



ALBERTA
LAW REFORM
INSTITUTE



ADVERSE POSSESSION AND LASTING IMPROVEMENTS TO WRONG LAND



REPORT FOR DISCUSSION

33

JULY 2019





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Deadline for comments on the issues raised in this document is 1 October 2019.

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This Report for Discussion by the Alberta Law Reform Institute (ALRI) reviews the law of adverse possession as well as claims regarding lasting improvements made to another's land in error under section 69 of the *Law of Property Act*.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these proposals and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes final recommendations.

You can reach us with your comments or with questions about this document on our website, by fax, mail or e-mail to:

Alberta Law Reform Institute
402 Law Centre
University of Alberta
Edmonton, AB T6G 2H5

Phone: (780) 492-5291
E-mail: lawreform@ualberta.ca
Website: www.alri.ualberta.ca

Law reform is a public process. **ALRI assumes that comments on this Report for Discussion are not confidential.** ALRI may quote from or refer to your comments in whole or in part and may attribute them to you, although we usually discuss comments generally and without attribution. If you would like your comments to be treated confidentially, you may request confidentiality in your response or you may submit comments anonymously.

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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The preferred method of contact for the Alberta Law Reform Institute is email at:

lawreform@ualberta.ca

402 Law Centre
 University of Alberta
 Edmonton AB T6G 2H5

Phone: (780) 492-5291
 Twitter: @ablawreform

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We are also grateful to the members of the Canadian Bar Association Real Property Law Sections in Calgary and Edmonton for sharing their views on our preliminary recommendations.

While Justice James Eamon was a member of the ALRI Board until February 2019, he did not participate in the discussions on this project.

Summary

What is ALRI recommending?

ALRI is recommending that the law of adverse possession be abolished in Alberta. This change would prevent new claims from being brought in the future, but would not affect claims that have been resolved or filed with the court before the change comes into effect.

This change would mean that a registered owner of land could recover possession at any time and would not have to act within the 10-year limitation period that currently applies.

If adverse possession is abolished, claims regarding lasting improvements to wrong land under section 69 of the *Law of Property Act* would have a more prominent role in resolving disputes concerning possession of land. To facilitate equitable resolution of disputes, ALRI recommends that an assign of the lasting improvement should not have to prove whether the person who made the improvement believed it was their land. This change would make section 69 consistent with how courts have applied it. ALRI also recommends that section 69 claims can be brought at any time.

Common terms

Adverse possession – Adverse possession allows a person who has occupied another’s land for at least 10 years to potentially claim ownership of that land. The occupation must be exclusive, open, notorious and continuous. Adverse possession is commonly, but mistakenly, referred to as squatter’s rights.

Lasting improvement – A lasting improvement is something that is a permanent addition to the land or not easily removable. For example, a house that encroaches on another’s land will usually be a lasting improvement. Where a lasting improvement was made on another’s land in the belief it was the improver’s own land, section 69 of the *Law of Property Act* allows the court to determine an appropriate remedy.

Why are these changes being proposed?

There have been several recent attempts in the Legislature to abolish adverse possession by private members’ bills. While adverse possession is not a common claim in Alberta, it is often perceived as being inconsistent with the land titles system of ownership. While adverse possession continues to serve a valid purpose in Alberta, in many instances that purpose is served by section 69 of the *Law of Property Act*. Section 69 has a further advantage in that it does not allow a deliberate trespasser to benefit from their own wrong, as is sometimes the case with adverse possession.

How can I support these proposed changes?

We welcome your comments in support of these changes and your suggestions for improvement. You can contact us using the methods noted at the end of this summary. There is also an online survey which you can access at http://bit.ly/AP_Alberta.

How can I oppose these changes?

In a consultation phase we welcome all views to help improve the laws of Alberta. You may send your comments against these changes or suggestions for improvement to us using the methods noted at the end of this summary. There is also an online survey which you can access at http://bit.ly/AP_Alberta.

What happens next?

ALRI will consider all the comments we receive. After reviewing the comments, we will make any appropriate changes to our recommendations and publish a final report. If you would like to be notified about the final report and our other publications, you may join our mailing list at:

<https://www.alri.ualberta.ca/index.php/mailling-list>

Contact us:

lawreform@ualberta.ca
402 Law Centre
University of Alberta
Edmonton, AB T6G 2H5

Issues and Recommendations

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RECOMMENDATION

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Table of Abbreviations

LEGISLATION

<i>Limitations Act</i>	<i>Limitations Act</i> , RSA 2000, c L-12.
<i>Law of Property Act</i>	<i>Law of Property Act</i> , RSA 2000, c L-7.
<i>Land Titles Act</i>	<i>Land Titles Act</i> , RSA 2000, c L-4.
<i>Municipal Government Act</i>	<i>Municipal Government Act</i> , RSA 2000, c M-26.

LAW REFORM PUBLICATIONS

2003 Report	Alberta Law Reform Institute, <i>Limitations Act: Adverse Possession and Lasting Improvements</i> , Final Report 89 (2003), online: https://www.alri.ualberta.ca/docs/fr089.pdf
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CASES

<i>Moore</i>	<i>Moore v McIndoe</i> , 2018 ABQB 235
<i>Power</i>	<i>Power v Goodram</i> , 2012 ABQB 50
<i>Reeder</i>	<i>Reeder v Woodward</i> , 2016 ABCA 91
<i>Lutz</i>	<i>Lutz v Kawa</i> (1980), 112 DLR (3d) 271 (Alta CA)
<i>Deguire</i>	<i>Deguire v Bennett</i> , 2013 ABQB 488
<i>Bank of Montreal</i>	<i>Bank of Montreal v 1323606 Alberta Ltd</i> , 2013 ABQB 596
<i>Bennett</i>	<i>Bennett v Butz</i> , 2003 ABQB 60
<i>Boyczuk</i>	<i>Boyczuk v Perry</i> , [1948] 2 DLR 406 (Alta SCAD)
<i>Koziey</i>	<i>Koziey Estate (Re)</i> , 2019 ABCA 43
<i>Canadian Wellhead</i>	<i>1215565 Alberta Ltd v Canadian Wellhead Isolation Corp</i> , 2012 ABQB 145
<i>Goertz</i>	<i>Goertz v Oliver</i> , 2018 ABQB 363

CHAPTER 1

Introduction

A. Adverse Possession in Alberta

[1] Adverse possession has a long history in the common law of England, Canada, and Alberta. It originated as a common law doctrine used to determine a person's rights to land. In today's Alberta, it involves two people: the person in actual possession of the disputed property (the occupier) and the registered owner of the disputed property (the registered owner).

[2] The essential common law elements of adverse possession are:

- the registered owner must be out of possession of the disputed land,
- the occupier must be in use and occupation of the disputed land, and
- the occupier's use and occupation must be exclusive, continuous, open or visible and notorious for the requisite time period.¹

[3] Despite originating as a common law doctrine, "adverse possession is primarily a statutory creature in Alberta today."² Adverse possession rests at the intersection of limitations law and land titles law. While there are several kinds of claims that relate to the law of adverse possession, most claims fall within three broad categories:

1. **Claims to recover possession of land:** Under the *Limitations Act*, the registered owner must bring a claim to recover possession of land within 10 years from the time that they are dispossessed, or within 10 years from the time the registered owner acquired the property as a *bona fide* purchaser for value – whichever is latest. If the registered owner fails to bring the claim within the 10-year limitation period, then the occupier may be entitled to retain possession of the disputed land.

¹ *Rinke v Sara*, 2008 ABQB 756 at para 19. See also *Moore v McIndoe*, 2018 ABQB 235 at para 116 [*Moore*]. The leading Alberta case on adverse possession is *Lutz v Kawa* (1980), 112 DLR (3d) 271 (AltaCA) at 279 [*Lutz*], discussed in Chapter 2. In Alberta, the requisite period of time is 10 years based on the *Limitations Act*, RSA 2000, c L-12 [*Limitations Act*].

² *Verhulst Estate v Denesik*, 2016 ABQB 668 at para 43.

2. **Claims to quiet title:** An occupier who is not the registered owner of land, but who possesses that land for more than 10 years, may be able to bring a claim against the registered owner to quiet title. The occupier must show actual possession that is exclusive, continuous, open, and notorious.³ A successful claim means that the occupier would be entitled to “quiet title” by obtaining a new title to the disputed property.
3. **Claims regarding lasting improvements:** An occupier who has made a lasting improvement on land based on the mistaken belief that they owned the land can bring a claim for compensation or other related remedies.⁴ Such claims often arise where the registered owner is still within time to recover possession, but to allow the registered owner to do so may cause some injustice to an occupier who has spent effort or resources to improve the disputed land. In these cases, allowing the occupier to retain the land – while compensating the register owner – may be required to remedy the injustice.

[4] It is important to note that adverse possession is only available against privately owned land. Public lands owned by the Crown are not subject to any adverse possession claims.⁵ Municipal lands⁶ and irrigation districts⁷ are also exempt from adverse possession claims.

³ *Nelson (City) v Mowatt*, 2017 SCC 8 at para 18. See also Alberta Law Reform Institute, *Limitations Act: Adverse Possession and Lasting Improvements*, Final Report 89 (2003), online: <<https://www.alri.ualberta.ca/docs/fr089.pdf>> at 27 [2003 Report].

⁴ *Law of Property Act*, RSA 2000, c L-7, s 69 [*Law of Property Act*].

⁵ According to section 4 of the *Public Lands Act*, RSA 2000, c P-4, “No person may acquire by prescription an estate or interest in public land or, as against the Crown, in any other land.” Similarly, section 2(4)(a) of the *Limitations Act*, note 1, states that “This Act does not apply where a claimant seeks... a remedial order based on adverse possession of real property owned by the Crown.”

⁶ *Municipal Government Act*, RSA 2000, c M-26, s 609 [*Municipal Government Act*]: “No person can acquire an estate or interest in land owned by a municipality by adverse or unauthorized possession, occupation, enjoyment or use of the land.”

⁷ *Irrigation Districts Act*, RSA 2000, c I-11, s 182: “No person may acquire an estate or interest in land owned by a district by adverse or unauthorized possession, occupation, enjoyment or use of the land.”

B. Basis for the Current Project

1. ALRI'S PREVIOUS WORK ON ADVERSE POSSESSION

a. Before 2003

[5] ALRI has considered adverse possession in some of its previous work on limitations legislation. In December 1989, ALRI published Report No 55 on *Limitations*.⁸ In the earlier stages of that project, ALRI considered eliminating ownership acquired through adverse possession but ultimately did not include such a recommendation in the Report:⁹

In the Report for Discussion we recommended that claims, whether legal or equitable, for the possession of property, whether real or personal, be excluded from coverage of the new Alberta Act, for we wished to eliminate the acquisition of ownership through adverse possession. We continue to be of the view that the substantive law governing adverse possession is in need of reform. However, we now think that the reform should be addressed in the context of another project, and have withdrawn the recommendation for an exception in the context of this report.

[6] ALRI's review of limitations legislation resulted in the passage of the current *Limitations Act* in 1996.¹⁰ ALRI's recommendation that claims to recover possession of real property ought to be subject only to the ultimate limitation period was also adopted.¹¹

[7] When the Legislative Assembly of Alberta passed the new *Limitations Act*, adverse possession was inadvertently and unintentionally abolished.¹² The new Act appeared to postpone the running of the limitation period for claims to recover possession of property until the occupier went out of possession. This

⁸ Alberta Law Reform Institute, *Limitations*, Report No 55 (1989).

⁹ Alberta Law Reform Institute, *Limitations*, Report No 55 (1989) at 39. See also Institute of Law Research and Reform, *Limitations*, Report for Discussion No 4 (1986).

¹⁰ See *Limitations Act*, SA 1996, c L-15.1, which came into force in 1999.

¹¹ See *Limitations Act*, note 1, s 3(4).

¹² The inadvertent abolition of adverse possession was discussed in the 2003 Report, which noted that the *Limitations Act* had the unintended consequence of postponing the running of the limitation period for claims to recover possession of real property until after the occupier leaves the land. As stated at page 19 of the 2003 Report:

Moreover, the outcome is the same as saying that claims to recover possession are not subject to a limitation period at all, contrary [to] the stated intention that the *Limitations Act* intended no change in the law.

See also 2003 Report, note 3 at 17-20.

effectively meant that the limitation period was not triggered until the cause of action ended.

b. The 2003 Report

[8] In May 2003, ALRI published Final Report No 89 entitled *Limitations Act: Adverse Possession and Lasting Improvements*.¹³ The 2003 Report looked at the role of adverse possession in Alberta, and the arguments for and against retaining adverse possession law.

[9] Ultimately, ALRI recommended that Alberta retain adverse possession within its land titles system. The 2003 Report noted the importance of recognizing that adverse possession does not operate as an exception to indefeasibility as it has sometimes been labelled.¹⁴ Further, it identified three main reasons in support of restoring a limitation period on claims to recover possession of real property:

- Limitation periods apply to nearly every other type of claim, with many claims limited to two years.
- No change in the law of adverse possession was intended when the new *Limitations Act* came into force.
- Neither the Legislature nor the courts have taken steps towards an active change.

[10] In considering the question of whether claims to recover possession ought to be subject to limitation periods at all, the 2003 Report raised the following concerns:

- Exempting such claims from any limitation period ignores limitations principles.
- The circumstances that require the owner to bring a claim to recover possession would ordinarily attract the two-year discovery rule.
- While the *Land Titles Act* guarantees ownership of the land described, it does not guarantee the description itself.
- Allowing someone to step into the place of a registered owner who cannot be located and has left no traceable heirs or assigns

¹³ 2003 Report, note 3.

¹⁴ In contrast, claims for lasting improvements under section 69 of the *Law of Property Act* are exceptions to indefeasibility as such claims survive an intervening transfer to a *bona fide* purchaser for value.

serves the objectives of ensuring transferability and protecting future ownership.

- Resolving disputes on the sole basis of the register, while efficient, is an arbitrary approach that does not assess the relative merits of competing claims.

[11] The 2003 Report also set out several recommendations regarding the *Law of Property Act* and lasting improvements to land made based on mistaken belief of ownership, including:

- Claims to recover possession of land should be subject to a ten-year limitation period that runs from the time the registered owner is dispossessed of the disputed land.
- Claims regarding lasting improvements brought under s 69 of the *Law of Property Act* should be subject to a ten-year limitation period that runs from the time the improvement was made.

[12] The government accepted most of the recommendations in the 2003 Report and made corresponding amendments to the *Limitations Act* in 2007.

2. EVENTS IN THE LEGISLATURE

[13] As noted in the 2003 Report, neither the courts nor the Legislature had taken active steps towards abolishing adverse possession. Since the 2007 amendments, however, there have been several initiatives in the Legislature to abolish adverse possession.

[14] In 2011, Ken Allred, the MLA for St Albert, introduced private member's Motion 507 for debate in the Legislature, which stated the following:¹⁵

Be it resolved that the Legislative Assembly urge the government to introduce legislation abolishing the common-law doctrine of adverse possession in Alberta and all statutory references to adverse possession in Alberta legislation.

[15] While Motion 507 was passed, it does not appear that the government took any further steps to abolish adverse possession.

[16] In 2012, Mr Allred introduced Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*.¹⁶ The 2012 Bill proposed amendments to the *Land Titles Act* and the *Limitations Act*, which would result in the abolition of

¹⁵ *Alberta Hansard*, 27-4, Issue 41 (28 November 2011) at 1404-09 (Ken Allred).

¹⁶ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*, 5th Sess, 27th Leg, Alberta, 2012 (first reading 7 March 2012) [2012 Bill].

adverse possession in Alberta. While the 2012 Bill passed second reading on March 12, 2012, it died on the order paper when a provincial election was called for April.

[17] In 2016, the Standing Committee on Resource Stewardship considered the issue of whether adverse possession should be abolished in Alberta. The Standing Committee's discussion was triggered by the 2014 Annual Report of the Property Rights Advocate Office.¹⁷ Mr N. Lee Cutforth, QC, the former Property Rights Advocate, recommended that the law of adverse possession be abolished.¹⁸ The acting Property Rights Advocate Ms Karen Johnson advised the Standing Committee that the Office had been contacted six times regarding adverse possession since 2012, and that between 1990 and 2011, "there were 23 cases related to adverse possession, five of which were successful."¹⁹ The Standing Committee decided to refer the recommendation to the Ministry of Justice and Solicitor General for review.²⁰

[18] The Standing Committee on Resource Stewardship again considered the issue of adverse possession in 2017, during its review of the 2015 Annual Report of the Alberta Property Rights Advocate Office. This time, the Standing Committee recommended, "that the government introduce legislation abolishing the common-law doctrine of adverse possession in Alberta and all statutory references supporting adverse possession in Alberta legislation."²¹

[19] Following the Standing Committee's recommendation, Pat Stier, the MLA for Livingstone-Macleod, introduced Bill 204, *Protection of Property Rights Statutes Amendment Act, 2017*.²² Although wider in scope than the 2012 Bill, the 2017 Bill

¹⁷ Alberta Property Rights Advocate Office, *2014 Annual Report*, (22 June 2015) online: <<https://open.alberta.ca/dataset/1fa95e77-3a58-44aa-87b7-04c561dfa099/resource/3165ca0a-0813-448e-9582-c020116f0075/download/annualreport2014.pdf>>.

¹⁸ See Recommendation 2014.03, Alberta Property Rights Advocate Office, *2014 Annual Report*, (22 June 2015) at 9-10, online: <<https://open.alberta.ca/dataset/1fa95e77-3a58-44aa-87b7-04c561dfa099/resource/3165ca0a-0813-448e-9582-c020116f0075/download/annualreport2014.pdf>>.

¹⁹ Alberta, Legislative Assembly, Standing Committee on Resource Stewardship, *Final Report: Review of the Alberta Property Rights Advocate Office 2014 Annual Report* (March 2016) (Chair: Nicole Goehring) at 2.

²⁰ Alberta, Legislative Assembly, Standing Committee on Resource Stewardship, *Final Report: Review of the Alberta Property Rights Advocate Office 2014 Annual Report* (March 2016) (Chair: Nicole Goehring) at 4. A minority report was appended to the Standing Committee's Final Report which criticized the majority's recommendation to refer the issue of abolishing adverse possession to the Minister of Justice instead of recommending that the Legislature act to reform the legislation: see 5-6.

²¹ Alberta, Legislative Assembly, Standing Committee on Resource Stewardship, *Final Report: Review of the Alberta Property Rights Advocate Office 2015 Annual Report* (March 2017) (Chair: Rod Loyola) at 1, 3.

²² Bill 204, *Protection of Property Rights Statutes Amendment Act, 2017*, 3rd Sess, 29th Leg, Alberta, 2017 (first reading 22 March 2017) [2017 Bill].

contained identical provisions to amend the *Land Titles Act* and the *Limitations Act* to abolish adverse possession.²³ The 2017 Bill did not proceed past second reading based on the Assembly's view that the bill did "not strike the right balance between individual property owner rights, industry's need for certainty and the public's need to protect Alberta's water and public lands."²⁴

[20] In October 2017, ALRI received a request from the Deputy Minister of Alberta Justice to review this area of law, including how best to accomplish the abolition of adverse possession. This request was considered by ALRI's Board of Directors, which agreed to move the project forward outside of ALRI's customary project selection process.

[21] In 2018, Richard Gotfried, the MLA for Calgary-Fish Creek, introduced a new version of Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2018*.²⁵ The 2018 Bill was identical to the 2012 Bill with one addition; it specified a "coming into force" date of January 1, 2019.²⁶ Meeting the same fate as the 2017 Bill but for different reasons, the 2018 Bill did not proceed past second reading to allow time for ALRI to complete its review of adverse possession in Alberta.²⁷

C. The Current Project

[22] The first issue that this Report addresses is whether the law of adverse possession is still necessary and appropriate in Alberta. The Project examines the problems adverse possession is intended to fix and considers whether the law still works in modern times, particularly where privately owned land falls under a land registration system.

²³ The 2017 Bill also contained proposed amendments to the *Alberta Land Stewardship Act*, SA 2009, c A-26.8, and the *Responsible Energy Development Act*, SA 2012, c R-17.3. These proposed amendments dealt with notice, compensation and the right to a fair hearing when an individual's property rights are affected by a regional plan.

²⁴ See *Alberta, Legislative Assembly, Hansard*, 29th Leg, 3rd Sess, No 33 (15 May 2017) at 1048 (Jessica Littlewood).

²⁵ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2018*, 4th Sess, 29th Leg, Alberta, 2018 (first reading 5 April 2018) [2018 Bill].

²⁶ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2018*, 4th Sess, 29th Leg, Alberta, 2018, cl 3 (first reading 5 April 2018).

²⁷ See *Alberta, Legislative Assembly, Hansard*, 29th Leg, 4th Sess, No 29 (14 May 2018) at 1031-1037. The amendment stated that "Bill 204, Land Statutes (Abolition of Adverse Possession) Amendment Act, 2018, be not now read a second time because a review of adverse possession is currently underway by the Alberta Law Reform Institute, and any recommendations and advice coming from that review must be taken into account prior to the government developing legislation and policies to give effect to the abolition of adverse possession."

[23] Work on this Project includes reviewing the law of adverse possession and its use in Alberta, with emphasis on cases decided since 2003, to determine whether adverse possession is still a necessary and useful dispute resolution mechanism.

[24] This project also considers claims regarding lasting improvements to land under section 69 of the *Law of Property Act*. If adverse possession were to be abolished, section 69 claims would have a more prominent role in resolving disputes involving possession of land. As such, it is appropriate to consider whether section 69 is an appropriate dispute resolution mechanism as it currently stands or whether it would benefit from any amendments.

[25] This Project is not intended to tackle other property-related issues that arise in Alberta outside the scope of adverse possession and claims regarding lasting improvements.

[26] Efforts have been made to avoid duplicating ALRI's previous work on adverse possession contained in the 2003 Report. While some background information about the history of adverse possession in Alberta has been reproduced in this Report for Discussion to provide the necessary context, the 2003 Report includes more in-depth information on the historical reasons for adverse possession, and the common misconceptions surrounding adverse possession. It is important to note that this Project may ultimately result in different Recommendations than the 2003 Report based on updated research and policy considerations, as well as consultation with interested stakeholders.

D. Aboriginal Title

[27] In determining the scope of this Project, the question of whether the doctrine of adverse possession has an effect on Aboriginal title claims was briefly considered.²⁸ A review of Alberta case law suggests that Aboriginal title claims in this province rarely intersect with claims for adverse possession. As a result, the potential effect of this Report's recommendations on Aboriginal title claims was not considered within the scope of the Project. Nothing in this Report is intended to abrogate or derogate any Aboriginal or treaty rights, or other Indigenous rights to land.

²⁸ In his discussion on the sufficiency of possession or occupation in the context of Aboriginal title claims, Bruce Ziff identifies the law of adverse possession as a potentially useful analogue for framing the appropriate standard: see Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada, 2018) at 226-7; see also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 38-41.

E. Natural Boundary Changes

[28] In Alberta, the boundaries between land and water are recorded in the descriptions on title, or are marked on surveys. Natural boundary changes – for example, a receding lake or migrating river – can affect a registered owner’s title to and interest in land. Section 89 of the *Land Titles Act* provides a mechanism for the Registrar to recognize such boundary changes on title.²⁹

[29] Natural boundary changes may create disputes between neighbouring landowners, or between a private landowner and the Crown, which need to be resolved. The law of accretion helps to determine who owns the land that is exposed when river or lake boundaries change slowly over time. In some circumstances, accretion can create overlapping claims between adjacent landowners.³⁰ There have been some cases in which the common law principles of accretion have come into direct conflict with the land registration system.

[30] There does not currently appear to be a clear framework for resolving certain types of disputes arising from natural boundary changes. Adverse possession has, however, played a complementary role to the law of accretion in some cases. Adverse possession may also offer a solution in cases of avulsion, where the boundary change occurs suddenly, but turns out to be permanent.

[31] While ALRI did consider natural boundary changes in the context of adverse possession, it became evident that accretion and avulsion issues fell outside the scope of this project. It is possible that the law of adverse possession may be a potentially useful doctrine in a small subset of disputes resulting from avulsion, or where accretion results in land that is detached and not accessible from the remaining land covered by the title. ALRI recommends that the legal issues arising from natural boundary changes, particularly in cases where there are overlapping claims, be considered in a separate project.³¹

²⁹ See *Land Titles Act*, RSA 2000, c L-4, s 89 [*Land Titles Act*]. See also Alberta, Land Titles Office, *Procedures Manual: Surveys – Natural Boundary Changes*, SUR-12 (Alberta: Land Titles Office, 2002), online: <www.servicealberta.ca/pdf/ltmanual/SUR-12.pdf>.

³⁰ See for example *Andriet v Strathcona (County) No 20*, 2008 ABCA 27, rev’g 2005 ABQB 848.

³¹ For an in-depth discussion on the law of accretion in the context of Alberta’s Torrens system of land registration, and calls for legislative reform, see Arlene Kwasniak, “Accretion, the Torrens System, and Law Reform” (2013) 24 J Envtl L & Prac 145.

F. Structure of this Report

[32] The historical background of adverse possession in Alberta as well as the basic elements of the claim are set out in Chapter 2 of this Report. The chapter also reviews the five successful cases of adverse possession decided by Alberta courts since 2003, and discusses the specific contexts within which those cases arise.

[33] The question of whether adverse possession should be abolished in Alberta is considered in Chapter 3. The recommendations in this Report are guided by the overarching principle of facilitating equitable dispute resolution. Abolishing adverse possession will exclude cases involving intentional trespass, temporary encroachment, and mere use. The five successful cases of adverse possession identified in Chapter 2 are re-considered through the lens of section 69 of the *Law of Property Act* to determine whether they would have led to a different result if adverse possession were abolished.

[34] The practicalities of abolishing adverse possession are discussed in Chapter 4. Eliminating claims to quiet title by amending section 74 of the *Land Titles Act* is only the first step. Ensuring that claims to recover possession of real property can be brought at any time is a key component to effectively abolishing adverse possession. This means that such claims ought to be excluded from the *Limitations Act*. Chapter 4 also raises transitional issues that ought to be considered to ensure that there is a clear period of time within which any outstanding claims to quiet title must be brought before adverse possession is abolished in Alberta.

[35] Claims regarding lasting improvements made on the wrong land are the focus of Chapter 5. The essential elements of claims made under section 69 of the *Law of Property Act* are discussed, as well as the broad range of remedies available under that section that allow courts to craft more balanced and equitable outcomes. This chapter also recommends that section 69 ought to be amended to clarify the type of knowledge an assign should have to bring a claim regarding lasting improvements. Lastly, planning law implications are considered.

[36] In Chapter 6, we turn to examining the question of whether claims regarding lasting improvements ought to be subject to a limitation period. In the absence of adverse possession, section 69 claims will take a central role in resolving disputes between neighbouring landowners. If a registered owner can bring a claim to recover possession of real property at any time, then an

occupier's claim regarding lasting improvements should also be excluded from the *Limitations Act*.

[37] A summary of the proposed reforms and recommendations can be found in Chapter 7, which concludes this Report.

CHAPTER 2

Adverse Possession

A. Purposes

1. HISTORICAL

[38] Adverse possession arose at a time when possession was of fundamental importance in determining ownership of land. At common law, title to land was based upon possession, or the right to enter upon the land and take possession. The result was that title to land became “essentially relative and hierarchical in nature”:³²

From the mere fact of possession, a title to the land or thing possessed accrues to the possessor, and this title, or right to continue undisturbed in the possession and fruits thereof, is protected by law against all persons except those who can establish a higher right. Accordingly, a squatter on lands has, by virtue of possession, an action in trespass against a stranger who cannot establish that they are acting pursuant to some superior right.

[39] In the 12th century, limitation periods began to emerge to reduce the time during which a person could assert a possessory right to land.³³ Priority would still go to the claimant with superior rights as determined by common law, but only as among those claimants who were within the limitation period. If the claimant’s evidence of possession fell outside of the prescribed limitation period, the claimant had no legal remedy to recover possession of the land.

[40] By 1540, claims to recover possession of land were subject to a 60-year limitation period.³⁴ In 1833, the *Real Property Limitation Act* reduced the limitation period to 20 years and introduced the principle of extinction.³⁵ In this way, both the right to recover possession of land and the remedy were extinguished by the 1833 Act.

³² Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed (Toronto: Thomson Reuters Canada, 2016) (looseleaf updated December 2016), vol 3, ch 28 at 17.

³³ For a comprehensive history of limitation periods since the 12th century, see Sandra Petersson, “Something for Nothing: The Law of Adverse Possession in Alberta” (1992) 30 *Alta L Rev* 1291 at 1296.

³⁴ *The Act of Limitation with Proviso* (Eng), 32 Hen VIII, c 2.

³⁵ *An Act for the Limitation of Actions and Suits related to Real Property and for simplifying the Remedies for trying the rights thereto*, 1833 (UK) 3 & 4 Will IV, c 27, ss 2, 34.

[41] The 1833 Act was received as law in Alberta when the Northwest Territories became part of Canada, so the first limitation period in Alberta for recovery of land was 20 years. This was the state of the law as received by Alberta in 1875, which formed the backdrop of the adoption of the Torrens land titles system in 1886.³⁶ In 1893, the limitation period was shortened to 12 years,³⁷ and in 1935, was shortened again to 10 years.³⁸

2. MODERN

[42] Adverse possession remained part of Alberta land law after the adoption of the Torrens land registry system. As noted above, the limitation period in Alberta for registered owners seeking to recover possession of real property was reduced from 20 years in 1875 to 10 years in 1935, where it remains to the present day.

[43] The leading case on adverse possession in Alberta is the 1980 decision of the Court of Appeal in *Lutz*.³⁹ In this case, the fence between two neighbouring properties in Edmonton was not built on the surveyed property line, unbeknownst to the property owners who lived on either side of the fence. Once it was discovered that the fence was built on the wrong spot, the appellant Mrs Lutz sought to retain the small strip of land on her side of the fence through adverse possession. As the registered owner of the strip, the respondent Mrs Kawa counterclaimed to recover possession of the disputed land.

[44] The Court of Appeal reviewed the history of adverse possession in Alberta, noting that the law had developed differently here than in other provinces with Torrens land titles systems.⁴⁰ In confirming the availability of adverse possession in Alberta, the Court also held that adverse possession does not require the occupier to know that the disputed land does not belong to them. An occupier who mistakenly believes that they own the disputed land can still establish the essentials of adverse possession:⁴¹

³⁶ *Northwest Territories Real Property Act*, SC 1886, c 26, which was replaced by the *Land Titles Act*, SA 1906, c 24.

³⁷ See *An Ordinance Respecting the Limitation of Actions Relating to Real Property*, ONWT 1893, no 28, s 1, referencing *An Act for the further Limitation of Actions and Suites relating to Real Property*, 1874, 37 & 38 Vict, c 57, s 1.

³⁸ See *The Limitation of Actions Act*, 1935, SA 1935, c 8, s 17.

³⁹ See *Lutz*, note 1.

⁴⁰ In its historical review, the Court of Appeal specifically referenced British Columbia, Manitoba, Saskatchewan, and Ontario: see *Lutz*, note 1 at para 10.

⁴¹ *Lutz*, note 1 at para 28.

Indeed, in most cases, to show such a belief would be added support for the fact of his own possession. He excludes *all* others, including the person who unknown to him has title to the land. That his motive for the exclusion is his belief in his right to ownership does not change the fact that he is in possession himself while the true owner is out of possession. If this were not so, the intentional trespasser would be in a better position in the law of adverse possession than would be the claimant who held the land in innocent error. The law cannot have intended any such advantage for deliberate as compared to innocent trespass [emphasis in original].

[45] In *Lutz*, Mrs Kawa's counterclaim to recover the disputed land was brought within the 10-year limitation period, so the Court of Appeal dismissed Mrs Lutz's adverse possession claim and granted judgment in favour of Mrs Kawa. The principles articulated by the Court of Appeal remain good law in Alberta.

B. Elements of the Claim

[46] Adverse possession is a mechanism for resolving competing claims to land. Even with the existence of a definitive system for recording land ownership in Alberta, the land titles registry does not preclude the emergence of disputes. Despite its name, adverse possession does not require any hostility between the occupier and the registered owner.⁴² The required possession must be adverse in the sense that the occupation must be without consent of the registered owner.⁴³

[47] As noted earlier, the essential elements of adverse possession at common law are:

- the registered owner must be out of possession of the disputed property,
- the occupier must be in use and occupation of the disputed property, and
- the occupier's use and occupation must be exclusive, continuous, open or visible and notorious for the requisite time period.

⁴² Sandra Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992) 30 Alta L Rev 1291 at 1306.

⁴³ *Moore*, note 1 at para 119.

[48] Adverse possession is determined only by the fact of use and occupation by the occupier; the belief, ignorance, mistake or intention of the occupier is immaterial.⁴⁴ As such, the actual attributes of the possession and the occupier's intention to possess are relevant to establishing adverse possession, regardless of whether the occupier was actually aware that they were in possession of another person's land.⁴⁵ The occupier's possession of the land does not depend on the intention of the registered owner.⁴⁶

[49] Once an occupier has fulfilled these essential elements, they may gain a legal interest in the land over the registered owner.⁴⁷ To have their interest formally recognized, the occupier must then take positive steps to quiet title to the land under section 74 of the *Land Titles Act*:⁴⁸

74(1) Any person recovering against a registered owner of land a judgment declaring that the person recovering the judgment is entitled to the exclusive right to use the land or that the person recovering the judgment be quieted in the exclusive possession of the land, pursuant to the *Limitation of Actions Act*, RSA 1980 cL-15, or pursuant to an immunity from liability established under the *Limitations Act*, may file a certified copy of the judgment in the Land Titles Office.

(2) Subject to section 191⁴⁹, the Registrar shall

- (a) enter on the certificate of title a memorandum cancelling the certificate of title, in whole or in part, according to the terms of the judgment, and
- (b) issue a new certificate of title to the person recovering the judgment.

⁴⁴ *Rinke v Sara*, 2008 ABQB 756 at para 19.

⁴⁵ *Moore*, note 1 at para 117.

⁴⁶ *Moore*, note 1 at para 137. Justice Eamon confirmed that the doctrine of inconsistent use is not the law in Alberta, and that the true owner's intention only comes into play where both parties have mutually agreed to occupation under a licence "or the like".

⁴⁷ *Power v Goodram*, 2012 ABQB 50 at para 99 [*Power*].

⁴⁸ *Land Titles Act*, note 29.

⁴⁹ Section 191 sets out certain conditions that must be met before the Registrar can cancel a certificate of title based on a court order or judgment. Essentially, the Registrar must be assured that the court order or judgment is final; namely, that any appeals have been extinguished, resolved or abandoned. The *Limitation of Actions Act*, RSA 1980, c L-15, included an extinguishment provision which stated that a registered owner's title would be extinguished once the limitation period for recovering possession of land had expired. This provision was not included in the new *Limitations Act*. See the 2003 Report, note 3 at 15-16.

[50] In this way, section 74 of the *Land Titles Act* works in concert with the *Limitations Act*.⁵⁰

By virtue of section 3 of the *Limitations Act*, the owner of the land loses the right of recovery of their property after the ten year period has elapsed. Their title would then be extinguished and granted to the new possessor through section 74 of the *Land Titles Act*.

[51] Section 74 does not suggest that there is a limitation period within which the occupier must file their judgment with the Land Titles Office or within which title must be registered in the occupier's name.⁵¹ Until the occupier actually registers their interest on title, their possession of the property remains vulnerable to third-party purchasers:⁵²

Even if the limitation period has lapsed and the right to the recovery of land has been extinguished, if title is not quieted a *bona fide* purchaser may still gain the root of a valid title.

[52] In this way, adverse possession is compatible with the principle of indefeasibility of title. If the occupier fails to take steps to quiet title, the occupier's right to possess the disputed land can be interrupted by a *bona fide* purchaser for value. In such a case, the *bona fide* purchaser is entitled to rely on the certificate of title to determine ownership of the land in question, free of the occupier's unregistered interest.⁵³ The 10-year limitation period re-starts when ownership is transferred to the *bona fide* purchaser.

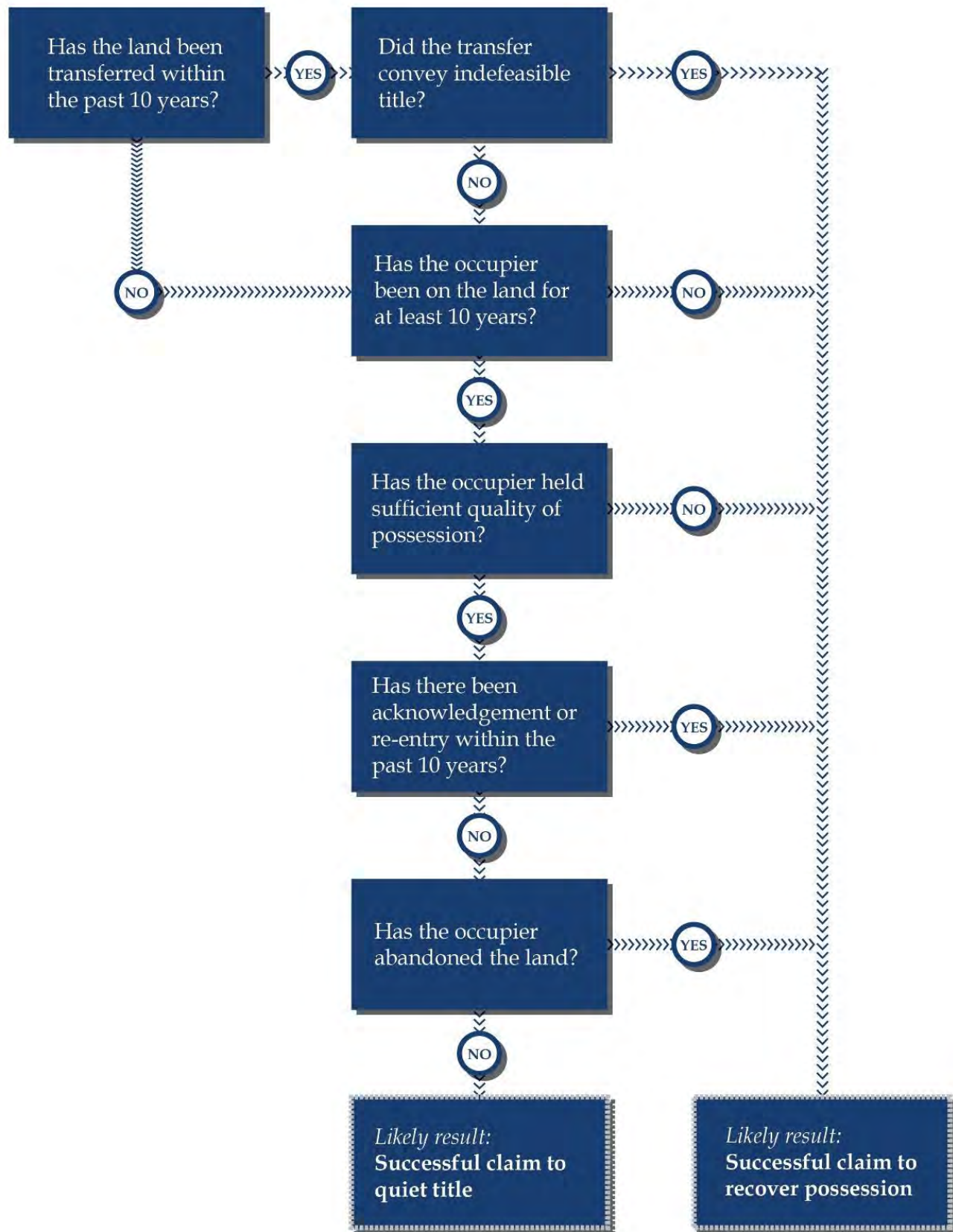
[53] ALRI reviewed the law of adverse possession in detail in the 2003 Report as well as the interaction among the common law elements, the *Land Titles Act*, and the *Limitations Act*. That discussion, which will not be repeated here, can be summarized in the following chart:

⁵⁰ *Verhulst Estate v Denesik*, 2016 ABQB 668 at para 17, Shelley J. The *Limitation of Actions Act*, RSA 1980, c L-15, included an extinguishment provision which stated that a registered owner's title would be extinguished once the limitation period for recovering possession of land had expired. This provision was not included in the new *Limitations Act*. See the 2003 Report, note 3 at 15-16.

⁵¹ The question of whether claims to quiet title ought to be subject to a limitation period was discussed in the 2003 Report. Setting aside the issue of whether such claims are declaratory or remedial in nature, the 2003 Report concluded that attaching limitation periods to claims to quiet title would produce absurd results. The 2003 Report also noted that the law motivates an occupier to act quickly to quiet title as their interest remains defeasible to third-parties until title is transferred to them. See 2003 Report, note 3 at 38-40.

⁵² *Power*, note 47 at para 101, citing *Lutz*, note 1. See also *Boyczuk v Perry*, [1948] AJ No 58, [1948] 2 DLR 406 (Alta CA) [*Boyczuk*]; *Nessman v Bonke* (1976), [1979] 1 WWR 210 (Alta SCTD).

⁵³ See *Land Titles Act*, note 29, s 170. The only exception to section 170 appears to be misdescription of the lands indicated on title, in which case a *bona fide* purchaser may be subject to ejection from the lands: see s 183(1)(e).



C. Adverse Possession Disputes

[54] Adverse possession disputes typically occur between landowners with neighbouring properties. In the 2003 Report, ALRI reviewed the adverse possession cases in Alberta up to 2003 and noted that whether the law favours the registered owner or the occupier often depends on the circumstances of the specific case. The 2003 Report suggested three circumstances where an occupier may be on land because of a reasonable belief of entitlement to the land:⁵⁴

1. The occupier's presence on the land is due to an **honest but mistaken belief in the boundary** (for example, a defining physical boundary – such as a fence or roadway – does not sit on the true property line).
2. There are **equitable circumstances** that support the occupier's presence on the land (for example, the occupier has some other claim on the land such as an unregistered agreement for sale or entitlement under an unprobated will).
3. There has been a **third-party error** prejudicial to the occupier (for example, a title error in a tax sale or a Registrar's correction).

[55] A review of the cases since 2003 confirms that most of the cases that discuss adverse possession fall into one of the three circumstances above.⁵⁵ However, not all of these circumstances equally result in successful claims of adverse possession. The first category – those cases where an occupier has an honest but mistaken belief in the boundary – are more often successful for the occupier than the cases reflected in the other categories.

D. Successful Claims of Adverse Possession Since 2003

[56] Since 2003, there have been five reported decisions involving successful claims for adverse possession in Alberta.⁵⁶ Four out of the five cases involve an

⁵⁴ 2003 Report, note 3 at 32-33.

⁵⁵ For examples of cases where the occupier held an honest but mistaken belief in the boundary see *Koziey Estate (Re)*, 2019 ABCA 43 [*Koziey*], aff'g 2017 ABQB 597; *Reeder v Woodward*, 2016 ABCA 91 [*Reeder*]; 1215565 *Alberta Ltd v Canadian Wellhead Isolation Corp*, 2012 ABQB 145 [*Canadian Wellhead*]. For examples of cases with equitable circumstances that support the occupier's claim on the land see *Woodward v Verbeek*, 2016 ABCA 262; *Quinton v Wynder*, 2017 ABQB 72; *Verhulst Estate v Denesik*, 2016 ABQB 668. For examples of cases with a third-party error prejudicial to the occupier, see *Deguire v Burnett*, 2013 ABQB 488 [*Deguire*]; *Power*, note 47.

⁵⁶ In comparison, the case law review revealed at least 10 unsuccessful adverse possession cases reported during the same timeframe. Some cases involve rural or agricultural land, while others involve urban or residential land. Many of the cases reviewed could be characterized as "fence in the wrong place" claims.

occupier who reasonably, but mistakenly, believes they are on or using land that belongs to them. Only one case involves an occupier who was well aware that the disputed land belonged to the registered owner. These decisions are described in detail below.

1. *BENNETT V BUTZ*

[57] The case of *Bennett v Butz* involved a mistaken belief in the ownership of agricultural land and land acquired through accretion.⁵⁷

[58] In 1964, the Butzs purchased a quarter section of land near Buffalo Lake, Alberta. In 1969, they purchased a second quarter section in the same area, plus a further acre of land on a nearby quarter section (the “Acre”). Over time, 16 acres of land had accreted to the Acre as Buffalo Lake receded. Believing that these 16 acres belonged to the Crown, the Butzs applied for haying permits in 1969 and 1970. The Crown denied the permits.

[59] In 1995, the Crown ordered a survey of the land along Buffalo Lake. The Crown advised the Butzs that they were entitled to own the 16 acres of land through accretion, and offered to purchase 12 acres of that land. The Butzs agreed and sold 12 acres to the Crown, and kept the other four accreted acres. It is these four acres, in addition to the original Acre, which formed the Disputed Land.

[60] The Bennetts owned property east of the quarter section upon which the Disputed Land was located (“the Quarter section”). In 1980, the Bennetts obtained a grazing lease from the Crown, which they believed entitled them to graze cattle on the entire Quarter section, including on the Disputed Land owned by the Butzs. The grazing lease was automatically renewed every year until 1998.

[61] The Butzs knew that the Bennetts were grazing cattle on the Quarter section. They did not know of the Bennetts’ grazing lease with the Crown. Neither the Butzs nor the Bennetts knew that the Butzs owned the accreted land. The Bennetts did not learn that the Disputed Land actually belong to the Butzs until 1999.

[62] The Bennetts applied to quiet title of the Disputed Land through adverse possession based on their occupation of the Disputed Land from 1979 to 1999. The Butzs, as the registered owners of the Disputed Land, counterclaimed and

⁵⁷ *Bennett v Butz*, 2003 ABQB 60. This case did not consider section 69 of the *Law of Property Act* [Bennett].

sought to have the caveat removed from their title. The Crown was not a party to the action.

[63] In granting judgment in favour of the Bennetts, Justice Foster of the Court of Queen's Bench considered the nature of their possession and occupation of the Disputed Land:⁵⁸

The kind of land, its nature and type, determines what is necessary to satisfy the requirements of possession and occupation.

[64] The Court found that the Bennetts consistently used and occupied the Disputed Land for approximately 20 years. The Disputed Land was integrated into the Bennetts' cattle operation and they did not differentiate the use of this land from their other property. Given the nature of the Disputed Land, it was not necessary for the Bennetts to construct fences, post signs or build structures to assert possession. The Bennetts exercised control over the Disputed Land and regulated its use and occupation. Although the Butzs occasionally entered the Disputed Land for recreational purposes or to recover livestock, the Court held that such re-entry did not interrupt the Bennetts' continuous and exclusive occupation.

[65] In the result, the Court held that the Bennetts satisfied both the statutory and common law grounds to quiet title through adverse possession. The Bennetts' mistaken belief about the ownership of the Disputed Land and their lack of intention to own the land was irrelevant, as adverse possession only looks to the fact of use and occupation.

[66] This case illustrates that land ownership is not always a simple matter to determine. For example, for more than 25 years both the Butzs and the Crown believed that the Crown owned the 16 accreted acres. The Butzs only learned of their ownership in 1995 after the Crown survey was completed. By that time, the Bennetts had already been grazing on the Disputed Land more than 15 years. Indeed, the Bennetts were not aware that the Butzs owned the Disputed Land until they received notice from the Crown in 1999. At that point, the Bennetts had been using the land for almost 20 years.

[67] This case further illustrates how lack of knowledge is a typical factor in many cases. In this case, no one knew who actually owned what land. The natural boundary changes caused by Buffalo Lake receding are a complicating but not unusual factor.

⁵⁸ Bennett, note 57 at para 18.

2. 1215565 ALBERTA LTD V CANADIAN WELLHEAD ISOLATION CORP

[68] The facts in *1215565 Alberta Ltd v Canadian Wellhead Isolation Corp* involve a boundary fence that was placed in the wrong place between two neighbouring commercial properties in an industrial subdivision.⁵⁹ The Plaintiff owned Lot 8, and the Defendant owned Lot 9. The Disputed Land was a 5m x 80m strip that ran the full length of Lot 9. The Plaintiff applied to quiet title to the Disputed Land through adverse possession.

[69] When the Defendant purchased Lot 9 in September 1998, the Disputed Land and Lot 8 were fenced in together. The only entrance to Lot 8, and the only access to the Disputed Land, was through a controlled pass gate. The Plaintiff, or its predecessor in title, controlled access to the Disputed Land.

[70] The Plaintiff obtained title to and took possession of Lot 8 and possession of the Disputed Land in April 2008.

[71] In July 2008, the Defendant learned that the fence did not mark the true boundary between the lots. The Defendant then took steps to address the situation, including offering to sell the Disputed Land to the Plaintiff, contacting the Plaintiff to demand the fence around the Disputed Land be removed, and entering on the Disputed Land to physically measure the land and to locate the survey markers.

[72] There was some evidence before the court that the previous owners of Lots 8 and 9 had reached an agreement to transfer the Disputed Land. A letter from the Red Deer Planning Commission, dated in 1994, proposed adjusting the boundary between Lot 8 and Lot 9. Although there was apparent agreement to subdivide the property by moving the lot line, a subdivision plan approved by the Planning Commission was never registered at the Land Titles Office. Further, there was no evidence that the previous owner of Lot 8 paid any consideration to the previous owner of Lot 9.

[73] The Court found that the Defendant did not bring an action to recover possession of the Disputed Land before the 10-year limitation period expired. One of the central issues in this case was whether the steps the Defendant took before the limitation period expired were enough to constitute re-entry within the meaning of section 3(6) of the *Limitations Act*.

⁵⁹ *Canadian Wellhead*, note 55. This case did not consider section 69 of the *Law of Property Act*.

[74] With respect to the Defendant's attempts at re-entry, the Court noted:⁶⁰

It is clear to me that applying the law as stated in *Lutz v Kawa* (*supra*), none of the acts of the Defendant can be said to have dispossessed the Plaintiff of the Disputed Land. The only physical entries (to find the survey markers) were made by entering through the gate controlled by the Plaintiff. In effect rather than dispossessing the Plaintiff of its occupation, the Defendant has entered onto the Disputed Land and the land clearly owned by the Plaintiff (Lot 8) by license of the Plaintiff. The entry cannot be said to be hostile as the Defendant did not even advise the Plaintiff of its entry.

[75] Although the Court found that the Defendant did intend to take steps to recover the Disputed Land once the true boundary was discovered, nothing was done before the limitation period expired that amounted to a re-entry under section 3(6) of the *Limitations Act*. In the result, the Court held that the Plaintiff (and the Plaintiff's predecessor) had established the elements of adverse possession and granted an order to quiet title of the Disputed Land pursuant to section 74 of the *Land Titles Act*.

[76] This case shows that simple physical re-entry by the registered owner onto Disputed Land may not be enough to stop the 10-year limitation period from running. To retake possession, the registered owner must show that they have effectively broken the occupier's exclusive or continuous possession of the lands in question. The Court expressly rejected the argument that the enactment of section 3(6) of the *Limitations Act* changed the common law test with respect to what constitutes re-entry to recover possession of real property.⁶¹

It is my view that to be effective any entry must be accompanied by an overt act or acts which objectively show the intention to recover the land then and there. Just as the possession of the [occupier] had to be open and notorious as against the [registered owner] and the world, the acts of the [registered owner], if it relies on entry to recover land, should be unequivocal.

3. REEDER V WOODWARD

[77] The Alberta Court of Appeal decision in *Reeder* involved a disputed 9.5 acre parcel of land along the boundary between two neighbouring quarter

⁶⁰ *Canadian Wellhead*, note 55 at para 28.

⁶¹ *Canadian Wellhead*, note 55 at paras 30, 34.

sections of farmland (the “Disputed Land”).⁶² The Woodwards owned the southeast (SE) quarter section since May 1999, while the north-east (NE) quarter section had been in the Reeders’ family for generations.

[78] The Disputed Land was created on the SE quarter section in 1972, when the County upgraded a highway a few feet south of the actual property line that separated the two quarter sections. The County moved the fence from the true property line to the boundary of the roadway. After the highway was upgraded, the Reeders began to use the Disputed Land on a regular basis to grow hay and pasture cattle. The previous owners of the NE parcel were aware that the Reeders used the Disputed Land, and such use was obvious to the Woodwards when they took title in 1999.

[79] The Reeders and the Woodwards were aware that there was some uncertainty about the rights to the Disputed Land, and they attempted to resolve the issues in a “neighbourly way”. However, in 2011, the Reeders filed a caveat on the land and the Woodwards responded by padlocking the gate and blocking access with a truck. The Reeders then commenced an action to enforce their caveat and the Woodwards counterclaimed to confirm their title to the Disputed Land. The trial judge found that the Reeders were entitled to keep the Disputed Land through adverse possession, as the Woodwards did not commence their claim to recover possession until after the 10-year limitation period had expired.

[80] The Court of Appeal dismissed the appeal.⁶³ The Court of Appeal noted that the Woodwards knew before they purchased the SE parcel that the Reeders were occupying the Disputed Land. The Reeders consistently asserted their right to occupy the Disputed Land regardless of the Woodwards’ objections. The exact source of the Reeders’ occupation was not determinative because the limitation period had expired. The Woodwards’ assertion of ownership, including padlocking the gate and blocking access, would only have been effective had they been made before May 2009. There was no express or implied license, and no acknowledgement in writing to change the character of the occupation from adverse to consensual. In the result, the Reeders were entitled to keep the Disputed Land.

[81] This case illustrates the impact of a third-party mistake. The Disputed Land was the result of the County mislocating the highway. A further result of

⁶² *Reeder*, note 55, aff’g in part unreported decision by Justice DK Miller, Docket Number 1106-00848 (QB). This case did not consider section 69 of the *Law of Property Act*.

⁶³ While the Court of Appeal dismissed the bulk of the appeal, it did set aside the damages award and varied the costs award.

this mistake was that the strip of the SE quarter section on the far side of the highway was likely less usable to the registered owner than it was to the occupier who owned the NE quarter adjoining the Disputed Land.

4. *MOORE V MCINDOE*

[82] Unlike the other cases discussed in this section, the case of *Moore* involved occupiers who deliberately possessed residential land they knew belonged to the registered owner with the express intention of using the land for their own purposes.⁶⁴

[83] The Moores purchased a lakefront property, Lot 10, in July 1989. The fence between Lots 9 and 10 was built on Lot 9, also a lakefront property, before the Moores purchased their land. The Moores exclusively occupied the strip of Lot 9 that was on their side of the fence (the Disputed Land). In 1990, they ordered a real property report that disclosed that the fence was on Lot 9. Nevertheless, they poured a concrete pad that encroached on the strip and continued maintaining and occupying the rest of the strip as if it was a part of their yard. In 2003, the Moores extended the fence towards the street with the knowledge that the extension was also on Lot 9. The distance between the property line and the fences ranged from approximately 0.22 meters at the street to 2.8 meters at the lake.

[84] The McIndoes purchased Lot 9 in October 2002. The McIndoes knew that the fence was on Lot 9 when they bought their property. When the fence was extended, they knew that the extension was on their land as well. They did not ask the Moores to leave the Disputed Land until 2014, when they needed to use the strip in their future landscaping plans. The McIndoes wanted to avoid confronting the Moores, who they believed to be difficult neighbours. They did not realize that their ability to enforce their rights would be affected by the passage of time.

[85] The Moores then brought a claim to quiet title to the Disputed Land based on section 74 of the *Land Titles Act*. The McIndoes did not dispute that the Moores had openly, continuously and exclusively occupied the Disputed Land for more than 10 years. Instead, the McIndoes argued that there was a revocable license to occupy that prevented the 10-year limitation period from running. Further, the McIndoes argued that the Court should decline a remedy because

⁶⁴ *Moore*, note 1.

adverse possession conflicts with the goals of the highly regulated land development and planning regime that exists in urban areas of Alberta.

[86] The Court rejected both defences. The Court noted that the law of adverse possession in Alberta is old and well defined, and that it is possible for a knowing trespasser to succeed:⁶⁵

It is usually immaterial whether the adverse possessor was or was not aware that they were in possession of another person's land. The actual attributes of the possession and the adverse possessor's intention to possess are what count. An intentional trespasser may adversely possess the true owner. An unintentional possessor may adversely possess the true owner. The fact both parties were mistaken as to the location of the true boundary between their lands does not preclude adverse possession.

[87] The Court turned to examine whether there was license to occupy, as consent precludes adverse possession. While consent may be inferred by words or conduct, the Court followed the reasoning in *Reeder* and noted that a claim to imply a license cannot be based on mere acquiescence. As a result, there was no license in this case.

[88] Turning next to planning law considerations, the Court noted that a claim for adverse possession may be made against a portion of a lot in a certificate of title. The Court also recognized that provincial legislation restricts further subdivision of most lots and parcels in a certificate of title, and these limitations are intended to ensure the orderly planning and development of real property. A successful claimant who establishes adverse possession against only part of a lot must obtain subdivision approval before the Registrar of Land Titles may accept the judgment for registration. Unless and until subdivision is granted, the judgment is effective only between the occupier and the registered owner.

[89] In the result, while the Court appeared to be sympathetic to the McIndoes' position, there was no basis to refuse quieting title through adverse possession or to infer a license to occupy in this case. Further, the Court did not have the discretion to grant a conditional judgment where the limitation period has expired. If it had, then the Court would have made the judgment conditional on subdivision approval within a specified time.

⁶⁵ *Moore*, note 1 at para 117.

[90] In obiter, the Court considered the apparent conflict in certain circumstances between the law of adverse possession and land use regulation:⁶⁶

There may be a case to provide specific legislated remedies to deal with shifted or misplaced survey pins or monuments, or other situations where a genuine error was made in reliance on incorrect survey information and cannot easily be undone. In contrast, one might question whether non-permanent improvements should receive the same protection in a Torrens system. Is there really a pressing need to protect fences, hedges, concrete patios, or garden sheds?

Therefore, one might question whether adverse possession arising from poorly placed fencing or other uncontrolled activities should over-ride, as between the original parties to the action, a carefully surveyed plan of subdivision, duly approved in accordance with municipal requirements, and registered in a Torrens land titles system.

[91] This case confirms that a deliberate trespasser can profit from their own wrongdoing, which leads to an inequitable result. While the Moores tried to argue that they were unaware of the true location of the fence, the Court did not find their assertions to be reliable or credible. The Court found that the Moores knew they were occupying the McIndoes' land and that they intended to stay unless forced to vacate. The Moores did not think that they had the McIndoes' permission to stay on the Disputed Land. Nevertheless, the Moores were able to establish the necessary elements of adverse possession and they were entitled to retain the Disputed Land.

5. KOZIEY ESTATE (RE)

[92] Another adverse possession case involving rural property was *Koziey Estate (Re)*.⁶⁷ In 1991, Mr Taylor purchased a quarter section of land immediately north of the Koziey lands. A road used to access the Koziey lands crossed through a portion of the Taylor lands in order to avoid a steep ravine. Soon after he acquired his property, Mr Taylor discovered that the road encroached upon approximately 0.79 acres of his land. In 1992, Mr Taylor built a fence along the road to contain his cattle without cutting off access to the Koziey lands. He testified at trial that he discussed the encroachment with the deceased, Mr Koziey, and advised that the road would eventually have to be moved.

⁶⁶ Moore, note 1 at paras 175-6.

⁶⁷ *Koziey*, note 55, aff'g 2017 ABQB 597. Although the trial decision referenced section 69 of the *Law of Property Act*, it did not form part of the court's analysis. The appeal decision referenced section 69(3) of the *Law of Property Act*, which provides that an easement cannot be acquired by prescription.

However, the road was never moved and the deceased and his tenants continued using it for the next 24 years.

[93] Mr Koziey died in 2014. In 2015, Mr Taylor advised the Koziey Estate that he intended to relocate his fence which would cut off the road access to the Koziey lands. The Koziey Estate responded by bringing an application to quiet title based on adverse possession. Mr Taylor brought a cross-application for a permanent injunction to prevent the Koziey Estate and any subsequent owners from using the road to access the Koziey Lands.

[94] The trial judge followed the reasoning in *Reeder*, and found that the evidence established that the deceased's possession of the 0.79 acres of disputed land was exclusive, open, visible, notorious, and continuous. While the deceased originally believed that the road was on the Koziey Lands, he continued using the road after he knew that it encroached upon Mr Taylor's land. The trial judge did not accept Mr Taylor's argument that he granted an implied license to the deceased:⁶⁸

In my view, [Mr Taylor's] acquiescence in the face of [the deceased's] continued failure to move the Road constituted a failure on Taylor's part to take timely steps to assert his claim to the land beyond the fence he had constructed.

[95] In the result, the trial judge granted the Koziey Estate's application to quiet title under section 74 of the *Land Titles Act*.

[96] On appeal, the majority confirmed that a right to cross the land of another cannot be obtained by prescription if the registered owner still has use of the right of way land for other purposes.⁶⁹ In this case, the Koziey Estate and its predecessors in title occupied the disputed land for over 100 years, and the deceased's exclusive maintenance of the road confirmed his possession.⁷⁰

[97] The majority also confirmed that there was no implied license in this case. There was no evidence corroborating the conversation between Mr Taylor and the deceased as required when a claim is made against an estate. Even if the deceased had promised to move the road, the promise was repudiated after a

⁶⁸ *Koziey Estate (Re)*, 2017 ABQB 597 at para 60.

⁶⁹ *Koziey*, note 55 at para 9.

⁷⁰ The majority did note that while the deceased's exclusive maintenance of the road confirmed his possession, it was not sufficient in itself to establish a possessory title: see para 11.

reasonable time by the deceased's non-performance. Once that reasonable time had passed, the deceased's occupation became adverse.

[98] The dissenting opinion was more sympathetic to Mr Taylor. In the dissent, Justice O'Ferrall agreed with the appellant that Mr Taylor was never dispossessed of his property and that section 3(7) of the *Limitations Act* did not apply to this case:⁷¹

Many rights attach to the ownership of real property, but one of the most basic rights is the right to let others use it. There is no need to put that permission in writing or pay a lawyer to draft an easement or right of way agreement. A simple consent suffices. But consenting to others using one's land for access does not amount to giving up of possession of the land because such consent or license, if you will, is always revocable. And if possession is not given up, there is no need to obtain an acknowledgment in writing of the owner's title from the person to whom consent is given.

[99] As such, Justice O'Ferrall determined that this was not a true case of adverse possession. The deceased's recurring transitory use of the road for over two decades did not have the necessary character to extinguish the registered owner's title. The evidence presented at trial did not support the finding that the deceased had effectively excluded Mr Taylor from possession of his land. Justice O'Ferrall distinguished this case from the Alberta Court of Appeal's previous decision in *Reeder*, primarily on the basis that Mr Taylor had consented to the deceased's use of the road.

[100] In the result, the majority of the Court of Appeal affirmed the trial judge's decision to quiet title through adverse possession.

6. SUMMARY OF CASES DECIDED SINCE 2003

[101] As with previous decisions, the post-2003 cases show that there are still disputes regarding possession of land but that successful adverse possession claims are relatively rare. Despite the evidence of boundaries and ownership that Alberta's survey and land titles system provide, people end up using another's land – often unintentionally, but sometimes deliberately.

[102] The post-2003 cases also illustrate that the basis for a dispute often arises before the current parties came to the land. In *Canadian Wellhead* and *Moore*, the fence was already in the wrong place when the parties acquired their respective

⁷¹ *Koziey*, note 55 at para 36.

parcels. In *Bennett*, *Reeder*, and *Koziey*, the geography of the land favoured a pattern of occupation and use that reflected the existence of a lake, a roadway, or a ravine. Again, none of the current parties to those disputes caused the situation where the land as surveyed and described on title was impractical to use. The disputes were not of the parties' own making. The facts in *Bennett* also illustrate the implications that natural boundary changes can have.

[103] In this context, it can be argued that adverse possession serves a valid purpose as a means of dispute resolution. Indeed, during consultation events hosted by the Alberta Branch of the Canadian Bar Association, some real property lawyers in Edmonton and Calgary indicated that they still saw a valid purpose for adverse possession.

[104] That said, imposing a time period to recover possession of land when the government registry provides conclusive proof of land ownership can be hard to justify. For example, in *Moore*, the plaintiffs were able to benefit from their deliberate trespass even though they knew they were on the defendants' land. On the other hand, in *Bennett*, the occupiers had been on the land for almost 20 years while the registered owners didn't know it was their land. Even though the owner's title could be said to provide conclusive proof of ownership, the interpretation of that title was unclear. As such, both the Crown and the registered owner assumed the Crown owned the disputed land. In this way, the registered owners lost their right to recover possession of the disputed land before they knew it was theirs.

[105] The law needs to address a wide range of disputes and to do so equitably. Abolishing adverse possession may or may not enhance dispute resolution between a registered owner and an occupier. The next chapter considers the question of whether adverse possession should be abolished.

CHAPTER 3

Should Adverse Possession be Abolished?

A. Facilitating Equitable Dispute Resolution

[106] There is considerable overlap between adverse possession and claims regarding lasting improvements to wrong land. They are typically brought as related claims with the occupier's preference going to adverse possession, as a successful claim does not result in compensation to the registered owner for the land lost. Adverse possession is also a preferred claim for the occupier as it can be established by mere occupation of land. These aspects of adverse possession – that an occupier may gain title to another's land without compensation simply through occupation – also lie at the heart of claims to abolish adverse possession.

[107] ALRI is concerned that disputes regarding possession of land be resolved effectively and equitably. If adverse possession were abolished, claims regarding lasting improvements would become the primary, rather than the alternative, claim for the occupier. This possibility is considered by reviewing the successful adverse possession cases discussed in the previous chapter through the lens of section 69 claims.

B. What Claims Would be Excluded if Section 69 Replaced Adverse Possession?

1. ELEMENTS OF A SECTION 69 CLAIM

[108] Claims regarding lasting improvements under section 69 of the *Law of Property Act* will be discussed in greater detail in Chapter 5. For the purposes of this chapter, the essential elements of a section 69 claim are:

- The improvement must be lasting, meaning that it is permanent or not easily removed, and
- The person who made the improvement held an honest and *bona fide* belief that they owned the land upon which the improvement was made.

[109] The claim may be brought by either the person who made the improvement or their assign. If the claimant is successful, they may be granted a

lien over the registered owner's land for the value of the improvement. Alternatively, the claimant may be entitled to retain the land after compensating the registered owner. Section 69 allows the court to consider a broad range of remedies depending on the circumstances of the specific case.

2. INTENTIONAL TRESPASS

[110] Currently, the law of adverse possession does not require an occupier to know whether the disputed land belongs to them or to someone else. The occupier's knowledge of who actually owns the disputed land is irrelevant in determining adverse possession, so long as the occupier can establish that their use and occupation of the land is exclusive, continuous, open and notorious. For example, an occupier can establish adverse possession even if their use of the land is based on an innocent but mistaken belief in ownership. The reverse is also true: an occupier who is fully aware that the land belongs to someone else is not precluded from obtaining title through adverse possession.

[111] In contrast, a section 69 claim requires the occupier to show that they believed that the property improved was their own, and that the belief is honest and *bona fide*. If the occupier made the lasting improvement on land that they knew belonged to someone else, then their section 69 claim would be defeated for lacking the requisite mistaken belief.

[112] Historically, adverse possession cases based on deliberate trespass are not usually successful in Alberta. But they do happen. Though rare, the equity of dispute resolution is impaired where a deliberate trespasser benefits from their own wrong. In limiting claims to mistaken belief in land ownership, section 69 appears more equitable.

[113] In this way, occupiers who deliberately trespass on land they know does not belong to them would not be able to acquire an interest in the land. Registered owners would no longer be subject to claims made by bad faith trespassers attempting to benefit from their intentional wrongs. For example, the occupiers in *Moore* would not have been entitled to retain the disputed land, as they knew at all material times that they were not the owners. The evidence at trial established that the Moores were not under a mistaken belief in ownership at any time they were in possession of the disputed land.

[114] Similarly, in *Reeder*, both parties were aware that there was some uncertainty about the rights to the disputed land because from time to time they

attempted to resolve the issue in a “neighbourly way.”⁷² Mr Woodward (the registered owner) told Mr Reeder (the occupier) that he wanted to fence off the disputed parcel, but Mr Reeder refused to cooperate with any suggestions about constructing the fence. Mr Reeder continuously rejected Mr Woodward’s claim to the disputed land and consistently asserted his right to be there notwithstanding the true state of the title. The evidence at trial suggested that Mr Reeder was aware that the disputed land did not belong to him when he began using it.⁷³ If Mr Reeder were a deliberate trespasser who knew that the disputed land did not belong to him, then he would not have been entitled to retain the land under section 69.

[115] It is also important to note that neither of these cases involved a lasting improvement. As noted earlier in this chapter, a successful claim under section 69 requires both a mistaken belief in ownership of the land as well as a lasting improvement. Cases that do not involve lasting improvements are discussed in the next section.

3. NO LASTING IMPROVEMENT

[116] Section 69 helps to address the unfairness in certain situations where an occupier spends effort and resources to make lasting improvements to land based on the mistaken belief that they owned the land in question. Abolishing adverse possession would preclude an occupier from retaining land in two main circumstances: where the occupier has built something on the land that does not qualify as a lasting improvement, and where the occupier has been merely using the land.

a. Temporary encroachments

[117] A lasting improvement must be lasting in the sense that it is permanent, or not easily removed. Whether an improvement is permanent or not easily removable will depend upon a number of factors, including the nature of the improvement and the materials used. The expense or inconvenience of removing the improvement are not usually factors to consider in determining whether the improvement qualifies as lasting.

⁷² *Reeder*, note 55 at para 5.

⁷³ At trial, the Reeders argued that they were lawfully entitled to the disputed land as a result of a three-way agreement between the county and the present parties’ predecessors in title. While the trial judge found some evidence of this contract, he did not make definitive findings of fact because he was able to resolve the dispute on the basis of adverse possession.

[118] Courts have consistently held that fences are not lasting improvements. Yet, fences are often used by occupiers to establish the necessary elements of adverse possession – the so-called “fence in the wrong place” cases referenced in Chapter 2. For example, in *Canadian Wellhead, Reeder, and Moore*, the placement of the fences indicated the areas where the occupiers exercised exclusive and continuous control over the registered owner’s land. Conversely, the fences kept the registered owners off the land.

[119] If adverse possession were abolished, then fences could not be used to establish a section 69 claim because they are not lasting improvements. This means that an occupier cannot rely on the existence or mistaken placement of a fence to ground a claim to retain land. In all three of the cases listed above, the registered owners would have been entitled to recover possession of the disputed land in the absence of adverse possession.

[120] Other improvements that do not qualify as lasting improvements under section 69 are basically temporary encroachments. While there would be a cost to the occupier associated with removing such encroachments from the registered owner’s land – both in terms of expense and inconvenience – the fact remains that the registered owner would be entitled to recover possession of their land. The loss to the occupier is offset by having had past use of the land.

b. Mere use of land

[121] Section 69 would not capture any claims in which an occupier was merely using the disputed land without making any lasting improvements on it. For example, using disputed land to graze cattle, as was the case in *Bennett*, would not be enough to allow an occupier to retain the land under section 69. In that case, the Bennetts did not build any fence, structure, boundary, or other marking on the disputed land to indicate that they claimed any interest in it. Nevertheless, their claim to quiet title was successful because they used the disputed land as part of their cattle farming operation for approximately 20 years.

[122] If adverse possession is abolished, an occupier cannot rely on section 69 to retain land based on mere use. Using land to graze livestock, or for haying, or for recreational purposes, would not enable an occupier to acquire an interest in the land in the absence of a lasting improvement. The registered owner would be entitled to recover possession of the land from the occupier, which would have led to a different result in *Bennett*.

[123] Adverse possession might be more equitable if the occupier was required to compensate the registered owner for the loss of the land. However, in cases of mere occupation, requiring the occupier to compensate the registered owner for gaining title to the land might be disproportionate to the occupier. For example, as a mere occupier of land, the value of the adverse possessor's use is closer to that of a tenant or lessee. Imposing compensation to acquire title, likely at fair market value, would be disproportionate in many instances of mere occupation. To put it another way, if the occupier had to pay more for the land than it was worth to them, many would likely give up possession.

4. NATURAL BOUNDARY CHANGES

[124] As noted in Chapter 1, we have excluded natural boundary changes from the scope of this report. In particular, riparian lands along water bodies are frequently subject to boundary changes that may be slow (as where a lake gradually recedes) or sudden (as where flooding moves the course of a river).

[125] Where boundaries change due to shifting water bodies, the common law principles of accretion and avulsion apply to determine whether newly revealed land is added to the adjoining title. There has been a call for legislative intervention to clarify the application of these principles in Alberta.⁷⁴

[126] It is generally accepted, however, that land cannot be accreted beyond the legal description of a parcel's boundaries. For example, sections 13 and 14 are adjoining sections. Portions of both sections are covered by Lake Receding. A's title is described as that portion of section 13 that is not covered by Lake Receding. Any newly revealed land on section 14 will not be accreted to section 13, even if there is no other way to access that land via section 14. Similarly, if Flooding River runs along the boundary between sections 13 and 14 and the course of the river suddenly isolates a strip of section 14 so that it is only accessible by using section 13, the concept of avulsion also precludes the isolated strip being added to section 13.

[127] We raise these natural boundary changes merely to note that adverse possession has been used alongside the principles of accretion and avulsion. Particularly where a natural boundary changes results in land that is no longer accessible from the title of which it is part, adverse possession has been used to attach the isolated land to the adjoining title if the adjoining owner has taken possession. If adverse possession is abolished, this would no longer be possible.

⁷⁴ See Arlene Kwasniak, "Accretion, the Torrens System, and Law Reform" (2013) 24 J Envtl L & Prac 145.

It is worth noting that most adverse possession claims that have also involved a natural boundary change have been mere occupation situations. As discussed earlier, in instances of mere use, it is inequitable for the registered owner to lose title and will usually be disproportionate to the occupier to require them to buy the land at fair market value.

5. REMEDIES

[128] The remedies set out in section 69 have been interpreted broadly to allow courts to craft flexible solutions to respond to the unique circumstances of a particular case, and to balance the equities between an occupier and the registered owner. Even if a court determines that it is just under the circumstances for an occupier to retain the disputed land, the registered owner may still be entitled to compensation. Depending on the remedy, a court may also make its order conditional on receiving subdivision approval so as to not run afoul of planning law considerations. In this way, proportionality is achieved between the interests of both registered owners and occupiers.

[129] Adverse possession does not allow courts to engage in this type of balancing act. Once the necessary elements of adverse possession are made out, and the requisite time period has passed, a court does not have the discretion to refuse to grant the remedy or to make it conditional on subdivision approval. Adverse possession does not allow the court to consider the equities of the parties, and may in fact reward an occupier acting in bad faith.

[130] If adverse possession were abolished, then the occupier in *Koziey* could have brought a claim regarding lasting improvements to determine what to do about the roadway that encroached upon the registered owner's land. The only practical access to the Koziey Estate property was by a road that crossed over the Taylors' land in order to bypass a steep ravine. If the Koziey Estate was able to satisfy the two requisite elements of section 69 – lasting improvement and mistaken belief – then the court would have had the flexibility to craft a remedy best suited to the circumstances of the case. Even if the court were to determine that the Koziey Estate ought to be allowed to retain the land – essentially, the same result under adverse possession – then the Taylors could have been entitled to receive compensation for the land they lost.

6. SUMMARY

[131] Disputes arising from the ownership and use of land are inevitable. Abolishing adverse possession will not entirely eliminate those disputes. In the absence of adverse possession, section 69 of the *Law of Property Act* will take a central role in determining how those disputes can be resolved efficiently and equitably.

[132] Where lasting improvements have been made, an occupier may bring a section 69 claim to retain the land if fairness warrants it. Only a lasting improvement will ground such a claim, which is a higher threshold than would otherwise be the case in adverse possession. Further, section 69 claims will eliminate cases in which a deliberate trespasser is seeking to benefit from their intentional wrong.

[133] As discussed above, some successful adverse possession cases would have been resolved in favour of the registered owner instead of the occupier. In the absence of adverse possession, parties might be encouraged to pursue out of court settlement to resolve their disputes if the incentive of “free land” is removed from an occupier’s claim to the disputed property. Abolishing adverse possession may encourage parties to come to alternative arrangements, such as a lease or license, regarding the use of the disputed land. A registered owner may even be encouraged to sell the disputed land to the occupier, subject to planning law considerations.

[134] In the interests of facilitating equitable dispute resolution, claims regarding lasting improvements provide a more flexible option than adverse possession. While section 69 of the *Law of Property Act* is not a complete replacement, equity is advanced by excluding those adverse possession claims that fall outside the parameters of section 69.

C. Adverse Possession and Principles of Limitations Legislation

[135] As will be discussed in greater detail in the next chapter, preserving evidence and being diligent in pursuing claims are among the rationales for having limitations. Each of these is addressed briefly here with respect to an occupier’s adverse possession.

1. EVIDENCE

[136] The evidence rationale of limitations legislation is concerned with not requiring people to preserve evidence beyond a reasonable period of time. However, adverse possession claims by their very nature rely on old evidence. For example, an occupier has to rely on evidence older than 10 years to establish possession that is exclusive, continuous, open and notorious. In most cases, evidence of possession will require witness evidence rather than documentary evidence. A registered owner may have to reach even further back in time to dispute the occupier's evidence or to establish that they consented to the occupier's presence on their land.

2. DILIGENCE

[137] The diligence rationale of limitations legislation requires claimants to act in a timely manner and to not sleep on their rights.

[138] In contrast to this principle, adverse possession requires that the occupier wait at least 10 years before bringing a claim to quiet title. In this way, an occupier may be perceived as "lying in the weeds" until the registered owner's limitation period to bring a claim to recover possession expires. This is contrary to the diligence rationale required in most other claims.

[139] In addition, there does not appear to be a corresponding limitation period for claims to quiet title. In theory, an occupier can sit on their claim to quiet title indefinitely. The occupier may be motivated to bring a claim to quiet title so as to protect their interest from being interrupted by a *bona fide* purchaser – otherwise, there is limited incentive for an occupier to bring their claim in a timely fashion.

3. CONCLUSION

[140] As a standalone claim, adverse possession appears to be at odds with the purposes of limitations legislation. By their very nature, adverse possession claims rely on old evidence and postpone the resolution of a claim. Claims to quiet title conflict with the limitations rationales of evidence and diligence.

[141] While abolishing adverse possession will inevitably result in hardship for some occupiers of land who can no longer bring a claim to quiet title, occupiers with a claim based on adverse possession are at risk of the same hardship if the land is transferred to a *bona fide* purchaser for value. This was the result in *Boyczuk v Perry*, where Mr Boyczuk lost his house and farm buildings which he

had mistakenly built on land later purchased by Mr Perry.⁷⁵ The Legislature crafted a remedy for such cases which now resides in section 69 of the *Law of Property Act*.

D. Adverse Possession in Other Provinces and Territories

[142] In Canada, there are two different land conveyancing systems: land titles and deed registration. Some provinces have a mixed system that includes both land titles and deed registration.

[143] The availability of adverse possession claims in other provinces often depends on whether the land in question falls under the deed registration system or the land titles system. For example, Ontario has a mixed system. Adverse possession claims can be brought against land under the deed registry system, but they are not available against land in the land titles system.⁷⁶

[144] Usually, provinces with land titles systems do not allow adverse possession claims against titled land. For example, British Columbia and Saskatchewan have abolished adverse possession claims.⁷⁷ However, Alberta, the Northwest Territories and Nunavut have retained adverse possession.⁷⁸ Conversely, some form of adverse possession appears to be available when the land falls outside the land titles system.

[145] A cross-jurisdictional review of the availability of adverse possession claims in other provinces and territories can be found in the Appendix.

E. Indefeasibility under the *Land Titles Act*

[146] Adverse possession has been criticised as being inconsistent with the land titles system as an exception to indefeasibility. As noted in our 2003 Report, ALRI does not consider this to be the case as a *bona fide* purchaser for value is entitled to rely on the register regardless of how long the occupier has been on the land.

⁷⁵ *Boyczuk*, note 52.

⁷⁶ *Land Titles Act*, RSO 1990, c L5, s 51. Ontario also has a category of title called "Land Title Conversion Qualified," which are still subject to adverse possession claims.

⁷⁷ See *Land Titles Act*, RSBC 1996, c 250, s 23(3); *Limitations Act*, SBC 2012, c 13, s 28; *Land Titles Act*, SS 2000, c L-5.1, s 21.

⁷⁸ See also *Limitation of Actions Act*, RSNWT 1988, c L-4, ss 2(1)(e), 18, 19, 43. The Northwest Territories act is also used in Nunavut, as it was duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.

[147] However, as also noted in our 2003 Report, section 69 of the *Law of Property Act* does operate as a true exception to indefeasibility. A *bona fide* purchaser for value will be subject to a claim for lasting improvements even though these are not reflected on the register. While we have some concern about substituting a claim that is an exception to indefeasibility over one that is not, we have recommended ways that the effect of such an exception might be mitigated in Chapter 6.

F. Conclusion

ISSUE 1

Should adverse possession be abolished in Alberta?

[148] As set out in this report, there have been several recent attempts to abolish adverse possession by legislation. These events in the Legislature call into question whether adverse possession still serves a valid purpose in Alberta.

[149] As our review shows, adverse possession continues to serve as a dispute resolution mechanism in a variety of circumstances. Some, but not all of these disputes can be addressed by claims under section 69 of the *Law of Property Act*. We have given further attention to the types of disputes that would not be covered by section 69 and the implications of disallowing a claim by the occupier in those situations. On balance, we think that section 69 offers a more equitable approach to dispute resolution where adverse possession claims and section 69 claims overlap. Further, for those claims that would not be addressed by section 69, it would not be equitable to retain adverse possession as a dispute resolution tool. Finally, with the benefit of further review, we have now also concluded that retaining adverse possession runs counter to some basic principles of limitations law.

RECOMMENDATION

Adverse possession should be abolished in Alberta.

[150] We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.

CHAPTER 4

How Might Adverse Possession Be Abolished?

A. Introduction

[151] The passage of time is a key element of adverse possession. If the registered owner fails to take action to recover possession of real property within a prescribed timeframe, then the occupier may bring an adverse possession claim. In this way, an adverse possession analysis requires two steps:

- (a) Is the registered owner's claim to recover possession of land outside of the relevant limitation period?
- (b) Has the occupier established the required elements of adverse possession?

[152] The focus of this chapter is on the first step of the analysis, and whether a registered owner ought to be allowed to recover possession of land at any time. To do so would require an exception to the *Limitations Act* for claims to recover possession of real property, which has not been part of previous attempts to abolish adverse possession.

B. Previous Attempts to Abolish Adverse Possession

1. PREVENTING CLAIMS BY ADVERSE POSSESSION

[153] The 2012, 2017, and 2018 Bills included identical provisions aimed at eliminating adverse possession in Alberta. Specifically, the Bills proposed repealing section 74 of the *Land Titles Act* and replacing it with the following provision, confirming that no right or title to land could be acquired or deemed to have been acquired through adverse possession:⁷⁹

⁷⁹ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*, 5th Sess, 27th Leg, Alberta, 2012, cl 1(2) (first reading 7 March 2012).

No title by adverse possession

74(1) In this section,

- (a) “amending Act” means the *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*;
- (b) “previous section” means section 74 of this Act as it read immediately before the coming into force of the amending Act.

(2) No right or title in or to land registered under this Act may be acquired or deemed to be acquired by adverse possession.

(3) Nothing in this section affects a certificate of title acquired by adverse possession and issued before the coming into force of the amending Act.

(4) Any claim commenced prior to the coming into force of the amending Act that results in a judgment that would entitle the claimant to a remedy under the previous section if it was still in force shall be treated for all purposes as if the amending Act had not come into force.

[154] The proposed amendment to section 74 of the *Land Titles Act* would eliminate the ability to establish an interest in land through possession. The amendment would not affect titles acquired by adverse possession that were issued before the change came into force, nor would it affect adverse possession claims commenced before the coming in force date.

[155] The Bills also proposed substituting the following provision for section 3(6) of the *Limitations Act*:⁸⁰

3(6) Unless otherwise provided by this or any other Act, a defendant is not entitled to an immunity based on adverse possession of real property.

2. EXTENDING TIME TO BRING A CLAIM TO RECOVER POSSESSION OF LAND

[156] The proposed amendments to the *Limitations Act* included a change to section 3(4). The current version of section 3(4) provides that:

The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real

⁸⁰ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*, 5th Sess, 27th Leg, Alberta, 2012, cl 2(3) (first reading 7 March 2012).

property, including a remedial order under section 69 of the *Law of Property Act*.

[157] The proposed amendment would result in the following wording:⁸¹

The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property under section 69 of the *Law of Property Act*.

[158] It appears that the overall intention of the amendments is to allow a registered owner to bring a claim to recover possession of real property at any time. This intention was referenced in the debates on the 2017 Bill:⁸²

If passed, the bill would also delete sections of the Limitations Act. This would remove the limitation period on a registered landowner's right to enforce ownership over his or her land, including the right to possession.

[159] However, the specific amendment to section 3(4) would not appear to deliver this intended purpose. The amendment purports to remove claims to recover possession of real property from section 3(4), so that only claims brought under section 69 of the *Law of Property Act* would be subject to the 10-year limitation period. However, the purpose of section 3(4) is to exclude claims to recover possession of land from the two-year discoverability period set out in section 3(1)(a) of the *Limitations Act*. The effect of removing claims to recover possession of real property from section 3(4) does not mean that such claims can be brought at any time; instead, such claims would be subject to either the two-year discoverability period or the 10-year ultimate rule, whichever comes first.

[160] In this way, the proposed amendments could result in much shorter time periods for registered owners to bring claims to recover possession of land. Further, section 3(5) of the *Limitations Act* provides that the registered owner would have the burden to show that they brought the claim to recover possession within two years from when they knew or ought to have known that the occupier was on their land.

[161] If the intention of the proposed amendments is to allow registered owners to bring claims to recover possession of land at any time, i.e., to eliminate the limitation period for such claims, then that exemption should be clear in order to alert both potential claimants and defendants. As the majority of civil claims in

⁸¹ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*, 5th Sess, 27th Leg, Alberta, 2012, cl 2(3)(b) (first reading 7 March 2012)

⁸² See *Alberta Hansard*, 29-3 (3 April 2017) at 902 (Erin Babcock).

Alberta are subject to limitation periods, any exemption from a limitation period should have a sufficient policy reason to support it. Whether there is a sufficient policy basis for exempting claims to recover possession and options for doing so are discussed in the next section.

C. Exempting Claims to Recover Possession of Real Property from the *Limitations Act*

ISSUE 2

Should a claim to recover possession of real property be excluded from the operation of the *Limitations Act*?

1. CURRENT FRAMEWORK UNDER THE *LIMITATIONS ACT*

[162] The *Limitations Act* currently imposes a 10-year limitation period on a claim to recover possession of real property.⁸³ The 10-year period runs from the time the claimant is dispossessed of the real property.⁸⁴ Claims to recover possession of real property are expressly excluded from the two-year limitation period.⁸⁵ Other provisions of the Act deal with events that stop the limitation period and the impact of transfers to donees during the limitation period.⁸⁶

⁸³ *Limitations Act*, note 1:

3(1) Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

(b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

⁸⁴ *Limitations Act*, note 1:

3(3) For the purposes of subsections (1)(b) and (1.1)(b),

(f) a claim for a remedial order for the recovery of possession of real property arises when the claimant is dispossessed of the real property.

⁸⁵ *Limitations Act*, note 1:

3(4) The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property, including a remedial order under section 69 of the *Law of Property Act*.

⁸⁶ *Limitations Act*, note 1:

3(6) The re-entry of a claimant to real property in order to recover possession of that real property is effective only if it occurs prior to the end of the 10-year limitation period provided by subsection (1)(b).

(7) If a person in possession of real property has given to the person entitled to possession of the real property an acknowledgment in writing of that person's title to the real property prior to the expiry of the 10-year limitation period provided by subsection (1)(b),

(a) possession of the real property by the person who has given the acknowledgment is deemed, for the purposes of this Act, to have been possession by the person to whom the acknowledgment was given, and

(b) the right of the person to whom the acknowledgment was given, or of a successor in title to that person, to take proceedings to recover possession of the real property is deemed to have arisen at

[163] In its 2003 Report, ALRI was of the view that claims to recover possession of real property should be subject to a limitation period as are the majority of civil claims in our justice system. Given the repeated calls to abolish adverse possession in the Legislature, the next section considers the policy basis for exempting claims to recover possession from the 10-year limitation period.

2. THE RATIONALE UNDERLYING LIMITATIONS LEGISLATION

[164] Traditionally, limitations statutes were based on three underlying rationales:

1. **Certainty:** potential defendants can rest assured that they will not be held to account for an ancient obligation.
2. **Evidence:** potential defendants should no longer be concerned with preservation of evidence after the limitation period has lapsed.
3. **Diligence:** plaintiffs are expected to bring suits in a timely fashion and “not sleep on their rights.”⁸⁷

[165] Traditional limitations statutes have generally been oriented towards the interests of the potential defendant.⁸⁸ However, in *Novak v Bond*, McLachlin J (as she was then), for the majority, added a fourth characteristic of contemporary limitations statutes:⁸⁹

Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant — certainty, evidentiary, and diligence — with the need to treat plaintiffs fairly, having regard to their specific circumstances.

...

The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims

the time at which the acknowledgment, or the last of the acknowledgments if there was more than one, was given.

(8) If the right to recover possession of real property first accrued to a predecessor in title of the claimant from whom the claimant acquired the title as a donee, proceedings to recover possession of the real property may not be taken by the claimant except within 10 years after the right accrued to that predecessor.

⁸⁷ *Novak v Bond*, [1999] 1 SCR 808 at 839, referring to *M (K) v M (H)*, [1992] 3 SCR 6, at 29-30.

⁸⁸ *Novak v Bond*, [1999] 1 SCR 808 at 839-40.

⁸⁹ *Novak v Bond*, [1999] 1 SCR 808 at 841.

where the evidence may have been lost to the passage of time, (3) an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.

[166] Contemporary limitations statutes attempt to take a more balanced approach between the interests of plaintiffs and defendants. In this way, the registered owner's own circumstances ought to be considered when assessing whether a claim should be barred by the passage of time.

a. Certainty

[167] The certainty rationale is concerned with assuring potential defendants that they will not be held accountable for an ancient obligation. For example, if an occupier has been in continuous possession of a piece of property for over 30 years, eliminating the limitation period would allow a registered owner to return at any time and make a claim to recover possession of the land. There may be a loss of certainty to a defendant occupier, and an actual loss if the occupier is required to give up their possession, but these losses can be addressed by section 69 of the *Law of Property Act* in appropriate cases.

[168] On the other hand, as the occupier is a continuing trespasser, they may be viewed as having a current rather than an ancient obligation to give up the land. In addition, it is worth remembering that a long-term occupier's interest in the land may be extinguished by a transfer to a *bona fide* purchaser.

b. Evidence

[169] The evidentiary rationale, which is concerned with preserving evidence for a reasonable amount of time, may be answered since evidence of the claimant's title is maintained through the land registration system. Moreover, a certificate of title is "conclusive proof in all courts as against Her Majesty and all persons whomsoever that the person named in the certificate is entitled to the land," except in very narrow circumstances.⁹⁰ Relying on the register to determine registered ownership provides evidentiary certainty. Titles do not

⁹⁰ Section 62 of the *Land Titles Act*, note 29, provides that certificates of title are conclusive proof of ownership, unless the registered owner has participated in fraud. The other exception relates to misdescription of land.

deteriorate over time. Further, a Torrens land registry system confirms the primacy of registered title over possessory title.

c. Diligence

[170] The diligence rationale provides that plaintiffs ought to bring their claims in a timely manner and not “sleep on their rights.” Keeping the limitation period to recover possession of land would encourage registered owners to be proactive in bringing timely claims to recover possession of land. However, if a registered owner is unaware that the disputed land belongs to them, perhaps as a result of a third-party mistake, then the limitation period may expire before the registered owner has a chance to recover possession.

d. Claimant’s circumstances

[171] The fourth characteristic of modern limitation statutes requires the consideration of the claimant’s specific circumstances. In the context of a claim to recover possession of real property, it is important to keep in mind that in many instances the owner will not know that their land is occupied by someone else. While the land titles and survey systems map out ownership and boundaries, these systems are often intangible and sometimes impractical compared to the physical markers people regularly look to when they use and occupy land. Accordingly, it is possible for claims to arise and for the limitation period to expire without the registered owner knowing there was a basis for a claim.

[172] While claims will arise and expire in other areas of the law, real property poses a special challenge. As noted, a certificate is conclusive evidence of ownership that does not deteriorate over time. While the initial parties to a claim may be unaware of it, at some time the claim will inevitably come to light and may impact future owners. That might not occur until decades into the future.⁹¹ When the claim does come to their knowledge, the parties should be able to resolve it. As lack of knowledge will typify many cases, it is key that dispute resolution be equitable.

e. Conclusion

[173] The unique circumstances of registered real property mean that allowing a claim to recover possession to be brought at any time is not in direct conflict with

⁹¹ For example, in *Koziey Estate (Re)*, 2017 ABQB 597, aff’d 2019 ABCA 43 at para 13, a witness deposed that the disputed road had been in continual use for over 100 years.

the underlying limitations rationale of certainty, evidence, and the claimant's circumstances.

[174] Viewed from the perspective of the underlying rationales for limitations legislation, a case can be made to exempt a claim to recover possession of real property from the operation of the 10-year limitation period. Such claims are already excluded from the two-year limitation period. Excluding claims to recover possession from the operation of the *Limitations Act* will mean that such claims can be brought at any time.

[175] One approach is to specifically exclude or exempt claims to recover possession of land from the *Limitations Act*. While it is true that the majority of civil claims are subject to limitations periods, there is also precedent of certain narrow categories of claims which are expressly excluded. For example, section 3.1 of the *Limitations Act* was added in 2017 to eliminate limitation periods for civil claims relating to sexual assault or battery.⁹² The limitation period for claims relating to sexual misconduct, or assault or battery other than sexual assault or battery, is suspended if certain conditions are met.⁹³

[176] ALRI recognizes that how to exempt claims to recover possession of property is a drafting question. We have indicated both in our 2003 Report and in this report that relying on continuous trespass to postpone the limitation period

⁹² *Limitations Act*, s 3.1(1), as amended by SA 2017, c 7.

⁹³ The conditions include if the claimant was a minor, a dependent, under a disability, or in an intimate relationship with the person who committed the misconduct, assault or battery. *Limitations Act*:

No limitation period

3.1(1) There is no limitation period in respect of

- (a) a claim that relates to a sexual assault or battery,
- (b) a claim that relates to any misconduct of a sexual nature, other than a sexual assault or battery, if, at the time of the misconduct,
 - (i) the person with the claim was a minor,
 - (ii) the person with the claim was in an intimate relationship with the person who committed the misconduct,
 - (iii) the person with the claim was dependent, whether financially, emotionally, physically or otherwise, on the person who committed the misconduct, or
 - (iv) the person with the claim was a person under disability,

or

- (c) a claim that relates to an assault or battery, other than a sexual assault or battery, if, at the time of the assault or battery,
 - (i) the person with the claim was a minor,
 - (ii) the person with the claim was in an intimate relationship with the person who committed the assault or battery,
 - (iii) the person with the claim was dependent, whether financially, emotionally, physically or otherwise, on the person who committed the assault or battery, or
 - (iv) the person with the claim was a person under disability.

(2) Subsection (1) applies to a claim in respect of an act that occurred before or after the coming into force of this section, regardless of the expiry of any previously applicable limitation period set out in section 3 or a predecessor of this Act.

until the trespasser leaves the land is not an ideal approach to exemption. How to state the exemption expressly, rather than by implication, is a question that should be left to the drafter.

[177] Making claims to recover possession of land subject to a limitation period creates a perceived injustice to the registered owner. Given the rationales underlying limitations legislation discussed above, there are sound policy reasons that justify treating claims to recover possession of land differently from virtually all other civil claims that remain subject to limitation periods.

[178] Seeing that exempting claims to recover possession of real property does not damage the principles of the *Limitations Act*, and taking into account our recommendations concerning section 69 of the *Law of Property Act* in the next chapter, ALRI recommends that claims to recover possession of real property should be excluded from the *Limitations Act*.

RECOMMENDATION

Claims to recover possession of real property should be excluded from the operation of the *Limitations Act*.

[179] We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.

D. Preventing Claims by Adverse Possession

[180] As noted, the previous bills included an amendment to the *Land Titles Act* to provide that:

No right or title in or to land registered under this Act may be acquired or deemed to be acquired by adverse possession.

[181] Even though a claim to recover possession of land could be brought at any time, a positive statement to abolish the common law doctrine of adverse possession would still be required.

E. Transitional Issues

1. EXISTING CLAIMS

ISSUE 3

How should the law deal with existing claims to quiet title if adverse possession is abolished?

[182] If adverse possession is to be eliminated from Alberta land law, then some thought must be given to transitional issues. As noted by Professor Bruce Ziff:⁹⁴

Where adverse possession has been prospectively abolished for parcels under land titles, squatter claims that had fully ripened prior to the introduction of land titles can be quite durable. For example, where land titles registration occurs in 2001, a right based on adverse possession perfected prior to that date can be asserted, even many years later. A bizarre irony results: the title is in fact clouded by the pre-existing squatter's claim, which itself cannot be statute-barred by the current owner, because that owner cannot, after 2002, acquire any rights via adverse possession.

a. Preserve existing claims

[183] Although British Columbia abolished adverse possession claims in 1975, the recent Supreme Court of Canada decision in *Nelson (City) v Mowatt* demonstrates that such claims can indeed have a long lifespan:⁹⁵

Acquisition of title to land in British Columbia by adverse possession was abolished on July 1, 1975 with the coming into force of the *Limitations Act*, SBC 1975, c 37. Title to land acquired by adverse possession *before* July 1, 1975, however, was preserved and could continue to be claimed, subject to the ability of the holder of registered title to bring a proceeding enforcing his or her rights within the applicable limitation period: *Limitations Act*, RSBC 1996, c 266, s 14(5).

[184] In that case, the plaintiffs commenced their first action in 2006.⁹⁶ In determining whether the plaintiffs had title to the disputed lands through

⁹⁴ Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada, 2018) at 167, fn 63. In his example, Professor Ziff is referring to the Ontario *Land Titles Act*, RSO 1990, c L.5, sub 51(2), *Heng v Rodriguez*, 2015 ONSC 1677.

⁹⁵ *Nelson (City) v Mowatt*, 2017 SCC 8 at para 9.

⁹⁶ The plaintiffs also brought a petition pursuant to the *Land Titles Inquiry Act* in 2013. Both proceedings were heard together.

adverse possession, it was necessary for the Court to consider old evidence proving the chain of occupation starting in the early 1900s. It is easy to see how such a claim, which requires proof of the use and occupation of the land by predecessors in title now deceased, may create significant challenges for the preservation of evidence.

b. Abolition with retrospective effect

[185] To prevent such mischief as occurred in British Columbia, the recommendations in this Report are intended to apply retrospectively. In other words, once the amendments come into force, new adverse possession claims can no longer be commenced. A set transition period would allow time and notice to bring forward any outstanding claims to quiet title. Once the amendments come into force, then no claims to quiet title may be brought even if the right to acquire title through adverse possession crystallized before the coming-in-force date.

[186] The previous bills to abolish adverse possession also took a retrospective approach to transition. The amendment to section 74 of the *Land Titles Act* would read:⁹⁷

74(3) Nothing in this section affects a certificate of title acquired by adverse possession and issued before the coming into force of the amending Act.

(4) Any claim commenced prior to the coming into force of the amending Act that results in a judgment that would entitle the claimant to a remedy under the previous section if it were still in force shall be treated for all purposes as if the amending Act had not come into force.

RECOMMENDATION

Adverse possession should be abolished retrospectively so that no new claims may be brought once abolition is in force.

[187] We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.

⁹⁷ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2018*, 4th Sess, 29th Leg, Alberta, 2018, cl 1(2) (first reading 5 April 2018). The 2018 Bill included a coming in force date of January 1, 2019.

2. CONCURRENT CLAIMS

ISSUE 4

How should the law deal with concurrent claims to quiet title and to recover possession of land if adverse possession is abolished?

[188] Excluding claims to recover possession of real property from the *Limitations Act* raises further transitional issues. As discussed earlier, claims to recover possession of real property are distinct from claims to quiet title by adverse possession. Amendments to abolish adverse possession must also include amendments allowing registered owners to bring claims to recover possession of land at any time.

[189] However, it is easy to foresee undesirable complications if a claim to quiet title co-exists with a claim to recover possession of land. Consider the following example. On May 31, Occupier A brings a claim to quiet title of disputed land by adverse possession. On June 1, amendments to abolish adverse possession come into force. Since Occupier A brought their claim to quiet title before adverse possession was abolished, A's claim to quiet title is allowed to proceed. If A is successful, A can have title to the disputed land transferred to them as if the law had not changed.

[190] Registered Owner B would have been out of time to bring a claim to recover possession of the disputed land on May 31. However, on June 1, when the amendments came into force to exclude claims to recover possession of real property from the *Limitations Act*, B can again bring the claim. What happens to A's pending claim to quiet title, if B is now able to bring a claim to recover possession?

[188] Allowing a registered owner to bring a claim to recover possession of real property when the occupier has a pending claim to quiet title by adverse possession would amount to ending the latter claim by legislation. While such an outcome is within the authority of the Legislature, it is rarely used. There is no convincing reason to invoke this exceptional approach here. As such, in cases where there is a pending claim to quiet title by adverse possession when the amendments to the *Limitations Act* come into force, the 10-year limitation period for claims to recover possession of real property should continue to apply.

RECOMMENDATION

Where a claim to quiet title was commenced before abolition is in force, the claim should be dealt with as if the 10-year limitation period for claims to recover possession of real property continued to apply.

[191] We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.

CHAPTER 5

Lasting Improvements to Wrong Land

[192] Abolishing adverse possession will not eliminate disputes regarding possession of real property. As noted earlier, it is not uncommon for someone to occupy another's land and there will be instances where the occupier will incur hardship if disputes are resolved solely based on registered ownership. ALRI is concerned that disputes should be resolved equitably. Equitable resolution is particularly important as one or both parties may not know there is a trespass on another's land. This chapter reviews claims under section 69 of the *Law of Property Act*. Section 69 has typically been an alternative claim where adverse possession is not made out. However, if adverse possession were abolished, then section 69 would place a central role in resolving disputes.

[193] With the exception of *Koziety*, none of the successful adverse possession cases decided since 2003 involved a lasting improvement. If the occupiers in those cases were unable to bring a claim to quiet title through adverse possession, then there would have been no alternative claim available to them that would allow them to retain the land. However, as discussed in Chapter 3, reliance on section 69 would not have led to an inequitable result.

A. What is a Claim Regarding Lasting Improvements?

[194] Claims regarding lasting improvements are available under section 69 of the *Law of Property Act*.⁹⁸ This section deals with situations in which an occupier makes lasting improvements on the wrong land because of mistaken belief in ownership:⁹⁹

69(1) When a person at any time has made lasting improvements on land under the belief that the land was the person's own, the person or the person's assigns

- (a) are entitled to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements, or

⁹⁸ *Law of Property Act*, note 4.

⁹⁹ Section 69 includes a third subsection which is not relevant to claims regarding lasting improvements and is not discussed in this chapter. Subsection 69(3) was added as a consequential amendment by the *Limitations Act*, SA 1996, c L-15.1 and reads as follows: "No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and no such right is deemed to have ever been so acquired."

- (b) are entitled to or may be required to retain the land if the Court is of the opinion or requires that this should be done having regard to what is just under all circumstances of the case.

(2) The person entitled or required to retain the land shall pay any compensation that the Court may direct.

[195] Claims regarding lasting improvements were introduced by amendment to the *Land Titles Act* in 1950¹⁰⁰ as a legislative response to the 1948 decision of the Alberta Court of Appeal in *Boyczuk v Perry*.¹⁰¹ In that case, Mr Boyczuk and his neighbour mistakenly believed that an existing fence marked the true boundaries between their properties. Based on this belief, Mr Boyczuk built his home and five other buildings on his neighbour's land. Mr Boyczuk occupied the disputed land for nearly 17 years before his neighbour sold it to the Perrys, who were initially unaware that the fence did not mark the true boundary of the property. At some point after the purchase, the Perrys became aware that the Boyczuk buildings were on their land and they brought a claim to recover possession of the disputed land, or compensation for it. The majority held that although Mr Boyczuk would likely have been able to obtain title to the disputed land through adverse possession if his previous neighbour still owned the property, the same could not be said once title was transferred to the Perrys. Given that the Perrys acquired indefeasible title to the property as *bona fide* purchasers for value, Mr Boyczuk no longer satisfied the requirements for an adverse possession claim.

[196] Claims regarding lasting improvements provided a legislated remedy in the *Land Titles Act* to occupiers who make lasting improvements to another's privately owned land under the mistaken belief that they themselves owned the land, as was the case for Mr Boyczuk.¹⁰² If the lasting improvements enhance the value of the disputed land, the occupier can apply for a lien on the land that reflects the increase in value. Alternatively, if a court determines that it just and equitable under the circumstances for the occupier to retain the land, the court

¹⁰⁰ *An Act to amend the Land Titles Act*, SA 1950, c 35, s 11.

¹⁰¹ *Boyczuk*, note 52.

¹⁰² Claims regarding lasting improvements under section 69 are not available if the improvements were made on public lands: see *Public Lands Act*, RSA 2000, c P-40, s 4; *Municipal Government Act*, note 6, s 609; and *Irrigation Districts Act*, RSA 2000, c I-11, s 182. See also *SW Properties Inc v Calgary (City of)*, 2003 ABCA 10, in which the Alberta Court of Appeal held that section 609 of the *Municipal Government Act* trumps section 69 of the *Law of Property Act* (then section 60); and *Palmer v. Alberta (Sustainable Resource Development)*, 2003 ABQB 348, in which the Court held that the Crown is not subject to section 69 claims based on section 14 of the *Interpretation Act*, RSA 2000, c I-8.

can direct the occupier to compensate the registered owner.¹⁰³ Retention of the land will usually occur where the lasting improvement adds value to the adjoining land rather than the encroached land.

[197] Although claims regarding lasting improvements are usually brought by an occupier in the alternative to a claim for adverse possession, section 69 claims may be brought separately and apart from adverse possession.¹⁰⁴ This is because claims regarding lasting improvements require the occupier to prove entirely different elements: where a claim for adverse possession requires the occupier to prove exclusive, continuous, open, and notorious possession for more than 10 years, a section 69 claim requires the occupier to prove that they made a lasting improvement on land they mistakenly believed was theirs.¹⁰⁵

[198] Claims regarding lasting improvements remained part of the *Land Titles Act* under the division titled “Remedial Proceedings” into the 1980s. Under the authority given to legislative counsel to prepare the Revised Statutes of Alberta 1980, the provision was moved from the *Land Titles Act* to the *Law of Property Act*. The *Law of Property Act* was a consolidation act prepared by legislative counsel and not an “original” product of the Legislature itself.

[199] It is worth noting that the recent legislative attempts to abolish adverse possession did not include any changes to claims regarding lasting improvements under section 69.¹⁰⁶ In his remarks during the second reading of the 2012 Bill, Mr Allred praised section 69 as striking the right balance:¹⁰⁷

[Section 69] is excellent legislation because unlike adverse possession, it protects both the legal owner of the land as well as the neighbour who built on it by mistake. Section 69 of the Law of Property Act adequately solves the common problem of building encroachments. Knowing that the law of lasting improvements is in

¹⁰³ *Law of Property Act*, note 4.

¹⁰⁴ See *Goertz v Oliver*, 2018 ABQB 363 at paras 50-53 [Goertz]. In that case, Justice Germain rejected the plaintiffs’ claim for an alternative remedy under section 69 based on his finding that the plaintiffs had not made lasting improvements on the land in the mistaken belief that the land was theirs.

¹⁰⁵ See *Medicine Hat (City of) v Mund*, 1988 ABCA 168, [1988] 86 AR 392.

¹⁰⁶ The 2012 Bill did propose striking out the words “including a remedial order” in section 3(4) of the *Limitations Act*, so that the amended section would read “The limitation period provided by subsection (1)(a) does not apply where a claimant seeks a remedial order for possession of real property under section 69 of the *Law of Property Act*.” In this way, the 10-year ultimate limitation period would be retained for claims brought under section 69. Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*, 5th Sess, 27th Leg, Alberta, 2012 (first reading 7 March 2012).

¹⁰⁷ *Alberta Hansard*, 27-5, Issue 15 (12 March 2012) at 437 (Ken Allred).

place, we can rest assured that the abolition of adverse possession will certainly not leave a gap in our legislation.

[200] In this way, claims regarding lasting improvements provide a balanced mechanism for resolving disputes between landowners. Section 69 permits the granting of rights in favour of one landowner against another.¹⁰⁸

[201] Section 69 is not unique to Alberta. Other jurisdictions have similar provisions – for example, the equivalent provision in Saskatchewan came into force in 1926,¹⁰⁹ while Manitoba’s provision came into force in 1910.¹¹⁰ Ontario’s equivalent can be traced back to at least 1914.¹¹¹ It appears that these earlier provisions – which were virtually identical to each other – were the model for Alberta’s section 69. Nova Scotia has most recently adopted a similar provision regarding lasting improvements as part of the 2003 reforms to its land registration system.¹¹²

¹⁰⁸ *SW Properties Inc v Calgary (City of)*, 2003 ABCA 10 at para 16. The 2003 Report detailed the historical background of section 69, along with the elements that make up a section 69 claim and the remedies available if a claim is successful: see 2003 Report, note 3 at 51-59.

¹⁰⁹ See *Improvements Under Mistake of Title Act, The*, RSS 1978, c I-1, s 2:

Where a person has made lasting improvements on land, under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by the improvements; or shall be entitled or may be required to retain the land if the Court of Queen’s Bench is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court may direct.

¹¹⁰ See *Law of Property Act, The*, RSM 1987, c L90, s 27:

Where a person makes lasting improvements on land under the belief that the land is his own, he is or his assigns are entitled to a lien upon the land to the extent of the amount by which the value of the land is enhanced by the improvements, or is or are entitled, or may be required, to retain the land if the Court of Queen’s Bench is of opinion or requires that that should be done, according as may, under all the circumstances of the case, be most just, making compensation for the land if retained, as the court may direct.

¹¹¹ See *An Act respecting the Law and Transfer of Property*, RSO 1914, c 109, s 37. The provision can be currently found in *Conveyancing and Law of Property Act*, RSO 1990, c C.34, s 37.

¹¹² See *Land Registration Act*, SNS 2001, c 6, s 76, which provides in part:

76(1) In this Section, “person” includes a person and that person’s heirs, executors, administrators, successors or assigns.

(2) Where a person makes lasting improvements on land under the belief that it is the person’s own, the court may, on the application of either the person making the improvement or the person to whom the land belongs,

- (a) require the person making the improvement to remove it or abandon it;
- (b) require the person making the improvement to acquire an easement, either limited in time or not, from the person to whom the land belongs, in the amount and on such terms as the court thinks just;
- (c) require the person making the improvement to acquire the land on which it was made from the person to whom the land belongs, in the amount and on such terms as the court thinks just; or
- (d) require the person to whom the land belongs to compensate the person making the improvement for the amount by which the improvement has enhanced the value of the land to the owner of it, in the amount and on such terms as the court thinks just.

(4) An acquisition of land pursuant to this Section is not a subdivision within the meaning of the *Municipal Government Act*.

B. Exception to Indefeasibility

[202] Unlike adverse possession, claims regarding lasting improvements are an exception to indefeasibility. As such, section 69 appears to address the problem of the intervening *bona fide* purchaser for value, who obtains clear title free of adverse possession:¹¹³

[C]laims based on lasting improvements would have little effect if they were also subject to indefeasibility. The problem is compounded by the problem of mistaken belief and discoverability. As noted in *Sel-Rite Realty Ltd v Miller*:

Land ownership is not static. As a practical matter these problems are not usually discovered until there has been a change in ownership and someone has had the foresight or has been required to obtain a survey.

Consequently, as courts have applied s 69, claims will survive an intervening transfer.

[203] Although claims regarding lasting improvements are not expressly included within the list of exceptions to indefeasibility set out in the *Land Titles Act*, they nevertheless reflect an unregistered interest that binds even the *bona fide* purchaser for value.¹¹⁴ The impact of this result is discussed further in the next chapter.

C. Elements of the Claim

[204] There are two main elements to a section 69 claim. First, the claim must relate to a lasting improvement. Second, the claim is only available if the person who made the improvements was “under the belief that the land was the person’s own.”¹¹⁵ There must be a mistaken belief in ownership for a section 69 claim to be successful. Such a claim would not be available to a person who knowingly and intentionally intrudes on another’s land.

1. LASTING IMPROVEMENTS

[205] The reported cases that ALRI has reviewed suggest that section 69 claims tend to focus on the question of the occupier’s belief, rather than on what

¹¹³ 2003 Report, note 3 at 59, citing *Sel-Rite Realty v Miller*, [1994], 20 Alta LR (3d) 58 (QB) at 67.

¹¹⁴ See *Land Titles Act*, note 29, ss 61(1), 183.

¹¹⁵ *Law of Property Act*, note 4.

constitutes a lasting improvement. There does not appear to be a clear framework for determining whether an improvement is a “lasting” one, leaving the question open to judicial discretion. That said, the cases do disclose a number of characteristics that a lasting improvement ought to have.

[206] First, the improvement must be lasting. The lasting nature of the improvement means that it “must be permanent in the sense of not being easily removable.”¹¹⁶ For example, buildings and roadways are generally characterized as lasting improvements, while sidewalks, fences, retaining walls and renovations to buildings are generally not lasting improvements.¹¹⁷

[207] In *Deguire*, the foundation of a house, part of which was built on neighbouring land by mistake, and a well, which was built entirely on neighbouring land, were both found to be lasting improvements as neither the house nor the well could be easily or practicably removed from their current locations.¹¹⁸ In *Power*, a party wall separating two duplex units was a lasting improvement.¹¹⁹ In contrast, if an improvement is readily removable, then the most efficient way to resolve the dispute between the landowners is to simply remove or relocate the improvement.

[208] Second, a lasting improvement requires something more than repair or maintenance. In other words, an occupier needs to improve the property, not simply repair it to a former standard or state.¹²⁰ For example, trimming back vegetation or filling in low spots on a gravel driveway are not lasting improvements.¹²¹

[209] The question of what constitutes a lasting improvement ought to be left to judicial discretion. Taking a prescriptive approach to determining whether an improvement is “lasting” for the purposes of a section 69 claim ought to be avoided. We anticipate that if section 69 claims become the primary means of resolving disputes between neighbouring landowners in the absence of adverse possession, the case law regarding lasting improvements will continue to develop.

¹¹⁶ 2003 Report, note 3 at 54, citing *Medicine Hat (City of) v Mund*, 1988 ABCA 168, [1988] 86 AR 392.

¹¹⁷ 2003 Report, note 3 at 54-55. Some improvements are not easily characterized. See, for example, note 142 for conflicting authority regarding driveways.

¹¹⁸ *Deguire*, note 55 at paras 39-41.

¹¹⁹ *Power*, note 47 at para 190.

¹²⁰ See *Deguire*, note 55 at para 40.

¹²¹ *Goertz*, note 104 at para 53.

2. MISTAKEN BELIEF BY THE PERSON WHO MADE THE IMPROVEMENT

[210] To benefit from a claim regarding a lasting improvement, the occupier must believe that they made the improvement on their own land. As the 2003 Report notes:¹²²

The mistake may be either a mistake of title [e.g. confusing lot A for lot B] or a mistake as to the identity of the property covered by the title [e.g. reliance on a misplaced fence].

[211] Many decisions involving section 69 claims turn on the claimant's belief at the time the improvement was made. Alberta courts have interpreted the belief requirement as being "honest" and "*bona fide*". There appears to be some conflicting authority as to whether the belief ought to be reasonable as well, but the courts seem to primarily use reasonableness as a lens through which to assess the honesty of the occupier's belief.

[212] The requirement of belief has been described as follows:¹²³

Clearly, section 69 requires the improvement builder to be "... under the belief that the land was the person's own ...", which includes mistakes about the title or the identity of the property covered by the title... To succeed, the claimant's belief need not be reasonable, so long as it is honestly held. The reasonableness of the belief is relevant as to whether it was, in fact, honestly held and is assessed on an objective basis.

[213] The belief must be honest and *bona fide*, but it does not need to be reasonable:¹²⁴

Had the Legislature intended to afford [the registered owner] a defence of unreasonableness, it would have been an easy matter for the Legislature to have imposed upon [the claimant] the burden of showing that he was "under the *reasonable* belief that the land was [his] own." [The registered owner] is therefore not asking me to strictly construe Section 69(1); he is asking me to add something to Section 69(1) that is not there.

At the same time, [the Court of Appeal's] direction that the reasonableness of the belief may be considered in evaluating a belief's honesty makes sense. The more reasonable the stated belief about the location of the improvements, the more likely it was honestly maintained. Conversely, an unreasonable belief about the

¹²² 2003 Report, note 3 at 52-53.

¹²³ *Bank of Montreal v 1323606 Alberta Ltd*, 2013 ABQB 596 at para 46 [references omitted] [*Bank of Montreal*].

¹²⁴ *Deguire*, note 55 at paras 28-9.

improvement's location is less likely to have been honestly maintained.

[214] In this way, reasonableness plays a secondary role, namely as a factor relevant to the honesty of the belief:¹²⁵

- (1) The requisite belief may be unreasonable, but it must be *bona fide*, in the sense that it must be honestly held, and
- (2) The unreasonableness of the belief is relevant to its honesty.

[215] Mistaken belief will not be established when the claimant knew that the land belonged to another when they made the lasting improvement. For example, a purchaser who made the lasting improvements on land that they anticipated would be transferred to them at a later date would not be able to meet the requisite element of mistaken belief.

[216] In *Community Credit Union Ltd v Otto*, the registered owners had entered into a purchase agreement with a third party, who began building his residence on the lands before title passed to him.¹²⁶ In the meantime, the registered owners' creditors commenced foreclosure proceedings on the lands. At the time of the hearing, construction was 61% complete. When the registered owners' application to approve the sale to the third party was denied, the Court turned to consider whether section 69 applies in this case:¹²⁷

I am satisfied that this section is designed to protect persons who make lasting improvements on land under the honest belief that the land was their own. Here the purchaser chose to build before he had title and was either oblivious or unconcerned with the state of the title and proceeded at his own risk... section 69 was not intended to deal with cases where a purchaser of land was so careless as to fail to check for writs against the vendor for building on land.

[217] A similar fact scenario arose in *Bank of Montreal v 1323606 Alberta Ltd*.¹²⁸ In that case, a residential property developer entered into a contract with a home building company under which the builder could purchase lots to construct a show home. The contract provided that if the builder decided to build a show home, the developer would transfer title to the show home lot to the builder once construction began. The builder paid a 10% deposit, and started building the

¹²⁵ *Dequire*, note 55 at paras 27, 36. Justice Brown (as he then was) provides additional commentary confirming that the established law in Alberta for nearly 40 years is that a claimant's belief must only be honest and *bona fide*: see paras 30-6.

¹²⁶ *Community Credit Union Ltd v Otto*, 2002 ABQB 317.

¹²⁷ *Community Credit Union Ltd v Otto*, 2002 ABQB 317 at para 16.

¹²⁸ *Bank of Montreal*, note 123.

show home approximately one year later. The construction was halted when the show home was nearly completed due to the developer's purported breach of contract. The developer never transferred the show home lot to the builder and subsequently went into receivership.

[218] In considering the builder's claim under section 69, the Court noted that the provision cannot be interpreted as granting an unregistered priority to *any* person who builds an improvement on land.¹²⁹ The Court agreed that the approach taken in *Otto* was correct where a person builds an improvement on land that is not their own and fails to register the interest.¹³⁰ The builder's section 69 claim ultimately failed because it did not believe it had title to the land upon which it built the show home.

[219] In a different example, a tenant who made improvements to the property and then argued that the property was to be transferred to them under a sale agreement was not able to bring a successful claim under section 69.¹³¹ In that case, the Court held that the tenants knew that the matter of ownership was in dispute:¹³²

If [the tenants] took the risk of putting money and sweat equity into this condominium without first obtaining title, even after there is an acknowledged disagreement over the terms of ownership, [the registered owner] should not be equitably or legally obligated to reimburse [the tenants] for these improvements.

[220] An occupier's belief that the land upon which they made the improvement may also be grounded in a third-party mistake. For example, a claimant may have relied on incorrect advice given by a surveyor regarding the location of the property boundaries.¹³³ Evidence of a third-party mistake would go to establishing that the occupier's belief was honest and *bona fide*.

¹²⁹ *Bank of Montreal*, note 123 at para 45.

¹³⁰ *Bank of Montreal*, note 123 at para 45.

¹³¹ *Jusza v Dobosz*, 2003 ABQB 512, supplemental reasons 2003 ABQB 582.

¹³² *Jusza v Dobosz*, 2003 ABQB 512 at para 165. The Court seemed to make this comment in the context of whether the improvements constituted unjust enrichment, and then clarified in the supplemental reasons that section 69 was not available to the tenants since they knew ownership was in dispute: see *Jusza v Dobosz*, 2003 ABQB 582 at paras 7-10.

¹³³ See *Dequire*, note 55. In that case, the claimant stated that he had retained a surveyor to tell him the location of the physical boundaries of the property. Justice Brown (as he then was) noted at para 56 that "these considerations go to the reasonableness of [the claimant's] belief that his improvements were being made to his own land – which is, as I have explained, a factor to be considered in evaluating the honesty of his belief."

[221] Any person can check the land titles registry to determine who owns a parcel of land. However, the land titles and surveys systems often do not translate into tangible evidence of boundaries or even useable or accessible parcels of land. As important as land titles and surveys are to the occupation and development of Alberta, people will still inadvertently ignore a parcel's true boundaries. There is no legal obligation to investigate possible unregistered claims which may be attached to land.¹³⁴

3. WHO CAN BRING THE CLAIM?

[222] Section 69 claims may be brought by the person who made the improvement or their assigns. It is clear that an improver can bring a claim under this section. However, the reviewed cases did not disclose any clear interpretation by the courts of the meaning of "assigns" in the context of claims regarding lasting improvements. The central question to be considered in this part is which subsequent occupiers can be considered "assigns" under section 69.

a. Who is an assign?

[223] In *Goertz v Oliver*, the driveway which formed the centre of the dispute was built before the occupiers purchased their land in 2007.¹³⁵ They did not discover that the driveway encroached upon their neighbours' property until 2015. The occupiers' section 69 claim failed on the grounds that their maintenance of the driveway did not constitute a lasting improvement. The occupiers did not call the prior owner or any other witness who could establish belief when the driveway was built.¹³⁶ The Court did not consider whether the driveway itself was a lasting improvement, nor whether the occupiers could be considered assigns of the person who made the improvement.

[224] A subsequent occupier was able to bring a successful claim regarding lasting improvements in *Power*.¹³⁷ In that case, a previous owner of the building had divided it into a duplex. Both units were sold to Mr Maraboli, who later sold

¹³⁴ *Bank of Montreal*, note 123 at para 5.

¹³⁵ *Goertz*, note 104.

¹³⁶ *Goertz*, note 104 at para 29. The Court made this comment in the context of the occupiers' claim for adverse possession, as it was considering the question of whether the occupiers were in continuous open possession for 10 years prior to the registered owners' re-entry.

¹³⁷ *Power*, note 47.

the units separately to the parties in question. It was then discovered that the party wall was not on the property line that defined the units.

[225] The Court found that the party wall and the related floors and ceiling became a lasting improvement on land that encroached on the plaintiff's property. Although the Court did not expressly discuss whether the subsequent occupiers could be considered assigns under section 69, it based its decision on the previous owner's mistaken belief that the party wall was on the property line:¹³⁸

Despite the fact that Mr. Maraboli intended the Party Wall Agreement to separate the units based on the party wall that existed, I am also satisfied that he believed the location of that wall was entirely adjoining the property line, even though we [know] today that is not the case and that the Agreement does not reflect that belief.

I also note that no allegations of fraud were made at trial and there were no claims made that the Party Wall Agreement was not [validly] registered on title.

Lacking any evidence showing that Mr. Maraboli was not mistaken as to the location of the party wall relative to the property line, I find that a lasting improvement to the Plaintiff's property was made under mistaken belief as to ownership.

[226] In the result, the Court awarded both the registered owner and the occupier mutual easements to clarify the status of the encroachments and to resolve any practical issues related to the two neighbouring properties.

[227] Similarly, remedies under section 69 are available where a lasting improvement is made by the owner of neighbouring properties which are subsequently purchased by different parties.¹³⁹

[228] As a lasting improvement is a permanent construction that is not easily removable, such as a building or roadway, the expected lifespan of the improvement makes it highly likely that successive occupiers will enjoy its use. If section 69 were limited to the person who build the improvement, it would be an ineffective dispute resolution mechanism, as lasting improvements will

¹³⁸ *Power*, note 47 at paras 191-3. Mr Maraboli, the previous owner of both duplex units, was not a party to the action. The case also suggests that where the person who made the improvement is unavailable to provide evidence of their belief, extrinsic evidence may be used to support an honestly held but mistaken belief.

¹³⁹ See *Sel-Rite Realty v Miller*, [1994], 20 Alta LR (3d) 58 (QB).

inevitably be transferred. This is why section 69 extends a remedy to the improver's assigns.

[229] Neither section 69 nor the case law offers a clear framework for determining who is an assign. As defined in the *Oxford English Dictionary*, an assign or an assignee is: “[A] person to whom a right or liability is legally transferred.” The Nova Scotia provision may provide some guidance in this regard. It contemplates a number of different categories of individuals who may bring a claim regarding lasting improvements:¹⁴⁰

In this Section, “person” includes a person and that person’s heirs, executors, administrators, successors or assigns.

[230] Further, the Nova Scotia provision confirms that an application may be brought by either the person making the improvement or “the person to whom the land belongs.”¹⁴¹

[231] To identify an assign, and consequently what belief they may be required to have, it is helpful to consider what right or liability is being transferred. A person who builds a lasting improvement on another’s land under mistaken belief in ownership will have an interest in the improvement. That person will also have a right to bring a claim under section 69. Both can be assigned to another person. Furthermore, in most if not all cases, the section 69 claim will be assigned by implication because the person believes they own the land associated with the improvement. Any transfer that includes the lasting improvement should also transfer the ability to bring a claim under section 69.

[232] In many respects, this is contrary to the typical scenario where improvements run with the land. However, section 69 addresses a rare category of case where, despite many safeguards, lasting improvements end up on the wrong land. The close association between improvements and land also supports the mistaken belief of subsequent transferees that the improvement and the land were acquired together.

[233] It is ALRI’s position that an assign must be someone who believed that they were getting the lasting improvement and the land associated with it.

[234] Considering whether the occupier is an assign might have led to a different result in *Goertz*. In that case, the occupiers purchased their property believing that the driveway was on their land. Instead of considering whether

¹⁴⁰ *Land Registration Act*, SNS 2001, c 6, s 76(1).

¹⁴¹ *Land Registration Act*, SNS 2001, c 6, s 76(2).

the occupiers had themselves made a lasting improvement by maintaining the driveway, the Court could have turned its mind instead to the question of whether the occupiers had been assigned the original improver's interest in the driveway.¹⁴² If the driveway were a lasting improvement, and the subsequent occupiers believed that the driveway was on land that belonged to them at the time they purchased their property, then the necessary elements of section 69 would be established. At that point, the Court could have determined what the appropriate remedy would be that would balance the interests of both parties.

b. Assigns and belief

[235] It is unclear what belief an assign must have to support a successful claim regarding lasting improvements. While section 69 confirms that a claim may be brought by an assign, it does not disclose what belief an assign is required to prove.

[236] As noted above, ALRI's position is that an assign must be someone who believed they were getting the lasting improvement and the land associated with it.

[237] A strict reading of section 69 would impose a higher burden on parties to a dispute than courts have done so far. A key element of section 69 is that the improver must have believed the land to be their own at the time the lasting improvement was made. However, the reported cases have not required an assign to prove the improver's state of mind when the lasting improvements were made.¹⁴³

[238] Further, having to establish a chain of mistaken belief back to the person who made the lasting improvement would reduce the effectiveness of section 69 as an equitable means of resolving a dispute. For example, in *Power*, the chain of

¹⁴² This would depend on whether the gravel driveway itself was a lasting improvement. The Court in *Goertz* did not make a specific finding in this regard. However, a driveway was found not to be a lasting improvement in *Jones v Semen*, 1999 ABQB 473 at para 20.

¹⁴³ For example, in *Power*, note 47, the person who built the party wall between two duplex units - a lasting improvement - was a previous unknown owner of both units. That owner sold both units to Mr Maraboli, who registered a party wall agreement on title before selling one of the units to the Goodrams. The section 69 claim was brought by the Goodrams, who had no involvement with the construction or placement of the party wall and had not altered the wall in any way. In considering the question of mistaken belief, the Court was satisfied that Mr Maraboli believed that the party wall was on the property line when he registered the party wall agreement and subdivided the property. The Court does not appear to make any specific findings in the context of the section 69 claim about whether the Goodrams also had a mistaken belief in the location of the party wall. While the Goodrams were aware that they were purchasing the larger of the two units, it is unclear whether they believed that the party wall accurately marked the property line between the two units.

belief would have failed as the lasting improvement – the duplex party wall – was made before Mr Maraboli split the title into two properties. The party wall was built by a previous unknown owner who owned the building containing both units. If the Goodrams were required to establish the chain of mistaken belief back to the unknown owner, their section 69 claim would have likely failed. The alternative result in that case might have been an order to relocate the party wall to the property line at a greater cost than what the Goodrams originally paid for their unit in 1991, and in disproportion to the remaining lifespan of the 100-year old building.

[239] In most cases, the person to whom the lasting improvement is transferred will not know that they are the assignee of the section 69 claim. The person acquiring the lasting improvement likely shares the improver’s belief that the improvement is on land that the improver owns. This should not require the person acquiring the improvement to obtain evidence of the improver’s subjective belief. It would be unreasonable for a person acquiring the improvement to have to trace subjective belief in ownership back to the improver, especially where there may be intervening transfers. It should be sufficient that the assign believed they were acquiring the lasting improvement and the land associated with it.

[240] Further, *Power* suggests that the requisite belief is present when an owner builds a lasting improvement on a single parcel of land that is later subdivided. In other words, that the person who built the improvement did in fact own the land at the time of the improvement does not undermine the claim of a subsequent occupier of the encroaching last improvement.

[241] As courts have interpreted and applied section 69, they have not typically required an occupier to go back to prove what the improver thought when building the improvements. In effect, section 69 operates differently depending on whether the claim is brought by the improver or the assign.

c. **Aligning section 69 with court interpretation**

ISSUE 5

Should an assign have to prove the belief of the person who made the lasting improvement under section 69 of the *Law of Property Act*?

[242] To date, courts have generally achieved appropriate results in cases where a lasting improvement made on wrong land has been transferred to an assign. It

is tempting to allow courts to continue their approach to section 69 without proposing an amendment.

[243] However, as noted, the approach courts have taken is not strictly provided for in section 69. While courts will likely achieve an appropriate result, the majority of cases will settle before a hearing or trial. In the context of guiding settlement discussions, it is appropriate that the legislation reflect its application. Accordingly, ALRI recommends that section 69 should be amended to reflect the approach taken by courts.

RECOMMENDATION

An assign should not have to prove the belief of the person who made the improvement under section 69 of the *Law of Property Act*.

[244] We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.

D. Remedies

[245] If the two requirements of mistaken belief in ownership and the lasting nature of the improvements are met, then section 69 offers two types of remedies:¹⁴⁴

1. The claimant may be entitled to a **lien for the value of the improvements**. A lien will be an appropriate remedy when the improvement has enhanced the value of the disputed land upon which it was build. The effect of this remedy is to essentially force the sale of the improvements from the occupier to the registered owner.
2. The claimant may be entitled to **retain the land and pay compensation to the registered owner**. “Retain the land” may mean that an occupier acquires an interest in the land that allows them to continue using it – similar to a license, lease, or easement – or it may mean that the occupier is entitled to have title conveyed to them. The effect of this remedy is to essentially force the sale of the disputed lands from the registered owner to the occupier.

¹⁴⁴ 2003 Report, note 3 at 55-58.

[246] Consequently, courts have a “tremendous amount of discretion” in determining when a remedy should be granted.¹⁴⁵

The discretion must be exercised judicially. In doing so, it is incumbent upon the Court to look at the historical use of this property, the connection of the Applicants to it, the reason for the purchase of the property [...] any hardship suffered by him as a result of the transfer, and the inconvenience to either party upon such a transfer. All of these factors contribute to the concept of ‘all circumstances of the case’.

[247] As noted in the 2003 Report, courts have used section 69 to create various remedies that go beyond simply having an occupier buy the land from the registered owner, or the occupier selling the improvements to the registered owner. For example, the phrase “retain the land” suggests the creation of an interest of land that has variously been described as a “forced sale”, “transfer of land”, or “easement” depending on the circumstances.¹⁴⁶ A court can determine appropriate compensation when land is retained. In this way, section 69 can be used as a “flexible tool” to allow for creative solutions that respond to varying circumstances and planning laws.¹⁴⁷

[248] The available remedies under section 69 claims have been interpreted broadly to allow courts to craft more balanced and equitable outcomes. The provision requires a court to consider the specific circumstances of each case in order to arrive at a just result. It provides a balanced mechanism for resolving disputes between landowners. The Recommendations in this Report do not suggest any changes to the broad range of remedies currently available to claimants under section 69.

[249] Where a section 69 claim results in the occupier retaining the land, there may be planning law implications. This is particularly so where the lasting improvement straddles the property line. Retaining the land may have the effect of moving a strip of land from one title to another.

¹⁴⁵ *Jones v Semen*, 1999 ABQB 473 at para 34, cited in *Power*, note 47 at para 187.

¹⁴⁶ *SW Properties Inc v Calgary (City of)*, 2003 ABCA 10 at para 11.

¹⁴⁷ 2003 Report, note 3 at 56.

E. Planning Law Implications

1. LAND USE PLANNING

[250] Part 17 of the *Municipal Government Act* provides statutory authority for planning and land use controls by local governments in the province.¹⁴⁸ The purpose of the planning provisions of the *Municipal Government Act* is “to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement” and “to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta”, “without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.”¹⁴⁹ The two main instruments for regulation are land use bylaws and subdivision controls.

[251] The *Municipal Government Act* requires every municipality to adopt a land use bylaw.¹⁵⁰ A land use bylaw (commonly referred to as a “zoning bylaw”) “may prohibit or regulate and control the use and development of land and buildings in the municipality” and must, at minimum, divide the municipality into one or more districts, prescribe the uses of land or buildings permitted in each district, and establish the method of making decisions on applications for development permits and issuing development permits for any development.¹⁵¹ A land use bylaw may additionally prescribe the subdivision design standards applicable in the municipality.¹⁵²

[252] The term “use” as it relates to land is not defined in the *Municipal Government Act*, but “development” is defined broadly in section 616(b) of the *Act* as:¹⁵³

- (i) an excavation or stockpile and the creation of either of them,

¹⁴⁸ See generally, Frederick A Laux & Gwendolyn Stewart-Palmer, *Planning Law & Practice in Alberta*, 4th ed (Edmonton: Juriliber, 2019). Other statutory arrangements that govern the development and use of land in the province – notably, the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 – are not considered in this report.

¹⁴⁹ *Municipal Government Act*, note 6, s 617.

¹⁵⁰ *Municipal Government Act*, note 6, s 639.

¹⁵¹ *Municipal Government Act*, note 6, ss 640(1)-(2).

¹⁵² *Municipal Government Act*, note 6, s 640(4)(a).

¹⁵³ Rogers defines “use” as what the occupier can do with his or her property: see Ian Rogers, *Canadian Law of Planning and Zoning*, 2nd ed [looseleaf]. Various activities, including for example, the removal of soil, or the temporary parking of trucks, have been held by the courts to constitute a “use” of land.

- (ii) a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, over or under land,
- (iii) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building, or
- (iv) a change in the intensity of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the intensity of use of the land or building.

[253] A land use bylaw typically prohibits any person from commencing or carrying on a development without a development permit issued in accordance with the land use bylaw.¹⁵⁴ A land use bylaw may, however, exempt certain uses or buildings from this requirement. Edmonton’s zoning bylaw, for example, requires no development permit for an accessory building of limited size which is otherwise compliant with the bylaw.¹⁵⁵

[254] Development undertaken in contravention of regulation is subject to enforcement proceedings, including a stop order and demolition.¹⁵⁶

2. LASTING IMPROVEMENTS AND PLANNING LAW

[255] In the context of lasting improvements made to wrong land, an application for a development permit will not necessarily alert the improver or the development authority to the mistake. This is because a real property report is not usually required to be submitted as part of the application. The property will usually be identified or referred to in the application by its postal address or legal description, and depicted on a site plan which is not approved by a land surveyor.

[256] A court order under section 69 that allows the improver to retain the land may be regarded as an “instrument” within the meaning of the *Land Titles Act* and *Municipal Government Act*, which effects the subdivision of land and which cannot be accepted for registration. From a planning perspective, such an order can raise the same concerns as a judgment quieting title pursuant to section 74 of the *Land Titles Act*.

¹⁵⁴ See *City of Edmonton, bylaw No 12800, Zoning Bylaw* (May 2017), s 5.1.

¹⁵⁵ *City of Edmonton, bylaw No 12800, Zoning Bylaw* (May 2017), s 12.2(1).

¹⁵⁶ *Municipal Government Act*, note 6, ss 645-646.

[257] In *Moore*, the Court held that a judgment quieting title in respect of part, rather than the whole, of a registered parcel constitutes a subdivision of land and cannot be accepted for registration in contravention of the subdivision control provisions of the *Municipal Government Act*.¹⁵⁷

A judicial determination that an owner's right of re-entry is extinguished or barred over part of his or her lot probably is a further division of land, because it grants the claimant exclusive possession against the true owner and is assignable to subsequent purchasers of the adverse possessor's lands.

The Legislature applied the [...] restriction to a judgment declaring adverse possession of part of a lot in a certificate of title. Section 76 of the *Land Titles Act* provides:

76 (1) No instrument or caveat shall be registered in contravention of Part 17 of the *Municipal Government Act* or the regulations made under that Part...

A judgment is an instrument subject to s 652 of the *Municipal Government Act* (*Land Titles Act*, s 1(k)(ii)¹⁵⁸, 76(1); *Municipal Government Act*, s 616(i)¹⁵⁹, 652¹⁶⁰).

Therefore, a successful claimant who establishes adverse possession against a part only of a lot in a certificate of title must obtain subdivision approval before the Registrar of Land Titles may accept the judgment for registration. In practice, the Registrar requires subdivision approval before registering such a judgment (Alberta Land Titles Procedures Manual, Procedure # ADV-1 and SUB-1).

[258] Whether or not a particular transfer or new interest relating to part of a parcel or lot is properly regarded as subdivision of land depends on the construction of the statute by reference to the purposes of subdivision control.

¹⁵⁷ *Moore*, note 1 at paras 153-56. See also Alberta, Service Alberta, *Alberta Land Titles Procedures Manual*, ADV-1 (Alberta: Service Alberta, 2002), s 5. If the judgment deals with only part of the land described in the existing certificate of title, it must be checked by the Surveys section for legal description approval. See procedure under SUB-1 with respect to compliance with subdivision requirements under the *Municipal Government Act*." According to Procedure SUB-1 (Requirements in Respect of the Subdivision of Land Under the *Municipal Government Act*, issued 04/01/2004), "In most cases, instruments such as transfers, subdivision plans or separations of title, which result in the issuance of separate titles, and instruments such as leases, mortgages, or discharges, which deal with a part of a parcel, require subdivision approval." The manual does not list a judgment among the exception to the requirement to obtain subdivision approval.

¹⁵⁸ *Land Titles Act*, note 29, s 1(k)(ii) defines "instrument" as including "a judgment or order of a court."

¹⁵⁹ *Municipal Government Act*, note 6, s 616(i) provides that "'instrument' means a plan of subdivision and an instrument as defined in the *Land Titles Act*."

¹⁶⁰ Section 652(1) of the *Municipal Government Act* provides that "A Registrar may not accept for registration an instrument that has the effect or may have the effect of subdividing a parcel of land unless the subdivision has been approved by a subdivision authority."

Beyond the general planning purposes defined in section 617 of the *Municipal Government Act* (“to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement” and “to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta”, “without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest”), the following objectives of subdivision control have been identified in the literature:¹⁶¹

- certainty of boundaries
- managing the supply of building lots in the municipality and preventing premature subdivision of land
- preventing the creation of inaccessible, substandard, or unserviceable lots
- securing land and financial contributions for municipal services
- controlling the layout and design of new neighbourhoods

[259] A judgment quieting title in respect of part of a parcel in favour of an occupier who does not own adjoining land results in a true subdivision in that it carves out an entirely new parcel out of the original parcel.¹⁶² From a planning perspective, such a case is identical to a voluntary sale by a registered owner of part of a parcel, which requires subdivision approval. In contrast, where the occupier is the owner of neighbouring land, the judgment divides the ownership of the disputed land but does not create any new parcels: the disputed land is removed from one parcel and added to its neighbour. From a planning perspective, the consequences are akin to those of a boundary change resulting from a voluntary sale by a landowner to a neighbour.

[260] The approach taken by *Moore* indicates that the definition of “instrument” includes a judgment or an order of the court in order to prevent the registration of new interests in land which cannot be created by a private transaction without frustrating planning purposes. The *Municipal Government Act* does not render the

¹⁶¹ See also Eran S Kaplinsky, *From Farms to Suburbs: Controlling Land Subdivision* (SJD Thesis, University of Toronto, 2006); JB Milner, “An Introduction to Subdivision Control Legislation” (1965) 43:1 Can Bar Rev 49 at 50-57; Sidney H Troister, *The Law of Subdivision Control in Ontario*, 3rd ed (Aurora, ON: Canada Law Book, 2010) at 4-6.

¹⁶² Theoretically, the claimant can establish adverse possession in several non-contiguous parts of a parcel, subdividing the parcel into multiple parcels.

adverse possession claim invalid, but simply confirms that the judgment cannot be registered in contravention of the subdivision control provisions.

[261] On the other hand, the need for subdivision approval for the registration of a judgment quieting title in relation to part of a parcel was also considered by the Court of Appeal in *Koziey*.¹⁶³ The majority of the Court observed an apparent conflict between section 76 of the *Land Titles Act*, which prohibits the registration of an instrument in contravention of Part 17 of the *Municipal Government Act*, and section 74 of the *Land Titles Act*, which directs the Registrar of Land Titles to register a judgment subject only to section 191 (but not section 76) of the *Land Titles Act*.¹⁶⁴

The apparent conflict between the two provisions raises interesting issues. One possible interpretation is that the order granted by the trial judge is valid, but it cannot be registered at the Land Titles Office unless subdivision approval is obtained. That interpretation seems to conflict with the wording of s. 74(2) that the Registrar “shall” issue a new title. Another possible interpretation would be that the more specific provisions of s. 74 override the more general provisions of s. 76. Section 74 specifically applies when a title has been quieted, and it expressly refers to cancelling the existing certificate “in whole or in part”. That would appear to authorize a *de facto* subdivision. The Alberta Law Reform Institute assumed that subdivision approval would be required when a title is quieted, but did not discuss the precise wording of s. 74: *Limitations Act: Adverse Possession and Lasting Improvements*, Final Report No. 89, p. 65.

[262] The Court found, however, that the proper interpretation of the statute did not need to be decided to resolve the case before it.

[263] In the context of section 69 claims, the disputed land will usually be part of a parcel between neighbouring landowners. Such boundary adjustments are treated *de facto* by local authorities as land subdivision. Voluntary transactions are approved in most cases as long as the new lots are suitable for their intended use,¹⁶⁵ and subject to payment of any outstanding property taxes,¹⁶⁶ and proof

¹⁶³ *Koziey*, note 55.

¹⁶⁴ *Koziey*, note 55 at para 24.

¹⁶⁵ *Municipal Government Act*, note 6, s 654(1)(a) requires that an application for subdivision approval be refused if the land that is proposed to be subdivided is unsuitable for the purpose for which the subdivision is intended in the opinion of the subdivision authority.

¹⁶⁶ *Municipal Government Act*, note 6, s 654(1)(d) provides that a subdivision authority must not approve an application for subdivision until all outstanding property taxes on the land proposed to be subdivided have been paid to the municipality where the land is located, or satisfactory arrangements have been made for their payment.

that satisfactory arrangements have been made with the municipality or local utility for the provision of separate water, sanitary, and drainage services for each lot as adjusted.¹⁶⁷ Other conditions may be imposed to ensure that existing structures are brought into compliance with provincial building and safety codes.

[264] A local subdivision authority may approve an application for subdivision, including a boundary change, notwithstanding noncompliance of the proposed subdivision with the land use bylaw, if in its opinion the proposed subdivision would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land, provided that the proposed subdivision conforms with the use prescribed for that land in the land use bylaw.¹⁶⁸

[265] Although a subdivision authority is under no obligation to approve a subdivision, normally it should not take into consideration the fact that the subdivision is effected by a judgment or order of the court, rather than a voluntary conveyance.¹⁶⁹ Where the judgment results in a subdivision that does not conform to the land use bylaw, however, the effect on the use, enjoyment, and value of the parcel which is subject to adverse possession is an explicit consideration.

[266] On a final point, lasting improvements in contravention of the local land use bylaw may be subject to a demolition order or enforcement. The occupier should not be allowed to retain the land of another if the improvements are the subject of a stop order or a demolition order. Lasting improvements that have been made recently are more likely to be subject to bylaw enforcement.

3. JUDGMENTS AND SUBDIVISION APPROVAL

ISSUE 6

Should a claimant who obtains a judgment under section 69 of the *Law of Property Act* be required to apply for subdivision approval to give effect to the judgment?

¹⁶⁷ See e.g., Edmonton Subdivision Authority, file no. LDA19-0052 (March 14, 2019).

¹⁶⁸ *Municipal Government Act*, note 6, s 654(2).

¹⁶⁹ Section 654(3) of the *Municipal Government Act* gives the subdivision authority the discretion to approve or refuse an application for subdivision approval.

[267] As discussed earlier, a court order under section 69 that allows the occupier to retain the land must go through the subdivision process before it can be registered on title. In this way, an occupier would be required to go through a two-step process. First, they obtain a judgment allowing them to retain the land and then they obtain subdivision approval to allow the judgment to be registered on title.

[268] It is unclear whether the second step ought to be necessary when the occupier has obtained a court judgment under section 69. On the one hand, the parties have already gone through litigation to determine what to do about the lasting improvement. Requiring the occupier to engage in a second process to have their interest in the lasting improvement formally recognized on title may be perceived as an unnecessary step. On the other hand, the subdivision approval process may act as a safeguard to prevent parties from using consent orders as a way to subvert certain planning law restrictions.

[269] A potential answer to the question of whether a two-step process ought to be required before registering a section 69 judgment on title may be found in the Nova Scotia legislation regarding lasting improvements. The *Land Registration Act* states: "An acquisition of land pursuant to this Section is not a subdivision within the meaning of the *Municipal Government Act*."¹⁷⁰

[270] This provision seems to address the concerns caused by the two-step process, while also leaving room for the parties to resolve disputes regarding lasting improvements through settlement.

[271] ALRI does not take a position on whether judgments under section 69 ought to be accepted for registration on title without first undergoing the subdivision approval process.

[272] We welcome any comments that you may have on this issue or additional options for reform.

¹⁷⁰ *Land Registration Act*, SNS 2001, c 6, s 76(4).

CHAPTER 6

Limitation Periods for Claims Regarding Lasting Improvements

A. Introduction

[273] To effectively abolish adverse possession, a registered owner must be able to bring their claim to recover possession of real property at any time. While exempting such claims from the *Limitations Act* is consistent with the rationales underlying limitation periods identified in the previous chapter, a similar analysis must be considered for claims regarding lasting improvements. If section 69 of the *Law of Property Act* is to play a central role in resolving disputes in the absence of adverse possession, then it is necessary to determine whether such claims ought to be subject to limitation periods at all.

ISSUE 7

Should a claim regarding a lasting improvement under section 69 of the *Law of Property Act* be excluded from the operation of the *Limitations Act*?

B. Current Situation

[274] Section 69 claims are expressly excluded from the two-year discoverability rule, meaning that claims brought under this section are subject to the ultimate 10-year limitation period.¹⁷¹ Further, section 69 claims are based on continuing trespass and thus trigger section 3(3)(a) of the *Limitations Act*, which postpones the claim from crystalizing until the conduct actually ends. The result is that the 10-year limitation period for section 69 claims never really begins.

C. Previous Report

[275] In the 2003 Report, ALRI noted that allowing section 69 to operate indefinitely has a negative effect on promoting future ownership and ensuring

¹⁷¹ *Limitations Act*, note 1, s 3(4).

transferability.¹⁷² Based on this rationale, ALRI recommended at that time that the 10-year limitation period for section 69 claims ought to be triggered when the improvement is made:¹⁷³

Recommendation No. 6

Claims under s. 69 of the *Law of Property Act* should be subject to the *Limitation Act*'s ultimate rule. For limitation purposes, such claims should arise when the improvements are made and should not be postponed by the fact of continuing trespass.

[276] The latter part of this recommendation – that the limitation period ought to be triggered when the lasting improvement was made – was not adopted in the 2007 amendments to the *Limitations Act*.

D. Section 69 is an Exception to Indefeasibility

[277] As noted in an earlier chapter, section 69 is an exception to indefeasibility because it survives an intervening transfer to a *bona fide* purchaser for value. Claims regarding lasting improvements reflect an unregistered interest in land that nevertheless binds a subsequent purchaser. As such, it may be appropriate to limit its operation by imposing a true limitation period of either two years based on discoverability, or 10 years based on a specific triggering event, or both.

[278] It is worth noting that other exceptions to indefeasibility under the *Land Titles Act* do not appear to be subject to limitation periods. For example, section 183 sets out a number of situations in which a registered owner may be ejected from their land, including where there has been a misdescription of the land or its boundaries.¹⁷⁴ Further, section 61 confirms that certificates of titles are subject to certain implied conditions, such as any public easements, regardless of whether they are registered on title.¹⁷⁵

¹⁷² 2003 Report, note 3 at 60-61.

¹⁷³ 2003 Report, note 3 at 62.

¹⁷⁴ Other circumstances that may lead to ejection include defaulting on a mortgage, lease, or other encumbrance, in certain cases involving fraud, or where there are two or more certificates of title for the same land. However, section 178 provides that an action for damages against the Registrar in cases where there has been an error, omission, or misdescription in the certificate of title must be brought within six years from when the error, omission, or misdescription was made.

¹⁷⁵ Other implied conditions that do not have to be specifically mentioned on title include unpaid taxes, Crown reservations or exceptions contained in the original grant, leases or agreements shorter than three years if there is actual occupation, expropriation rights, and any other right of way or easement granted or acquired under Alberta law.

E. What Limitation Period Might Apply?

1. TWO-YEAR PERIOD BASED ON DISCOVERABILITY

[279] Currently, claims brought under section 69 of the *Law of Property Act* are exempt from the two-year limitation period based on discoverability.¹⁷⁶ The Current Project provides an opportunity to consider whether the two-year discoverability rule ought to apply to such claims.

[280] As discussed earlier, knowledge is a necessary factor for establishing a claim regarding lasting improvements. During two consultation events in Edmonton and Calgary with members of the legal profession, ALRI proposed that section 69 claims ought to be subject to the two-year discoverability rule. The two-year period would be triggered when the occupier knew or ought to have known that the lasting improvement was not on land that belonged to them. In other words, once the mistake in ownership is known or there are circumstances where it ought to have been known, the occupier should act on the claim.

[281] The majority of lawyers present at both consultation events expressed support for introducing a two-year limitation period for section 69 claims. However, lawyers in both cities raised the issue of “handshake agreements” – namely, those situations in which neighbours become aware that a lasting improvement has been made on the wrong land, but they informally agree to allow the encroachment to continue. These types of “handshake agreements” can continue for many years, particularly when neighbours remain on good terms. If the relationship breaks down, or a subsequent purchaser decides not to honour the agreement, then the occupier would lose their ability to bring a section 69 claim if it is subject to the two-year discoverability rule.

[282] On the other hand, imposing a two-year limitation period may be appropriate as the basis for bringing a section 69 claim is that the occupier’s state of knowledge has changed. Either the occupier now knows that they do not own the land in question, or the occupier’s belief is no longer honest or *bona fide*. Something has happened which caused or ought to have caused the occupier to question their ownership but only once they have reason to suspect they do not own it. Once the occupier is alert to the fact that they may not own the land, their belief in ownership may no longer be honest or *bona fide*. At some point, there

¹⁷⁶ *Limitations Act*, note 1, s 3(4).

may be a duty to inquire because the occupier ought to have known they were not the owner.

2. 10-YEAR ULTIMATE LIMITATION PERIOD

[283] As discussed earlier, section 69 claims are subject to the 10-year ultimate limitation rule. The 2003 Report noted that this limitation period is indefinitely postponed as it is based on a continuous trespass. The 2003 Report further recommended that the triggering event ought to be when the lasting improvement was made. The rationale underlying this recommendation was based on the fact that section 69 claims are exceptions to indefeasibility and as such, their impact on indefeasible title ought to be narrowed by imposing an effective limitation period.

[284] It is important to recognize that ALRI's previous recommendations regarding limitation periods for section 69 claims were made in the context of adverse possession's continued existence in Alberta law. In the absence of adverse possession, imposing a limitation period on section 69 claims could preclude an occupier from having any defence to claims to recover possession of real property. If claims to recover possession of land are exempt from the *Limitations Act*, then it may be appropriate to allow an occupier to bring a section 69 claim at any time.

3. CONCLUSION

[285] At first blush, imposing a limitation period on claims regarding lasting improvements may seem appropriate, as section 69 is an exception to indefeasibility. Once an occupier knows or ought to know that they do not own the land, they should take timely steps to address the situation with the registered owner. The occupier should not be allowed to sleep on their claim to the detriment of subsequent registered owners or subsequent assigns.

[286] That said, imposing a limitation period for such claims does not reflect the common practice of informal "handshake agreements" between neighbours to allow an encroachment to continue. It is easy to conceive of a scenario in which, after many years of otherwise quiet enjoyment, a falling out between neighbours would result in the registered owner bringing a claim to recover possession of the disputed land. The occupier would not be able to bring a counterclaim regarding the lasting improvement if the limitation period has already expired, which would lead to an inequitable result.

[287] Further, imposing a limitation period on section 69 claims could also give rise to a new mischief. A registered owner may be encouraged to delay their claim to recover possession of real property until the after the limitation period for the occupier's section 69 claim has expired.

[288] Claims regarding lasting improvements will invariably arise between parties who did not cause the basis for the dispute. In the context of imposing a limitation period, it is relevant to note that land transfer practices have changed since section 69 was enacted in 1950. For example, real property reports are now commonly done when land is transferred, which will help to bring problems to light. Real estate agent practices have changed to require better descriptions of the dimensions of improvements. Aerial views of properties are now readily available through sources such as Google Earth, and these images may help owners and occupiers to see problems. Further, as noted elsewhere in this Report, lasting improvements will typically require development permits. In other words, there have been many changes since 1950 which should not only bring existing encroaching improvements to light, but also help to reduce future occurrence.

[289] While section 69 claims are exceptions to indefeasibility, the effects of this can be limited in other ways as will be discussed in the next section. Given the above discussion, ALRI recommends that claims regarding lasting improvements brought under section 69 of the *Law of Property Act* should not be subject to any limitation period.

RECOMMENDATION

A claim regarding a lasting improvement under section 69 of the *Law of Property Act* should be excluded from the operation of the *Limitations Act*.

[290] We welcome any comments that you may have in support of or in opposition to this recommendation or additional options for reform.

F. Treating Section 69 as an Exception to Indefeasibility

[291] Given that section 69 is an exception to indefeasibility, there would be value in making this clear in the *Land Titles Act*. The general practice is that exceptions to indefeasibility are expressly stated in the *Land Titles Act* as, for example, sections 61 and 183.

[292] Further, the current placement of section 69 in the *Law of Property Act* does not adequately recognize the effect of this section on indefeasibility:¹⁷⁷

The *Law of Property Act* is not intended to provide an interest that trumps the *Land Titles Act* and the normal operation of the Torrens land registration system. Here, I note that while the *Land Titles Act* does not include any operational limitations, the *Law of Property Act* references the operation of the *Land Titles Act*. For example, section 64(8) specifically identifies that section 64:

... is subject in all respects to the Land Titles Act ... and the priority of any interest registered or filed under the [Land Titles Act] shall be determined pursuant to that Act.

While section 69 does not include an explicit restriction on its function, the operation of the Torrens system means that it simply cannot be interpreted to grant an unregistered priority to *any* person who builds an improvement on land. To interpret it otherwise would defeat the legislature's intent in adopting the Torrens system.

[293] As noted earlier, the original version of section 69 was enacted by the Legislature as part of the "Remedial Proceedings" division of the *Land Titles Act*. It was under the authority of the *Revised Statutes 1980 Act* that the provision was moved to the *Law of Property Act*, which did not exist before the Revised Statutes of Alberta 1980 came into force.¹⁷⁸ If the provision had not been moved to the *Law of Property Act*, it would likely still be in the "Remedial Proceedings" division of the *Land Titles Act* between sections 185 (Reference by Registrar to judge) and 186 (Reservations in original grant from the Crown). While that placement is slightly awkward given the proximate sections, it would be harder to argue that section 69 interrupts the normal operation of the land titles system if it was still part of the *Land Titles Act*. For example, placing the provision as the first section under the subdivision titled "Appeals and References to Judge" and ahead of appeals concerning the Registrar might be a better fit. Such a placement would also follow directly after section 183 (Protection against ejectment), which alerts registered owners to exceptions to indefeasibility.

[294] ALRI recognizes that the placement of section 69 is a drafting issue. While we make no recommendation as to where in the statute book the provision should be, it is important to note that its shift to the *Law of Property Act* has had consequences both for those who rely on the *Land Titles Act* and for how the

¹⁷⁷ *Bank of Montreal*, note 123 at paras 43-4.

¹⁷⁸ *Revised Statutes 1980 Act*, SA 1979, c 66 (assented to 16 November 1979).

provision is interpreted as part of the *Law of Property Act* rather than the *Land Titles Act*.

CHAPTER 7

Summary of Proposed Reforms

A. Proposed Reforms

[295] The proposed reforms contained in this Report are based on the recommendation that the law of adverse possession no longer has compelling policy reasons to continue in Alberta. We look forward to feedback on these recommendations in formal consultation; the recommendations contained in this Report may change depending on the formal consultation results. However, preliminary and informal consultation suggests that there is significant support to expand a registered owner's ability to recover possession of land from an occupier, regardless of how much time has passed.

[296] The net result of the proposed reforms can be summarized as follows:

1. There should be a positive statement that no title or interest in land may be acquired by adverse possession after the proposed amendments come into force.
2. A claim to recover possession of real property can be brought at any time.
3. A claim regarding lasting improvements under section 69 of the *Law of Property Act* can be brought at any time.
4. Section 69 of the *Law of Property Act* should be amended to ensure that occupiers who did not make the lasting improvement have access to the same range of remedies as the person who made the improvement.

[297] The proposed reforms would affect the following acts:

Act	Amendment to provide that:
<i>Limitations Act</i> , various sections	<ul style="list-style-type: none"> ▪ No limitation period for claims to recover possession of real property. ▪ No limitation period for claims regarding lasting improvements.
<i>Land Titles Act</i> , s 74	<ul style="list-style-type: none"> ▪ No title or interest in land may be acquired or gained through adverse possession after the coming in force date. ▪ Successful claims to quiet title under previous version of section 74 are undisturbed. ▪ Claims to quiet title commenced before the coming in force date may proceed as if the 10-year limitation period to recover possession of land was still in force. If the claim results in a judgment in the occupier's favour, the occupier may register the title under the previous version of section 74.
<i>Law of Property Act</i> , s 69	<ul style="list-style-type: none"> ▪ An assign can bring a claim without having to establish the improver's belief.¹⁷⁹

[298] The proposed reforms are intended to balance the equities between a registered owner seeking to recover possession of land, and an occupier who has made, maintained, or benefitted from a lasting improvement on land they believed they rightfully owned. As such, the proposed reforms are focused on ensuring that section 69 of the *Law of Property Act* is interpreted as being available to a subsequent occupier who continues to benefit from a lasting improvement.

[299] Bringing occupiers' claims under section 69 also allows courts to exercise broader discretion in determining the appropriate remedies. Currently, courts do

¹⁷⁹ We have indicated that returning section 69(1) and (2) of the *Law of Property Act* to the *Land Titles Act* should be considered. The reasons for this are that the interpretation of the section may have changed since being placed in the *Law of Property Act* and that it is an exception to indefeasibility. While not expressly discussed in this report, section 69(3), which precluded acquiring easements by prescription, might be appropriately placed alongside the abolition of adverse possession in section 74 of the *Land Titles Act*.

not have the discretion to refuse to quiet title once the criteria for adverse possession are met. As noted by the Justice Eamon in *Moore*:¹⁸⁰

Presently, the only test for adverse possession under the *Limitations Act* is passage of time. Where the requirements of section 3 of the *Limitations Act* are met and the narrow exceptions prescribed in the *Limitations Act* do not apply, the Court cannot refuse judgment for adverse possession or provide that the declaration will expire if subdivision approval is refused. At most, the Court has power to postpone the operation of its judgment in proper cases.

[300] In contrast, claims regarding lasting improvements permit courts to craft a range of solutions to resolve disputes that take into account the particular circumstances of each individual case. This broad discretion allows courts to achieve proportionality between the parties. Certain remedies such as easements, licenses, and liens, may be time-limited to reflect the lifespan of the lasting improvement. In some cases, it may be appropriate for a court to order that title to the land underneath the lasting improvement be transferred permanently to the occupier. A court may make such an order conditional on subdivision approval. The registered owner would be entitled to compensation, which would not otherwise be available to them under the law of adverse possession.

¹⁸⁰ *Moore*, note 43 at para 179.

Appendix – Cross-Jurisdictional Comparison of Adverse Possession in Canada

Jurisdiction	Provision(s)	Availability of Adverse Possession	Time Period(s)
Land Title Systems Alberta	<i>Land Titles Act</i> , RSA 2000, c L-4, s 74	Available against: <ul style="list-style-type: none"> Privately owned land in the land titles system Public land, municipal land, and irrigation districts are exempt from adverse possession claims 	10 years (<i>Limitations Act</i> , RSA 2000, c L-12, s 3(1)(b))
Northwest Territories	<i>Limitation of Actions Act</i> , RSNWT 1988, c L-8, ss 2(1)(e), 18, 19, 43	Available against: <ul style="list-style-type: none"> Privately owned land in the land titles system 	10 years from when right first accrued (<i>Limitation of Actions Act</i> , RSNWT 1988, c L-8, s 18)
Nunavut	<i>Limitation of Actions Act</i> , RSNWT 1988 (Nu), c L-8, ss 2(1)(e), 18, 19, 43	Available against: <ul style="list-style-type: none"> Privately owned land in the land titles system <p>Note: Nunavut is an exceptional jurisdiction due to lack of fee simple property ownership; most individuals “equity lease” their property from the municipality.</p>	10 years from when the right first accrued (<i>Limitation of Actions Act</i> , RSNWT 1988 (Nu), c L-8, s 18)
British Columbia	<i>Limitations Act</i> , SBC 2012, c 13, s 28	Available only against: <ul style="list-style-type: none"> Land not in land title system (i.e. Crown land) when the claim arose before July 1, 1975 Unregistered interests on the parcel 	20 years from when the right first accrued (<i>Statute of Limitations</i> , RSBC 1948, c 191, s 16) prior to amendment about claims that arose pre-1975
Nova Scotia	<i>Land Registration Act</i> , SNS 2001, c 6, s 74(1)	Available only against: <ul style="list-style-type: none"> Land in the land title system, where the % claimed is less than 20% of the size of the parcel 	10 year limitation for land in land title system (<i>Land Registration Act</i> , SNS 2001, c 6, s 74(2))

Jurisdiction	Provision(s)	Availability of Adverse Possession	Time Period(s)
Saskatchewan	<i>Land Titles Act</i> , SS 2000, c L-5.1, s 21(1).	<ul style="list-style-type: none"> Land in the land title system, where the % claimed is more than 20% when the claim crystallized before registration and the claim is brought within ten years of the registration Presumably land still in the deeds system 	20 year limitation for land in deed system (<i>Of The Limitations of Actions</i> , RSNS (5th) (1884), c 112, s 11)
Yukon	<i>Land Titles Act</i> , SY 2015, c 10, s 44	Abolished against other land by <i>An Act to Provide a System for the Registration of Title to Land</i> , SNS 1978, c 8, s 18 Not available. Abolished by <i>Land Titles Act</i> , SS 2000, c L-5.1, s 21(1).	n/a
Deed Systems			
Prince Edward Island	<i>Statute of Limitations</i> , RSPEI 1988, c S-7, ss 16, 46	Available against: <ul style="list-style-type: none"> Privately owned land with 20 years of continuous occupation Crown land with 60 years of continuous occupation 	20 years from when the right first accrued (<i>Statute of Limitations</i> , RSPEI 1988, c S-7, s 16)
Quebec	<i>Civil Code of Quebec</i> art 2918	Available against: <ul style="list-style-type: none"> Property acquired in good faith Private individuals or the state 	10 years (<i>Civil Code of Quebec</i> , art 2918)
Newfoundland and Labrador	<i>Lands Act</i> , SNL 1991, c 36, s 36(1)	Available only against: <ul style="list-style-type: none"> Crown land if occupation was for a continuous 20-year period prior to January 1, 1977 	10 years (<i>An Act to Revise the Law Respecting Limitations</i> , SNL 1995, c L-16.1, s 7(1)(g))
Mixed Systems			
Manitoba	<i>Real Property Act</i> , The, RSM 1988, c R30, s 61(2) (prevents adverse possession)	Available only against: <ul style="list-style-type: none"> Presumably land still in the deeds system Land in the land title system when the claim crystallized before registration 	10 years (<i>Limitation of Actions Act</i> , CCSM, c L150, s 25)

Jurisdiction	Provision(s)	Availability of Adverse Possession	Time Period(s)
Ontario	<i>Land Titles Act</i> , RSO 1990, c L5, s 51(1)	<p>Abolished against other land by <i>An Act respecting Real Property in the Province of Manitoba</i>, 1902 SM, c 43, s 75.</p> <p>Available only against:</p> <ul style="list-style-type: none"> • Deeds (registry system and Land Title Conversion Qualified (LTCQ) titles) • Only possible against LT Plus title (absolute title) when the claim crystallized 10 years before title was registered 	10 years (<i>Real Property Limitation Act</i> , RSO 1990, c L.15, s 4)
New Brunswick	<i>Land Titles Act</i> , SNB 1981, c L-1.1, s 17(1)	<p>Abolished against other land by <i>An Act to Simplify Titles and to Facilitate the Transfer of Land</i>, SO 1885, c 22, s 25</p> <p>Not available. Abolished by <i>Land Titles Act</i>, SNB 1914, c 22, s 44.</p>	n/a

Deadline for comments on the issues raised in
this document is **1 October 2019**.

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Web: alri.ualberta.ca

Phone: 780.492.5291

Email: lawreform@ualberta.ca

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