor, owed a duty of care. It was conceded by his counsel that he owed a contractual duty to Mrs. Wallace, and that she was an individual to whom he would owe a duty of care. More contentious is whether Mr. Mintz owed a duty of care to Mrs. Robertson, and to the Matwychuk-Goodmans.

[58] A determination of this duty starts by looking at the origin of negligence principles set out in *Donoghue v. Stevenson*, [1932] A.C.562. A duty is owed to someone who is in a position that a duty should exist, in the sense a neighbour or someone with a proximity that there is a duty to take care to avoid causing foreseeable damage. It is that the omission or the act complained of is one which had so close or direct an affect on a person that the defendant should have thought of the plaintiff when contemplating the act or omission.

[59] I find that Mr. Mintz had a duty of care to Mrs. Robertson. Mr. Mintz was involved in determining a boundary around Mrs. Wallace's property. The boundary is not just of her property, but it also by definition deals with the boundary of Mrs. Robertson's property. She was someone directly in his contemplation as being affected by his work, and thus falls within the neighbour principle.

[60] The issue of whether Mr. Mintz owed a duty of care to the Matwychuk-Goodmans is not so straightforward. Counsel for the Matwychuk-Goodmans argued that they were potential purchasers about whom Mr. Mintz knew. Even if he did not know of them by name or person, it was understood and anticipated by Mr. Mintz that someone would be purchasing the lands, in fact it was for such a sale that Mrs. Wallace requested his survey. Mr. Mintz knew of the realtor, and was in direct communication with him. He or his office provided a copy of the draft survey and the exact acreage for the listing information. Mr. Mintz admitted that he knew a third party purchaser may become involved after the survey and plan registration.

[61] Counsel for Mr. Mintz argues that the survey became a public document when registered, and it would be opening the floodgates for litigation if anyone who could get a copy of the plan could be owed a duty of care. The principles discussed in *Kripps v. Touche Ross* (1992), 69 B.C.L.R. (2d) 62 (C.A.) were argued, as it relates to the concept of proximity for recovery of economic loss, as was the case of *Hercules Managements Ltd. v. Friendly Farms Ltd.*, [1997] 2 S.C.R. 165. These cases point out that where there is economic loss, whether a duty of care is owed depends on whether any duty, if it exists, is negated or limited by policy considerations. Proximity is established here, and reliance by the Matwychuk-Goodman's on the survey and title

would, in the particular circumstances of this case, be reasonable. There is no policy reason here to suggest a need to limit the duty of care. Nothing suggests that by extending a duty to the Matwychuk-Goodmans, that Mr. Mintz or a surveyor in a similar circumstance may be exposed to liability in an indeterminate amount for an indeterminate time to an indeterminate class.

[62] I understand the concern about extending the duty owed by a surveyor to include an unknown member of the public who may obtain a plan from the Land Titles Office. I do not classify the Matwychuk-Goodmans in that class. Mr. Mintz, although he did not physically meet the Matwychuk-Goodmans, knew this survey was being done for the purpose of a sale and knew it would be relied on by the vendor, Mrs. Wallace and the purchasers from her, who existed and would take title, as revised as a result of his survey. In this context, the Matwychuk-Goodmans are in sufficient proximity, they are people Mr. Mintz knew would rely on his survey and the resulting description on title and I find he owed them a duty of care.

c. The Standard of Care

[63] The review of the title and information about the river and determination of the boundary is, in this case, a very complex matter. It is significant that the surveyors who testified as experts commented on how complex this determination was. The issue here is not whether Mt Mintz was negligent in coming to his decision or opinion that the boundary was where it was. All parties concede that although they may not agree with his opinion, because it is not right, it is not necessarily negligent.

[64] The issue goes beyond that, and it relates to whether a surveyor in the position of Mr. Mintz, once having come to his opinion in this complex determination, and having developed his survey of the boundaries, had a duty not to proceed to register the plan at Land Titles, or actively assist Mrs. Wallace to obtain an amended title without advising Mrs. Wallace of the risk that his opinion could be challenged and the need to provide notice to the potentially affected landowner, Mrs. Robertson, before changing the description of the boundary on title.

[65] The standard of care to be imposed on a professional requires a determination of how the reasonable professional in that situation would conduct himself. What is a reasonable amount of care and a reasonable degree of skill and knowledge to expect? It is determined by not only an examination of any legislated and professional standards, but also through expert evidence.

[66] All three individuals qualified as professional surveyors and experts to testify about land survey practice and standards in the province of Alberta (Mr. Deyholos, Mr. Hunter and Mr. Allred) agreed that when a surveyor surveys a boundary, although he acts for one landowner in his determination, he may be affecting the rights of the adjacent landowner. Establishing boundaries are relevant to not only the client but the public at large.

[67] The *Surveyors Act* S.A., 1981, c.1-4.1 is the legislation in Alberta dealing with surveys. There has been no breach of any of the sections of that Act by Mr. Mintz. The Alberta Land Surveyors Association is a self-governing profession established under that legislation. All

experts referenced the Manual of Standard Practice of the Alberta Land Surveyor's Association which includes a Code of Ethics.

[68] The Manual of Good Practice in force in 1994 was marked as exhibit 20. The introduction to the Code of Ethics portion is instructive. It states:

Introduction

The Code of Ethics represents a standard of conduct for the Alberta land surveyor. It stresses his responsibility not only to the public and to his clients but also to his personnel and to his colleagues.

Those who rely on an Alberta land surveyor may find it difficult to assess the quality of his services. They have a right, however, to expect that he be a person of integrity and competence.

Because ethics are abstract concepts, they are not easily defined. Therefore, care must be used in applying the Code of Ethics to judge the Alberta land surveyor. There could be cases when certain parts of the commentary should not be strictly enforced. Similarly, the code cannot cover all instances of unethical conduct. It is the responsibility of the Association to judge whether the code is followed not so much in fact, as in spirit.

Item 1.1 in that code and the commentary provides as follows:

The Code

1.1 An Alberta land surveyor shall serve society, his clientele and his profession with the ultimate objective of contributing to the knowledge of land, to the better management of land and to the preservation of peaceful and lawful enjoyment of land.

The public responsibility of an Alberta land surveyor to contribute to the knowledge of land, to the management of land and to the peaceful and lawful enjoyment of land imposes particular obligations on him. Especially important is the work of establishing or reestablishing boundaries of land. The correct survey or resurvey of boundaries of land is essential to the maintenance of the land survey system and the land titles system in the province of Alberta. This public interest must be greater than the interest of the client of the Alberta land surveyor and requires that the Alberta land surveyor carry out his duties without favour, affection or partiality.

Item 1.5 in that code and some of the commentary is as follows:

1.5 Professional Judgment

An Alberta land surveyor has a duty to exercise unbiased independent professional judgment on behalf of his client, and shall represent his client competently.

...

An Alberta land surveyor shall present clearly to his client, circumstances where his professional judgement may be overruled by regulatory or legal authority and the consequences thereof.

[69] All the witnesses were clear that a boundary is one between two landholders, and a surveyor has to give due consideration to the interest of the other property owners who may be affected by his or her work. All expert witnesses also referenced the Manual of Instruction for the Survey of Canada Lands. Although applying specifically to surveys done for the Government of Canada, they agreed the manual does provide guidance in other situations, and it is part of the syllabus for surveyors in obtaining their professional designation. Item eight in Chapter B7 reads as follows:

8. In any case of a disputed boundary, the surveyor can only advise the disputants and give his opinion as to the correct or most equitable position of the boundary. In addition to this, he should take care not to perform any act that might have the effect of prejudicing the case of either party. So long as the dispute continues, no surveyor can lay down the boundary since its determination is of necessity a judicial act and must be judged in court according to law after the hearing of evidence.

[70] Mr. Deyholos has been an Alberta Land Surveyor since 1963. He was retained to transpose the survey of James MacMillan over that of Mr. Mintz for comparison's sake. He also gave the opinion that Mr. Mintz fell below the standard of an Alberta Land Surveyor by failing to give Mrs. Robertson proper notice of the proposed amendment of title in light of the potential impact on her property. He criticized Mr. Mintz for seeking to have the title amended to reflect a 20% increase in acreage without giving consideration to the adjacent and potentially adversely affected landowner. Mr. Deyholos felt Mr. Mintz had failed to comply with the provisions of the *Land Titles Act* and failed to consider the interest of the public and other landholders as required by the Code of Ethics. Mr. Deyholos was also critical of Mr. Mintz's opinion as to the boundary, largely because he did not feel Mr. Mintz gave enough thought to avulsion as a possibility, looking at the rapid changes in the river between 1890 and 1917.

[71] Many of Mr. Deyholos's answers in cross examination on the issue of duty were based on his opinion that Mr. Mintz ought to have done something differently to avoid the situation in which the parties now find themselves. Some of his evidence was flawed as he testified as to what he would have done, as opposed to the standard of a reasonable surveyor and generally accepted practices. Mr. Deyholos acknowledged the application for the changed title was made and signed by Mrs. Wallace, but indicated Mr. Mintz was the agent for Mrs. Wallace in coming up with the idea, assisting her in preparing the letter and sending it to the Land Titles Office. He felt that the way Mr. Mintz registered the plan and got the revised title was inconsistent with promoting the peaceful enjoyment of land. Although he could not point to a form of notice, or a directive for this specific situation, he felt Mr. Mintz should have discontinued the survey or arranged to have it solved by the landowners or a tribunal, rather than proceeding to registration.

[72] Mr. Hunter has been an Alberta Land Surveyor since 1969. He reviewed Mr. Allred's report and took two exceptions to it: firstly, the conclusion that all the lands in the Mintz plan resulted from natural accretion; and secondly, with the idea the Mr. Mintz acted in an acceptable manner in these circumstances. He emphasized that a reasonable surveyor asked to determine a common boundary between two parties has a responsibility to both parties and a duty to inform his client of the possibility of dispute and suggest to the client that a matter may have to be resolved through a lawyer and the courts. A surveyor is not meant to be an advocate, and if he is aware of a dispute he should not involve himself in the middle. He may be an expert witness but the determination of a dispute is not in his hands. Mr. Hunter's argument with Mr. Mintz was not in coming to an opinion, (although he did not agree with it totally), but rather in taking the step to register the plan and obtain a new title referencing the plan and a different acreage without formally notifying Mrs. Robertson. Mr. Hunter strongly felt that knowing there was a dispute and with the information Mr. Mintz had, a prudent surveyor would have not registered the plan, but advised the client that he was obligated to notify the adjacent land owner who may be adversely affected. He felt that Mr. Mintz had stepped into the arena as the judge of the issue by his actions, and that is not the role of a surveyor. He was most critical that a surveyor would be involved in the process of changing titles without an adjacent or affected landowner being involved. He stated that establishing natural boundaries was one of the most difficult matters, and this case presents a particularly difficult problem and the determination of the boundary on the facts of this case "ranks up there in the top 5%". Of the three experts, I found Mr. Hunter's the most compelling evidence and accept it as to the acceptable standard of practice among surveyors.

[73] Mr. Allred has been a surveyor since 1961. Besides his practical experience, he was the executive director of the Alberta Land Surveyors Association for 14 years. In terms of the registration of the plan and Mr. Mintz's subsequent conduct, Mr. Allred found nothing inconsistent with the standard care he would impose on a surveyor. Mr. Allred talked about s. 90 of the *Land Titles Act*, saying the Mr. Mintz did approach the Crown and obtain its approval as the adjacent land owner (owning the bed and shore of the river). Further, he stated he had no concern with Mr. Mintz's professional judgement. Mapping what he felt was the boundary on the ground, submitting the plan to the Land Titles Office and applying for a new title are things he is entitled to do, and Mr. Allred's opinion is the onus is on the Land Titles Office if notification is necessary.

[74] Mr. Allred's evidence was that what Mr. Mintz did was "totally without favour to his own client". However, he acknowledged a duty not to take steps to unilaterally resolve a dispute, that a surveyor in giving his opinion may find that opinion adverse to one side, but he should then leave it to lawyers, or a process set out by statute for the dispute to be resolved. A surveyor should not circumvent the law to outdo someone on behalf of his client. Mr. Allred stated in cross examination that his understanding of the law is that Mr. Mintz was required to get the okay of Alberta Environment, and the law says Mr. Mintz can file the plan, and can apply for a new wording of the title as shown on the plan. Mr. Allred says the discretion is in the Registrar at that point. He agreed that once having given his opinion, Mr. Mintz was "a little out of his element" to help Mrs. Wallace made an application to the Land Titles Office, but he did not think it was inconsistent with good practice for Mr. Mintz to do this.

[75] I have difficulty accepting in totality the evidence of Mr. Allred. He agrees in principle with many of the general statements about the role of a surveyor as a public officer, and the duty to be fair and impartial. Mr. Allred himself wrote the following in an essay entitled: “The Surveying Profession” published in a book, Survey Law in Canada, (Toronto: Carswell, 1989).

§11.09 Land surveyors like other persons in responsible positions usually must swear an oath of office and on occasion also an oath of allegiance as evidenced by the Alberta *Land Surveyors Act*. A surveyor is bound by his oath, as well as by his professional ethics, to uphold the law and to act without prejudice - to act neither in favour of his client nor against his client’s neighbour. In all of his dealings, he must act with total impartiality, respecting the rights of all parties. Figure 11.1 is the sample oath of office required by the *Examination and Training Regulation* pursuant to the *Land Surveyors Act* of the Province of Alberta. It reflects the surveyor’s responsibilities.

FIGURE 11.1 OATH OF OFFICE

CANADA }
PROVINCE OF ALBERTA }

I,, do swear that I will diligently, faithfully and to the best of my ability, execute according to law the office of land surveyor; and that I will, as an Alberta land surveyor, conduct all surveys faithfully and to the best of my ability, giving due consideration to the lawful rights of all persons; I will accurately locate and record all evidence of boundary monumentation truly and accurately to the best of my ability. I will measure and record all data truly without prejudice either towards or against any land owner, but in all things conduct myself truly and with integrity; maintaining and upholding the law and the interests of the public.

[76] Mr. Allred in his report exhibit 30 at page 29 outlines the 1996 Code of Ethics, s. 1.1 and 1.5, and states:

These statements set out the duty of an Alberta Land Surveyor, not just to his client but to his clients adjoiners as well. The statements also make it clear that the Alberta Land Surveyor is not the final authority and must not represent to his client that he is.

[77] Later in exhibit 31 page 7 he appears to contradict this in saying that article 1.1 “had nothing to do with the interest of the public and other landholders vis-a-vis the client of the Alberta land surveyor”

[78] Mr. Allred in his report (exhibit 30 page 32) states:

It is clear from the evidence that Mr. Mintz took the proper steps by advising that a full survey would be required. He also consulted with the Land Titles Office to

determine what the title of the plan should read and what signatures were required on the plan. It is apparent that Mr. Mintz, having formed his opinion on the boundary, was only following the procedural steps necessary to have the plan recorded in the Land Titles Office and an amended title issued which showed a reference to the current area.

[79] This latter quote ties in with a number of references Mr. Allred makes in his reports and his testimony that Mr. Mintz had followed the right procedure and law to determine the boundary. He talked about s. 90 of the *Land Titles Act*, testifying how he felt Mr. Mintz had complied with its terms. Mr. Allred states at page 4 of exhibit 31 that “Mr. Mintz followed the normal procedures set out in the *Land Titles Act* to rectify the title to the Wallace Property.” He goes on to say at Page 7 that:

In summary, it is my opinion that Mr. Mintz determined the boundary of his clients lands giving due consideration to the rights and interest of adjacent landowners within the confines of the law and in recognition of the nature of the ongoing dispute between his client and Mrs. Robertson. Given his professional opinion as to the boundary between the respective parcels, which he researched and formed giving due consideration to all material facts, Mr. Mintz has complied with the legislation and normal standard of practice of an Alberta Land Surveyor.

[80] Mr. Allred incorrectly read section 90 to be discretionary, and interpreted the adjoining land owner to be the Crown. Mr. Allred’s opinion is based on his erroneous interpretation that the law (here s. 90) was followed. At times he seems to suggest that since Mr. Mintz was not negligent in coming to his opinion, he had in essence made the determination of the boundary, and not doubting he was right, was entitled to facilitate its registration as he had no doubts about it. I do not agree with this. Mr. Mintz, once he stepped past presenting his opinion, and assisted a client to change title, had a responsibility to make sure he was complying with proper procedure to have his opinion adopted. He directly contravened the legislative directive in assisting to change the description of Mrs. Wallace’s title.

[81] Once a surveyor, who is supposed to be impartial, and is aware of a dispute between property holders, takes steps that go beyond expressing his opinion, but actually registering that opinion, and actively facilitating a new title description, he takes on another role, and to the extent that he does not follow the law, and knowingly acts without the knowledge or consent of another party whose boundary he is now taking steps to affect, he certainly offends the code of conduct, as well as attracting legal liability for foreseeable damage that he causes.

[82] Mr. Mintz testified that he was surprised when the Land Titles Office registered his plan. He was surprised when the Land Titles Office issued the new title to Mrs. Wallace. He testified that: he was aware the boundary was in issue, he was aware of facts that another surveyor may well present a contrary opinion of where the boundary was, he knew his opinion would mean a significant change in the acreage of the Wallace property, he understood the registration of the plan could have an adverse effect on the land of Mrs. Robertson, he was aware of s. 90 of the *Land Titles Act*, and aware of the provision requiring the consent of

owners that may be adversely affected to an amendment of description, and he submitted the plan to the Land Titles Office and facilitated Mrs. Wallace amending her title anyway. He gave no warning to Mrs. Wallace of the probability of a challenge to his survey and the possible future effect of the lack of consent by Mrs. Robertson.

[83] I find that Mr. Mintz did breach a duty of care he owed to Mrs. Wallace, by failing to advise her that he could provide his opinion about the boundary, but that a determination of the boundary may require some other intervention. He registered the plan and had her sign the letter for the amended title, without ever advising her that consent by Mrs. Robertson should be sought. He conducted himself in such a way that Mrs. Wallace understood she could rely on his expertise to “fix” the boundary issue.

[84] Mr. Mintz also breached a duty of care he had to Mrs. Robertson. As soon as he stepped beyond expressing his opinion, (producing the plan), and started to take steps to submit it for registration as part of the requirement to obtain a new title with a new description and a new acreage for Mrs. Wallace, he was stepping far beyond the actions of a reasonable public servant, with a duty not to decide boundary issues unilaterally. He knew the consent of owners who may be adversely affected was required, he knew there was a boundary dispute. He knew to obtain a revised title for Mrs. Wallace may prejudice or make more difficultly for Mrs. Robertson in any subsequent litigation on the title. Every red flag was up, yet he took steps to submit the plan and then he went further and prepared documents for Mrs. Wallace to sign to change the description. He was surprised the Land Titles Office did not reject the request. He said nothing. This goes further than breaching a rule of practice, it is a direct breach of a duty to the adjoining land owner that Mr. Mintz had, as he actively took steps to make his opinion the description of the land.

[85] Mr. Mintz’s counsel argued that breach of a code of ethics is not negligence in itself. That is correct, although a breach of a code of ethics is one piece of evidence a court can take into account in looking at the standard of care in the particular circumstances of the case.

[86] Mr. Mintz’s counsel argued that a breach of a statute does not give a cause of action in negligence. That is correct, it is again just one consideration in deciding the standard of care. Mr. Mintz stated that he was intending to register the survey, and assist Mrs. Wallace in obtaining a new certificate of title, showing the current boundary of her property. Section 90 of the *Land Titles Act* is the applicable section, it reads as follows:

90(1) Where a parcel of land that adjoins land owned by the Crown in right of Alberta has a natural boundary, the Registrar, on application by the registered owner of the parcel or the Crown, may amend the description of the parcel to reflect the current location of the natural boundary.

(2) Where a parcel of land

(a) had adjoined land owned by the Crown in right of Alberta, and

(b) had a natural boundary that no longer exists,

the Registrar, on application by the registered owner of the parcel, may amend the description of the parcel to reflect the non-existence of the natural boundary.

- (3) An application under subsection (1) or (2) shall be accompanied
 - (a) in the case where the natural boundary still exists, by a plan of survey or other evidence satisfactory to the Registrar showing the location of the natural boundary,
 - (b) in the case where the natural boundary no longer exists, by evidence satisfactory to the Registrar of the non-existence of the natural boundary,
 - (c) by the consent of the Minister charged with the administration of the adjoining land or a person authorized by him, where the Crown is not the applicant, and
 - (d) by the consent of the registered owners of parcels that may be adversely affected by the amendment of the description.

[87] The section applies as the Wallace lands in places adjoins the river, the bed of which is owned by the Crown. There is a natural boundary. The section clearly gives a discretion to the Registrar as to whether he changes a title. The legislation is directive, the application shall (my emphasis) be accompanied by a plan of survey, the consent of the Minister (here the consent sought and obtained by Mr. Mintz), and the consent of the registered owners of parcels that may be adversely affected by the amendment of the description.

[88] The directive nature of s.90 (3) is not beyond Mr. Mintz, it is plain. He understood the consent of owners who may be adversely affected was necessary. Further, having stepped into the area of registration in a situation he knew was complex, in the face of a dispute, and aware of the legislative requirement of consent, Mr. Mintz clearly had a duty to comply with the legislation. Instead he submitted an application he knew did not comply with the legislation, stood by passively when the plan was registered and then actively assisted Mrs. Wallace to get an amended title, and stood by when the Registrar mistakenly and to Mr. Mintz's surprise granted the amended title.

[89] Mr. Mintz's counsel argues that Mr. Mintz does not create titles, he just applies, and that registration had no effect on Mrs. Robertson's title, it stayed the same. It is true Mr. Mintz does not change titles, and it is true Mrs. Robertson's title did not change. But Mr. Mintz, as a surveyor, knew that the registration of his plan and the result of the application for a new title, created two titles where the same lands would seem to be owned by two people. He was the one person with the knowledge of the complexity of the issues. He chose not only to register his plan, but then to have Mrs. Wallace sign the letter he had drawn up for an amended title, with no warning to her of the possible consequences or complexity of the issues.

[90] Mr. Mintz's counsel suggests that this is a mere error of judgement, it is not negligence. It is clear that Mr. Mintz's opinion and his survey would fall under an error of judgment, when scrutinized now in the black and white of a court room with the expert testimony given at trial. However, to actively try to take steps to register one's opinion in a Torrens land title system, and amend a title on that basis, without getting the consent of the Mrs. Robertson is not an error of judgement. Mr. Mintz's actions went beyond an error of judgement that is excusable in law, and into the area of a breach to someone to whom Mr. Mintz owed a duty of care.

[91] Mr. Mintz's actions also breached a duty of care he had to the Matwychuk-Goodmans. In the specific facts of this case, as he entered the arena of applying to register his plan, and proceeded to assist Mrs. Wallace to get a title that he knew may well be subject to challenge, he broke a duty to those purchasers, waiting to complete the purchase, by acting the way he did in obtaining a certificate for Mrs. Wallace, which he knew would be vulnerable to challenge by Mrs. Robertson.

POSITION OF THE MATWYCHUK-GOODMANS

a. Status as Bona Fide Purchasers for Value

[92] Mr. Matwychuk-Goodman first became interested in the quarter when he saw it advertised for sale. He and his wife had in the past bought property as an investment for subdivision and sale. He recognized value in the property, as it was on the river and close to the town of High River. He contacted the realtor and viewed the property several times. I accept his evidence that he knew nothing of the boundary dispute between the Wallace and the Robertson families, prior to receiving the Statement of Claim in this action. The Matwychuk-Goodmans knew a survey was being done to establish the boundary in the quarter and to determine the acreage of the land to be sold. They knew the title was being updated at the Land Titles Office and retained a lawyer to act for them in the purchase, and to make sure the title reflected what they understood they were buying, 132.87 acres of land in the quarter on the edge of the river. It was clearly their intention to subdivide the land and sell the parcels.

[93] They entered into an agreement with Mrs. Wallace dated November 22, 1994 to purchase portions of the N.W. 1/4 and the N. E. 1/4 of 7-19-28-W4M, containing 267.98 acres for \$450,000, with possession to be March 31, 1995. There was an express condition in the contract that it was "subject to satisfactory review of title and any encumbrances on or before December 9, 1994 and satisfactory study of flood plain"

[94] The condition was extended a number of times, and finally waived on December 22, 1994, when the amended certificate of title was available and had been reviewed by their counsel.

[95] Counsel for Mrs. Robertson argued that the Matwychuk-Goodmans were not bona fide purchasers for value. He argued that by using the same realtor to purchase the property, as Mrs. Wallace used for its sale, that the realtor became their agent, and the agent's knowledge of the boundary dispute was therefore imputed to them. He also argued that the Matwychuk-Goodmans should not be believed, that they really did know about the boundary dispute. Considerable time in cross-examination was spent going through a notebook that the Matwychuk-Goodmans had kept, and questioning entries that referenced Mr. Pope, Mrs. Robertson's husband.

[96] I am not willing to impute to the Matwychuk-Goodmans the knowledge of the realtor. The fact that they used the same individual as Mrs. Wallace in the negotiation of the purchase

of the property does not mean they are in law imputed with his knowledge. This is especially the case where there is no direct evidence of any conversation between them and the realtor about the boundary dispute. Further, I accept the Matwychuk-Goodman evidence. The cross examination did not in my view show that any of the entries demonstrated that these purchasers had knowledge of the boundary dispute. I accept the evidence of Mrs. Matwychuk-Goodman that this was a very large investment for them, she initially opposed the use of their resources in this manner. I accept the evidence of both the Matwychuk-Goodmans that had they known of the boundary issue, or that notice had not been given to Mrs. Robertson and this may involve them in litigation in the future, they would never have put so much capital into this land, knowing they could be exposed to a lawsuit or issue about their ownership of the land, and the resulting delays to achieving subdivision and sale.

[97] I find the Matwychuk-Goodmans are bona fide third party purchasers for value. They purchased from Mrs. Wallace and obtained title to lands as described in the Mintz plan, which was registered at the Land Titles Office and calculated as 132.87 acres in the quarter.

b. Who Retains the Lands Overlapped by Two Titles

[98] At this point of time, there are two titles issued which both purport to include some of the same lands in the quarter. The Matwychuk-Goodmans have a title that purports to give them the 132.87 acres set out in the Mintz plan, that includes the chute cutoff and the island area that I have decided is legally part of the Robertson lands. Mrs. Robertson has a title that describes lands, which I have indicated includes not only what is on the east and south side of the existing river, but the island and chute cutoff areas.

[99] Although a general tenant of the Torrens land title system is that the title is indefeasible, in Alberta the law is governed by the *Land Titles Act*. Section 66 reads as follows:

66(1) Every certificate of title granted under this Act (except in case of fraud wherein the owner has participated or colluded), so long as it remains in force and uncanceled under this Act, is conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named therein is entitled to the land included in the certificate for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 65, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land.

(2) For the purpose of this section, that person shall be deemed to claim under a prior certificate of title who is holder of or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate of title granted, notwithstanding that the certificate of title has been surrendered and a new certificate of title has been granted on any transfer or other instrument.

S. 173(1)(e) and (f) read as follows:

173(1) No action or ejectment or other action for the recovery of any land for which a certificate of title has been granted lies or shall be sustained against the owner under this Act in respect thereof, except in any of the following cases:

- ...
- (e) the case of a person deprived of or claiming any land included in a grant or certificate of title to other land by misdescription of the other land or of its boundaries, as against the owner of the other land;
 - (f) the case of an owner claiming under an instrument of title prior in date of registration under this Act, or under any law heretofore in force in any case in which 2 or more grants, or 2 or more certificates of title, or a grant and certificate of title, are registered under this Act or under any such law in respect of the same land.

[100] These two sections make it clear that a certificate of title granted to the Matwychuk-Goodmans is not conclusive proof that they are entitled to the disputed land, as Mrs. Robertson is a person claiming under a prior certificate of title.

[101] As a result of the operation of clear terms of the Land Titles Act, Mrs. Robertson is the legal owner of the chute cutoff and island areas currently on the west side of the Highwood River, notwithstanding that the title of the Matwychuk-Goodmans purports to have those portions presently registered in their name.

c. Remedies of the Matwychuk-Goodmans Against Mrs. Wallace.

[102] The Matwychuk-Goodmans have brought an action against Mrs. Wallace, suing for damages in breach of contract and negligence as they did not get all the land they understood they purchased.

[103] The contractual terms must be carefully examined in terms of the claim for breach of contract. The relevant terms are the following:

4. Warranties/Representations

4.1 The Seller warrants to the Buyer that; the Seller has the legal right to sell the Property; . . .

. . .

4.4 Any legal action relating to a warranty or representation in this Contract must be started within one year from the Completion Day.

4.5 The Seller and the Buyer each acknowledge that, except as otherwise described in this Contract, there are no other warranties, representations or collateral agreements made by or with the other party, the Seller's Agent, the Buyer's Agent and their sales people about the property, any neighbouring lands and this transaction, including any warranty, representation or collateral agreement relating to the size/measurements

of the Land and buildings or the existence or non-existence of any environmental condition or problem.

6. Additional Terms

6.2 All time periods, deadlines and dates in this Contract will be strictly followed and enforced.

[104] As a result of the contractual terms any right of action on a warranty or representation in the contract is lost, as it was not brought within the one year set out in the contract. Under the terms of the contract it was a condition precedent that the purchaser made a satisfactory review of title. That condition was waived by the purchaser. The contract itself includes terms that the seller has the right to sell the property, and the warranty or representation in the contract about the land containing 267.98 acres is clearly subject to a one year period for legal action. Under the terms of the contract, the Matwychuk-Goodmans do not have a remedy.

[105] However, the Matwychuk-Goodmans advance a claim in negligent misrepresentation, as Mrs. Wallace misrepresented the amount of land she held and was able to sell. They argue that a tortious action can run concurrently, even when there is a contract between the parties.

[106] In terms of a claim in negligent misrepresentation, it is clear that Mrs. Wallace represented that the acreage of the lands was 267.98 acres, she knew that the Matwychuk-Goodmans were relying on that representation. However, Mrs. Wallace believed that was the acreage, and she had no reason to doubt that acreage. That information was provided by the surveyor, with no caveat or warning that an issue could arise after he filed the survey and obtained a new title for her. The realtor had provided the Mintz survey in draft form to the Matwychuk-Goodmans, and their lawyer was specifically reviewing the survey and title for them. The acreage of the property was important to the sale, and it was wrong.

[107] Mrs. Wallace's misrepresentation was innocent, not negligent in this circumstance. Clearly the acreage became a term of the contract. The terms of the contract dealt with the time to bring forward any breach of warranty or representation. Thus, one comes back to the contract or bargain between the parties, which does not leave a damages remedy for the Matwychuk-Goodmans against Mrs. Wallace.

[108] The Matwychuk-Goodmans are not entitled to a remedy in tort against Mrs. Wallace, as even if the misrepresentation was negligent, a tort cannot run concurrently and provide a remedy if the misrepresentation was expressly included in the contract, and the contractual terms dealt with how a breach of that term was to be dealt with, and within what time period. A tort remedy is not available to parties to a contract, when the subject matter of the tort was an included term of the contract and one on which the party made an express contractual term.

[109] It has to be noted here that mutual mistake or mistake of any type was not plead by the parties to the contract. The Matwychuk-Goodmans do not want rescission of the contract, and rescission was not plead or requested by them or Mrs. Wallace.

6. IS THERE LIABILITY AGAINST THE REGISTRAR?

[110] At trial, counsel for the Registrar called no evidence. The parties relied on read-ins of evidence given at examinations for discovery by Mr. Wayne Johnston, an employee of the Land Titles Office and Mr. Allen Gartke, the officer of the Registrar. Although the pleadings filed by the Registrar denied liability or any wrongdoing, counsel for the Registrar in argument admitted that the Registrar should have insisted on the consent of Mrs. Robertson, before amending the certificate of title of Mrs. Wallace. Counsel for the Registrar did not formally concede with which specific requirements or sections of the *Land Titles Act* the Registrar had failed to comply, taking the position the section under which the plan was filed, and the title amended was not in evidence.

[111] It is important for this court to determine the actions of the employees, and any statutory requirements not followed in either allowing the filing of the Mintz plan, and or amending the Wallace title, as any remedy as a result is strictly defined by statute.

[112] It is not the registration of the Mintz plan by itself that offends the provision of the *Land Titles Act*, it is allowing it to be filed in the context of a section 90 application, and relying on it to issue a new title, without making sure the consent of Mrs. Robertson was obtained. Section 90 is permissive for the Registrar to amend the title, but requires certain things, one of which is the consent of potentially affected adjacent land holders.

[113] Section 94 allows the Registrar to change the legal description assigned to a parcel of land, if the Registrar is satisfied that the change will not adversely affect any person. Section 94 reads:

- 94(1)** The Registrar may change the legal description assigned to a parcel of land if
- (a) The Registrar is satisfied that the change will not adversely affect any person, and
 - (b) the change does not alter the boundaries of the parcel.
- (2) On making a change under subsection (1), the Registrar shall notify the registered owner and all other persons having a registered or caveated interest in the parcel that the description of the parcel has been changed.

[114] Mr. Gartke, the officer of the Registrar, in the evidence read in from page 9 of his Examination for Discovery, testified that the request to amend the description of title held by Mrs. Wallace was pursuant to section 90 of the Land Titles Act. He admitted that the staff of the Land Titles Office should have followed the policy and the legislation and required the consent of the registered owners of parcels that may be adversely affected. He also testified at pages 13 and 14 that s. 94 was intended to deal with changing descriptions to facilitate computerization, but even under s. 94 if someone was going to be affected by the change in description, the Registrar would want to be sure there was not an adverse effect on landowners, or at minimum give the landowner notice to have a say before their interests are affected. From the evidence, the employees of the Registrar here amended the title, based on the survey provided to them, but without any consent from or requirement of notice to a potentially

affected adjacent landowner, Mrs. Robertson, something that was clearly required under the Act.

[115] Any liability of the Registrar is set out by statute, the relevant sections of the *Land Titles Act* being s. 158 , 161 and 162.

- 158** Any person
- (a) who sustains loss or damage through an omission, mistake or misfeasance of a Registrar or an official in his office in the execution of his duties, or
 - (b) who is deprived of any land or encumbrance or of an estate or interest therein
 - (i) through the bringing of it under this Act,
 - (ii) by the registration of another person as owner of the land or encumbrance, or
 - (iii) by an error, omission or misdescription in a certificate of title, and who by this Act is barred from bringing an action for the recovery of the land or encumbrance or interest therein,
- may bring an action against the Registrar of the district in which the land is situated for the recovery of damages.

- 161(1)** In an action for the recovery of loss or damage arising only through an omission, mistake or misfeasance of the Registrar or his officials, the Registrar shall be sole defendant.
- (2) If the action is brought for loss or damage
- (a) arising only from the fraud or wrongful act of some person other than the Registrar and his officials, or
 - (b) arising jointly through the fraud or wrongful act of such other person, and the omission, mistake or misfeasance of the Registrar or other official,
- then the action shall be brought against both the Registrar and the other person.

- 162** In all such actions where there is a defendant other than the Registrar and damages are recovered, if the court finds that some defendant other than the Registrar is liable for the loss sustained, final judgment shall not be entered against the Registrar until a judge of the court in which the action was brought has made an order declaring that the judgment is not and cannot presently be satisfied in whole or part out of the goods or land of the other defendant found liable, and that the amount of the judgment in whole or as to the part thereof that remains unsatisfied, together with costs, should be a judgment against the Registrar, and judgment may thereupon be entered against the Registrar.

[116] The scheme from compensation set out in s. 158 sets out two classes of people who may bring an action against the Registrar. The first class is anyone who falls under s. 158, a

person who sustains loss or damage through a mistake of an official in the Registrar's office in the execution of his duties. In this case, there was clearly a mistake made by an official in the Registrar's office in the execution of his duties. The staff of the Registrar should have required the consent of Mrs. Robertson to the Mintz plan before the application to amend title was considered. To the extent any party can show they have "sustained loss or damage" as a result of that mistake, they would fall under s. 158(a). The determination if any of the parties have sustained loss or damages was split from this trial, and left to be determined on another day.

[117] In relation, to the second class of person who can sue the Registrar, being a person who is deprived of land, only the Matwychuk-Goodmans could be parties who may qualify to be within that class. They must be "deprived of land" by an error, omission or misdescription in a certificate of title, and by the Act barred from bringing an action for the recovery of the land.

[118] The Matwychuk-Goodmans do not fall under that definition as they are not "deprived of land". They never actually held it by their title, there being a prior certificate of title in relation to the acres I have indicated are Mrs. Robertson's. Also, they are not barred by the Act for bringing an action for the recovery of the land, they never were entitled to the land, and any action they have against Mrs. Wallace, who thought she owned it to sell it, is not barred by the Act.

[119] This interpretation is supported in The Registration of Title to Land by Victor Di Castro, Vol 2, p. 22-39 which in discussing compensation against the Registrar states the following:

A bona fide purchaser for value cannot claim compensation for rights asserted on the authority of a statutory exception to indefeasibility of title. There has been no change in his position and thus he has suffered no loss.

[120] Sections 161 and 162 of the *Land Titles Act* deal with the manner of suing the Registrar, and make it clear that where there is a defendant other than the Registrar, and if the court finds some defendant other than the Registrar liable for the loss as well as the Registrar, final judgement shall not be entered against the Registrar until it is clear the judgment against the other defendant cannot be satisfied. This statutory enactment of placing the Registrar as the payee only if recourse is not available against another party, clearly outlines a legislative regime of a primary obligation to any other party who jointly with the Registrar is responsible for the situation which arises and it is only if that judgement cannot be recovered, that the Registrar and fund set up for that purpose is to be available to compensate the aggrieved party.

[121] Here, liability has been found against Mr. Mintz, and vicariously against his employer. It is clearly the negligence of Mr. Mintz, and his employer vicariously, jointly with the failure of the Registrar to insist on notice, before issuing the changed title, that lead the situation to unfold as it did. As a result, even where loss or damage can be proven under s. 158, if it is loss or damage jointly caused by Mr. Mintz, recovery will be against the Registrar, only if Mr. Mintz or his employer cannot satisfy the judgement.

7. ALLEGATIONS OF TRESPASS

[122] Pleadings were filed by the Matwychuk-Goodmans alleging various trespasses. There was specific evidence about an event in July of 1995. At that time Mr. Pope entered the NW 1/4 of s.7 to round up a bull. Although the evidence of Mrs. Matwychuk-Goodman and Mr. Pope differ about exactly what occurred that day, it is clear that a bull that was on loan to Mrs. Robertson was on lands legally owned by the Matwychuk-Goodmans. In addition, the Matwychuk-Goodmans testified that cattle owned by Mrs. Robertson have at times trespassed on their land, by being on the east side of the injunction fence sporadically, and at times on the NW 1/4 of section 7. No evidence was given as to exactly when this was, or the exact location. The evidence of Mrs. Robertson was that at times her cattle did in general graze the lowlands on the north side of the river, and to the east of the injunction fence. The evidence is not specific as to whether the cattle were on what is referred to in this judgment as the island section, or the chute cutoff area but it is clear they roamed freely on the flood plains at times. The Robertson land is not fenced so as to keep the cattle from crossing the river. On the evidence, there has been trespass by Mrs. Robertson's cattle on the Matwychuk-Goodman lands.

[123] Mrs. Robertson alleges a trespass by the Matwychuk-Goodmans, as the injunction fence was tampered with by individuals who were identified at trial by Mr. Matwychuk-Goodman as himself and his son. There is not sufficient evidence before me to specifically say that Mr. Matwychuk-Goodman (as he is the only one of the two sued) was specifically on lands referred to in this judgment as the island that belongs to Mrs. Robertson, as the evidence does not show me exactly where the north part of the injunction fence is with such accuracy, that I could say on the balance of probabilities that by being around and near the fence, a trespass on the island portion of the Robertson land would have occurred.

8. CONCLUSION

[124] I have determined the boundary between the lands owned by Mrs. Robertson, and those owned by the Matwychuk-Goodmans in the quarter. The Registrar is directed to amend the certificate of titles of the Matwychuk-Goodmans and Mrs. Robertson to reflect the boundary of their property as set out in red on Schedule A to this judgment. In so far as the Highwood River is still the boundary in some places, riparian rights have in the past and will continue to operate to change the location of the boundary as the river changes course. In between stations five and ten on Schedule A, the boundary is no longer the river and therefore is not subject to change by virtue of riparian rights.

[125] I have found that Mr. Mintz, and vicariously his employer, were negligent and breached a duty owed in law to Mrs. Wallace, Mrs. Robertson and the Matwychuk-Goodmans.

[126] I have found the employees of the Registrar made a mistake in the execution of their duties, by failing to give notice to Mrs. Robertson, or require her consent before the amendment to the Wallace title was made. Any party that can show they sustained loss or

damage through that mistake is entitled to judgment against the Registrar, but may not enter that judgment unless any defendant against whom liability is also found is unable to pay.

[127] The Matwychuk-Goodmans are bona fide third party purchasers for value, but due to the statutory scheme set up by the *Land Titles Act* in Alberta, they are not entitled to retain the lands which are currently described by their certificate as owned by them, to the extent those lands as a result of this judgement have been declared the lands of Mrs. Robertson.

[128] Trespass has been proven by cattle owned by Mrs. Robertson on the lands of the Matwychuk-Goodmans.

[129] The injunction granted on August 13, 1997 is vacated.

[130] As all issues of damages were split from the assessment of liability, a determination of damages will be dealt with at a later date. Counsel shall meet with me before the middle of June, so that the length and timing of the damages part of this trial can be arranged.

HEARD February 28 to March 10, 2000.

DATED at Calgary, Alberta this 8th day of May, 2000.

J.C.Q.B.A.