Succinct Report on ALRI Report
January 5, 2020
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Context:
Further to my report to ALSA on adverse possession (September 17) and discussion at ALSA Council (November 7), I was directed on November 13, 2019, to establish a relationship with the Alberta Law Reform Institute (ALRI) to:

- Address any boundary-centric errors in the ALRI Report, with an emphasis on riparian bounds.
- Assess the tension between sanctioning lasting improvements and approving subdivisions.

Recommendations:
1. Ask ALRI to clarify the riparian boundary principles set out in Paragraphs 28-31 and 124-137 of the ALRI Report, in accordance with the suggestions in Part 3 of this Succinct Report.
2. Ask ALRI to clarify other boundary/parcel principles set out in Paragraphs 171, 210, 221, and 278 of the ALRI Report, in accordance with the suggestions in Part 4 of this Succinct Report.
3. Approach the Alberta Land Institute (ALI) about working together on issues of mutual interest, to advance debate among and enhance the knowledge of Alberta Land Surveyors, as a fundamental tenet of a self-governing profession acting in the public interest.

Part 1 - Relationship with ALRI:
In interacting with ALRI (face-to-face meeting, email discussions, phone conversations), I advised Stella Varvis (author of the ALRI Report) and Sandra Petersson (Executive Director) that I had merely been authorized by ALSA Council to meet with ALRI to gather information, that I did not speak for ALSA Council, and that ALSA Council will convey its views/position to ALRI. ALRI advised me that they had reviewed my Report of September 17, that they had learned much about ALSA and some about boundaries from the Report; and that they did not quibble with the findings.

Relationship-building spanned eight topics:
1. ALRI appreciated the opportunity to interact with ALSA, and eagerly awaits any feedback from ALSA Council. ALRI recognizes that its expertise is in legislative reform, and not in boundary principles, so that there is much opportunity for synergy between the two groups.
2. ALRI awaits comments from all stakeholders and will not finalize its Report before Spring 2020.
3. ALRI was keen to get ALSA Council's views on using s69 of the Law of Property Act in lieu of the doctrine of adverse possession. I responded that I will submit my s69 analysis to ALSA Council in late November, after which ALSA Council will convey its views/position to ALRI.

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1 This Succinct Report (Task 2) follows my Succinct Report (Task 1) of November 26, 2019.
4 This corresponds to recommendation #5 in my September 2019 Report.
5 This corresponds to recommendation #4 in my September 2019 Report.
6 Since 2012, ALI has supported and enhanced land use policy in Alberta by impartially informing public-debate and decision-making. Publications include: A guide to property rights in Alberta (2014).
7 This suggestion was first made by ALRI at our meeting of November 25, 2019.
8 ALSA letter to ALRI. December 13, 2019.
4. ALRI was intrigued by the valuable role played by Real Property Reports (prepared by Alberta Land Surveyors) when land is transferred or developed.9

5. ALRI was keen to get ALSA Council's views on the relationship between accretion/avulsion and adverse possession. I responded that I will submit my riparian analysis to Council in early January, after which ALSA Council will convey its views/position to ALRI.

6. ALRI will not be pursuing riparian issues now.10 However, ALRI noted the potential for collaboration on this issue between ALSA and ALI.

7. ALRI was intrigued to learn of various mechanisms for addressing boundary uncertainties – s9 of the Surveys Act; the ALSA Boundary Panel; and the Ontario Boundaries Act Tribunal.

8. ALRI was keen to learn about – and perhaps attend – the ALSA Webinar on January 16 (that will engage ALSA members on adverse possession and lasting improvements across boundaries).

Finally, I was able to inform ALRI of a new judgment (October 30, 2019) re: adverse possession and s69, in a dispute over a shelterbelt between two rural parcels in Bluesky. The court held that neither cutting grass nor planting trees constituted adverse possession. The possessor was a mere trespasser.11

Part 2 - Riparian boundary principles to clarify in the ALRI Report:

First, the ALRI Report is inconsistent regarding the rate of shift of a watercourse. It is not simply that “a receding lake or a migrating river” affects the spatial extent of a fee simple parcel. Rather, parcels get larger through accretion and smaller through erosion only if the watercourse shifts slowly, gradually and imperceptibly. To be clear, the ALRI Report does – in places – acknowledge that “river or lake boundaries change slowly over time.” However, in other places, the ALRI Report muddles the rate: “boundary changes that may be slow ... or sudden”12 The requirement that boundaries only shift gradually and never shift suddenly does not permeate the ALRI Report. Thus, a clearer distinction is needed between:

- Accretion/erosion, which has the effect of shifting boundaries; and
- Avulsion, which does not have the effect of shifting boundaries.

Second, the ALRI Report implies that the doctrine of accretion/erosion is incompatible with Alberta's land title system: “The common law principles of accretion have come into direct conflict with the land registration system.”13 This is disingenuous. Rather, the Legislative Assembly, the courts and the land surveying profession have acknowledged since at least 1930 that accretion/erosion coexists well with the land titles system. Three examples should suffice:

- The Land Titles Act guarantees title to land (with a few exceptions and reservations). It explicitly does not guaranty the location of a boundary or the area of a parcel:
  “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 ... expresses an area that is more or less than the actual area.”14

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9 ALRI Report, paragraph 288.
10 ALRI Report, paragraph 31.
11 Watchorn v Brouse, 2019 ABQB 834.
12 Paragraph 124.
13 Paragraph 29.
14 AB Land Titles Act, s90.
In a dispute over accretion along the south bank of the North Saskatchewan River, the Supreme Court of Canada held that the parcel increased in area, regardless of the description in the certificate of title. Indeed, accretion/erosion exists in all land titles systems across Canada, because it is a pragmatic response to the caprice of nature.

The Surveys Act empowers Alberta Land Surveyors to render opinions as to the current location of a water boundary based on criteria of soil and vegetation. Such an opinion is independent of the location described on a certificate of title, or on a subdivision or township plan.

Thus, the ALRI Report hint that accretion/erosion is in “direct conflict,” to be addressed through “legislative reform,” should be reconsidered. Any call for “legislative intervention” to clarify accretion/erosion has been very muted. Indeed, the reform climate in Saskatchewan is instructive. Despite abolishing the doctrine of accretion in 1966, Saskatchewan – which is similar to Alberta in terms of watercourses, settlement and land titles system – recognized in 2017 that accretion serves a purpose in clarifying the spatial extent of title. It enacted legislation to welcome back accretion.

Third, the ALRI Report suggests that there exists no “clear framework for resolving … natural boundary changes.” This rather overstates the case, because the Provincial Wetlands and Water Boundaries Section of the Alberta government has a detailed process for amending title to reflect gradual shifts in watercourses. Also, the courts use proportional shorelines to allocate accretion among parcels.

Fourth, the ALRI Reports notes that “adverse possession has … played a complementary role to the law of accretion in some cases.” This is a wee bit misleading, in that the two issues (accretion and adverse possession) have only reared their heads in one Alberta case. Some 16ac of land accreted to a parcel on Buffalo Lake; the adverse possessor was successful in claiming 4ac. Thus the complementary role of the two doctrines is rather overstated, because “adverse possession has been used to attach the isolated land to the adjoining title” only once, ever. It is truly an unusual factor.

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15 Clarke v City of Edmonton, [1930] SCR 137.
16 AB Surveys Act, s17.
17 ALRI Report, footnote 31.
19 Paragraph 30.
21 Andriet v Strathcona (County No. 20), 2010 ABQB 323.
22 Paragraph 30.
23 Of which I am aware.
25 Paragraph 127.
26 The ALRI Report suggests that it is not an unusual factor. Paragraph 67.
Finally, lest I be accused of pedantry, I acknowledge that the ALRI Report:

- Focuses superbly on adverse possession, meaning that any discussion of riparian issues is an aside. I do not wish to distract from the ALRI analysis – there is much to commend.
- Acknowledged that accretion/erosion fell outside the scope of the adverse possession project and should be addressed in a separate project. This latter point was repeated when I met with ALRI, and it is in that context that liaising with ALI was suggested.

Thus, the ALRI Report requires only some clarification vis-à-vis water boundaries, not wholesale revision.

**Part 3 - Other boundary/parcel principles to clarify in the ALRI Report:**

**Paragraph 171:** The ARI report makes an artificial distinction between “survey system” monuments and “physical markers that people regularly look to when they use and occupy land.” Given that many ¼ sections, all block corners, and all subdivision parcel corners post-1988 have been marked with boundary monuments of wood, stone or metal, and that many fences and walls are built in relation to such monuments, the distinction is rather artificial and should be clarified. Survey system monuments are often tangible, not “intangible.” The assertion is repeated (Paragraph 221):

- On the one hand, the land titles system can be used to determine who owns land.
- On the other hand, the same system does not “translate into tangible evidence of boundaries”.

This is a false dichotomy, because the land titles system also includes subdivision plans or township field notes, for example, which reveal much about boundaries (e.g. monuments, distances, locations, …).

**Paragraph 210:** The ALRI Report can also refer to s36 of the British Columbia Property Law Act.27

**Paragraph 278:** The ALRI Report correctly notes that guaranty of title does not extend to parcels whose parcels have been misdescribed. However, it is misleading to link misdescription to “a registered owner being ejected from their land.” Although full ejection can happen, the more common result with misdescription is that the landowner has title to a parcel that is larger, smaller, differently shaped or differently located than as shown on the certificate of title. Perhaps this can be clarified?

**Part 4 - Tension between lasting improvements and subdivision approval:**

The ALRI analysis of lasting improvements and planning law (paragraphs 255 to 266) is top drawer. Comparing the taking of a lasting-improvement area (i.e. from Parcel 1 to Parcel 2) to a boundary change resulting from neighbourly agreement is inspired.28 There is, however, one thing to clarify: Paragraph 255 suggests that, for lasting improvements made to wrong land, a development permit application “will not necessarily alert the improver or the development authority to the mistake.” This is misleading at best, and incorrect at worst.

For example, if applying for a development permit for a new house/garden suite in the City of Edmonton, one supporting document is a plot plan or site plan, which “should be prepared by an Alberta Land Surveyor.” Such a plan shows much of relevance to lasting improvements, including:

- Property lines and property dimensions;
- Site depth, width, area and coverage;

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27 As elaborated upon in my Succinct Report (Task 1) of November 26, 2019.
28 Paragraph 259.
- Setbacks;
- Dimensions of all proposed and existing structures.

Moreover, for a Mature Neighbourhood Overlay, the development/building permit application must also include an abutting properties plan, “prepared by an Alberta Land Surveyor” that shows the “setback distances to foundations of abutting principle structures.” Thus, whether described as a site plan, a plot plan or a real property report, the ALS product will certainly show the location of a lasting improvement relative to the boundary.

Also, in the context of adverse possession, the Alberta Court of Appeal affirmed in 2019 that the courts can direct the Registrar of Land Titles to:

- Cancel existing certificates of title that reflect original boundaries.; and
- Issue new certificates of title that reflect new boundaries (post-adverse possession).30

The Alberta courts allow adverse possession to co-exist with the subdivision process set out in the Municipal Government Act, because successful adverse possession claims are rare and tend to affect small areas of land, particularly in the urban setting.

Likewise, for the following seven reasons, a s69 judgment on lasting improvements should not be required to get subdivision approval:

- The narrow definition of lasting improvements;
- The need for the belief to be an honest mistake;
- The tiny areas in dispute;31
- How rarely a strip of land is taken from Parcel 1 and added to Parcel 2;
- The range of solutions to be made available to claimants;
- The discretionary nature of subdivision approval;
- The Court of Appeal’s view that subdivision approval is unnecessary.32

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30 *Koziey Estate (Re)*, 2019 ABCA 43, at para 26: “Appellate intervention is not warranted.”
31 *Moore v McIndoe*, 2018 ABQB 235: A strip of land 1.2m in width crystalized the debate over adverse possession.
32 Admittedly for adverse possession.