July 25, 2011

Lack v. Alberta: Court Unmuddies and Advances Accretion Law

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Cases Considered:

Lack v. Alberta (Sustainable Resource Development), 2011 ABQB 379.

Courts typically find the facts, ascertain the applicable law, and apply the law to the facts. When asked to apply common law of accretion to a natural world overlaid with complex situations of land ownership and statutory rules and rights under the Alberta *Land Titles Act*, RSA, c L-4, this straightforward approach cannot always easily be adopted. Over the last few years accretion challenges have invited creative judicial activity and problem solving in order to reconcile classic accretion at common law, the natural world, and the Alberta Torrens system as manifested in the *Land Titles Act.* My earlier blog Andriet v. County of Strathcona No. 20: Court of Appeal Conjures a Creative Accretion Approach discussed some of the accretion issues that lead to questions regarding what is the applicable law in Alberta. Is it the old common law concerning accretion Is it an evolving common law to account for a changing physical and social world? Is it the common law mixed or modified by the application of the *Land Titles Act,* and rights under that Act? Justice Yamuchi's decision in *Lack v. Alberta* takes us a fair distance in clearing up some of these recently exposed murky areas.

By way of background, disputes over accreted land in Alberta typically are framed as contests between the Crown, as owner of beds of lakes and rivers, and of permanent and naturally occurring bodies of water, pursuant to section 3 of the *Public Lands Act*, RSA, c P-30, and riparian owners who seek to acquire title to exposed bed under the process prescribed in the *Land Titles Act* RSA, c L-4, s 89. Riparian owners, by definition, are owners or occupiers of land that abuts the shore of natural water bodies, such as lakes, or rivers. At common law, the entitlement to accreted land is an incident of riparian ownership. Accretion occurs where the bed of a river or water body is exposed through the gradual, imperceptible retreat of the water. At common law, the so exposed bed attaches or "accretes" to the property of the riparian owner whose land abuts it thus increases the size of the riparian owner's estate.

In Alberta, an owner of property who believes that common law accretion has occurred may apply to the Registrar of Land Titles under section 89 of the *Land Titles Act* to add the accreted parcel to registered title. Officially adding the land to title is critical under the Torrens system as manifested in the *Land Titles Act.* Subsection 62(1) of the Act states that the a certificate of title is conclusive proof that the person named on the certificate is entitled to hold the land described on it, subject to certain exceptions and reservations set out in the *Act*. A purchaser of land may rely on the certificate as the setting out precisely what a landowner owns. An astute purchaser would not rely on riparian landowner's claims that he or she actually owns more land than stated on title through common law accretion and would require that the alleged accreted land officially be added onto title under the *Land Titles Act.* It is highly arguable that until accreted land is

officially added the land cannot be recognized as being owned by the riparian owner under the *Land Titles Act*, even if common law accretion has occurred. One of the ways in which the *Lack v. Alberta* is illuminating is its setting out how a gradual, imperceptible naturally caused exposure of Crown owned bed of a lake to a parcel of land may not be an accretion of land to that parcel under the *Land Titles Act* that qualifies for a title amendment.

The *Lack v. Alberta* proceedings arose from an application for judicial review of a decision of the Riparian Land Management & Water Boundaries Unit, Land Management Branch, Lands Division of Alberta Sustainable Resource Development ("SRD") that it issued in August of 2008 (the "Decision"). SRD made its Decision under section 89 of the *Land Titles Act* which reads:

> 89(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.
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> (2) Where a parcel of land
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> (a) had adjoined land owned by the Crown in right of Alberta, and
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> (b) had a natural boundary that no longer exists,
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> 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.
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> (3) An application under subsection (1) or (2) shall be accompanied
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> (a) in the case where the natural boundary still exists, with a plan of survey or other evidence satisfactory to the Registrar showing the location of the natural boundary;
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> (b) in the case where the natural boundary no longer exists, with evidence satisfactory to the Registrar of the non-existence of the natural boundary;
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> (c) with the consent of the Minister charged with the administration of the adjoining land or a person authorized by the Minister, where the Crown is not the applicant; and
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> (d) with the consent of the registered owners of parcels that may be adversely affected by the amendment of the description.

The Applicants owned 15 lots on the south side of Gull Lake, in the vicinity of Red Deer, Alberta. As a group, the Applicants retained a lawyer to make an application under section 89 of the *Land Titles Act* to claim accreted land and to amend their titles to reflect the accretion. Under clause 89(3) (c) the Minister of SRD's consent was needed before the Registrar could amend the title to reflect any accretion. In its Decision the SRD refused to give its consent in part because the Applicants' proposed plan of survey created in the application process purported to distribute accreted land beyond the Alberta Township Survey System (ATS) boundary of one quarter section (NE 25 40-1-W5M (the "NE Quarter")) into another quarter section (SE 36-40-1-W5M (the "SE Quarter")). The SE Quarter was not owned by any of the Applicants. It was owned by the Griffins, who held title to the South half (para 11). An appendix to the case includes a helpful map of the layout of parcels, the allegedly accreted land, the location of Gull Lake, and the subdivision and survey lines.

Also by way of background, as noted in my earlier blog *Andriet v. Strathcona*, in 1871, the Dominion of Canada developed a survey grid for what were then the North-West Territories. About 800,000 square miles of prairie was divided into 36-square-mile townships, each of which was divided into 36 one-square-mile sections, each of which was further divided into the familiar four 160-acre quarter-sections. These survey lines and grids are collectively referred to as the Alberta Township Survey System (ATS). The ATS continues to form the basis for land title descriptions in the province. Besides ATS lines or boundaries a title may reflect what the cases call "non-ATS" lines or boundaries. These are (usually) surveyed lines or boundaries such as lot boundaries or subdivision plan lines or boundaries.

The tie between the ATS and accretion concerns the question whether a landowner may add accreted land to a title where the accreted land extends beyond an ATS boundary on which the title is based? In earlier cases — *Pitt v. Red Deer (City)*, 1998 ABQB 724, affirmed 2000 ABCA 281 and *Johnson v. Alberta*, 2001 ABQB 642, affirmed 2005 ABCA 10 — the Court of Appeal held that an owner's entitlement to accreted land was limited by the legal description in the owner's title. The legal descriptions in the cases that the courts focussed on were ATS lines or boundaries. To illustrate the principle from these cases, suppose a title to land reflected ownership of all of the land in the SW 21-31-2 W4th not covered by the waters of Maddie Lake. The ATS lines or boundaries in the description of title are the survey lines at the edges of the SW 21-31-2 W4 quarter section. If Maddie Lake recedes through common law accretion beyond the SW quarter, into the NW quarter, the title holder cannot have title amended to add on land beyond the boundary of the SW quarter.

The Applicants in *Lack v. Alberta* agreed that their entitlement to accreted land would be limited by ATS lines or boundaries referenced in certificates of title, but they argued that the legal descriptions of their lots contained non-ATS lines and that these non-ATS lines did not describe boundaries on all sides. They argued that the ATS line or boundary limitation did not apply to them and they could accrete beyond the NE Quarter boundary into the SE Quarter, even though title to the SE Quarter was held by another party – the Griffins. The Applicants even obtained the consent of the Griffins to their application under the *Land Titles Act*.

The Respondent SRD did not buy the Applicants' argument. The SRD noted that the title description to the NE Quarter referenced subdivision Plan 1970 EO registered in 1930. The Respondents conducted a historical chain of title search which revealed that the subdivision Plan stated, in effect, that the lots were part of the NE Quarter. Based on their digging farther back, the SRD noted that the 1896 original Crown grant to the NE Quarter stated "All that portion of the Northeast quarter of Section Twenty -five (25) ... which are not covered by any of the waters of Gull Lake, as shown upon a map or plan of Survey ... " . The Respondent argues that the land lots described as Plan 1970 EO referenced ATS boundaries (para 54). Hence, SRD argued, by the principle that entitlement to accreted land cannot extend beyond the ATS line or boundary in (or referenced by) the title description the Applicants' accretion could not extend beyond the NE Quarter. The only way the Applicants could acquire an interest in the SE Quarter would be through the legal acquisition of the land such as through a purchase or gift from the owner. The Applicants obtaining the consent of the owner of the SE Quarter did not amount to an acquisition of land. As well, the SRD contended that as a result of the recession of the waters into the SE Quarter, the Applicants ceased to be riparian owners, so they had no accretion rights in any event.

The Court of Appeal agreed with the Respondents on all points, hastening to add, based on earlier decisions including *Andriet v. Strathcona,* that both ATS lines/boundaries and non-ATS lines/boundaries may limit entitlement to accretion (para 60). The Court found the non-ATS lines or boundaries were helpful in establishing the legal limits of accretion (para 60). The Court agreed that the Applicants' potential for accretion ended at the NE Quarter, and since the lake receded beyond the NE Quarter into the SE Quarter, the Applicants lost their riparian rights.

The Court speculated regarding legal entitlement if the waters of Gull Lake were to rise again beyond the northern ATS line of the NE Quarter. The Court stated that in such case the Applicants and the Respondents would be subject to the principles laid down or reflected in this decision. The owners of the SE Quarter would cease to be a riparian owner and would be bound by the original land grant to the south half of section 36 "not covered by the waters of Gull Lake" (paras 57 and 63). The Applicants would once again become riparian owners and then presumably could claim entitlement to any accreted lands up to the bank in the NE Quarter.

The Court thus clarified that the title description itself does not need to specify ATS lines or boundaries. It is sufficient that the title documents which a title description references sets out ATS boundaries for the parcel in question. Accordingly, both ATS and non-ATS boundaries or lines are relevant to establishing the limits of potential riparian land ownership through accretion in Alberta. The case also established that there was no common law accretion to the Applicants on the facts. This sheds light on how section 89 of the *Land Titles Act* operates and on its impact on the common law. It was not the case that land accreted beyond the SW quarter *at common law* to the Applicants but the accretion could not be added to title because of the workings of the Torrens system and the *Land Titles Act.* The Court made it clear that the Applicants lost their riparian rights. The Applicants simply accreted no land at common law or under the *Land Titles Act.* Thus the case demonstrates how in Alberta an evolving, common law of accretion is emerging based on a modification of classic common law accretion principles merged with and limited by the Torrens system as manifested in the *Land Titles Act* and rights obtained under the Act.

The Court also clarified the Minister's scope of discretion in either giving or refraining to give consent to an application under section 89 of the *Land Titles Act,* and set out the standards of review for the various Applicants' challenges. Although these are important aspects of the case, they are not pursued in this short note.

Also of interest, the Court quickly dismissed the view that this was a situation to which the *Expropriation Act*, RSA 2000, c E-13 applied (paras 64-66). It stated that the Crown was not seeking to expropriate any accreted land. The Crown was not taking land from an owner. By contrast, the case established ownership of accreted land, and by the principles set out or reflected in the case, ownership did not lie with the Applicants.