

Johnson v. Alberta, 2001 ABQB 642

Date: 20010720
Action No. 9701-18144

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

BETWEEN:

WILLIAM WALTER JOHNSON, PAUL W. JOHNSON, GABRIEL RICHARD RIEBEL,
JOHN PETER RIEBEL, ALEXANDER F. J. RIEBEL, THOMAS RIDER, CORINNE
RIDER, SHEILA ANN JOHNSON, DENNIS BENNETT and SYLIVA SAWYER

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA, THE
MINISTER OF PUBLIC WORKS, SUPPLY AND SERVICES and THE MINISTER OF
ENVIRONMENTAL PROTECTION

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE C.S. PHILLIPS

APPEARANCES:

J. Patrick Peacock, Q.C. and Lorenz Berner
for the Plaintiffs

William H. Hurlburt, Q.C. and Sheila C. McNaughtan
for the Defendants

BACKGROUND

[1] The dispute between the parties in this case revolves around the gradual and imperceptible recession of waters of Buffalo Lake in Alberta, giving rise to accreted land. The Crown does not dispute the Plaintiffs' claims to accreted land. They do, however, dispute title to the extent that the accreted land impedes on the neighbouring sections. The question posed before me was phrased as follows:

Are the accretions to the Plaintiffs' lands limited by the theoretical or legal section, quarter-section, or legal subdivision lines within the relevant Townships?

[2] The parties offered expert evidence on the practice and procedure of surveying in Alberta. The Plaintiffs' evidence is that boundaries in Alberta are established once the land has been surveyed and markers have been placed in the ground to show respective land boundaries. In the case at bar some markers, called monumentation, were not placed on the Plaintiffs' lands. This was primarily due to the fact that it was impossible to place a monument in the middle of Buffalo Lake when the original survey was conducted many years ago. As such, they argue, absent a proper monument the boundaries of the Plaintiffs' lands should be Buffalo Lake, entitling them to accreted land beyond the theoretical or legal section, quarter-section, or legal subdivision lines within the townships to the natural water boundary.

[3] The Defence evidence is that boundaries are ascertainable according to the Alberta Township System. The fact that land has not been surveyed or has been imperfectly surveyed does not mean that the boundary does not exist. The land boundary, now exposed over time due to the shrinking of Buffalo Lake is capable of being located. As such, they argue that the Plaintiffs are entitled to accreted lands only within the ascertainable boundaries.

AGREED FACTS

[4] The relevant facts, which are not disputed, are set out in the Statement of Agreed Facts for April 2, 2001 Trial of Issue ("Agreed Facts"). They include the following points which are of particular relevance:

- (a) In 1997 the Plaintiffs commenced this Action in the Court of Queen's Bench of Alberta, Judicial District of Calgary, seeking damages for trespass as well as compensation for the Crown's alleged act of flooding and depriving the Plaintiffs of land adjacent to Buffalo Lake, northeast of Red Deer. In mid, 1998, the Crown expropriated lands adjacent to Buffalo Lake, and the Plaintiffs thereafter applied for compensation before the Land Compensation Board of Alberta ("the Board").
- (b) All parties agreed that the Board has jurisdiction to address the question of compensation for the lands expropriated. However, the Plaintiffs and Crown disagree as to nature and extent of title and ownership of some of the lands as at the time of expropriation. The Board does not have jurisdiction to resolve these issues, but can refer them to the Court of Queen's Bench for determination in accordance with s. 69 of

the *Expropriation Act*. Instead of proceeding formally under this provision, the parties agreed that they would use the existing Court of Queen's Bench action as a mechanism for having two questions concerning the nature and extent of the Plaintiffs' title immediately prior to expropriation, resolved by the Court. The Defendants reserve their right to argue that the Court has jurisdiction on costs in this proceeding and that the costs provisions in the *Expropriation Act* do not apply to this determination by the Court, whether the issues were addressed as a s.69 referral or by proceeding as agreed.

- (c) The current trial is intended to address the question referred to above.
- (d) The Plaintiffs are owners of lands around Buffalo Lake in Alberta. Portions of each of the Plaintiffs' lands were expropriated by the Defendant, effective various dates in June, 1998. Copies of the various certificates of title as they existed immediately prior to the expropriation were included in the binder of Agreed Exhibits, and it was agreed that these are accurate copies of the titles which were registered with the Land Titles Office.
- (e) At the time of expropriation, the Plaintiffs' ownership of lands was riparian in nature where bounded by Buffalo Lake, and each of the Plaintiffs were entitled to all of the rights and incidents of riparian ownership. In particular, it was agreed that at the time of expropriation, the Plaintiffs were entitled to accretions of the former bed of Buffalo Lake to the extent provided by the common law and legislation of Alberta.
- (f) In Alberta, where a boundary of a parcel is a natural body of water (i.e. a river or lake), the ownership of the parcel carries with it a riparian right to the ownership of accretions to the parcel from the natural body of water. The parties agree that the Plaintiffs are entitled to certain accretions, but disagree as to whether such entitlement "ends" at actual or theoretical section, quarter-section, or legal subdivision boundaries referred to in the Plaintiffs' certificates of title.
- (g) Buffalo Lake is located approximately 30 kilometres north and east of Red Deer, and north and west of Stettler, Alberta.
Between the late 19th century and the present (immediately prior to expropriation), the waters of Buffalo Lake have slowly receded and advanced. Over all the Lake receded more than it advanced, and the present location of the boundary of the Lake is generally "lakeward" from the positions shown on the Official Township Plans and original survey material.
The land in issue was gradually and imperceptibly exposed by the recession of the waters of Buffalo Lake.
- (h) Under both the Third System and the Alberta Township System, lands are surveyed into "townships" consisting of 36 sections. Each section was to be 1 mile square and each township was to be 6 miles square. A surveyed section consists of four quarter sections, each approximately ½ mile square.

- (i) The section, quarter-section or LSD boundaries relating to the lands in issue may be wholly surveyed, or may be partly surveyed or surveyed only as to certain portions.

CERTIFICATES OF TITLE LEGAL DESCRIPTIONS

[5] The Certificates of Title legal descriptions for the Plaintiffs' lands are integral to understanding the rights of the Plaintiffs. The descriptions are outlined below as they will become the subject of my case law analysis and application of the expert evidence.

JOHNSON

1. SW 1/4 Section 21:
ALL THAT PORTION OF THE WEST HALF OF SECTION TWENTY ONE (21)
TOWNSHIP FORTY ONE (41)
RANGE TWENTY ONE (21)
WEST OF THE FOURTH MERIDIAN, NOT COVERED BY ANY OF THE
WATERS OF BUFFALO LAKE, AS SHOWN ON A PLAN OF SURVEY OF THE
SAID TOWNSHIP SIGNED AT OTTAWA ON THE 2ND DAY OF AUGUST A.D.
1894.

The title then excepts out land from the above description.

2. NW 1/4 Section 16:
FIRST
MERIDIAN 4 RANGE 21 TOWNSHIP 41 SECTION 16
ALL THAT PORTION OF THE NORTH WEST QUARTER LYING GENERALLY
NORTH AND EAST OF PLAN 9524816; CONTAINING 55.51 HECTARES (137.17
ACRES) MORE OR LESS.
EXCEPTING THEREOUT ALL MINES AND MINERALS

SECOND
MERIDIAN 4 RANGE 21 TOWNSHIP 41 SECTION 16
ALL THAT PORTION OF THE SOUTHWEST QUARTER LYING GENERALLY
NORTH OF PLAN 9524816; CONTAINING 7.49 HECTARES (18.51 ACRES)
MORE OR LESS. EXCEPTING THEREOUT ALL MINES AND MINERALS.

3. Lot 1, Descriptive Plan 9020007:
DESCRIPTIVE PLAN 9020007
LOT 1
CONTAINING 28.375 HECTARES (70.12 ACRES) MORE OR LESS
EXCEPTING THEREOUT ALL MINES AND MINERALS.

Accreted land claimed by Plaintiffs, Johnson according to the Statement of
Agreed Facts:

- (1) Accretion westward from SW 1/4 Sec. 21-41-21-4 into SE 1/4 Sec. 20-41-21-4.
- (2) Accretion westward from NW 1/4 Sec. 16-41-21-4 into NE 1/4 Sec.17-41-21-4.

NOTE: These Plaintiffs' claim to the SW 1/4 Sec. 21 and the NW 1/4 Sec. 20 (and to any accretion thereto) arises by virtue of an adverse possession claim which has not yet been resolved. The certificates of title to these lands are in the name of third parties who are not parties in this action. However the Crown and Plaintiffs agree that any decision of the Court with respect to the "accretion beyond boundary" issue will bind only the Crown and these Plaintiffs, and that these Plaintiffs' claim for such accretion will be dependent upon their establishing a claim to the ownership of SW 1/4 Sec. 21 and the NW 1/4 Sec. 17.

RIDER

1. South 1/2 section 34:

FIRST

MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER NORTH WEST

ALL THAT PORTION IN THE SAID PROVINCE, WHICH IS NOT COVERED BY ANY OF THE WATERS OF BUFFALO LAKE, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 7TH DAY OF OCTOBER A.D. 1903 CONTAINING 60.58 HECTARES (149.70 ACRES) MORE OR LESS

SECOND

MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER SOUTH WEST

ALL THAT PORTION IN THE SAID PROVINCE, WHICH IS NOT COVERED BY ANY OF THE WATERS OF BUFFALO LAKE, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 7TH DAY OF OCTOBER A.D. 1903 CONTAINING 49.89 HECTARES (123.20 ACRES) MORE OR LESS

EXCEPTING THEREOUT ALL MINES AND MINERALS

THIRD

MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER NORTH EAST

ALL THAT PORTION WHICH IS NOT COVERED BY ANY OF THE WATERS OF SAID BUFFALO LAKE, AS SHOWN ON SAID PLAN OF SURVEY CONTAINING 12.53 HECTARES (31.7 ACRES) MORE OR LESS.

EXCEPTING THEREOUT: THE ISLAND IN THE SAID LAKE AS SHOWN ON SAID PLAN OF SURVEY CONTAINING 0.121 HECTARE (0.30 OF AN ACRE), MORE OR LESS.

EXCEPTING THEREOUT ALL MINES AND MINERALS.

FOURTH
MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER SOUTH EAST

ALL THAT PORTION WHICH IS NOT COVERED BY ANY OF THE WATERS OF SAID BUFFALO LAKE, AS SHOWN ON SAID PLAN OF SURVEY CONTAINING 6.49 HECTARES (16.6 ACRES) MORE OR LESS EXCEPTING THEREOUT ALL MINES AND MINERALS

2. N ½ SEC. 34:

FIRST
MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER NORTH WEST

ALL THAT PORTION IN THE SAID PROVINCE, WHICH IS NOT COVERED BY ANY OF THE WATERS OF BUFFALO LAKE, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 7TH DAY OF OCTOBER A.D. 1903, CONTAINING 60.58 HECTARES (149.70 ACRES) MORE OR LESS.
EXCEPTING THEREOUT ALL MINES AND MINERALS

SECOND
MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER SOUTH WEST

ALL THAT PORTION IN THE SAID PROVINCE, WHICH IS NOT COVERED BY ANY OF THE WATERS OF BUFFALO LAKE, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 7TH DAY OF OCTOBER A.D. 1903, CONTAINING 49.89 HECTARES (123.20 ACRES) MORE OR LESS.
EXCEPTING THEREOUT ALL MINES AND MINERALS

THIRD
MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER NORTH EAST

ALL THAT PORTION WHICH IS NOT COVERED BY ANY OF THE WATERS OF SAID BUFFALO LAKE, AS SHOWN ON SAID PLAN OF SURVEY CONTAINING 12.53 HECTARES (31.7 ACRES) MORE OR LESS.
EXCEPTING THEREOUT: THE ISLAND IN THE SAID LAKE AS SHOWN ON SAID PLAN OF SURVEY CONTAINING 0.121 HECTARE (0.30 OF AN ACRE), MORE OR LESS.
EXCEPTING THEREOUT ALL MINES AND MINERALS

FOURTH
MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 34
QUARTER SOUTH EAST

ALL THAT PORTION WHICH IS NOT COVERED BY ANY OF THE WATERS OF SAID BUFFALO LAKE, AS SHOWN ON SAID PLAN OF SURVEY CONTAINING 6.49 HECTARES (16.6 ACRES) MORE OR LESS. EXCEPTING THEREOUT ALL MINES AND MINERALS.

Accreted land claimed by Plaintiff, Rider, according to the Statement of Agreed Facts:

- (1) Accretion eastward from SE 1/4 Sec. 34-40-21-4 into SW 1/4 Sec. 35-40-21-4.
- (2) Accretion eastward from NE 1/4 Sec. 34-40-21-4 slightly into NW 1/4 Sec. 35-40-21-4.
- (3) Accretion northward from NE 1/4 Sec. 34-40-21-4 into SE 1/4 Sec. 3-41-21-4 (excluding the lands accreted into the extreme SW corner of SE 1/4 Sec. 3-41-21-4).

RIEBEL

1. LSD 1,7,8 in Section 29:
MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 29
ALL THOSE PORTIONS OF LEGAL SUBDIVISIONS 1,7 AND 8 NOT COVERED BY ANY OF THE WATERS OF BUFFALO LAKE AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP DATED ON THE 12TH DAY OF SEPTEMBER A.D. 1919 CONTAINING 24.9 HECTARES (61.40) ACRES MORE OR LESS.
EXCEPTING THEREOUT ALL MINES AND MINERALS AND THE RIGHT TO WORK THE SAME.

2. SW 1/4 Section 29:
MERIDIAN 4 RANGE 21 TOWNSHIP 40 SECTION 29
ALL THOSE PORTIONS OF THE SOUTH WEST QUARTER NOT COVERED BY THE WATERS OF BUFFALO LAKE AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP DATED 12 SEPTEMBER A.D. 1919 CONTAINING 14.2 HECTARES (34.40 ACRES) MORE OR LESS.
EXCEPTING THEREOUT ALL MINES AND MINERALS.

Accreted land claimed by Plaintiffs, Riebel, according to the Statement of Agreed Facts:

- (1) Accretion southward from Legal Subdivisions (“LSD”) 1, 7 and 8 of SE 1/4 Sec. 29-40-21-4, into LDS 2 of the same quarter, and further into the northeastern corner of NE 1/4 Sec. 20-40-21-4.

BENNETT

1. SW 1/4 Section 26:

MERIDIAN 4 RANGE 22 TOWNSHIP 40 SECTION 26
ALL THAT PORTION OF THE SOUTH WEST QUARTER

NOT COVERED BY ANY OF THE WATER OF BUFFALO LAKE, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 27TH DAY OF SEPTEMBER A.D. 1894, CONTAINING 55.1 HECTARES (136.16 ACRES) MORE OR LESS AND 9.29 HECTARES (22.96 ACRES) MORE OR LESS DUE TO CHANGE IN THE NATURAL BOUNDARY (INSTRUMENT NOS. 862203064 & 862203065)

EXCEPTING THEREOUT:	HECTARES	(ACRES) MORE OR LESS
A) PLAN 8622314 - PUBLIC WORK (CANAL RIGHT OF WAY)	0.12	0.30

EXCEPTING THEREOUT ALL MINES AND MINERALS

2. LSD 12 & 13 in Section 24:

FIRST: ALL THAT PORTION OF THE NORTH WEST QUARTER OF LEGAL SUBDIVISION THIRTEEN (13) OF SECTION TWENTY FOUR (24) TOWNSHIP FORTY (40) RANGE TWENTY TWO (22) WEST OF THE FOURTH MERIDIAN, NOT COVERED BY ANY OF THE WATERS OF BUFFALO LAKE AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 12TH DAY OF SEPTEMBER A.D. 1919, CONTAINING 0.729 HECTARES (1.80 ACRES) MORE OR LESS AND 3.27 HECTARES (8.08 ACRES) MORE OR LESS DUE TO CHANGE IN THE NATURAL BOUNDARY (INSTRUMENT NO. 902007133).
EXCEPTING THEREOUT ALL MINES AND MINERALS

SECONDLY: THE SOUTH WEST QUARTER OF LEGAL SUBDIVISION TWELVE (12) OF SECTION TWENTY FOUR (24) TOWNSHIP FORTY (40) RANGE TWENTY TWO (22) WEST OF THE FOURTH MERIDIAN, AS SHOWN ON A PLAN OF SURVEY OF THE SAID TOWNSHIP SIGNED AT OTTAWA ON THE 12TH DAY OF SEPTEMBER A.D. 1919, CONTAINING 4.05 HECTARES (10.00) ACRES MORE OR LESS.

EXCEPTING THEREOUT ALL MINES AND MINERALS

3. Description Plan 9020042, Lot 2, (NE 1/4 Sec. 23):

DESCRIPTIVE PLAN 9020042
LOT 2
EXCEPTING THEREOUT ALL MINES AND MINERALS

Accreted land claimed by Plaintiffs, Bennett, according to the Statement of Agreed Fact:

- (1) Westward from LOT 2 of Descriptive Plan 9020042 (NE 1/4 Sec. 23-40-22-4), into NW 1/4 Sec. 23-40-22-4.
- (2) Southeastward from NW 1/4 LSD #13 in Sec. 24-40-22-4, into other portions of NW 1/4 Sec. 24-40-22-4.
- (3) Northeastward from SW 1/4 LSD #12 in Sec. 24-40-22-4, into other portions of NW 1/4 Sec. 24-40-22-4.
- (4) Eastward from NE 1/4 Sec. 23-40-22-4 into NW 1/4 Sec. 24-40-22-4; and
- (5) Southward from SW 1/4 Sec. 26-40-22-4 (as to the west side of this quarter only - into NW 1/4 Sec. 23-40-22-4).

DISCUSSION

[6] As stated above, the Crown does not dispute the Plaintiffs' claims to accreted land in general, but they do dispute accreted land that impedes on neighbouring sections. The parties succinctly stated this problem in the Statement of Agreed Facts at paragraph 7 and as set out in subparagraph (f) above. It is worthy of repeating here:

In Alberta, where a boundary of a parcel is a natural body of water (i.e., a river or lake), the ownership of the parcel carries with it a riparian right to the ownership of accretions to the parcel from the natural body of water. The parties agree that the Plaintiffs are entitled to certain accretions, but disagree as to whether such entitlement "ends" at actual or theoretical section, quarter-section, or legal subdivision boundaries referred to in the Plaintiffs' certificates of title.

[7] To determine the boundaries, I must consider the statutory and common law principles as applied to certificates of title in Alberta. The *Land Titles Act* c. L-5 RSA 1980 speaks of natural boundaries as follows:

s.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.

[8] The above section of the *Land Titles Act*, however, must be read in conjunction with section 91 which reads:

s.91 Every parcel of land described in a certificate of title consists only of the actual area within its legal boundaries and no more or less, notwithstanding that a certificate of title or other instrument that describes the parcel expresses an area that is more or less than the actual area.

[9] The statutory language suggests that the legal description in a certificate of title is binding on the holder. This coincides with the legislative intent to create absolute title and provide holders of certificates with certainty in title. The title system in Alberta is such that the holder of a certificate of title can refer to the certificate and be able to ascertain the location of property without having to research the history of the parcel of land. This is the hallmark of the Torrens system. There are, however, exceptions to the rule of “absolute title”. The law of accretion is one of those exceptions.

[10] An appropriate explanation of the term accretion, as applied in Canada, was provided in *Clarke v. Canada (Attorney-General)*, [1930] S.C.R. 137 at p. 144:

The term “accretion” denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substance, or the permanent retiral of the waters. This increase must be formed by a process so slow and gradual as to be, in a practical sense, imperceptible, by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour, although, after a certain period, it can be observed that there has been a fresh addition to the shore line. The increase must also result from the action of the water in the ordinary course of the operations of nature and not from some unusual or unnatural action by which a considerable quantity of soil is suddenly swept from the land of one man and deposited on, or annexed to, the land of another.

The fact that the increase is brought about in whole or in part by the water, as the result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion, for the doctrine of accretion applies to the result and not to the manner of its production [Citations omitted].

[11] The parties in the case before me do not dispute that accretion has occurred due to the shrinking of Buffalo Lake. As stated above, the dispute refers to the extent, or limits, that the Plaintiffs have a right to title in the accreted land. The issue being, what are the boundaries of those parcels of land? More specifically, can the changes in the boundary of a water body, such as Buffalo Lake, expand the Plaintiffs’ title beyond the boundaries of a section, quarter-section or legal subdivision referred to in the Plaintiffs’ Certificates of Title?

[12] The boundaries of land in Alberta are based on the Township Survey System. Unlike Atlantic Canada, surveyors mapped out Alberta such that land was divided into townships, sections and quarter-sections. The starting point for the mapping begins at the corner of the province where the United States border meets the Alberta and Saskatchewan borders.

Certificates of Title reflect the position of the parcel of land in comparison to the starting point. Accordingly, townships, sections and quarter-sections in the province are ascertainable by a surveyor using the Township Survey System.

[13] The law of accretion conflicts with the Township Survey System if the description of the parcel of land does not adhere to the legal description of township, section and quarter-section. In particular, disagreements arise when the certificates of title refer to or show on a plan, a body or river of water. In those instances, the parcel of land was bounded, at some point in time, by water. Several cases follow, which deal with this conflict.

[14] In *Clarke v. Canada (Attorney-General)*, [1930] S.C.R. 137 the Supreme Court of Canada was looking at a particular lot on a particular plan. The lot had three boundaries which were defined by boundary lines on the plan. The fourth boundary (i.e. northern boundary) was a river, the boundary of which appeared on the plan. No other delimitation of the northern boundary of the lot was given. Also, no delimitation of the fourth boundary of this lot appeared in the title description. In *Clarke*, at p. 152, the court held that the river was intended to be the northern boundary of the lot in question and stated:

Both the east and west boundary lines run to the line which marks the river and no other delimitation of the northern boundary of the lot is given. This boundary line must, therefore, be determined by the rules of law and the construction to be placed upon the plan. A plan of land abutting on a river which shows the east and west boundary lines of a lot as running northerly to the river line *and having no defined northern boundary*, is, in my opinion, to be construed as having the river (i.e., the edge of the river bed) for the northern boundary of such lot.
[emphasis added]

[15] Similarly, in *Chucky v. The Queen in Right of the Province of Manitoba* (1973), 35 D.L.R. (3d) 607, the property in question was bounded by a river. Chucky's title described his land as wood lots and showed the river as one of the boundaries on the plan. In *Chucky* the Supreme Court of Canada held the accreted lands, being an irregularly shaped parcel of land bounded on the north and west by a river were the property of the appellant, Chucky and that he was entitled to compensation for them on the basis that they were expropriated or that they were injuriously affected. So too, in *Chucky* as in *Clarke*, one of the boundaries was a river, the boundary of which was shown on the plan, but without any delimitation of this boundary appearing in the title description.

[16] I read the cases of *Clarke* and *Chucky* as holding that one of the boundaries was determined solely by the river. The facts in the case at bar, however, show that the parcels of land do not have a boundary defined solely by a body of water or river. In these specific cases before me, a parcel of land is or was described in a Certificate of Title as all or part of a section, quarter-section or legal subdivision not covered by any of the waters of Buffalo Lake. In the result, the boundary is therefore determined by the boundaries of the applicable legal section, quarter-section, legal subdivision within the relative township, or water boundary, which ever is the lesser. Unlike *Clarke* and *Chucky*, this case is not merely a matter of

accretion, as much as it is a case of applying legally described boundaries under the Alberta Township System (“ATS”).

[17] In *Boychuk v. Her Majesty the Queen* (unreported order) September 8, 1964, Milvain J., in Chambers, was faced with the following question:

‘whether in view of the fact that the Plaintiffs’ ownership of the lands situate in Section 13, Township 9, Range 22, West of the 4th Meridian are held under Certificate of Title 110 C 223 which certifies that the Plaintiffs are owners of “all that portion of the South West Quarter of Section 13 in the said Township which lies South and West of the Left Bank of Oldman River, as shown on a Plan of Survey of the said Township approved at Ottawa 31 October 1916, containing One Hundred and Thirty Four and Twenty Hundredths (134.20) acres more or less” they would in any event through the doctrine of accretion become owners of any lands in said Section 13 in excess of the 160 acres in the South West Quarter of said Section 13?’

Milvain J. found and declared that “the doctrine of accretion can in no event extend the ownership of the plaintiffs’ lands described under Certificate of Title 110 C 223 beyond the boundaries of the South West Quarter of Section 13, Township 9, Range 22, West of the 4th Meridian.

[18] Justice Hope of the Alberta Court of Queen’s Bench in *Rockland Holdings Ltd. v. 309458 Alberta Ltd.*, [1987] A.J. No. 1349 (QL) at paragraph 2 cited *Milk River v. McCombs and Madge*, [1978] 4 W.W.R. 614 at p. 625:

It is this section which, since the introduction of what is called the Torrens System into first the Northwest Territories and then into Alberta, has formed the basis of the conclusive title which is the main thrust of the system.

Justice Hope goes on to quote from p. 626 of the above decision as follows:

The principle of the Act is that a person may ascertain the state of the title by reference to the records of the land titles office and the person who is registered owner has the right by transfer duly registered to convey a good title to a bona fide purchaser subject only to what appears on the register and the reservations and exceptions of sec. 57. It is registration that gives and extinguishes title.

[19] The *Rockland Holdings* case was concerned more with establishing boundaries, than addressing the issue of accretion. More particularly, it dealt with a dispute between the parties relating to the path the Sheep River or Sheep Creek took across a particular quarter-section. Title to the property in question was split in 1920. Since that occurrence, each title had used the same description to delineate the north and south portions of the land; that is the property was described as lying north or south of Sheep Creek **as shown on township plan approved at Ottawa, 1 August, 1892.** (Emphasis added). It was argued that that township plan does not

represent the correct path of the river across that quarter-section. Justice Hope was asked to make a determination as to the boundary between the two parties' lands.

[20] In making his decision, Justice Hope raised concerns in *Rockland Holdings* that have crossed my mind in this case. In order to preserve the integrity of the Torrens System in Alberta, the descriptions in certificates of title ought to be respected. Justice Hope in *Rockland Holdings* at para. 3 expressed anxieties similar to my own, should I grant the application of the Plaintiffs. Justice Hope stated:

. . . I am of the opinion from the evidence before me that to grant either the plaintiffs or the defendants requests would have the effect of destroying the indefeasible title principle and force persons dealing with titles, split as they are here, to look behind the register in order to investigate the history of their author's title and to satisfy themselves as to its validity. In this case it would have been necessary for a person taking one of these split titles to go to Ottawa and to archives, check surveyor's notes, check aerial maps, et cetera, in order to determine whether or not the approved township plan correctly set out the course of the river across this quarter section. Further, it may well have been necessary for a person to do on-site investigations as occurred in evidence before me.

Justice Hope goes on to conclude at paragraph 4:

In my opinion, this approved township plan being a plan according to scale would enable a person should he wish to do so to ascertain the north and south boundaries of the split properties, and there is accordingly no reason to find that this case fits into the exception mentioned in section 66(1) of the *Land Titles Act*. (*i.e. that of wrong description*) (*my words added*). In my opinion, the present whereabouts of the river has no bearing upon the defendant's south boundary or the plaintiff's north boundary. To preserve the indefeasible titles of the Torrens system the north boundary of the plaintiff's property and the south boundary of the defendant's property is set by a readily available filed plan. Their property remains the same irregardless of the movement of the river unless the principle of adverse possession applies. Further, in my opinion, this is not a case for applying the principles of accretion or avulsion. . . .

[21] Justice Hope then found that the township plan boundary as shown on the township plan approved at Ottawa 1 August, 1892 was the boundary between the two parties' lands.

[22] In my view, the definitive case on this issue is *Pitt v. Red Deer (City)*, [2000] A.J. No. 1198 (Alta. C.A.). This case dealt with a claim by Mr. Pitt for expropriation of accreted land. The land in question was described as part of a north-east quarter of Section 13 in a certain township and range, lying to the north of the left bank of the Red Deer River, as shown on a plan of the said township. Mr. Pitt had taken title to this property in 1961. By 1988, when the City of Red Deer had commenced expropriation proceedings, the course of the river had

changed such that the line of the water's edge had moved in a south-easterly direction, creating a parcel of land where the river once ran. The parcel covered 2 quarter sections; only one of which was owned by Mr. Pitt. Mr. Pitt claimed that he took title to the water's edge of the north shore of the river and therefore, he should also receive compensation for the parcel of land accreted onto the adjoining quarter-section to the water's edge. Mr. Pitt had already been compensated for the accretion on his own quarter-section. The Court of Queen's Bench dismissed Mr. Pitt's claim and found that he had no claim beyond that for which he had already been compensated.

[23] The Alberta Court of Appeal in reviewing *Pitt* posed the following question at para. 1: "Does alluvial accretion inevitably extend the ownership of land beyond the original boundaries set forth in the Certificate of Title?" In responding in the negative the Court of Appeal stated at para. 3: "It seems clear to us that the change of the physical boundaries of the watercourse cannot create an expanded title overriding the boundaries of title he received."

[24] The Court of Appeal affirmed the decision in the Court of Queen's Bench by holding that the title to accreted land is limited by the legal description in the certificate of title. I find para. 18 of *Red Deer (City) v. Pitt*, [1998] A. J. No. 965 (Alta. Q.B.) persuasive and binding on this court:

It will be seen from this that Pitt's title is bounded on all sides. He does not have an open side, as did Clarke, because he took all that portion of Section 13, and could not have taken any more than that, by terms of his grant. If there was to be some objection to the way the title was drafted, it should have been done years ago. His predecessor in title to this change might have some right to object to it. In my opinion, Pitt does not. He cannot gain land beyond the limits of the N.E. of 13 as it is shown on the Township map of 1884. *His title is limited whether by the boundaries of 13 or by the boundary of the river, whichever is the lesser, and cannot give him a claim to the portions of the quarter section of his neighbour in part of Section 18.* The City has conceded and paid for the accretion to Pitt's title that has occurred by river movement *within the N.E. of Section 13*, but I agree that they do not have to pay him for any part of the land within Section 18. His title does not support a claim to that accreted land. [Emphasis added]

[25] In the Queen's Bench decision of *Pitt*, at para. 10, Mr. Pitt's counsel had argued: "... any accretion on that river edge must accrue to Pitt, even though there is an intervening road allowance between the accreted piece and the northeast of 13 and even though the accretion lies solely within a quarter section which he does not, and never did, own." As in the *Pitt* case, the Crown in the case before me has conceded that payment is due within the applicable section, quarter-section or legal subdivision to which the Plaintiffs have title, but they dispute paying the Plaintiffs for accreted land outside those areas. I agree with the conclusion in *Pitt* that the Plaintiffs' "title does not support a claim to that accreted land.": *Pitt* at para. 18.

EXPERT OPINION EVIDENCE

[26] The parties tendered expert evidence in the case at bar on the practices and procedures of surveying in Alberta. The parties disagree whether or not monuments, markers which identify a particular location, are integral to the establishment of boundaries in Alberta.

[27] The Plaintiffs argue that monuments are vital to establishing and identifying the boundaries of parcels of land. No monuments were placed in Buffalo Lake and, as such, the boundary of the lake would constitute the boundary of the land. Accordingly, the Plaintiffs argue that the accreted land beyond the theoretical boundary to the natural boundary of Buffalo Lake belongs to them because there is no marker to suggest otherwise.

[28] The Defendants argue that it was impossible to place a monument in the middle of the lake at the time the survey was originally done. They also argue that it does not matter in any event because the boundaries of the Plaintiffs' lands are as described in the Certificates of Title, i.e. the township, section, quarter-section and legal subdivision.

[29] The Plaintiffs in the case at bar brought forth two expert witnesses, one in direct examination and one in rebuttal of the Defendants' case. The Defendants offered two expert witnesses.

[30] Mr. Stephen H. Nichol was tendered by the Plaintiffs as an expert in the field of land surveying in Alberta. Mr. Nichol has been a qualified Alberta Land Surveyor since 1981 and a qualified Canada Land surveyor since 1992. The purpose of his testimony was to provide evidence on the practices, procedures and requirements for establishing Alberta Township boundaries. The crux of Mr. Nichol's testimony is that for land to be properly surveyed in Alberta there are several requirements: (1) monumentation: seven markers that are set in the ground as a reference to landowners, the public and other land surveyors; (2) a measurement of the bearing and the distance between monuments: recorded in field notes and then transferred to a plan; and (3) instructions to surveyors, examinations, approvals and finally confirmations of plans provided by the Director of Surveys.

[31] Mr. Nichol emphasized the importance of the existence of a monument in a properly surveyed parcel of land. He described the ability of surveyors to use "witness monuments" if physically unable to place a monument in the exact desired location, e.g., the middle of a lake. The witness monument provides sufficient information to a surveyor to locate a boundary despite the obstruction. Mr. Nichol is of the opinion that land cannot be considered as surveyed in the absence of proper monumentation (i.e. seven monuments per section). Nevertheless, the following exchange took place between counsel for the Defendants and Mr. Nichol at trial:

- Q: Well, I didn't ask that. Can you have? I didn't say "Did someone issue a title?" I said, "Can you have title?"
- A: You can have title.
- Q: Without the seven monuments?
- A: You can, yes.

Q: Yes. So, you can have title in Alberta to a parcel that does not have surveyed boundaries, correct?

A: That is correct.

...

Q: If you do not have a fully-surveyed boundary, don't you just have this vaguely ascertainable boundary?

A: That's correct.

According to Mr. Nichol, without the proper monumentation, boundaries may be ascertained for title purposes but they are not technically surveyed according to the practices and procedures of surveying.

[32] Mr. Philip Michael Michaud was offered by the Defendants as an expert in surveying policies, practices and procedures in the same vein as Mr. Nichol. Mr. Michaud, however, is not only a licensed surveyor, but the Director of Surveys for Alberta. In describing the land system in Alberta Mr. Michaud offered the following explanation of the Alberta Township System:

It really establishes a model for land surveying, which superimposes the township grid over Alberta, and also, it dictates the positions of township section and quarter section corners.

[33] Mr. Michaud is of the opinion that the position of all townships, quarter sections and legal subdivisions are ascertainable in Alberta based on the Alberta Township System. It was his evidence that township, quarter section and legal subdivision plans have been approved and certificates of title have been issued even when monuments have been missing. The fact that one or more of the boundaries has not been surveyed does not preclude the issuance of a certificate of title nor locating those boundaries through mathematical calculations. In furtherance of this, Mr. Michaud stated in paragraph 15 on page 3 of his written opinion:

“Statute requires Official Township Plans to be filed with the appropriate Land Titles Office. Certificates of title are customarily issued based on sections, quarter-sections and legal subdivisions shown on Official Township Plans although some boundaries are not surveyed, as set forth above.”

[34] In response to my question on whether or not the whole of Alberta has been properly surveyed, Mr. Michaud responded:

Half of Alberta is called unsurveyed territory and half of Alberta, roughly, is under a monumented surveyed township system. The other half never was surveyed and probably never will.

[35] With respect to whether or not boundaries are theoretical, Mr. Michaud testified that it is possible for a surveyor to ascertain boundaries on a parcel of land through mathematical

calculations. He disagreed with Plaintiffs' counsel that this process of determining a boundary through calculations was theoretical.

[36] In addition to Mr. Michaud, the defence called upon Mr. David McWilliam, an Alberta Land Surveyor since 1978. Mr. McWilliam was also of the opinion that the placement of monumentation is not vital to the establishment of boundaries. It was his evidence that boundaries are ascertainable under the Alberta Township System. If the boundaries in a recent survey differ from a survey done at the turn of the century, he indicated it is primarily due to more sophisticated technology and methods of modern times. If there are errors in a survey, or a monument has been lost or destroyed, it is possible to resurvey the area and adjust the survey plan accordingly so that it mimics the original survey. With respect to the meaning of monuments in surveying, I find the following comment by Mr. McWilliam very persuasive: "[M]onuments don't dictate a position. They mark a position."

[37] The Plaintiffs called Mr. Izaak de Rijcke as a rebuttal expert witness. Mr. de Rijcke has been a commissioned land surveyor in Ontario since 1978. He is also a lawyer but was only qualified as an expert with respect to surveying. The effect of Mr. de Rijcke's testimony was to agree with Mr. Nichol's opinion that a boundary is not properly surveyed unless there exists proper monumentation. It is to be noted that both of these Plaintiffs' experts were unable to point to any authority which supported their view about this requirement for monumentation; that is: seven monuments must be posted around a section in order for the boundaries of the section to be surveyed.

[38] Having considered all of the evidence presented, I prefer the evidence offered by the defence for the following reasons:

1. The certificates of title describe ownership boundaries according to the applicable township, section, quarter-section and legal subdivision.
2. The Plaintiffs' certificates of title do not describe any boundary as being Buffalo Lake. Rather, where there is a reference to Buffalo Lake, title is explicit in indicating that the title holders are owners of land within the applicable township, section, quarter-section and legal subdivision that is not covered by any of the waters of Buffalo Lake.
3. Much of Alberta is unsurveyed and/or is less than perfect with respect to monumentation. To hold that a boundary is non-existent or imperfect because of lack of proper monumentation would throw the entire land system into havoc and cause many landowners to question their title. Ascertainable boundaries are as valid as established boundaries. No evidence was presented by the Plaintiffs to suggest otherwise.

FINDINGS

[39] A. For the following reasons, I find that accretions to the Plaintiffs' lands are limited by the theoretical or legal section, quarter-section or legal subdivision lines within the relevant townships:

1. Section 91 of the *Land Titles Act* states that land described in a certificate of title consists only of the actual area **within** its legal boundaries and no more or less.[emphasis added]
2. *Pitt* is binding authority on this court with respect to legal descriptions of land in Alberta. More specifically, *Pitt* is binding authority for the position that accretion cannot give title beyond the boundaries of the applicable sections, quarter-sections and parts of legal subdivisions referred to in these Plaintiffs' Certificates of Title. For example, a Certificate of Title to the part of the NE quarter not covered by the waters of a lake, does not confer entitlement to any part of the NW quarter.
3. Following *Pitt*, the land owned by the Plaintiffs consists of land (including the accreted land) within the applicable section, quarter-section or legal subdivision, as the case may be, that is not covered by any of the waters of Buffalo Lake and the boundaries are to the limits of that applicable section, quarter-section or legal subdivision, or the water line, whichever is the lesser, but not beyond. In other words, the boundaries, as described, allow for accretion within the applicable section, quarter-section or legal subdivision but do not extend beyond those areas.
4. If we allow accretion to go beyond the limits of the legal description, the Plaintiffs will gain title to land they were never entitled to own.

[40] B. **Surveyed vs Non-Surveyed Land** - Parcels of land are determinable in Alberta whether or not they have already been surveyed. This is illustrated in Part 2 and Part 3 of the *Surveys Act*, S.A. 1987, c. S-29.1. Land can be surveyed and re-surveyed to accurately reflect the position of the parcel according to the Alberta Township System.

[41] The fact that a parcel of land is surveyed or not surveyed does not affect the validity of title. The parcel of land is ascertainable based on the mapping system in Alberta. As the Defendants correctly state in their Brief at para. 35 on page 15: "Certificates of Title, by using the descriptors of sections, quarter-sections and legal subdivisions, adopt the prescribed boundaries. The descriptor "NE 34-40-21-4", to use the NE Rider title, adopts the boundaries prescribed by the Alberta Township System for that descriptor." As such, legal descriptions are not referring to hypothetical parcels of land and their boundaries in the context submitted by the Plaintiffs; they are real. The Plaintiffs argue that unsurveyed boundaries are "hypothetical" because they have not been ascertained by survey and that therefore, their entitlement to accretions does not end at these "hypothetical grid lines".

[42] If the descriptions in a Certificate of Title (which Certificate refers to the applicable section, quarter-section and/or legal subdivision and adopts its prescribed boundaries) were hypothetical simply by virtue of the land not having been surveyed, then there would be no identifiable parcel of land that answers to those descriptions. If that is so, the Certificate of Title to this unidentifiable parcel of land is as the Defendants submit a Certificate of Title to nothing, which covers nothing and confers no rights on its holder (including a claim for accretion). If one accepted this, it could be concluded that individuals' Certificates of Title

were meaningless. But that is certainly not the case. It therefore, leads me to find that the protection and preservation of the land ownership method in Alberta dictates that boundaries which are ascertainable but unsurveyed are as valid and real for title and accretion purposes as boundaries which have been ascertained. Given this result, I need not determine which boundaries of the Plaintiffs' lands in question are surveyed and which are unsurveyed. This would only have had to be determined if I had found that a surveyed boundary limits accretion but an unsurveyed boundary does not. Since I am of the view that it makes no difference whether a boundary has been surveyed or not in determining the limits of the accretions to the Plaintiffs' lands, I will now turn to setting out my conclusions.

CONCLUSIONS

[43] It is my finding in the trial of the issue before me that the accretions to the Plaintiffs' lands are limited by the theoretical or legal section, quarter-section or legal subdivision lines within the relevant townships. Further, I find that the fact that a parcel of land has been surveyed or not surveyed does not invalidate a Certificate of Title. Therefore, the relevant lines (referred to above) are those which are the boundaries of the lands described in the Plaintiffs' Certificates of Title.

[44] If the matter of costs cannot be resolved as between the parties, then costs may be spoken to within 60 days hereof. In that regard, I understand that there may be a jurisdictional issue with respect to the costs of this trial.

DATED at Calgary, Alberta this 20th day of July, 2001.

J.C.Q.B.A.