Adverse possession:
Land grab or quieting of title?

Report to the Alberta Land Surveyors’ Association

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Shakespeare knew adverse possession

Falstaff: Of what quality was your love, then?
Ford: Like a fair house built upon another man’s ground, so that I have lost my edifice by mistaking the place where I erected it.¹

The Alberta courts also know adverse possession

“Many large buildings have been erected ... on sites surveyed by local surveyors. Some of these surveyors are dead. Others are very old.”²

¹ Merry Wives of Windsor. Act 2, Scene 2.
² Justice O’Connor, in dissent: Boyczuk v Perry, 1948 CanLII 221 (AB CA) at 417.
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A. Purpose

Ballantine was all over the place. In 1918, he noted that “Title by adverse possession sounds like title by theft.”3 In 1919, he had changed his tune; adverse possession was legitimate “if a person occupies up to a certain fence or other line beyond his actual boundary “ and “if the occupier exercises dominion … such acts manifest a claim of title hostile, adverse and absolute.”4

So which is it? Is adverse possession the theft of land from the true owner, or does it respect those who actually possess land? Does it upset indefeasibility of title, or does it quiet title? In February 2019, the Alberta Land Surveyors Association (ALSA) asked us5 to disentangle these two schools of thought, and to provide guidance to ALSA in confronting landowner umbrage, case law principles, Legislative Assembly debate and surveyors’ views. Disentangling confronts many realities about adverse possession:

- It has existed in Alberta since 1911, long sanctioned by legislation and by the courts.
- It does not apply to Indian Reserves,6 public lands,7 joint tenancy lands8 or the subsurface.9
- It has generated much rhetoric, as inconsistent as Ballantine.
- It requires a parcel boundary, for “To be adverse possession, it must be over a boundary.”10

In order to assist ALSA in preparing an informed opinion on adverse possession, we interviewed 28 stakeholders in three jurisdictions (with a focus on Alberta),11 reviewed Hansard transcripts since 2011 on abolishing adverse possession, analyzed 30 seminal cases that dated from 1911 to 2019, placed adverse possession within the context of squatting, explained the fundamental criteria to be met by the possessor to sustain a claim and the techniques to be used by the owner to resist a claim, and identified the misconceptions linking adverse possession with indefeasibility of title.

Following the May 12 (original) and July 19 (slightly revised) reports to ALSA, the Alberta Law Reform Institute (ALRI) released its report for discussion on adverse possession and lasting improvements.12 Thus, this – final – version of the report to ALSA describes the ALRI findings and modifies the recommendations to ALSA in light of such findings.

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3 Ballantine. Title by adverse possession. 32 Harvard Law Review 1918, at p135.
5 To be clear, we have done this research/analysis on our own time; not as employees of the federal government.
7 Public lands = municipal land, provincial Crown land and Irrigation District land. Municipal Government Act, s74; Public Lands Act, s4; irrigation Districts Act, s182.
8 Verhulst Estate v Denesik, 2016 ABQB 688.
11 See Appendix 2.
B. Findings

1. Surveyors play an important role in preventing and identifying adverse possession. In 2003, ALRI noted that “surveying is an expert science and it is not necessarily a simple matter to identify bounds” owing to legal descriptions and to fences not on boundaries.\(^{13}\) In 2019, ALRI noted that a claimant might rely on “advice given by a surveyor regarding the location of property boundaries.”\(^{14}\) In another jurisdiction, applicable in Alberta, “a survey often sheds light on a state of affairs which is not consistent with the extent of title ... but with which neighbours have been naively content.”\(^{15}\)

2. In 2017-18, a committee of the Alberta legislature recommended that adverse possession be abolished and asked that ALRI look at the effects of abolishing it. ALRI’s report was released in July 2019. It recommends that adverse possession be eliminated and that the Law of Property Act be used where the possessor built on the owner’s parcel if two criteria are met – lasting improvement and honest belief. ALRI seeks comments on its recommendation by October 1, 2019.

3. Adverse possession (a future claim on land) coexists well with indefeasibility of title (immunity against past claims on land); it does not blight the land titles system.

4. Alberta Land Surveyors who were interviewed were opposed to adverse possession.

5. Other stakeholders who were interviewed were either ambivalent or had views influenced by the side of an adverse possession claim on which they landed.

6. Once a survey identifies a discrepancy between a fence/wall/road (being lived up to) and a boundary (that is not being lived up to), adverse possession provides a mechanism for settling the boundary dispute. Recall that land title legislation guarantees title (with reservations and exceptions); it does not guaranty boundaries (i.e. the spatial extent of title).\(^{16}\)

7. Only about 30% of adverse possession claims are successful. Failures result from re-setting the limitation period upon transfer, consent of the owner, or possession not being exclusive.

8. Mere measuring (such as pacing by the owner) or formal surveying (by an ALS) of the possessed parcel does not constitute re-entry by the owner.

9. Adverse possession claims are not confined to farmland; the rural idyll is not threatened.

10. Adverse possession litigation appears to be increasing in volume.

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\(^{13}\) ALRI. Limitations Act: Adverse possession and lasting improvements. Final report 89. para 42. May 2003.
C. Recommendations

That ALSA:

1. Forward this September 17 report immediately to ALRI. Discussions with ALRI have revealed that it is keen to peruse the ALSA findings and to collaborate with ALSA on a way forward.

2. Submit a two-page response to the ALRI Report for Discussion that:

   - Supports, in principle, ALRI’s six recommendations, with the caveat that ALSA has not examined s69 of the Law of Property Act with the same rigour as it has examined adverse possession.
   - Clarifies a few boundary principles, in particular that riparian boundaries only shift gradually and imperceptibly and that erosion/accretion is distinct from avulsion (para 28-31; 124-127).
   - Expresses a desire to work closely with ALRI in addressing the interplay between adverse possession and riparianism and the tension between lasting improvements and subdivisions.

3. Establish a working relationship with ALRI so that ALSA researches the interplay between adverse possession and riparian rights (such analysis is sought by ALRI – para 31), particularly the potential for a parcel to get larger through accretion and smaller through erosion.

4. Establish a working relationship with ALRI so that ALSA researches the tension between sanctioning lasting improvements built innocently on another’s parcel and the subdivision approval process (such analysis is sought by ALRI – para 271).

5. Commission research into Alberta Land Surveyors’ experience with s69 of the Law of Property Act, when retained either by the possessor/improver or by the true owner of the parcel.

6. Educate Alberta Land Surveyors through CPD sessions, webinars and Information bulletins about the role of surveys in preventing and identifying both adverse possession and the building of lasting improvements on another’s parcel.

7. Liaise with the Law Society of Alberta to educate the public through public information sessions about the role of surveys in preventing and identifying adverse possession and the building of lasting improvements on another’s parcel, and about the need for landowners to be vigilant about their boundaries.

8. Liaise with Alberta Land Titles about a mechanism (e.g. a provincial tribunal with boundary expertise or a provincial ombudsman) as an alternative to the courts for resolving adverse possession claims and for sanctioning lasting improvements built innocently on another’s parcel.

9. Consult more closely with New Zealand land administrators and surveyors as to how adverse possession co-exists peacefully within a land titles system in a jurisdiction similar to Alberta.

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17 If the October 1 deadline cannot be met, implore ALRI to extend the deadline to accommodate ALSA’s response.
D. Squatting as a precursor

The purpose of this section is to show that Alberta has a rich heritage of squatting, which morphed easily into an acceptance of adverse possession.\textsuperscript{18}

Back in the day, squatting simply meant possessing land without the owner’s permission (there were no limitation time periods to contend with) and was the foundation of settlement in Alberta, which might account for why the province has been “generally receptive to the concept of adverse possession.”\textsuperscript{19} As the parcel fabric, represented by the Dominion Lands Survey system, unfurled across the province, surveyors and land administrators acknowledged that people were already living on the land. Surveyors were instructed to show all settlers’ improvements – buildings and cultivations – in notes and on plans.

The \textit{Dominion Lands Act}, 1872 recognized the claims of occupants of unsurveyed land, such that “squatters’ rights were usually respected.”\textsuperscript{20} The legislation from 1872 to 1919 consistently allowed squatters to get title to the parcel. For example, after a township survey had been confirmed by the Surveyor General, “any person who has bona fide settled and made improvements before such confirmed survey ... shall have a prior right to obtain homestead entry.”\textsuperscript{21} A squatter’s possession was converted to title through an Occupancy Declaration, which posed 22 questions and asked for a description of the parcel:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.jpg}
\caption{Occupancy declaration from a squatter in the Peace River district, 1899.}
\end{figure}

Other legislative provisions set out how a squatter might be evicted; if he/she forfeited possession. Whether perfecting squatters’ rights or evicting squatters, the Crown acknowledged that people were possessing land to which they did not have title. Petroleum exploration in the McMurray Field, at the confluence of the Athabasca and Clearwater Rivers, recognized squatting. A 1906 Crown reservation to explore was not renewed in 1911 because a “number of bona fide squatters had taken possession of the river lots.”\textsuperscript{22} Rather than renew the reservation which had been lost owing to the “encroachment of squatters,” the Crown offered to sell the land subject to the rights of “any persons in a position to show that they have in the meantime squatted upon these lands.”\textsuperscript{23}

\textsuperscript{18} We are aware, of course, that Indigenous peoples possessed these lands since time immemorial. However, the focus of this analysis is on settlement after the \textit{Real Property Limitation Act}, 1874; the \textit{Territories Real Property Act}, 1886; the AB \textit{Real Property Act}, 1906, and the AB \textit{Land Titles Act}, 1906.
\textsuperscript{19} Verhulst Estate \textit{v} Denesik, 2016 ABQB 688, at para 47.
\textsuperscript{21} Dominion Lands Act, 1883, s28.
\textsuperscript{22} Huggard Assets \textit{v} Alberta, 1950 CanLII 463 (AB CA).
\textsuperscript{23} Order in Council 1263. May 31, 1911.
Perhaps the best illustration of pervasive squatting, and its contribution to the development of Alberta, is the river lot settlements that were accepted by the Crown. Edmonton settlement was surveyed in 1882 by Deane DLS. The plan showed many squatters and “it was after and upon this survey that patents were issued to various persons, all or most of whom, had been ‘squatters’ before survey.” Squatting was the norm from the 1860s (with the arrival of Groat and McDougall) through to the 1890s (when Brown’s store was located in the middle of Jasper Avenue). During that period, Edmonton’s “growth had been without too much reference to survey lines” and its residents had not “been concerned with titles to property.”

Before 1890, Victoria and Fort Saskatchewan settlements (and others) were accepted along the North Saskatchewan River; after 1890, many settlements were accepted along the Peace and Athabasca Rivers (e.g. Fort Vermilion). In total, some 30 settlements of squatters were formalized. The Deputy Minister of the Interior conceded in 1886 that: “In no case where settlers have been found on a river front in advance of a survey and desired that their holdings should be laid out with river frontages, has the privilege been refused.”

Until 1930 (and the transfer of natural resources from Canada to Alberta), Metis and others were allowed to squat on land if fishing, trapping, hunting or gathering. Well into the 1920s and 1930s, the Topographic Survey Branch accommodated squatters. In 1927, “miscellaneous subdivision to provide for squatters on unsurveyed land was made in seven localities;” in 1930, “to provide for the requirements of squatters on unsurveyed land, subdivision surveys were made in parts of 19 townships in the Peace River district of Alberta.”

Over time, the concept of squatting evolved into the concept of adverse possession, given increases in population, urbanization and land values, and a decrease in parcel sizes (meaning less tolerance for differences between boundaries and fences/walls). Squatting does live on, but only in the sense of people occupying buildings, not in the sense of a neighbour possessing land across a boundary:

Squatters had found their way into the building, which must have presented some awkwardness in showing the building … I suppose it is possible that the squatters climbed through open windows and that the purchaser was not inclined to avail himself of that means of access.

Land surveyors need not concern themselves with such squatting.

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24 Plan approved and confirmed on May 25, 1883.
25 Re: Jackson, 1925 CanLII 487 (AB CA).
31 Eastcorp Holdings v 1331952 AB Ltd, 2010 ABQB 107, at para 5.
E. Hansard debates

The purpose of this section is to review the recent debates on adverse possession in the Legislative Assembly, and to examine the motions introduced by three MLAs to abolish the doctrine.

Concerns in Alberta about the legitimacy of adverse possession date to 2011. In 2003, the Alberta Law Reform Institute (ALRI) did not question adverse possession in the context of the Limitations Act. To the contrary, ALRI noted that:

- By the 1920s, the legislature and courts had balanced the principle of limitations (extinguishing the true owner’s rights) with land title legislation (guaranteeing the true owner’s title).
- In order to protect the principle of indefeasibility of title, a parcel transfer gave the purchaser title with a new limitation period. That is, adverse possession before purchase was irrelevant because the 10-year clock re-set upon purchase.
- Thus, it is a misconception that adverse possession is an exception to indefeasibility. It is not: “Indefeasibility is a shield against prior claims, not a sword to oppose future claims.” Nor is it inconsistent with the Alberta land titles system. Rather, a purchaser gets indefeasible title.
- It is also a misconception that adverse possession is land theft. Generally, adverse possession represents the status quo, whereby the possessor has been living up to a fence for some time.
- An adverse possession claim will likely succeed if there is an honest but mistaken belief in the boundary (e.g. if a fence/wall/roadway between neighbours is not at the boundary).

Finally, ALRI set out unequivocally that adverse possession must be exclusive, continuous, open or visible and notorious and for the limitation period of 10 years. If those criteria are met, then the true owner is prohibited from re-entering the land. Despite ALRI’s 2003 explanation of the evolution, rationale and criteria of adverse possession, there were concerns raised about its injustices by 2011.on 2011-12

In May 2011, MLA Allred ALS raised the issue of adverse possession in the legislature. On November 28, he moved that legislation be introduced: “Abolishing the common-law doctrine of adverse possession in Alberta and all statutory references to adverse possession in Alberta legislation.”

He argued that adverse possession “is commonly known as squatter rights,” warned that if the Occupy Edmonton group had occupied for 10 years then they could “go to court and claim those lands as their own,” recalled an “old fellow” who lived in a shack on some vacant industrial parcel in west-end Edmonton in the 1970s, noted that “boundaries are guaranteed by the monuments on the ground,” and described adverse possession as:

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- “This antiquated custom of legalized land theft.”
- “An out-dated common-law practice.”
- “An impediment to the very successful land titles system.”

MLA Allred ALS concluded with seven reasons for abolishing adverse possession. The first was that Alberta’s land tenure system being vastly different to England’s system and the last was that the doctrine did not stand up to common sense.

In March 2012, MLA Allred ALS introduced Bill 204 – Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012. First reading was on March 7 and second reading was on March 12. He argued that:

- The issue that adverse possession was meant to resolve never actually existed in Alberta.
- Its abolition was “fair and just and in keeping with Alberta’s spirit of justice.”
- Adverse possession claims are “very rare.”

We presume that Bill 204 died with the end of the 27th legislature.

2017
Adverse possession was revisited in April and May of 2017. On April 3, MLA Stier moved second reading of Bill 204 – Protection of Property Rights Statutes Amendment Act, 2017. Bill 204 focused on regional land use planning and responsible energy, but also abolished adverse possession. MLA Stier pointed out, in support of the Bill, that adverse possession was “one of the most archaic rules that’s been around in Canada” and that it had recently led to some unfortunate situations in southern Alberta.

There was much debate on Bill 204 on May 8, 15 and 16. On May 15, an Amendment was passed that Bill 204 not be read a second time because it did not strike the correct balance between the rights of individuals, industry and the public. The Amendment caused some distress. MLA Hanson suggested that “when the rubber hit the road, [the government] drove straight into the ditch, throwing one of their few rural MLAs under the bus in the process.”

2018
The third iteration of the debate to abolish adverse possession was in April and May 2018. On April 15, MLA Gotfried introduced Bill 204 – Land Statutes (Abolition of Adverse Possession) Amendment Act, 2018 into first reading; on May 7 he introduced Bill 204 into second reading. He praised former MLA Allred ALS and current MLA Stier, recounted the attempts to abolish adverse possession dating back to 2011, described land tenure in England as “based on boundaries indicated by general markers such as hedges, fences, ditches, probably a few castles in the middle, suggested that adverse possession was much more problematic in the rural sector; and asked his urban colleagues to imagine:

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If somebody moved into your backyard in the city and squatted there in a tent and stayed there for 10 years and all of a sudden said that it was their land. Like, you can’t even imagine that happening. But that’s what happening in rural Alberta. It doesn’t make sense.\textsuperscript{39}

In debate that followed, it was noted that Alberta Justice had recommended waiting for analysis by ALRI, who had informed the legislature that:

While considerable work has been done, we are not yet in a position to make preliminary recommendations and to put those out for consultation with stakeholders. To exempt claims to recover possession of land from the operation of the Limitations Act would be a significant change to Alberta law and one that should not be taken without thorough review.\textsuperscript{40}

On May 14, an Amendment was passed that Bill 204 not be read a second time because of ALRI’s review.\textsuperscript{41} Again, the Amendment caused some distress. On May 30, MLA Gotfried suggested that Alberta Justice had “dithered time and again in taking meaningful action to abolish adverse possession.” Minister of Justice Ganley closed the debate by reminding the legislature that:

- An all-party committee (of government and opposition MLAs) had recently recommended that adverse possession be abolished.
- Government had then asked ALRI to analyze the effects of abolishing adverse possession.
- Government was not “supporting an archaic law;” rather, it was “moving forward on getting rid of adverse possession.”
- Government merely awaited ALRI’s recommendations.\textsuperscript{42}

To conclude this section, recall that Allred ALS praised adverse possession in 1983: “In the end, however, the claim by adverse possession appears to have brought justice to reign.” The possessor was “the equitable owner.”\textsuperscript{43}

\textsuperscript{39} Alberta Hansard. p836. May 7, 2018: Bill 204.
\textsuperscript{40} Alberta Hansard. p837. May 7, 2018: Bill 204.
\textsuperscript{41} Alberta Hansard. p1031. May 14, 2018: Bill 204.
\textsuperscript{42} Alberta Hansard. p1343. May 30, 2018: Bill 204.
F. Case law analysis

The purpose of this section is to examine trends in Alberta court decisions on adverse possession between 1911 and 2019, and to analyze those factors that bolster successful claims or defeat unsuccessful claims.

We analyzed 30 seminal cases that dealt with adverse possession,\(^{44}\) selected using these criteria:

- The oldest few and the most recent few.
- The six most relevant, using keywords “adverse possession” and “survey.”
- The six most relevant, using keywords “adverse possession” and “boundary.”\(^{45}\)
- All cases heard by the Court of Appeal that used keywords “adverse possession” and “survey.”
- Those cases of which we knew through the literature.

Given these criteria, we are confident that the 30 cases are a representative sample of adverse possession litigation over the 108-year period. As a preface to our findings, Alberta courts have not characterized adverse possession as a land grab. The term has been used elsewhere in Canada to describe trespass that was malicious, calculated, indecent, inexcusable,\(^{46}\) ill-conceived, aggressive,\(^{47}\) false and greedy.\(^{48}\) Adverse possessors have not been described in those terms in Alberta.

Here’s what we found:

- Only one-third of claims are successful.
- Until 1994, all successful claims involved large rural parcels that had long been farmed.\(^{49}\)
- After 2012, half of successful claims involved urban parcels; most parcels were small.\(^{50}\)

- Claims failed because:
  - The parcel had been transferred, meaning that the new owner received indefeasible title, the 10-year limitation period began anew and the limitations clock re-set (N=7).
  - The true owner explicitly consented to the possession, as in a tenancy, meaning that the possession was not adverse (N=6).
  - The possession was not exclusive because others also used the parcel (N=3).

- Only one claim failed because the true owner re-entered the parcel within the 10-year period.

\(^{44}\) See Appendix 1.
\(^{45}\) Using the CanLII – Alberta definitions of relevance.
\(^{46}\) McInnis v Stone, 2016 NSSC 212.
\(^{47}\) Shennan v Szewczyk, 2009 CanLII 34058 (ON SC).
\(^{49}\) For example, an entire NE ¼ section had been possessed for 28 years: Saturley v Young, [1945] WWR 110.
\(^{50}\) For example, there was a suburban dispute over a 1.2 m wide strip: Moore v McInroe, 2018 ABQB 235.
- Most adverse possessors lived up to a physical feature such as a road, fence or wall, across a boundary. For example:
  o A “disputed strip of land was created when the County upgraded Highway 501 … a few feet south of the actual property line.”
  o “The fence was in the wrong place.”
  o “The party wall between the duplex units is irregular in that the neighbouring unit encroaches … totalling 208.6 square feet of lost space.”

- A new survey often disclosed that the road/fence/wall was not located on the boundary, thus identifying the potential for adverse possession. For example, “She had the lot legally surveyed and discovered that the fence … was wholly on her Lot 18 … No one knew until the surveyors arrived that a mistake had been made”

- A new survey – in and of itself – is insufficient evidence of re-entry by the true owner. A survey, let alone informal measuring/pacing by the true owner, is not exclusive possession:

  Stepping out the width of the disputed lot … can be regarded as an entry but it is not an overt act of possession … just as the acts of the [possessor] had to be open and notorious as against the [owner] and the world, the acts of the [owner] if it relies on entry to recover the land, should be unequivocal.

- Indeed, one adverse possessor refused entry to a surveyor retained by the true owner to ascertain the area in dispute.

- There is risk in acquiescence (Figure 2). If an owner stands by and allows possession of the parcel, then there is no defence against a claim of adverse possession. Such inactivity (non-performance) by the owner does not constitute consent to possess; “there is no basis to infer a license in cases of mere acquiescence.” Boundary vigilance is critical.

- Adverse possession can be equitable, if it is significant to the possessor, insignificant to the owner, and has been long-continued over many years (Figure 3). Such was the case for an access road used “to bypass a steep ravine.”

- Adverse possession litigation appears to be increasing. Certainly, in the past eight years (since debate in the legislature focused on this topic):
  o There have been 10 significant cases.
  o Three cases have been heard by the Court of Appeal.

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52 Belseck v Jette, 2018 ABQB 512, at para 3.
56 Edwards v Duborg & Registrar, [1982] 6 WWR 128, at 139.
57 Moore v McIndoe, 2018 ABQB 235, at para 142.
Three cases were urban; few of the rural cases were farmland.

- The interplay between adverse possession and subdivision approval is still being teased out.\textsuperscript{59}

Figure 2 - A 2016 urban dispute in which the landowner acquiesced in the neighbour’s possession of a 1.2 m wide strip.

Figure 3 - A 2019 rural dispute over a 0.8 ac access road used to bypass a ravine.

\textsuperscript{59} “Apparent conflict” between ss 74 & 76 of the \textit{Land Titles Act: Re Koziey Estate}, 2019 ABCA 43, at para 24; and “I will not issue directions to the subdividing authority”: \textit{Moore v McIndoe}, 2018 ABQB 235, at para 199.
G. Views of Alberta stakeholders

Surveyors & landowners

Both landowners and land surveyors who have been involved with adverse possession were contacted and interviewed. Initially, eight Alberta Land Surveyors were interviewed regarding cases of adverse possession that they have been involved in. These land surveyors represented clients from both the rural and the urban areas of Alberta. Six of them had been involved with cases that had gone to the courts (both before and after a decision was made). Two of them had been only involved with cases that had boundary encroachments, but the landowners found a solution that did not involve the courts. The land surveyors also provided contact information for landowners who agreed to be interviewed.

After the land surveyors were interviewed, landowners were contacted. There were four landowners who agreed to be interviewed. There was a fifth landowner who had just settled a case, but declined the interview since he/she was dealing with a transfer of title. The landowners who were interviewed comprised three from rural areas and one from an urban area. Three of them had cases that had gone to the courts and one was able to settle after spending $10,000 on legal fees. One of the landowners had been the adverse possessor, while the other three were true owners.

Both the landowners and the land surveyors were asked a similar set of questions regarding views and knowledge on adverse possession. The questions that were asked are shown below with generalized answers following each question.

1. Are you in favour of, or opposed to, adverse possession? Why?

In almost all instances, everyone was opposed to adverse possession. The landowner who had been the adverse possessor was the only person who responded in favour. All other landowners were the true owners of the land and felt that adverse possession should not apply in Alberta. It seemed that many of them had been advised on the integrity of the survey system in Alberta. All of their responses indicated that the land was surveyed prior to settlement and that the land titles system in place in Alberta was secure. If this portion of the response is not taken into account, it is obvious to see that they opposed adverse possession because they were the ones to lose land. They all admitted that prior to the challenge from their neighbour they knew nothing about adverse possession. Most landowners even indicated that their lawyers knew little about adverse possession prior to their cases.

Every land surveyor was strongly opposed to adverse possession. The common theme of the answers was that land surveyors take great pride in the integrity of the survey system. The concept of adverse possession goes against everything that they practice and is contrary to the well-defined boundaries that they survey on a daily basis.

2. What of adverse possession owing to land being abandoned or the owners not being vigilant?

The responses to this question were similar to those in question 1. The landowner who had been the adverse possessor felt that he had done nothing wrong and had been rightly using the land. All other landowners felt that this only applied to Crown owned lands. The rural landowners especially did not like the idea of being “vigilant” since they own large amounts of land and many also own multiple ¼ sections of land. The effort that would be required to monitor their lands for adverse possessors would
not be realistic. In the situation where land was abandoned, most landowners recommended the land be claimed by the government and then auctioned off. This would only apply to lands if taxes were not paid or if the landowner was no longer around.

The responses from land surveyors varied. They thought that if taxes were not paid and the landowner could not be contacted, then the government should claim the property and auction it off. There was a common idea that if a person was paying taxes, they she/he was exercising ownership of the land. If the land was truly abandoned, another person should not be able to occupy the land. The local government should auction it off in order to recover the taxes that had not been paid.

3. What are your views on these recent attempts to eliminate adverse possession?
Almost all landowners were aware that attempts had been made to eliminate adverse possession. Some had a vague knowledge of these attempts, while others had been in contact with the MLA’s involved.

The responses received from land surveyors about these attempts were quite varied. About half of the responses indicated knowledge of these attempts. Of the other half of the group, the responses ranged from minimal knowledge (they recalled hearing about it) to ALS X replying that adverse possession no longer existed in Alberta.

4. What are your views on the statutory period of ten years, given that other jurisdictions in Canada have longer time periods?
All of the landowners interviewed know about the statutory period in Alberta. None of them knew about this timeframe prior to their cases being brought to a lawyer. The landowner who had been the adverse possessor indicated that he knew nothing about the 10-year timeframe prior to consulting his lawyer on options. None of the landowners knew that there was a longer time period in other jurisdictions in Canada. Most indicated that they had been advised that adverse possession did not exist anywhere else in Canada and that Alberta was the anomaly.

The land surveyors interviewed had a better knowledge of adverse possession elsewhere in Canada. This is likely due to their educational backgrounds. They responded that it was more common in eastern provinces where the survey system is not as well defined as in Alberta and the land registry is different.

5. If adverse possession is to be retained in Alberta, what changes need to be made?
Even though almost all respondents were against the concept of adverse possession, most were able to provide ideas on how to make it better, should it be kept. One idea was to find a better (alternate) method for dealing with cases. Most cases seem to involve the location of a fence (both urban and rural). Instead of allowing one landowner to claim adverse possession when a fence is not located on the property line, allow for an agreement to be placed on title. The agreement could state that the fence will be moved at a later date to be agreed upon by both parties. Since boundaries are surveyed and marked, an encroachment should not open the door for adverse possession.

Another common recommendation was to find a way to deal with the matter more efficiently and in a cost-sensitive manner. The combined costs for the court cases are well over $150,000 for the landowners. The cases dragged on for over five years. For situations that have not gone to court, the
costs for legal fees were around $10,000 for each landowner. In these situations, either a fence was moved or the entire parcel was sold to the adverse possessor.

6(a) Landowners: Should there should be more education for the public on adverse possession? Who should be responsible for this (e.g. ALSA, realtors, lawyers, government)?

All landowners agreed that there needs to be more education on adverse possession on Alberta, but this created a general fear that more education could open up more claims of adverse possession. There were a small number of respondents who thought the government should educate the public since it is the government that is keeping this law in place. All landowners also indicated that lawyers need to be more aware of what adverse possession is and to be able to advise on it, especially if they are going to practice in real property law. Some of the landowners indicated that lawyers should be working with purchasers and advising on any potential for claims of adverse possession. Two landowners indicated that real property reports should always be a requirement in a land transaction, especially if one has not been completed in the last ten years.

6(b) Surveyors: Does ALSA need to educate members/public on adverse possession? If so, what recommendations would you give on this process?

Most land surveyors indicated that there needs to be more education for land surveyors on the existence of adverse possession in Alberta. They also indicated it was not the responsibility of the ALSA to educate the public since the ALSA’s role is to govern the practice of land surveyors. Land surveyors also need to know their role in the process and it must be made clear they are not to advise a landowner; that is the responsibility of the lawyer.

Towards the end of the research, a ninth surveyor was interviewed in a less-structured and more free-flowing manner that allowed for written comments:

- ALS #9 was opposed to adverse possession, because Alberta has one of the best land titles systems in use in the world, meaning that “landowners rely on the Torrens system to protect them from loss of title to any portion of their lands.” However, he/she recognized that the human aspect is the hardest to rationalize, albeit the most important. Most people have heard of squatters’ rights, but they tend to assume this applies to government lands and not to their own land. As long as adverse possession exists in Alberta in its current format, then “we are allowing for a loophole that questions the integrity of the survey and land titles systems.”

To conclude this section: During the research, a number of land surveyors were contacted to see if they had been involved with adverse possession cases. Most surveyors replied that they had not and one surveyor replied that it does not exist in Alberta.

In discussions with landowners and land surveyors, it has become apparent that for most people, the concept of adverse possession is not well known. For those that have dealt with it, the only people that are in favour are those who have been adverse possessors. Most respondents wish adverse possession to be abolished. There is strong support for the survey system and the land titles system in Alberta; many noted that we have the best systems in the world. Landowners in Alberta place a lot of trust in the government to ensure that their title is secure and that nobody can steal their land by occupying it.
There was a general feeling that true landowners are being punished because they have allowed their neighbour to occupy their land without forcing them from it. Poor relations are created between neighbours and animosity develops within neighbourhoods.

If adverse possession is not abolished, then respondents wish more education aimed at all parties involved with land transactions. The province also needs to find a way to deal with situations that are encroachments and should only allow for adverse possession to exist when land is truly abandoned. The landowners that were interviewed came mostly from rural areas, so the solution to the dispute was to sell the whole parcel of land to the person possessing the land. This solution usually came about after one, or both, of the landowners involved had incurred legal fees of some $10,000. In the end, there was and is a strained relationship between neighbours.

The disputes that made it to trial have been based on encroachments of portions of land. The true landowners knew that there was an encroachment, but decided not to force a change until it was needed. The person possessing the land made improvements and continued to use the land, even with the knowledge that they were encroaching onto another’s land. For the true owners of the land who eventually lost lands, they believe that the possessor was acting with the full intent to make a claim for the land and knew quite well about adverse possession. None of the true owners who were interviewed were aware of adverse possession until a claim was filed. The combined financial cost of the cases that made it to courts is upwards of $150,000. It has also left both sides emotionally drained and with disdain for each other.

Lawyers
Four Alberta lawyers were interviewed. Their views on adverse possession diverged remarkably, depending on whose ox was being gored. Those who had represented the true owner in litigation regarded adverse possession with disfavour; others were either in favour or ambivalent:

- Lawyer #1 believed that acquiescence – essentially being community-minded by not questioning the neighbour’s trespass because the trespass seems so innocent (either in area/distance or in time) – should count for something. Such acquiescence should take the form of an implied licence, by which the owner allows the possession, meaning that it is not adverse. He/she was also opposed to adverse possession on public policy grounds; that the doctrine made a mockery of the subdivision approval process as set out in provincial legislation and as administered through municipal bylaws and regulations.

- Lawyer #2 acknowledged that there are many circumstances in which the doctrine of adverse possession has a role to play, as for allowing access in the rural setting or formalizing maintenance work done up to fences/walls in the urban setting. If the doctrine is abolished, he/she observed that it must be replaced with a legislative mechanism to meet such needs, given that the mechanism for recognizing lasting improvements is limited in application (i.e. honest but mistaken belief). Finally, he/she was ignorant of the part played by surveys in identifying and preventing adverse possession, and wondered whether the doctrine had any effect on accretion and erosion.
- Lawyer #3 had the benefit of experience working in both a land titles system (AB) and a land registry system (another province). In the latter jurisdiction, he/she had dealt extensively with adverse possession, but was “surprised” to learn that it flourished within the Alberta land titles system. He acknowledged that the case law was “nuanced” and that the factual bar that the possessor was required to clear was set quite high.

- Lawyer #4 recognized the equitable nature of adverse possession, in that it formalized long-standing possession and use of land. He/she knew that the courts agreed with only one-third of adverse possession claims (owing to consent from the owner, transfer to a new owner or non-exclusive possession) and that there had been much debate recently in the legislature about its inconsistency within a land titles system. He/she suggested that much of the debate was “ill-considered, inconsistent bombast with little grounding in the facts” and an example of “soapbox politics;” he/she welcomed the ALSA study.
H. Views of the Alberta Law Reform Institute

Recall that on May 30, 2018, the Alberta Minister of Justice reminded the Legislative Assembly that ALRI had been asked to analyse the effects of abolishing adverse possession. ALRI finished its analysis in July 2019 and released its Report for Discussion. The Report addresses seven issues and proffers six recommendations across 93 pages (including a cross-jurisdictional comparison) and welcomes any comments supporting or opposing the recommendations “or additional options for reform.”\(^{60}\) ALRI is to be commended for both its research and its consultation with lawyers in Calgary and Edmonton.

It is worth noting the sinuous background to ALRI analyses of adverse possession. In 1989, ALRI looked into limitations. Initially ALRI wished to eliminate adverse possession, but its final report refrained from recommending its elimination. Instead, it observed that “the substantive law governing adverse possession is in need of reform.”\(^{61}\) In 2003, ALRI reported on the Limitations Act, and “recommended that Alberta retain adverse possession within its land titles system.”\(^{62}\) At that time, neither the courts nor the Legislature suggested that adverse possession be eliminated. How the times have changed, because – as we have seen (Part E herein) – the Legislature is now rife with initiatives to eliminate adverse possession. ALRI’s 2019 Report is sensitive to legislative debates resulting in the introduction of Bill 204 in 2012, 2017 and 2018; and to the Moore v McIndoe (2018)\(^{63}\) decision wherein a deliberate trespasser gained land through adverse possession. ALRI is candid in acknowledging that the 2019 recommendations differ from the 1989 and 2003 recommendations owing to “updated research and policy considerations, as well as consultation with interested stakeholders.”\(^{64}\)

The 2019 Report for discussion also acknowledges that “adverse possession serves a valid purpose as a means of dispute resolution,” in quieting title and in sanctioning long-standing possession.\(^{65}\) Furthermore, abolishing adverse possession will not eliminate those disputes because the Law of Property Act does not address all such disputes.\(^{66}\) However, the fundamental principle underlying the ALRI analysis is that “disputes should be resolved equitably.”\(^{67}\) To the extent that adverse possession can reward both deliberate trespassers and the mere use of land, then it is considered inequitable. Thus, ALRI recommends that adverse possession be abolished, and that a claim regarding a lasting improvement under s69 of the Law of Property Act can be brought at any time.

Given that possessors and owners will continue to clash, “equity is advanced”\(^{68}\) by relying on the lasting improvement doctrine, which allows the court to transfer occupied lands from owner to possessor for compensation, or to place a lien on the owner’s land to the value of the improvement. Section 69 has a higher threshold than adverse possession in two respects:

\(^{60}\) ALRI. Adverse possession and lasting improvements to wrong land. Report for Discussion 33. July 2019. For example, see para 150 seeking comments on the recommendation that adverse possession be abolished.


\(^{63}\) Moore v McIndoe, 2018 ABQB 235.


- The improvement must be lasting, not something easily moved such as fence.\textsuperscript{69}
- The possessor must build the improvement innocently – with the honest but mistaken belief that the improvement is on the possessor’s land (not on the owner’s land).

The result of substituting the lasting improvement doctrine for adverse possession is that most adverse possessors would have been evicted as mere trespassers and would not have retained the land, despite each being in possession for 10-15 years.\textsuperscript{70} Finally, ALRI advocates the use of the lasting improvement doctrine in place of adverse possession because the former gives the courts much discretion to “craft a range of solutions.”\textsuperscript{71} Such discretion – including time-limits, easements, liens, possession, level of compensation, conditional upon subdivision approval – “achieve proportionality between the parties” and is now not available in adverse possession cases. Rather, the courts now lament that if adverse possession criteria have been met, judgment cannot be refused nor conditions imposed.\textsuperscript{72}

\begin{flushright}
\textsuperscript{69} ALRI. \textit{Adverse possession & lasting improvements to wrong land}. Report for Discussion 33. para 118. July 2019.
\textsuperscript{71} ALRI. \textit{Adverse possession & lasting improvements to wrong land}. Report for Discussion 33. para 300. July 2019.
\textsuperscript{72} \textit{Moore v McIndoe}, 2018 ABQB 235, at para 179.
\end{flushright}
I. Views from Ontario & British Columbia

Ontario does not allow adverse possession for parcels within the land titles system, but does allow it for parcels before they enter the system. As time goes on from first registration in land titles, therefore, the task of proving adverse possession becomes more difficult. Three Ontario Land Surveyors were interviewed, whose views were somewhat consistent:

- OLS #1 said that “in principle, I understand the concept” but struggled with the nuances of consistent vs inconsistent use and of intentional trespass vs mistaken belief. He/she knew that a survey at transfer or fence-building reduces adverse possession in the future, but was troubled by the role that surveys (e.g. real property reports) play in identifying adverse possession.

- OLS #2 acknowledged that “there’s a place” for adverse possession as a “common law animal,” but only if the trespass was accidental and not deliberate. He/she was aware of the leading cases that defined adverse possession in Ontario, noted that it was similar to the quit claims process in quiet title, and observed that its use would fade with time as all parcels entered the land titles system.

- OLS #3 waffled between “indifferent” and “I don’t care for it.” On the one hand, he/she knew of examples of it being equitable in allowing for long-standing, peaceful possession to continue. On the other hand, he/she was troubled by lack of clarity from the courts on intention, mistaken belief and inconsistent use; and because it “usually arises due to lack of up-to-date surveys.”

Two recent Ontario cases show the interplay between surveys, boundaries and adverse possession. In Belfort (2017), a 2008 survey for a new fence identified a 0.75m gap between the old fence and the boundary. The parcel was registered in the land titles system in 1998, meaning that adverse possession had to be proven for a 10-year period beginning in 1988. However, there was a 10-month gap with no evidence of possession, so the claim failed. In Mississippi Valley Conservation Authority (2017), a boundary dispute between a rail trail and a neighbour was resolved on the basis of adverse possession. The Kingston & Pembroke Railway (later the CPR) had possessed the rail trail corridor from 1894 to 1960, bounded by the fence that the neighbours removed in 2014.

This difficulty in proving adverse possession before a parcel enters the land title system was examined recently by the Supreme Court of Canada. In British Columbia, adverse possession was abolished in 1970 against the Crown and in 1975 against fee simple parcels. That meant that the claimants, who took possession of the disputed parcel in 1992, were required to prove adverse possession since 1910 – either for 20 years before 1930 or for 60 years before 1970. Sadly, there was gap in the historical record of possession from 1916 to 1920. The adverse possession claim failed.

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Footnotes:

73 These nuances are irrelevant to Alberta; they do not form the criteria for assessing adverse possession.
74 Belfort v Zuchelkowski, 2017 ONCA 774.
75 Mississippi Valley Conservation Authority v Bucci, 2017 ONSC 5407.
76 Nelson (City) v Mowatt, [2017] 1 SCR 138.
77 For reasons of escheat of the fee simple parcel in 1930.
J. Views of New Zealand stakeholders

New Zealand’s land titles and survey systems are very similar to those in Alberta, and were adopted at a similar time. The similarities do not end there; NZ is a common law jurisdiction, with a healthy urban-rural mix and a population within 15% of Alberta’s population. Moreover, NZ allows adverse possession, and has done so since 1963 with the rationale that land be used productively rather than abandoned. Thus, there might be lessons for Alberta from NZ, particularly because the NZ Land Transfer Act was recently amended which meant that adverse possession was newly debated.

The response to the debate was that adverse possession was “firmly entrenched” so as to serve the public good by:

- Encouraging true owners to be vigilant.
- Facilitating transfers of abandoned lands.

Guidelines were suggested for determining adverse possession, which focused on “evidence of abandonment” and “evidence of physical possession and control of the subject land.” The true owner is favoured (principle of indefeasibility) rather than the possessor (principle of quieting title).

In the context of lessons for ALSA, there are three distinctions between NZ’s regime and Alberta’s regime. First, an application by the NZ adverse possessor is defeated by a caveat from the owner. This means that in the absence of a caveat (e.g. if land has been abandoned), then the possessors’ rights are formalized/perfected without a trial. Second, mistakes about boundaries do not support adverse possession (i.e. boundary encroachments are dealt with by other legislation). Third, and perhaps most significantly, urban-residential parcels are regularly transferred in the absence of real property reports or mortgage surveys. This means that people live up to fences/walls and are – largely – ignorant of whether the fence/wall is at the boundary.

These distinctions do not detract from general views on the merits/demerits of adverse possession. To that end, we interviewed eight stakeholders – surveyors, land administrators and lawyers:

- Surveyor #1 saw a role for adverse possession in dealing with parcels that had been abandoned, and had worked on two straightforward claims in the past 10 years. Neither claim was opposed so neither required a trial. He/she suspected that the surveying profession’s views on adverse

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78 In 2017, NZ = 4.8M and AB = 4.2M.
79 The new Act came into effect on November 12, 2018.
83 There are three other wrinkles in that: NZ enjoys titles that are limited as to parcels; the limitation period is 20 years; the true owner’s right to re-enter is not extinguished. Again, the nuances do not detract from the general views on the merits/demerits of adverse possession.
84 NZ Property Law Act.
85 We are indebted to Sue Hanham of Waimate for assistance with the interviews.
possession depended upon age, with the older cohort (like the respondent) being more pragmatic in accepting evidence of occupation.

- Surveyor #2 had dealt with more adverse possession claims than any other surveyor, and was opposed to the cost, time and uncertainty of litigation. These factors, he/she believed, explained why there were few adverse possession claims litigated.

- Surveyor #3 believed that most adverse possession claims arose in the rural sector over abandoned land, but only then rarely. He/she noted that the caveat was a useful technique, but was prone to misuse by those with no interest in the parcel.

- Surveyor #4 was incensed that the Crown had made the parcel fabric system “too spatially pedantic” with little knowledge of survey law and boundary principles. The result was that adverse possession – which served a purpose – “costs a lot of money for very little.” He/she recommended an Ombudsman, as an alternate resolution mechanism to the courts.

- Land administrator #1 was concerned with the disconnect between the cadastre (as shown on plans) and possession (as exists on the ground), and used road allowances as an example. That is, strips of lands that had been intended to be roads but were never proclaimed (neither dedicated by landowners nor accepted by the municipality) and were now in the possession of a neighbour. He/she lamented that many rural municipalities ignored such adverse possession.

- Land administrator #2 focused on the role of the caveat in adverse possession claims and observed that any “interested party” (not just the true owner) can lodge a caveat. The authority given to the true owner, in his/her opinion, allowed the public to rely on the land titles system.

- Lawyer #1 believed that most adverse possession claims were caused by mistakes in boundaries and not abandonment, and referred to the case of Edmunds v Lauder et al (2013). He/she recognized that pragmatism influenced one’s views: If the land titles system is to be all-powerful, then the possessor should not be able to retain land. But, if the “effective use of land” is to carry the day, then the possessor should get the land.

- Lawyer #2 was involved in the Law Commission submission to the new Land Transfer Act and noted that there was little discussion “about whether the principles were good or bad with respect to adverse possession.” It was generally accepted that the doctrine served a purpose, and that the caveat system favouring the true owner was just.

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86 There was discrepancy between the fence and the boundary = 4,800 sq m of land. Adverse possession for the relevant limitation period was not proven: Edmunds v Lauder & Registrar General of Land, [2013] NZHC 2770.
Appendix 1 – 30 adverse possession cases

Yes denotes a successful claim; * denotes a Court of Appeal decision.

<table>
<thead>
<tr>
<th>Case</th>
<th>Claim</th>
<th>Time</th>
<th>Area</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Harris v Keith</em> (1911)</td>
<td>Yes</td>
<td>17 yea</td>
<td>strip of ⅓ section</td>
</tr>
<tr>
<td><em>Wallace v Foster</em> (1913)</td>
<td>Yes</td>
<td>13 yea</td>
<td>30 ac</td>
</tr>
<tr>
<td><em>Riddell v McRae</em> (1917)</td>
<td>No</td>
<td>Not ex</td>
<td></td>
</tr>
<tr>
<td><em>Sinclair v McLellan</em> (1919)</td>
<td>No</td>
<td>Clock re-set</td>
<td></td>
</tr>
<tr>
<td><em>Shirtcliffe v Lemon</em> (1923)</td>
<td>Yes</td>
<td>16 yea</td>
<td>68 ft wide strip of ⅓</td>
</tr>
<tr>
<td><em>Berube v Cameron</em> (1945)</td>
<td>No</td>
<td>Consent</td>
<td></td>
</tr>
<tr>
<td><em>Satruey v Young</em> (1945)</td>
<td>Yes</td>
<td>28 yea</td>
<td>⅓ section</td>
</tr>
<tr>
<td><em>Boyczuk v Perry</em> (1948)</td>
<td>No</td>
<td>Clock re-set</td>
<td></td>
</tr>
<tr>
<td><em>Nessman v Bonke</em> (1976)</td>
<td>No</td>
<td>Clock re-set</td>
<td></td>
</tr>
<tr>
<td><em>Lutz v Kawa</em> (1980)</td>
<td>No</td>
<td>Clock re-set</td>
<td></td>
</tr>
<tr>
<td><em>Edwards v Duborg</em> (1982)</td>
<td>Yes</td>
<td>10 yea</td>
<td>3 ac</td>
</tr>
<tr>
<td><em>Edmonton v Registrar</em> (1994)</td>
<td>No</td>
<td>Not exclusive (road)</td>
<td></td>
</tr>
<tr>
<td><em>Tooke v Eastern Irr District</em> (1993)</td>
<td>No</td>
<td>Consent</td>
<td></td>
</tr>
<tr>
<td><em>Urban v Urban Estate</em> (1994)</td>
<td>Yes</td>
<td>15 yea</td>
<td></td>
</tr>
<tr>
<td><em>Holmes v Nil-Ray Farms</em> (2000)</td>
<td>No</td>
<td>Clock-re-set</td>
<td></td>
</tr>
<tr>
<td><em>Thrutter v Otto</em> (2007)</td>
<td>No</td>
<td>Consent</td>
<td></td>
</tr>
<tr>
<td><em>Rinke v Sara</em> (2008)</td>
<td>No</td>
<td>Delay in litigating</td>
<td></td>
</tr>
<tr>
<td><em>Andriett v Strathcona Cty</em> (2008)</td>
<td>No</td>
<td>Not exclusive</td>
<td></td>
</tr>
<tr>
<td><em>Power v Goodram</em> (2012)</td>
<td>No</td>
<td>Clock-re-set</td>
<td></td>
</tr>
<tr>
<td>1215565 Ltd v Cdn Wellhead (2012)</td>
<td>Yes</td>
<td>10+ yea</td>
<td>400 sq m</td>
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<tr>
<td><em>Reeder v Woodward</em> (2016)</td>
<td>Yes</td>
<td>12 yea</td>
<td>10 ac</td>
</tr>
<tr>
<td><em>Moore v McIndoe</em> (2018)</td>
<td>Yes</td>
<td>15 yea</td>
<td>1.2 m strip</td>
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<tr>
<td><em>Goertz v Oliver</em> (2018)</td>
<td>No</td>
<td>Re-entry</td>
<td></td>
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<tr>
<td><em>Belseck v Jette</em> (2018)</td>
<td>No</td>
<td>Clock re-set</td>
<td></td>
</tr>
<tr>
<td>Samco v CNR (2018)</td>
<td>No</td>
<td>Consent87</td>
<td></td>
</tr>
<tr>
<td><em>Janot v Janot</em> (2018)</td>
<td>No</td>
<td>Consent88</td>
<td></td>
</tr>
<tr>
<td><em>Re: Koziey Estate</em> (2019)</td>
<td>Yes</td>
<td>27+ yea</td>
<td>0.8 ac</td>
</tr>
</tbody>
</table>

87 However, all was not lost for the possessor: “CN is not without remedies. Railways remain powerful entities.” Samco v CNR, 2018 ABQB 586, at para 54.
88 The Appellant carried on business under the Trade Name: “Stoned or drunk, we will haul your junk.” Janot v Janot, 2018 ABCA 20.
Appendix 2 – 28 people interviewed

Alberta
   Alberta Land Surveyors = 9
   Landowners = 4
   Lawyers = 4

Ontario
   Ontario Land Surveyors = 3

New Zealand
   Land surveyors = 4
   Land administrators = 2
   Lawyers = 2