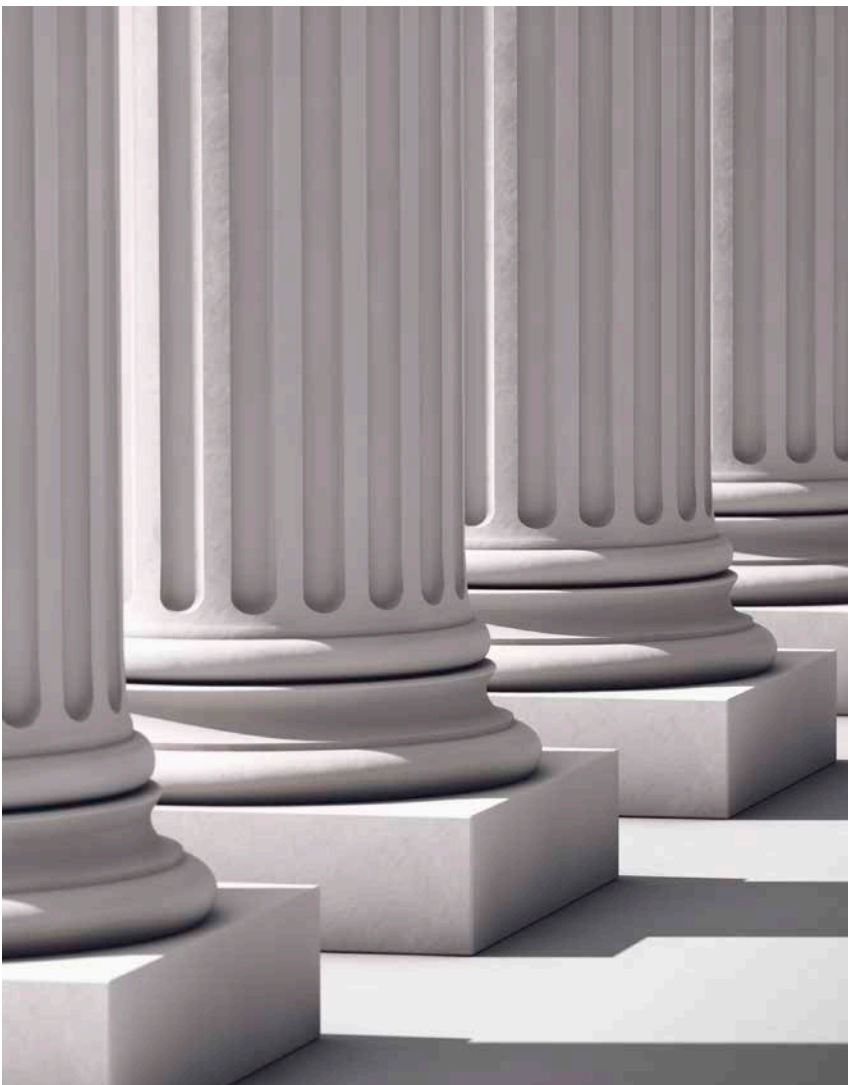




ALBERTA
LAW REFORM
INSTITUTE



ADVERSE POSSESSION AND LASTING IMPROVEMENTS TO WRONG LAND



FINAL REPORT

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ADVERSE POSSESSION AND LASTING IMPROVEMENTS TO WRONG LAND

FINAL ||| **115**
REPORT

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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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Commercial Real Property Law, South
Residential Real Property Law, South
Real Property Law, North
Commercial Property & Leasing, North

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 the 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.

Recommendations

RECOMMENDATION 1

Adverse possession should be abolished by amending the *Land Titles Act* to provide that no right or title in or to land registered under the Act may be acquired or deemed to be acquired by adverse possession. 47

RECOMMENDATION 2

The *Limitations Act* should be amended so that there is no limitation period on claims to recover possession of real property..... 52

RECOMMENDATION 3

The amendments to the *Land Titles Act* to abolish adverse possession should apply retrospectively so that no new claims may be brought once abolition is in force..... 54

RECOMMENDATION 4

The amendments to the *Limitations Act* to allow claims to recover possession of real property to be brought at any time should not apply where a claim based on adverse possession was commenced before abolition is in force. In such circumstances, the 10-year limitation period for claims to recover possession of real property should continue to apply..... 56

RECOMMENDATION 5

The amendments to the *Land Titles Act* to abolish adverse possession should not affect a certificate of title acquired by adverse possession and issued before abolition is in force, or a judgment issued in favour of an adverse possessor before abolition is in force. 57

RECOMMENDATION 6

Section 69 of the *Law of Property Act* should be amended to provide that an assign should not have to prove the belief of the person who made the improvement. 73

RECOMMENDATION 7

The *Limitations Act* should be amended so that there is no limitation period on claims regarding lasting improvements under section 69 of the *Law of Property Act*. 92

Abbreviations

LEGISLATION

<i>Land Titles Act</i>	<i>Land Titles Act</i> , RSA 2000, c L-4
<i>Law of Property Act</i>	<i>Law of Property Act</i> , RSA 2000, c L-7
<i>Limitations Act</i>	<i>Limitations Act</i> , RSA 2000, c L-12
<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: www.alri.ualberta.ca/docs/fr089.pdf
RFD 33	Alberta Law Reform Institute, <i>Adverse Possession and Lasting Improvements to Wrong Land</i> , Report for Discussion 33 (2019), online: www.alri.ualberta.ca/images/stories/docs/RFD33.pdf

CASES

<i>Bank of Montreal</i>	<i>Bank of Montreal v 1323606 Alberta Ltd</i> , 2013 ABQB 596
<i>Bretin</i>	<i>Bretin v Ross</i> , 2019 ABQB 957
<i>Canadian Wellhead</i>	<i>1215565 Alberta Ltd v Canadian Wellhead Isolation Corp</i> , 2012 ABQB 145
<i>Deguire</i>	<i>Deguire v Bennett</i> , 2013 ABQB 488
<i>Goertz</i>	<i>Goertz v Oliver</i> , 2018 ABQB 363
<i>Koziey</i>	<i>Koziey Estate (Re)</i> , 2019 ABCA 43
<i>Lutz</i>	<i>Lutz v Kawa</i> (1980), 23 AR 9 (CA)
<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

CHAPTER 1

Introduction

A. The Law of Adverse Possession

[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 parties: 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), 23 AR 9 (CA) [*Lutz*], discussed in Chapter 3. In Alberta, the requisite period of time is 10 years as set out in 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 registered 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: <www.alri.ualberta.ca/docs/fr089.pdf> at 27 [2003 Report].

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

⁵ According to s 4 of the *Public Lands Act*, RSA 2000, c P-40, “No person may acquire by prescription an estate or interest in public land or, as against the Crown, in any other land.” Similarly, s 2(4)(a) of the *Limitations Act*, 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 recommending the elimination of 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*, 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 para 37 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 at paras 34-38.

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*. 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.¹³ 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 serves the objectives of ensuring transferability and protecting future ownership.

¹³ In contrast, claims for lasting improvements under s 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.

- 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:¹⁴

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*.¹⁵ The 2012 Bill proposed amendments to the *Land Titles Act* and the *Limitations Act*, which would result in the abolition of adverse possession in Alberta. While the 2012 Bill passed second reading on

¹⁴ Alberta, Legislative Assembly, *Hansard*, 27th Leg, 4th Sess, Issue 41 (28 November 2011) at 1404-09 (Ken Allred).

¹⁵ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2012*, 5th Sess, 27th Leg, Alberta, 2012 (first reading 7 March 2012) [2012 Bill].

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.¹⁶ Mr N. Lee Cutforth, QC, the former Property Rights Advocate, recommended that the law of adverse possession be abolished.¹⁷ 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."¹⁸ The Standing Committee decided to refer the recommendation to the Ministry of Justice and Solicitor General for review.¹⁹

[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."²⁰

[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*.²¹ Although wider in scope than the 2012 Bill, the 2017 Bill contained identical provisions to amend the *Land Titles Act* and the *Limitations*

¹⁶ Alberta Property Rights Advocate Office, *2014 Annual Report*, (22 June 2015) online: <open.alberta.ca/dataset/1fa95e77-3a58-44aa-87b7-04c561dfa099/resource/3165ca0a-0813-448e-9582-c020116f0075/download/annualreport2014.pdf> [<https://perma.cc/ZM77-3WVA>].

¹⁷ See Recommendation 2014.03, Alberta Property Rights Advocate Office, *2014 Annual Report*, (22 June 2015) at 9-10, online: <open.alberta.ca/dataset/1fa95e77-3a58-44aa-87b7-04c561dfa099/resource/3165ca0a-0813-448e-9582-c020116f0075/download/annualreport2014.pdf> [<https://perma.cc/ZM77-3WVA>].

¹⁸ 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.

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 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.

²⁰ 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.

²¹ Bill 204, *Protection of Property Rights Statutes Amendment Act, 2017*, 3rd Sess, 29th Leg, Alberta, 2017 (first reading 22 March 2017) [2017 Bill].

Act to abolish adverse possession.²² 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."²³

[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*.²⁴ The 2018 Bill was identical to the 2012 Bill with one addition; it specified a "coming into force" date of January 1, 2019.²⁵ 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.²⁶

C. The Current Project

[22] The Report for Discussion for this Project, entitled *Adverse Possession and Lasting Improvements to Wrong Land* [RFD 33], was published on July 23, 2019.²⁷

[23] The first issue that RFD 33 addressed was whether the law of adverse possession is still necessary and appropriate in Alberta. It examined the problems adverse possession was intended to fix and considered whether the

²² The 2017 Bill, note 21, 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.

²³ See Alberta, Legislative Assembly, *Hansard*, 29th Leg, 3rd Sess, No 33 (15 May 2017) at 1047-48 (Jessica Littlewood).

²⁴ Bill 204, *Land Statutes (Abolition of Adverse Possession) Amendment Act, 2018*, 4th Sess, 29th Leg, Alberta, 2018 (first reading 5 April 2018) [2018 Bill].

²⁵ 2018 Bill, note 24, cl 3.

²⁶ See Alberta, Legislative Assembly, *Hansard*, 29th Leg, 4th Sess, No 29 (14 May 2018) at 1031-37. 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.

²⁷ Alberta Law Reform Institute, *Adverse Possession and Lasting Improvements to Wrong Land*, Report for Discussion 33 (2019), online: <www.alri.ualberta.ca/images/stories/docs/RFD33.pdf> [RFD 33].

law still works in modern times, particularly where privately owned land falls under a land registration system. RFD 33 included a review of 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] RFD 33 also considered 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 was 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 was 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 were 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 was reproduced in RFD 33 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.

[27] Following publication of RFD 33, ALRI engaged in consultation with interested stakeholders. The consultation results, which will be discussed in detail later in this Final Report, indicate that there is broad support for the Recommendations set out in RFD 33. As a result, the Recommendations contained in this Final Report are substantively the same as those enumerated in RFD 33.

D. Aboriginal Title

[28] 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,

²⁸ In his discussion on the sufficiency of possession or occupation in the context of Aboriginal title claims, Professor 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 226-27; see also *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 38-41.

the potential effect of this Report's recommendations on Aboriginal title claims was not considered within the scope of the Project. Nothing in this Final Report is intended to abrogate or derogate any Aboriginal or treaty rights, or other Indigenous rights to land.

E. Natural Boundary Changes

[29] 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

[30] 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

[31] 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

[32] 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. In RFD 33, ALRI recommended

²⁹ See *Land Titles Act*, RSA 2000, c L-4, s 89 [*Land Titles Act*]. See also Alberta, Service Alberta, *Alberta Land Titles and Procedures Manual*, SUR-12 (Alberta: Service Alberta, 2002), online: <www.servicealberta.ca/pdf/ltmanual/SUR-12.pdf> [<https://perma.cc/P3SX-G23F>].

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

³¹ It is worth noting the difference between accretion/erosion, and avulsion when it comes to shifting boundaries. While accretion/erosion does have the effect of shifting boundaries – parcels get larger through accretion or smaller through erosion – avulsion does not have the effect of shifting boundaries.

that the legal issues arising from natural boundary changes, particularly in cases where there are overlapping claims, be considered in a separate project.³²

[33] In response to RFD 33, ALRI was contacted by the Alberta Land Surveyors Association (ALSA). ALSA had commissioned a report on adverse possession, which was revised to reflect ALRI's recommendations.³³ The ALSA Report recommended that ALSA "[e]stablish a working relationship with ALRI so that ALSA researched the interplay between adverse possession and riparian rights... particularly the potential for a parcel to get larger through accretion and smaller through erosion."³⁴ We subsequently met with Dr Brian Ballantyne, the lead author of the ALSA Report, to discuss the potential implications of adverse possession in the context of riparian rights and avulsion.³⁵

[34] Ultimately, ALRI determined that questions regarding riparian rights and avulsion ought to remain outside the scope of this Project based on the considerations previously mentioned in RFD 33. ALRI welcomes the opportunity to work together with ALSA on a future project and sees a great deal of value in that partnership. We will consider this potential topic in a future project selection process.

F. Objectives of Proposed Reforms

[35] Disputes arising from the ownership and use of land are inevitable:³⁶

The law needs to provide an efficient and appropriate mechanism to resolve them, not only to determine the parties' interests in a current dispute but also to prevent the dispute from troubling future owners.

[36] The recommendations set out in RFD 33 were informed by certain objectives, which were in turn reinforced by the responses we received during the consultation process. As a result, the Recommendations contained in this Final Report are guided by the following objectives:

³² 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.

³³ Dr Brian Ballantyne and Roberta Holtner, "Adverse possession: Land grab or quieting of title?", Report to the Alberta Land Surveyors' Association, revised on September 17, 2019 [ALSA Report].

³⁴ ALSA Report, note 33 at 6.

³⁵ Following this meeting, ALRI received a supplemental report from ALSA on February 27, 2020 that included additional commentary regarding riparian boundary principles [ALSA Supplemental Report].

³⁶ 2003 Report at xiii.

- a. Protecting future ownership
- b. Ensuring transferability
- c. Promoting the efficient and equitable resolution of disputes
- d. Preventing the case of the “deliberate trespasser”

[37] The first two objectives – protecting future ownership and ensuring transferability – also guided the recommendations made in the 2003 Report. The 2003 Report included a third objective: preventing the revival of stale claims. This objective reflected the important role traditionally played by limitations legislation in adverse possession claims.

[38] While we carefully considered including a similar objective in this Final Report, we determined that the focus of future reforms regarding the law of adverse possession should instead consider how to best promote the efficient and equitable resolution of disputes. Using the register as the sole means for resolving disputes is an arbitrary approach and does not assess competing claims on their merit. To counter this, the proposed reforms aim to strike a balance between allowing registered owners to pursue their claims to recover possession of property at any time, while also ensuring that occupiers have a broad range of remedies available to them to prevent inequitable results. In this way, proportionality is achieved between the interests of both registered owners and occupiers.

1. PROTECTING FUTURE OWNERSHIP

[39] Land titles legislation operates on a “curtain principle” to protect future owners from prior claims. Limitations legislation acts in a somewhat similar fashion, as the passage of time prevents past claims from being litigated after the limitation period expires.

[40] While there is a potential for conflict between limitation and land title legislation when it comes to resolving present disputes, both legislative regimes work well and in concert to protect future ownership.³⁷

Limitations legislation protects future ownership by extinguishing prior rights when the limitation period expires. Land titles legislation protects future ownership with the guarantee of indefeasible title to purchasers for value. Thus while limitations legislation would

³⁷ 2003 Report at para 17.

extinguish the prior rights of the registered owner, land titles legislation disregards unregistered rights, such as those of a person in possession of land.

[41] The Recommendations contained in this Final Report confirm the importance of protecting future ownership. They do not affect the registered owner's ability to transfer indefeasible title to a *bona fide* purchaser. The difference is that a registered owner would be able to take steps at any time to protect their title from trespassers and to preserve its integrity.

2. ENSURING TRANSFERABILITY

[42] The "mirror principle" is another feature of the Torrens system of land registration, and provides that the title reflects all current interests in the land. Any interested purchaser can pull title to a parcel of land and see in one place all of the rights in relation to that land. Coupled with the government's guarantee that the interests registered on title are correct, the mirror principle helps to ensure transferability.³⁸

[43] Eliminating an occupier's ability to acquire title through adverse possession is consistent with the mirror principle. A *bona fide* purchaser for value acquires title from the registered owner free and clear of the occupier's unregistered interest. The difference is that the occupier will not be able to bring a claim for adverse possession even if more than 10 years pass from the time the *bona fide* purchaser first acquired title.³⁹

3. PROMOTING EFFECTIVE AND EQUITABLE RESOLUTION OF DISPUTES

[44] If a registered owner is able to bring a claim to recover possession of land at any time, then there must be a mechanism in place in the absence of adverse possession to ensure that a long-time occupier is not unfairly displaced from the disputed land. Where lasting improvements have been made, an occupier may bring a claim under section 69 of the *Law of Property Act* 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.

³⁸ It is important to remember that a title is subject to certain implied conditions regardless of whether those interests are registered: see, for example, *Land Titles Act*, s 61.

³⁹ Given the proposed reforms set out in this Final Report, it would make no difference whether land is transferred to a *bona fide* purchaser for value or a donee; in both cases, the registered owner would be able to bring a claim to recover possession of land at any time.

[45] Once an occupier is able to establish the lasting nature of the improvement, then the court must consider whether the lasting improvement was made on land the occupier mistakenly believed they owned. If the occupier can establish these two elements of the claim, then the court can exercise its discretion to order a wide variety of remedies that balance the interests of both the occupier and the registered owner.

[46] It would usually be in the occupier's best interest to bring a claim regarding lasting improvements when the occupier first realizes that the lasting improvement is on land that does not actually belong to them. For example, the longer the occupier waits to bring the claim, the more likely the lasting improvement would depreciate or lose value over time.

[47] Currently, the wording of section 69 provides that the remedy is available to the person who made the lasting improvement or their assigns. There has been very limited judicial consideration of "assigns" in the context of claims regarding lasting improvements, and it is unclear if "assigns" is intended to include subsequent occupiers who maintain or continue to derive benefit from the lasting improvement. The recommendations in this Final Report are intended to clarify that a subsequent occupier, who believed that the lasting improvement was on land they purchased, would also be able to access a remedy through this provision.

4. PREVENTING THE CASE OF THE "DELIBERATE TRESPASSER"

[48] The cases of adverse possession that seem to provoke the most public outrage are those involving a "deliberate trespasser". A "deliberate trespasser" is an occupier who knows the disputed land does not belong to them. In this context, it is not necessary for the deliberate trespasser to know who the specific registered owner is - the knowledge requirement is met as long as the occupier is aware that the disputed land does not actually belong to the occupier. As noted by the Alberta Court of Appeal in *Reeder v Woodward*:⁴⁰

Mere knowledge that the occupant does not have legal title to the land does not preclude a claim for adverse possession; on the contrary, nothing can be more adverse than claiming property owned by another. The case law is clear that the knowledge of the claimant about the exact state of the title is not important; what matters is the

⁴⁰ *Reeder v Woodward*, 2016 ABCA 91 at para 16 [*Reeder*].

intention of the claimant to possess the disputed piece of land: *Lutz v Kawa* at paras 19, 28.

[49] In a subsequent decision, the Court of Appeal discussed the quality of knowledge required to establish adverse possession:⁴¹

Adverse possession, however, is not obtained by words but rather by conduct. The owner and the occupier may never actually meet, and may not be known to each other, but that does not preclude adverse possession. [The occupier] exclusively, visibly, and notoriously occupied the road, and that is sufficient to support the claim.

Knowledge about the exact location of the boundary line, and the exact registered ownership of the underlying land, is not essential to start possession that is adverse in nature. The fact that [the occupier] knew the road was on the land he did not own shows the adversity of his possession.

[50] Currently, the law of adverse possession does not draw a distinction between a deliberate and an innocent trespasser. A bad neighbour who deliberately built their fence to steal their neighbour's land benefits from adverse possession in the same way as a good neighbour who had no idea that the fence was in the wrong place. This lack of distinction creates a negative public perception that all adverse possession cases involve bad neighbours, a perception which is not supported by the reported case law.

[51] Preventing any person from acquiring a title or interest in land through adverse possession may seem to unfairly penalize both the deliberate and the innocent trespasser. However, innocent trespassers would still be able to bring claims regarding lasting improvements under section 69 of the *Law of Property Act*. Eliminating claims rooted in adverse possession for deliberate trespassers is consistent with the legal doctrine that a person should not be able to benefit from an intentional wrong.

G. Structure of this Report

[52] The consultation process following the publication of RFD 33 is set out in Chapter 2 of this Report. The chapter also reviews the results of the consultation process, as well as details of the feedback gathered through ALRI's online surveys.

⁴¹ *Koziey Estate (Re)*, 2019 ABCA 43 at para 14 [Koziey] [emphasis added].

[53] The question of whether adverse possession should be abolished in Alberta is considered in Chapter 3. Having concluded that abolition is appropriate, the process for achieving abolition is discussed in Chapter 4. In addition to abolishing adverse possession, it will also be necessary to ensure that claims to recover possession of real property can be brought at any time. 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.

[54] 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.

[55] In Chapter 6, we discuss why claims regarding lasting improvements ought to be subject to a limitation period. In the absence of the legal recognition 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*.

[56] Chapter 7 considers that the costs of litigating section 69 claims may be disproportionate and suggests that the government may wish to consider vesting jurisdiction for some land disputes in the Provincial Court. A summary of the proposed reforms and recommendations can be found in Chapter 8, which concludes this Final Report.

CHAPTER 2

Consultation Results

A. Consultation Process

[57] RFD 33 was published on July 23, 2019. The report, as well as an infographic and two-page summary, were available on the ALRI website.

[58] RFD 33 asked for comments by October 1, 2019. The deadline to complete the online survey was extended to October 22, 2019.

[59] During the consultation period, ALRI carried out the following activities.

1. MEDIA COVERAGE AND ONLINE PUBLICATIONS

[60] During the consultation period, ALRI received a number of interview requests from media, resulting in the following news stories about RFD 33:

- Lawyer’s Daily, “Time to abolish adverse possession in Alberta – institute”, published August 13, 2019:
<www.thelawyersdaily.ca/articles/14360/time-to-abolish-adverse-possession-in-alberta-institute>.
- CBC News, “Report recommends Alberta scrap ‘squatters’ rights’ legislation”, published August 13, 2019:
<www.cbc.ca/news/canada/edmonton/adverse-possession-alberta-law-reform-institute-land-property-owners-1.5244670>
[<https://perma.cc/W4LE-6A26>]. Sixty-one comments were posted following the story.
- Alberta Primetime, “Adverse Possession”, aired August 13, 2019 (lead story):
<alberta.ctvnews.ca/video?clipId=1749261&binId=1.3892985&playlistPageNum=1> [<https://perma.cc/R4UG-XAMR>].
- Western Producer, “Squatter’s rights take new hit”, published August 29, 2019: <www.producer.com/2019/08/squatters-rights-take-new-hit/> [<https://perma.cc/U3UD-9FBG>].
- University of Alberta, Faculty of Law, “Alberta Law Reform Institute Requests Public Input to Proposed Changes in Provincial Property

Law”, published September 18, 2019:
 <www.ualberta.ca/law/about/news/celebrating-research/2019/september/provincial-property-law>
 [<https://perma.cc/U6CL-KAHB>].

[61] An interview with 660 News in Calgary was also done but ultimately not broadcast.

[62] Additional articles written for publication to the legal profession include:

- ABlawg, “The End of Adverse Possession?”, published on September 10, 2019: <ablawg.ca/2019/09/10/the-end-of-adverse-possession/> [<https://perma.cc/JQC6-33SC>].
- CBA Law Matters, “The End of Adverse Possession?”, published in the Fall 2019 Edition: <www.cba-alberta.org/CBAMediaLibrary/cba_ab/PDFs/Law%20Matters/law-matters_fall-2019_web.pdf> [<https://perma.cc/BB5X-2FZH>].

[63] In addition, ALRI posted regularly about the consultation on Twitter and LinkedIn, as well as through various email distribution lists.

2. CANADIAN BAR ASSOCIATION (CBA) PRESENTATIONS

[64] ALRI gave two presentations to lawyers’ groups before RDF 33 was published. Approximately 70 lawyers attended these presentations.

- CBA Real Property Law – Residential and Real Property Law – Commercial (South) – May 1, 2019, in Calgary. This was a combined meeting of both sections. Estimated attendance was 40 lawyers.
- CBA Real Property Law and Commercial Property & Leasing (North) – May 10, 2019, in Edmonton. This was also a combined meeting of both sections. Estimated attendance was 30 lawyers.

[65] Feedback from both presentations was incorporated into RFD 33 and its recommendations. Project updates were sent to the chairs of the four CBA sections who participated in the presentations, as well as invitations to provide further comments on RFD 33.

[66] A version of the CBA presentation was given to students enrolled in a Land Titles course at the University of Alberta, Faculty of Law. This presentation took place on October 9, 2019.

3. MINISTERIAL MEETINGS

[67] ALRI was in communication with representatives of Alberta Justice and Service Alberta during the consultation period. RFD 33 was presented in person to the Honourable Doug Schweitzer, Minister of Justice, on July 18, 2019, and to the Honourable Nate Glubish, Minister of Service Alberta, on September 23, 2019.

4. OTHER CONTACTS

[68] We wrote directly to a number of organizations or individuals to inform them of our consultation. The organizations and individuals that we contacted included:

- The Central Alberta Bar Society (Red Deer): ALRI contacted the President of the Society and offered to conduct a consultation event for its members.
- Karen Johnson, Acting Property Rights Advocate: ALRI met with Ms Johnson in August 2018, when the project was still in its early stages. At that time, she advised that the Office of the Property Rights Advocate received four calls from the public about adverse possession in 2018.⁴² RFD 33 was forwarded to the Office after publication and additional follow-up emails were sent.
- Richard Gotfried, MLA for Calgary-Fish Creek.⁴³
- Ken Allred, former MLA for St Albert:⁴⁴ Mr Allred provided ALRI with a copy of his March 2017 paper entitled “A Case for the Elimination of Adverse Possession”. In a letter dated September 29, 2019, he provided ALRI with his comments on RFD 33. He indicated that he is largely in support of the recommendations.

⁴² Ms Johnson estimates that in previous years, the number of calls about adverse possession to the Property Rights Advocate would range from one to three calls per year. The Property Rights Advocate Office opened in February 2013. (Email from Karen Johnson to Sandra Petersson, August 13, 2018).

⁴³ Mr Gotfried has served as the MLA for Calgary-Fish Creek since 2015. He introduced a private members’ bill in 2018 to abolish adverse possession. The 2018 Bill, note 24, is discussed in paragraph 21 of RFD 33. Mr Gotfried was named in the “Acknowledgments” page of RFD 33, in thanks for the information he provided to us in our research efforts.

⁴⁴ Mr Allred served as the MLA for St Albert from 2008-2012. He introduced a private members’ bill in 2012 to abolish adverse possession – 2012 Bill, note 15. The 2012 Bill is discussed at paragraph 16 of RFD 33. Mr Allred is also a retired Canada Lands Surveyor.

- Jim McIndoe: ALRI met with Mr McIndoe on November 27, 2018, and provided him with a hard copy of RFD 33 in July 2019. In an email dated September 2, 2019, Mr McIndoe indicated that he supports all of the recommendations.
- Property Law professors: ALRI contacted a number of property law professors at the University of Alberta's Faculty of Law to request their feedback on the recommendations contained in RFD 33. One professor provided detailed feedback indicating that he did not agree with the recommendations.
- Alberta Land Surveyors Association (ALSA): ALRI was contacted by ALSA in May 2019 regarding a report it was also preparing on adverse possession. In a letter dated September 30, 2019, ALSA President Steve Yanish provided us with a copy of the report entitled, "Adverse Possession: Land Grab or Quieting of Title?" Mr Yanish also indicated that ALSA "supports, in principle, ALRI's six recommendations, with the caveat that ALSA has not examined s 69 of the *Law of Property Act* with the same rigor as it has examined adverse possession." We then met with Dr Brian Ballantyne, the lead author of the ALSA Report, following which we received additional materials from ALSA regarding lasting improvements made to wrong land.

[69] We also contacted by email the MLAs who spoke during the debates on the 2017 and 2018 Bills. A few individuals contacted our office directly after hearing about the project through media reports or other word of mouth.

5. ONLINE SURVEY

[70] ALRI created an online survey, which was available on ALRI's website. The survey opened on July 23, 2019, with a stated response deadline of October 1, 2019. The survey response period was extended to October 22, 2019. ALRI did not offer an incentive to complete the survey.

[71] The survey generated a total of 279 responses.⁴⁵ Out of this number, 89% (248) of respondents fully completed the survey. The bulk of the responses (227) occurred during the week of August 12, 2019.

⁴⁵ It appears that there were at least 277 unique responses to the online survey. Two responses came from the same IP address, however the survey answers were different. It is possible that two different people took the survey using the same device.

a. Survey demographics

[72] The survey results will be discussed in detail throughout the Final Report. This section provides demographic information about the survey respondents.

[73] Survey respondents were asked:

If you are a landowner, what type of land do you own?

[74] Approximately 49% of respondents indicated that they own urban land, while almost 24% of respondents indicated that they own rural land. An additional 19% indicated that they own both urban and rural land, while 8% stated they did not own land.

[75] Survey respondents were also asked where they are located. Approximately 40% of respondents indicated that they lived in Edmonton, while 28% stated that they were located in Calgary. Additional locations represented include:

Red Deer	2.9%
Lethbridge	2.9%
Grande Prairie	3.3%
Medicine Hat	3.3%
Wood Buffalo	2.0%
Other	15.5%

[76] Other locations represented in the survey include Hinton, Lloydminster, Vermillion, High River, Two Hills, St Paul, Cold Lake, Cardston, Vulcan, Lac La Biche, and Athabasca.

[77] Respondents were also asked if they had ever been involved in an adverse possession claim. Approximately 10% of respondents indicated that they had been involved in an adverse possession claim, while almost 90% stated they had not.

[78] Lastly, the survey asked respondents to indicate their occupation:

Lawyer	6.6%
Surveyor	5.0%
Real estate agent	2.5%
Other	85.9%

[79] The respondents who indicated “other” represented a wide cross-section of occupations and industries. Respondents who identified as farmers, ranchers, or otherwise engaged in agricultural enterprises represented approximately 11% of total responses. Almost 13% of respondents indicated that they were retired, however they did not provide any additional information regarding their previous occupations.

b. Commissioned survey comparison

[80] As a comparative exercise, ALRI also commissioned an online survey company to run a second survey containing the same questions as ALRI’s original survey. The commissioned survey ran from November 7-8, 2019, and received a total of 250 responses.

[81] It is worth noting the difference in how respondents came to each survey. In the case of the original survey, respondents went to the ALRI website after hearing about the Project through media or other distribution sources. It is reasonable to assume that respondents who were already interested in adverse possession or had formed an opinion on whether adverse possession ought to be abolished in Alberta sought out the survey to make their opinions known.

[82] In contrast, the commissioned survey was sent to a pool of respondents that did not necessarily have any pre-existing interest in adverse possession. This difference is reflected in the demographics of each survey. For example, a higher percentage of respondents in the commissioned survey did not identify as landowners:

If you are a landowner, what type of land do you own?	Original Survey	Commissioned Survey
Urban	48.6%	47.2%
Rural	23.9%	10.0%
Combination of both	19.3%	4.0%
I do not own land	8.2%	38.8%

[83] The commissioned survey also had more urban respondents:

Where are you located?	Original Survey	Commissioned Survey
Edmonton and area	40.2%	43.6%
Calgary and area	28.5%	40.4%
Red Deer	2.9%	2.0%
Lethbridge	2.9%	2.8%
Medicine Hat	3.3%	1.6%
Grande Prairie	3.3%	3.6%
Wood Buffalo	2.0%	0.8%
Other	15.5%	4.4%

[84] There were also differences in the occupations represented in the commissioned survey, which included far fewer farmers, ranchers, and those otherwise involved in agriculture than responded to the original survey:

What is your occupation?	Original Survey	Commissioned Survey
Lawyer	6.6%	2.0%
Surveyor	5.0%	5.6%
Real estate agent	2.5%	2.8%
Other	85.9%	89.6%
Farmer/rancher/ agriculture ⁴⁶	11%	1.2%

[85] Fewer respondents in the commissioned survey had been involved in adverse possession claims than those who responded to the original survey: 5.24% compared to 10.61%.

[86] Despite these differences, the majority of respondents in the commissioned survey also agreed that adverse possession should be abolished in Alberta; however a significant number said they were unsure:

⁴⁶ Neither survey included a specific category for farmers, ranchers, or other individuals involved in agriculture. The percentages for this chart are derived from the respondents who selected the category "other" and self-identified as a farmer, rancher, or otherwise involved in agriculture.

Should adverse possession be abolished in Alberta?	Original Survey	Commissioned Survey
Yes. Adverse possession should be abolished.	87.3%	53.9%
No. Adverse possession should not be abolished.	10.1%	15.9%
Unsure.	2.5%	30.23%

[87] Both surveys included a number of open-ended questions aimed at gathering the respondents' qualitative comments regarding the recommendations set out in RFD 33. In comparing the qualitative data, the comments in the commissioned survey echoed many of the comments contained in the original survey. However, the original survey yielded significantly more qualitative data overall, both in terms of the number of comments and the amount of detail contained in the responses.

[88] As such, it may be reasonable to assume that the responses to the commissioned survey are more reflective of the views of so-called typical Albertans who do not have strong pre-existing opinions regarding adverse possession. In contrast, the original survey appears to have attracted more respondents with established beliefs regarding adverse possession, or who have been personally affected by adverse possession claims.

[89] For the purposes of this Final Report, ALRI will be primarily using the data results from the original survey. The respondents of the original survey include a greater proportion of landowners, as well as more individuals outside the major urban centres. In addition, the original survey contains stronger qualitative data that is better suited to determining whether the recommendations contained in RFD 33 ought to be modified or adapted in any way to address common public concerns.

CHAPTER 3

Adverse Possession

A. Adverse Possession in Alberta

1. HISTORICAL PURPOSES

[90] Adverse possession arose at a time when possession was of fundamental importance in determining ownership of land.⁴⁷ At common law, title to land was based upon possession, or the right to enter upon the land and take possession. While limitation periods began to emerge in the 12th century to reduce the time during which a person could assert a possessory right to land, priority would still go to the claimant with superior rights as determined by common law.

[91] Adverse possession remained part of Alberta land law after the adoption of the Torrens land registration system in 1886. The first limitation period in Alberta for recovery of land was 20 years.⁴⁸ In 1893, the limitation period was shortened to 12 years,⁴⁹ and in 1935, was shortened again to 10 years,⁵⁰ where it remains to the present day.

[92] The leading case on adverse possession in Alberta is the 1980 decision of the Court of Appeal in *Lutz*. The Court 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.⁵¹ 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.⁵² The principles articulated by the Court of Appeal remain good law in Alberta.

⁴⁷ For a more in-depth discussion of the law of adverse possession in Alberta, see Chapter 2 of RFD 33.

⁴⁸ *The Territories Real Property Act*, SC 1886, c 26, which was replaced by the *Land Titles Act*, SA 1906, c 24.

⁴⁹ See *An Ordinance Respecting the Limitation of Actions Relating to Real Property*, ONWT 1893, no 28, s 1, referencing *The Real Property Limitation Act, 1874*, 37 & 38 Vict, c 57, s 1.

⁵⁰ See *The Limitation of Actions Act, 1935*, SA 1935, c 8, s 17.

⁵¹ In its historical review, the Court of Appeal specifically referenced British Columbia, Manitoba, Saskatchewan, and Ontario: see *Lutz* at para 10.

⁵² In this way, an occupier who mistakenly believes that they owned the disputed land can still establish the elements of adverse possession: see *Lutz* at para 28.

2. ELEMENTS OF THE CLAIM

[93] Despite its name, adverse possession does not require any hostility between the occupier and the registered owner.⁵³ The required possession must be adverse in the sense that the occupation must be without consent of the registered owner.⁵⁴

[94] 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.

[95] 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.⁵⁵ 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.⁵⁶ The occupier's possession of the land does not depend on the intention of the registered owner.⁵⁷

[96] Once an occupier has fulfilled these essential elements, they may gain a legal interest in the land over the registered owner.⁵⁸ 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*:

⁵³ Sandra Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992) 30 Alta L Rev 1291 at 1306.

⁵⁴ *Moore* at para 119.

⁵⁵ *Rinke v Sara*, 2008 ABQB 756 at para 19.

⁵⁶ *Moore* at para 117.

⁵⁷ *Moore* 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".

⁵⁸ *Power v Goodram*, 2012 ABQB 50 at para 99 [*Power*]. It is worth noting that an occupier's acquisition of title through adverse possession does not extinguish previously registered encumbrances: see *Bretin v Ross*, 2019 ABQB 957 at paras 25-30 [*Bretin*].

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 191,⁵⁹ 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.

[97] In this way, section 74 of the *Land Titles Act* works in concert with the *Limitations Act*.⁶⁰

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*.

[98] 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.⁶¹ Until the occupier actually registers their interest on title, their possession of the property remains vulnerable to third-party purchasers.⁶²

⁵⁹ Section 191 of the *Land Titles Act* 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.

⁶⁰ *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 at paras 31, 74-75.

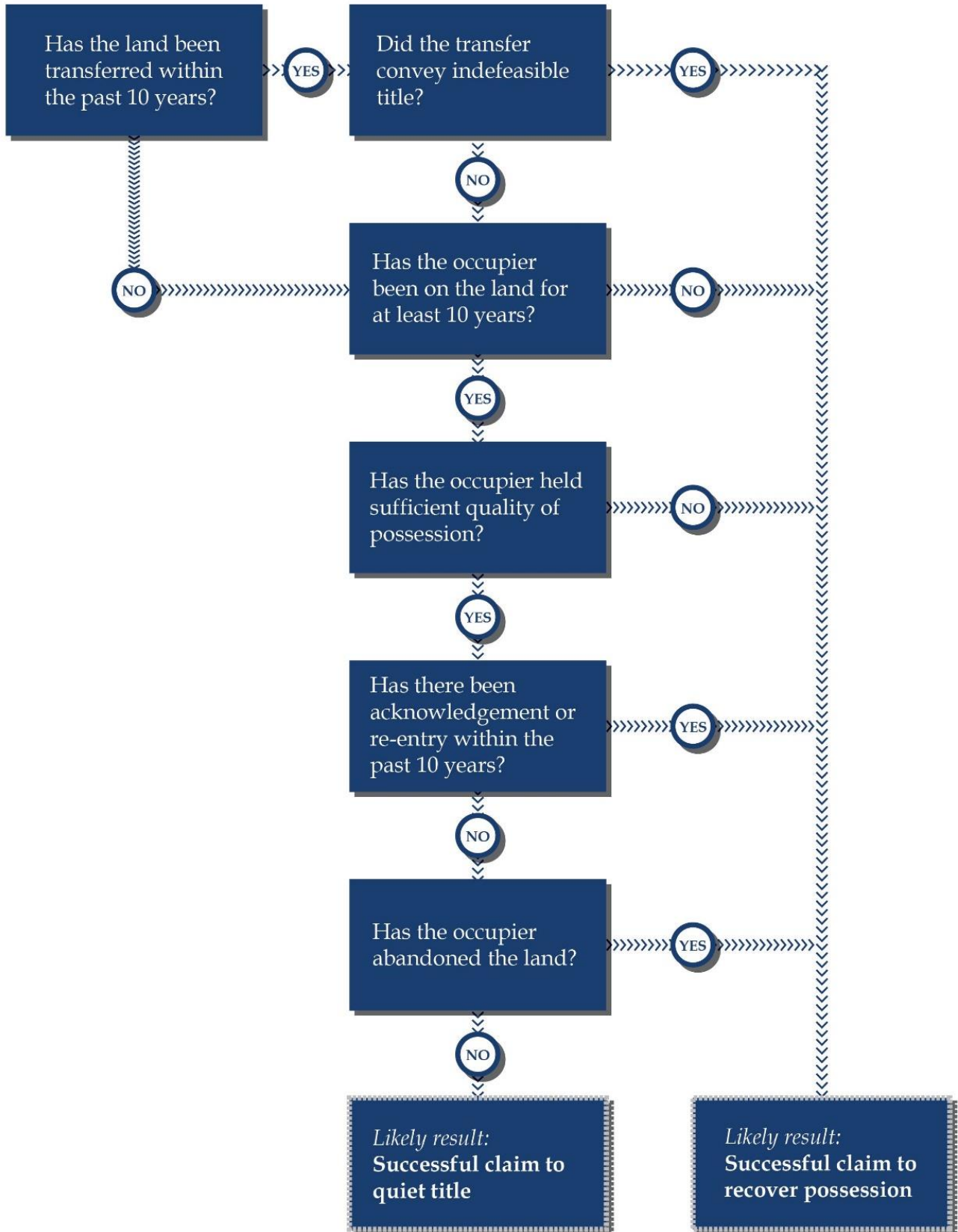
⁶¹ The question of whether claims to quiet title ought to be subject to a limitation period was discussed in the 2003 Report. Setting aside the issue of whether such claims are declaratory or remedial in nature, the 2003 Report concluded that attaching limitation periods to claims to quiet title would 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 at paras 70-73.

⁶² *Power* at para 101, citing *Lutz*. See also *Boyczuk v Perry*, [1948] 2 DLR 406 (Alta SCAD); *Nessman v Bonke* (1976), [1979] 1 WWR 210 (Alta SCTD).

[99] 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.⁶³ The 10-year limitation period re-starts when ownership is transferred to the *bona fide* purchaser.

[100] Adverse possession claims can be summarized in the following chart:

⁶³ See *Land Titles Act*, s 170. The only exception to s 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 also s 183(1)(e).



3. ADVERSE POSSESSION DISPUTES

[101] 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.⁶⁴

[102] RFD 33 discussed five successful adverse possession cases decided since 2003.⁶⁵ Four out of the five cases involve an occupier who reasonably, but mistakenly, believed they were 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.

[103] The five cases – *Bennett*,⁶⁶ *Canadian Wellhead*,⁶⁷ *Reeder*,⁶⁸ *Moore*,⁶⁹ *Koziey*⁷⁰ – are analyzed in detail in RFD 33. For the purposes of this Final Report, the cases illustrate the following points:

⁶⁴ The 2003 Report suggested three circumstances where an occupier may be on land because of a reasonable belief of entitlement to the land: the occupier's presence is due to an honest but mistaken belief in the boundary; there are equitable circumstances that support the occupier's presence on the land; there has been a third-party error prejudicial to the occupier. See 2003 Report at para 61. For examples of cases where the occupier held an honest but mistaken belief in the boundary see *Koziey*; *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, aff'ing in part 2015 ABQB 593; *Verhulst Estate v Denesik*, 2016 ABQB 668; *Quinton v Wynder*, 2017 ABQB 72. For examples of cases with a third-party error prejudicial to the occupier, see *Deguire v Burnett*, 2013 ABQB 488 [*Deguire*]; *Power*.

⁶⁵ In comparison, the case law review revealed at least 12 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. Since the publication of RFD 33, the Alberta Court of Queen's Bench issued its decision in *Bretin*, which also involved a successful adverse possession claim. However, *Bretin* is not included in the discussion above as the registered owner did not oppose the occupier's claim to quiet title and the Court did not evaluate the merits of the adverse possession claim. Instead, the central issue in *Bretin* was whether the occupier's title was subject to existing encumbrances, namely a utility right-of-way. In her decision, Justice Grosse confirmed that acquiring title by adverse possession does not extinguish prior encumbrances: see *Bretin* at paras 25-30.

⁶⁶ *Bennett v Butz*, 2003 ABQB 60. This case did not consider s 69 of the *Law of Property Act*.

⁶⁷ *Canadian Wellhead* did not consider s 69 of the *Law of Property Act*.

⁶⁸ *Reeder*, aff'g in part an unreported decision by Justice DK Miller, Docket Number 1106-00848 (QB). While the Court of Appeal dismissed the bulk of the appeal, it did set aside the damages award and varied the costs award. This case did not consider s 69 of the *Law of Property Act*.

⁶⁹ This case did not consider s 69 of the *Law of Property Act*.

⁷⁰ *Koziey*, aff'g 2017 ABQB 597. Although the trial decision referenced s 69 of the *Law of Property Act*, it did not form part of the court's analysis. The appeal decision referenced s 69(3) of the *Law of Property Act*, which provides that an easement cannot be acquired by prescription.

- a. Land ownership is not always a simple matter to determine.⁷¹
- b. An occupier's mistaken belief in the ownership of the disputed land and their lack of intention to own the land is irrelevant to adverse possession, which only looks at the fact of use and occupation.
- c. Lack of knowledge is a typical factor in adverse possession claims.
- d. Simple physical re-entry by the registered owner may not be enough to stop the limitation clock from running.⁷²
- e. A registered owner's attempts to re-enter the disputed land after the expiry of the limitation period cannot prevent a successful adverse possession claim.
- f. A registered owner may be inadvertently dispossessed of their land due to a third-party mistake.⁷³
- g. A deliberate trespasser can bring a successful claim since adverse possession does not distinguish between a deliberate and innocent trespasser.⁷⁴
- h. The counter-argument that a registered owner has granted an implied license to the occupier to use the disputed lands has been rejected by the courts in at least two cases.⁷⁵

[104] 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.

⁷¹ For example, in *Bennett v Butz*, 2003 ABQB 60, 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.

⁷² To re-take possession, the registered owner must show that they have effectively broken the occupier's exclusive or continuous possession of the disputed land: see *Canadian Wellhead* at paras 30, 34.

⁷³ For example, in *Reeder*, the disputed land was the result of the local county mislocating a highway, which created a strip of the registered owner's land that was more usable by the occupier than the registered owner.

⁷⁴ See *Moore* at para 117.

⁷⁵ See *Moore* and *Koziey*.

[105] The post-2003 cases also illustrate that the basis for a dispute often arises before the current parties came to the land, meaning that the disputes were not of the parties' own making.⁷⁶ In some circumstances, a registered owner has lost their right to recover possession of the disputed land before they knew it was theirs.

[106] In this context, it can be argued that adverse possession serves a valid purpose as a means of dispute resolution. 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.

[107] 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.

B. Facilitating Equitable Dispute Resolution

[108] 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.

[109] 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.

1. ELEMENTS OF A SECTION 69 CLAIM

[110] Claims regarding lasting improvements under section 69 of the *Law of Property Act* were discussed in detail in RFD 33. For the purposes of this Final Report, the essential elements of a section 69 claim are:

⁷⁶ For example, in *Canadian Wellhead* and *Moore*, the fence was already in the wrong place when the parties acquired their respective parcels. In *Bennett v Butz*, 2003 ABQB 60, *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.

- 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.

[111] 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. CLAIMS THAT WOULD BE EXCLUDED IF SECTION 69 REPLACED ADVERSE POSSESSION

[112] As discussed in RFD 33, the following types of claims would be excluded if section 69 replaced adverse possession in Alberta:

- a. Claims involving intentional trespass,
- b. Claims involving temporary encroachments, and
- c. Claims involving mere use of land.

[113] Currently, the law of adverse possession does not require an occupier to know whether the disputed land belongs to them or to someone else. 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*. 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.

[114] Section 69 also 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,⁷⁷ and where the occupier has been merely using the land without making any lasting improvements on it.

3. REMEDIES

[115] 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.

C. Adverse Possession and Principles of Limitations Legislation

[116] As will be discussed in the next chapter, preserving evidence and being diligent in pursuing claims are among the rationales for having limitations. These rationales were discussed in detail in RFD 33.

[117] 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.

[118] 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.

⁷⁷ Courts have consistently held that fences are not lasting improvements. Determining whether something is a lasting improvement depends on 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. It is possible that a fence could be considered a lasting improvement where warranted, but it is unlikely that typical fences would fall into this category.

D. Adverse Possession in Other Provinces and Territories

[119] 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.

[120] 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.⁷⁸

[121] 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.⁷⁹ However, Alberta, the Northwest Territories and Nunavut have retained some form of adverse possession.⁸⁰

[122] 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*

[123] 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.⁸¹

[124] 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

⁷⁸ *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.

⁷⁹ See *Land Title Act*, RSBC 1996, c 250, ss 23(3), 171; *Limitation Act*, SBC 2012, c 13, s 28; *Land Titles Act*, SS 2000, c L-5.1, s 21.

⁸⁰ 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. It is important to note that in the Northwest Territories, all land is either registered under the land titles system, or is Crown land. It is only titled land that appears to be subject to potential adverse possession claims. In contrast, while there is some titled land in Nunavut, most land falls under leasehold or land claim agreements, neither of which are subject to adverse possession claims.

⁸¹ For recent commentary on this point, see *Bretin* at para 30.

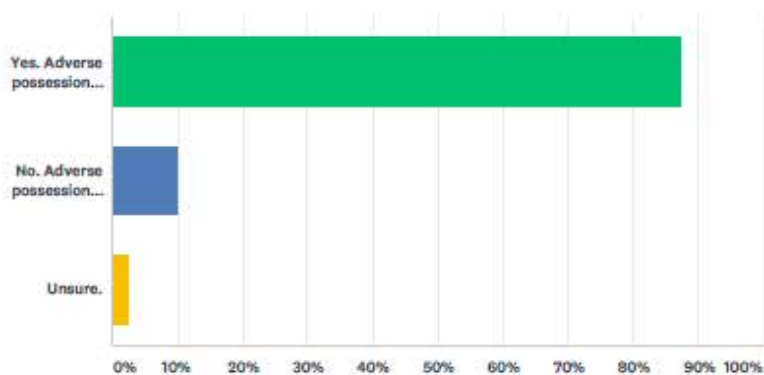
substituting a claim that is an exception to indefeasibility over one that is not, we have recommended ways that the effect of such an exception might be mitigated in Chapter 6.

F. Consultation Results

1. SURVEY RESULTS

[125] The survey asked the following question:

Q3: Should Adverse Possession be abolished in Alberta?



ANSWER CHOICES	RESPONSES	
Yes. Adverse possession should be abolished.	87.32%	241
No. Adverse possession should not be abolished.	10.14%	28
Unsure.	2.54%	7
TOTAL		276

[126] As the chart above indicates, 87% of respondents agreed that adverse possession should be abolished in Alberta.⁸² The following comments are a representative sample in favour of abolition:

- Whoever holds title to the land should be entitled to keep it.
- No one should be able to take another person's land who rightfully paid for it.
- Adverse possession is theft.

⁸² In comparison, almost 54% of respondents in the commissioned survey answered in favour of abolishing adverse possession in Alberta. The commissioned survey also indicated that approximately 16% of respondents were opposed to abolishing adverse possession, while slightly over 30% were unsure.

- The law should not reward bad behaviour.⁸³
- Trespassers should be unable to legally obtain someone else's land.
- Clarity of law is needed.
- Property boundaries are easy to establish now. Mistakes made in the past can be corrected.
- Property taxes paid to a municipality should guarantee ownership without risk of adverse possession ever being a factor.
- Adverse possession is a relic from the past which no longer serves a useful purpose.
- Adverse possession is an unjust doctrine that operates contrary to the principles of certainty and fairness that the Torrens land system was founded on.
- Ten years is not a significant length of time. Many landowners might not even realize that a "squatter" exists.
- Many landowners are unaware that adverse possession exists in Alberta.
- A fence should not dictate who owns the property.
- A landowner should not be penalized for trying to be a good neighbour.
- Adverse possession is an unregistered cloud on title, which is inconsistent with indefeasible title. The fact that it can be defeated by a sale to a bona fide purchaser for value makes it even more unpredictable. Evidentiary issues add to this uncertainty.
- Adverse possession is unnecessary in this day of survey standards. The property line can be located and the fence can be rebuilt for significantly less than the cost of an adverse possession claim.
- Registered owners should not have to constantly monitor their own titled property.
- Adverse possession undermines property rights.

⁸³ There were many references to occupiers acting as "bullies".

[127] A number of respondents indicated that they were in favour of keeping some form of adverse possession in Alberta. The following comments are a representative sample against abolition.

- Adverse possession is not usually about people stealing land. It is about protecting long-standing occupiers of land from being ejected on a whim by absentee landlords.
- Adverse possession promotes responsible land ownership by ensuring that property owners take steps to find where their boundaries are.
- If a landowner does not take proper care of their property, and their neighbour has taken care of it for more than 10 years, the neighbour should be entitled to the land unless there is a land use agreement between the two parties. The person who has been stewarding that land should be able to exert ownership.
- Adverse possession is a good way to adjust property boundaries, which is probably the most common way it is used.
- There needs to be some mechanism to ensure that errors in surveying, for example, don't result in a loss for an occupier who realistically believes that they own the land.
- Adverse possession also provides a remedy in cases of multiple or overlapping titles and in situations where boundaries are uncertain due, for example, to errors in 19th century surveys. In all these cases, adverse possession can prevent people from being ejected from land they have occupied at length and in good faith. It can prevent long-standing neighbours from using the results of a survey and any encroachments it may uncover simply for vexatious purposes. It encourages responsible land ownership by actual people living on the land.
- Adverse possession should be abolished except in cases where the land is not registered for historical reasons (for example, First Nations claims).
- While there are genuine issues to abolish aspects of the law, it should be strengthened in the case of agricultural land where land use is not demonstrated.
- Adverse possession should be allowed for crown lands only.

[128] Some respondents provided examples of adverse possession claims they or members of their families had been personally involved in. For example,

My family has their driveway to their homes and farm buildings across another's property. The road was originally a wagon road from over 100 years ago located specifically due to challenging topography. My family has tried to purchase the land from the last three property owners, all of which refused to sell, but had no problem with us using the road. We've invested money to build up the road, gravel in, put in culverts and fences and maintain it over the 75 years we've been there. We have no guarantee that the next owner won't close off the road and then where does that leave us?

[129] Another example:

Our ranch sits in the bottom of a valley with a creek. Access to our homestead goes across the neighbour's land because that is the only way to access it. That access has been there for probably about 100 years – before my grandparents bought this place in 1946 and before the neighbour bought the adjoining land in [the] 60's. Now the neighbour has died and his son has inherited the piece of land and wants to sell it. I don't have the money to buy it to the tune of \$380,000 so where does that leave me? There has never been a formal agreement made. We have always maintained the access road and the fences that go along it. And there is no other reasonable access to my home. I do not want to claim adverse possession rights unless it is absolutely required. I would rather try to work civilly with my neighbour and the potential buyer but if these rights are not available if required it could leave me in the lurch.

[130] Other examples mentioned in the survey comments include a garage built exactly on the property line, a cabin built over the property line, a driveway on the wrong land, a fence that is eight inches off the property line, and a sidewalk and swale being used as a passageway to a neighbouring building.

[131] We received 26 responses (approximately 10.6%) from individuals who indicated that they have been involved in adverse possession claims.⁸⁴ While most of these respondents indicated that they were in favour of abolishing adverse possession in Alberta, six respondents were opposed to abolition, while two respondents were unsure.

[132] One respondent in favour of abolishing adverse possession indicated that they had been involved in two adverse possession claims:

⁸⁴ In comparison, 13 respondents (approximately 5.2%) in the commissioned survey indicated that they had been involved in adverse possession claims.

This law has adversely impacted me twice. Once when someone had built a house on my property by 5 feet, in the city, and once when the farmer next door planted crops on my land neatly skimming 3 square acres of my cropland.

[133] Another respondent in favour of abolition hoped that a change in the law would help resolve their present situation:

We are currently involved in a property line dispute involving a strip of former CPR Land we purchased some 35 years ago. Prior to our land purchase from the CPR the adjacent owner illegally and without permission moved in a row of large spruce trees. The landowner was, at the time of our purchase, advised and made aware that the fence being constructed by us was being inset approximately three feet from his property line to allow for future growth of the trees. He, at that time, was in agreement.

Two years ago the adjacent landowner erected a tall board fence on the three foot strip of land and when questioned claimed he had “squatter’s rights”. He retained legal counsel, as did we, and to this date there has been no resolution and the fence remains standing. The dispute has, in fact, turned ugly...

[134] The commissioned survey respondents did not share any specific examples of personal involvement in adverse possession claims.

2. OTHER CONSULTATION FEEDBACK

[135] ALRI received emails from a number of individuals who supported our recommendation to abolish adverse possession. For example, a former Alberta MLA who had been lobbying for abolition for over 20 years stated that adverse possession “is an antiquated law that was based on the English system of general boundaries and has no application in our system of fixed, definite boundaries.”

[136] The ALSA Report included a historical perspective of surveys in Alberta to illustrate how occupation and use had been used to settle claims to land:

As the parcel fabric, represented by the Dominion Land Survey System, unfurled across the province, surveyors and land administrators acknowledged that people were already living on the land. Surveyors were instructed to show all settlers’ improvements – buildings and cultivations – in notes and on plans.

The *Dominion Lands Act, 1872* recognized the claims of occupants of unsurveyed land, such that ‘squatters’ rights’ were usually respected... Whether perfecting squatters’ rights or evicting squatters,

the Crown acknowledged that people were possessing land to which they did not have title.

[137] The ALSA Report also included the views of a number of individuals, including surveyors, lawyers, and landowners, who had been contacted by the authors to express their views on adverse possession. In conversation with one of the authors, it appears that surveyors tend to have a professional predisposition against adverse possession. This was noted in the ALSA Report:

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

[138] Other themes were identified in the ALSA Report:

- Rural landowners were concerned that the cost and effort required to monitor their lands to guard against adverse possession claims was unrealistic.
- None of the landowners who were interviewed knew about the 10-year limitation period for bringing a claim to recover possession of land. They all admitted that they knew nothing about adverse possession until their neighbours brought claims against them.
- In cases involving abandoned land, most landowners recommended that the land ought to be claimed by the government and then auctioned off. This would only apply if taxes were not paid or the landowner could not be located.⁸⁵
- There was a general feeling that true landowners are being punished because they have allowed their neighbour to occupy their land without forcing them from it. Poor relations are created between neighbours and animosity develops within neighbourhoods.

[139] ALRI also received an email from a property law professor expressing the view that adverse possession served an important purpose in cases of mistaken boundaries and should be retained:

⁸⁵ The ALSA Report, note 33 at 16, noted that “[t]here was a common idea that if a person was paying taxes, they [were] exercising ownership of the land.” This idea was also reflected by many of the respondents to ALRI’s online survey.

We have a relatively young property system in Alberta. The older a property system gets, the greater the potential that boundaries as they are understood on the ground will not line up with boundaries as they are described in the title registry. Giving no weight at all to settled expectations on the ground is problematic, and has the potential to become more problematic over time. As the property system becomes more mature, there is the potential that parties will act under a mistaken understanding of the boundaries for long periods of time. In these cases they will act in reliance on a mistaken belief as to the boundary... The notion that one cannot rely on ownership of land that has been consistently occupied for decades strikes me as something that could potentially lead to some harsh and unfair outcomes.

G. Conclusion

[140] 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.

[141] 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*. On balance, we think that section 69 offers a more equitable approach to dispute resolution where adverse possession claims and section 69 claims overlap.

[142] 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. We have now also concluded that retaining adverse possession runs counter to some basic principles of limitations law.

[143] 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.

[144] The consultation results demonstrate strong support to abolish adverse possession in Alberta. There is a widespread view among respondents that adverse possession benefits deliberate trespassers who are able to acquire another person’s land without paying any compensation to the registered owner.

In addition, many people pointed out that boundary disputes are often not discovered until significant time has passed, which means that the registered owner's right to recover their land has expired before they became aware that they had a claim. Lastly, there is a strongly-held belief that the land titles system ought to be the final word on ownership, and that registered owners ought not to be penalized for being good neighbours.

[145] In contrast, those who support keeping adverse possession in Alberta believe that it promotes responsible land stewardship and reflects the parties' settled expectations on the ground.

[146] The idea that adverse possession promotes responsible land stewardship is often rooted in two different beliefs, both of which were reflected in the survey responses. The first is that adverse possession rewards the individual who uses the land in an economically productive manner, regardless of ownership. For example, Registered Owner A has decided to allow their land to lie fallow for many years. Occupier B, however, has been using part of A's land to cultivate and grow crops. If this situation continues uninterrupted for over 10 years, then adverse possession can be seen as a way to acknowledge and reward B for their long-term labour.

[147] At first blush, encouraging the economically productive use of land seems to reflect a public policy reason in support of adverse possession. On the other hand, there is a strongly held belief that it should be up to the registered owner to determine how they wish to use their land. For example, consider a registered owner who chooses to "use" their land to establish a nature reserve. Such a choice could be considered contrary to maximizing the economically productive use of the land in question. That said, establishing a nature reserve cannot be said to be a less valid use of land than cultivating crops, so long as that is the registered owner's choice.

[148] Another example that is often mentioned is the case of vacant land. For example, Registered Owner A owns an undeveloped and vacant parcel of land for investment purposes. Occupier B begins using part of the land while it sits vacant. If 10 years pass, should B be entitled to keep the land through adverse possession?

[149] While it may seem attractive to allow B to retain the land, there may be multiple reasons why A has decided not to develop the land. For example, a registered owner may have left the land undeveloped because the surrounding economic circumstances did not allow them to recoup their investment. The

registered owner may choose to leave the land idle until economic circumstances improve to support further development. In such a case, maximizing the economical productivity of the land may seem to favour B, who is currently using the land, over A, who is waiting to derive a future benefit. Nevertheless, as the registered owner, it is A's choice as to how to use their land. Favouring B also gives priority to current use which may be less economically productive than A's eventual development.

[150] The second belief is that adverse possession promotes responsible land stewardship by encouraging registered owners to monitor their boundaries. Again, this seems like a reasonable objective at first blush. Depending on the type and size of land, however, monitoring boundaries may be difficult and cost-prohibitive. For example, land that includes a densely wooded area along the boundary may be very difficult to monitor at the boundary line. Another example is a very large rural parcel of land, for which frequent monitoring of the boundary may be both labour and cost-intensive.

[151] The concern that adverse possession reflects the parties' settled expectations on the ground warrants closer examination. This concern arises in the context of mistaken boundaries between neighbouring properties. The issue is whether it is unfair to disturb the parties' settled expectations about the location of boundary, specifically where the accepted boundary on the ground is inconsistent with its description on title.⁸⁶

[152] When considering this concern, it is worth remembering that the parties' settled expectations is not determinative in adverse possession claims. An occupier's long-term use of the land has always been vulnerable to a *bona fide*

⁸⁶ While the *Land Title Act* guarantees ownership of land, it does not necessarily guarantee boundaries. See *Land Titles Act*, s 62(1):

62(1) Every certificate of title granted under this Act (except in case of fraud in which the owner has participated or colluded), so long as it remains in force and uncanceled under this Act, 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 included in the certificate for the estate or interest specified in the certificate, subject to the exceptions and reservations mentioned in section 61, **except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title** and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of same land. [Emphasis added.]

Where there has been a misdescription of land or its boundaries, a registered owner may be ejected from the land. See *Land Titles Act*, s 183(1)(e):

183(1) No action of ejectment or other action for the recovery of land for which a certificate of title has been granted lies or shall be sustained against the owner under this Act in respect of it, except in any of the following cases:

...

- (e) the case of a person deprived of or claiming any land included in a grant or certificate of title to other land by misdescription of the other land or of its boundaries, as against the owner of the other land.

purchaser for value. Because of indefeasibility of title, the *bona fide* purchaser comes to the land in a way that effectively disrupts the settled expectations of the parties. Disruption by a *bona fide* purchaser cannot be avoided, even if the occupier has been in possession of the disputed land for decades.

[153] Based on the above, ALRI considers that adverse possession should be abolished in Alberta. The legislative changes needed for abolition are set out in the next chapter.

CHAPTER 4

Abolishing Adverse Possession

A. Preventing Claims by Adverse Possession

[154] To effectively abolish adverse possession in Alberta, a number of steps must be taken to ensure that an occupier can no longer acquire any rights to land through adverse possession. The first step is a positive statement confirming that adverse possession cannot be used as a means to acquire title to land.

[155] Previous legislative attempts to abolish adverse possession included an amendment to the *Land Titles Act* to provide that:⁸⁷

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

[156] During consultation, a former Alberta MLA supported ALRI's recommendation that "there should be a specific exclusion to make it abundantly clear that adverse possession is no longer part of Alberta law."

[157] Amending the *Land Titles Act* to prevent adverse possession of land registered under that Act, would not be effective for any privately held land that has yet to be registered. It would be exceptionally rare but not impossible for such land to still exist in Alberta. However, such land would be covered by our later recommendation that the *Limitations Act* should be amended to allow a claim to recover possession of land to be brought at any time

RECOMMENDATION 1

Adverse possession should be abolished by amending the *Land Titles Act* to provide that no right or title in or to land registered under the Act may be acquired or deemed to be acquired by adverse possession.

⁸⁷ This proposed amendment would affect s 74 of the *Land Titles Act*: see the 2012, 2017, and 2018 Bills – notes 15, 21, 24.

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

1. CURRENT FRAMEWORK UNDER THE *LIMITATIONS ACT*

[158] The *Limitations Act* currently imposes a 10-year limitation period on a claim to recover possession of real property.⁸⁸ The 10-year period runs from the time the claimant is dispossessed of the real property.⁸⁹ Claims to recover possession of real property are expressly excluded from the two-year limitation period.⁹⁰ Other provisions of the Act deal with events that stop the limitation period and the impact of transfers to donees during the limitation period.⁹¹

⁸⁸ *Limitations Act*:

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.

⁸⁹ *Limitations Act*:

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.

⁹⁰ *Limitations Act*:

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*.

⁹¹ *Limitations Act*:

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 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.

2. THE RATIONALE UNDERLYING LIMITATIONS LEGISLATION

[159] Traditionally, limitations statutes were based on three underlying rationales:⁹²

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.”

[160] Traditional limitations statutes have generally been oriented towards the interests of the potential defendant.⁹³ Contemporary limitations statutes attempt to take a more balanced approach between the interests of plaintiffs and defendants.⁹⁴ 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.

[161] As detailed in RFD 33, 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 the underlying limitations rationale of certainty, evidence, and the claimant’s circumstances. 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.

a. Survey results

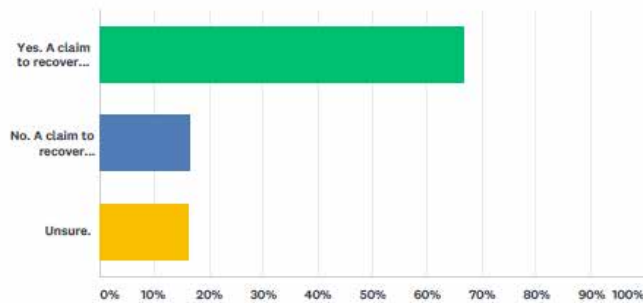
[162] The survey asked the following question:

⁹² *Novak v Bond*, [1999] 1 SCR 808 at 839, referring to *M (K) v M (H)*, [1992] 3 SCR 6, at 29–30.

⁹³ *Novak v Bond*, [1999] 1 SCR 808 at 839–40.

⁹⁴ *Novak v Bond*, [1999] 1 SCR 808 at 840–41.

Q5: Should a claim to recover possession be excluded from the operation of the *Limitations Act*?



ANSWER CHOICES	RESPONSES
Yes. A claim to recover possession should be excluded from the operation of the Limitations Act so that the claim could be brought at any time.	66.80% 173
No. A claim to recover possession should continue to be subject to a limitation period like most civil claims in Alberta.	16.60% 43
Unsure.	16.22% 42
TOTAL	259

[163] As the chart above indicates, 66.8% of respondents agreed that claims to recover possession of land should be excluded from the operation of the *Limitations Act*.⁹⁵ The following comments are a representative sample in favour of eliminating the limitation period:

- Landowners may not know that someone is adversely possessing their land, and they should be able to recover their land when they find out.
- There shouldn't be a limitation but perhaps a remedy or ability for the squatter to reasonably extract themselves from the improper possession of the lands they improperly occupy.
- A person should have the right to recover their property or sell it if an agreement can be reached, there should be no time limit as the person never voluntarily gave up the property.
- A limitation period does not benefit the owner of the land.
- Property rights should not expire due to the passage of time.
- If an owner is suing to recover possession of land then the problem can clearly be said to be ongoing. A limitation period in this situation would therefore be inappropriate.

⁹⁵ In comparison, 41.1% of respondents in the commissioned survey answered in favour of excluding claims to recover possession of land from the operation of the *Limitations Act*. The commissioned survey also indicated that approximately 25.3% of respondents answered that claims to recover possession should continue to be subject to a limitation period, while 33.6% were unsure.

- Possession is just one of the 'rights' included in fee simple. If an owner cannot recover possession, they have effectively lost all rights to the part of the property that is in the possession of another. They have lost all reasonable use and all reasonable ability to use that portion of the property. They've been expropriated – except without any compensation.

[164] A number of respondents indicated that they were in favour of retaining limitation periods for claims to recover possession of land. The following comments are a representative sample against eliminating the limitation period.

- There has to be some limit or we could have very stale claims brought forward. There needs to be a balance here.
- I do agree that a version of a limitation period should be enacted. However, I don't agree that it should be set via a number of years, or a specific time period. Possibly applying it to let's say "Once A and B are no longer the title owners on either property than the [adverse possessor] may be subject to a claim to recover possession."
- 10 years is plenty of time to figure out where your land is. If you didn't need a strip of land for the first 10 years, you should lose your rights.
- A definite time period that is reasonable should be set. Otherwise, people will be able to bring historical claims from far in the past.

b. Other consultation feedback

[165] A property law professor disagreed with ALRI's recommendation to eliminate the limitation period for claims to recover possession of land, and suggested that the limitation period for such claims could be extended to 20 years instead of 10.⁹⁶

c. Conclusion

[166] 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

⁹⁶ As noted in Chapter 3, Alberta (as part of the Northwest Territories) did have a 20 year limitation period for claims to recover possession of real property from 1875 to 1893.

chapter, ALRI recommends that claims to recover possession of real property should be excluded from the *Limitations Act*.

[167] Making claims to recover possession of land subject to a limitation period creates a perceived injustice to the registered owner. 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.

[168] We have indicated both in our 2003 Report and in RFD 33 that relying on continuous trespass to postpone the limitation period until the trespasser leaves the land is not an ideal approach to exemption. In the interests of clarity and to help parties resolve their disputes, such an exemption should be stated expressly rather than by implication.

[169] As noted earlier, our recommendation that the *Land Titles Act* be amended to abolish adverse possession would not address adverse possession of private land that might still be held outside that Act. Moreover, possession might provide evidence of ownership if any private land has evaded registration for more than 100 years. However, allowing a claim to recover possession of unregistered land at any time would be an additional tool should such exceptional circumstances arise.

RECOMMENDATION 2

The *Limitations Act* should be amended so that there is no limitation period on claims to recover possession of real property.

C. Transitional Issues

[170] Adverse possession is a claim that arises through the passage of time. As such particular attention must be paid to transitional issues and to the impact that abolition might have on existing adverse possession claims, renewed claims to recover possession, and claims resolved in the past.

1. EXISTING ADVERSE POSSESSION CLAIMS

[171] There are two options for dealing with existing adverse possession claims. Claims can be abolished prospectively or retrospectively.

a. Prospective abolition

[172] With prospective abolition, no new claims could be established after the date of abolition. This approach can be problematic. As noted by Professor Bruce Ziff:⁹⁷

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.

[173] Although British Columbia abolished adverse possession claims prospectively in 1975, the recent Supreme Court of Canada decision in *Nelson (City) v Mowatt* demonstrates that such claims can indeed have a long lifespan:⁹⁸

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).

[174] In that case, the plaintiffs commenced their first action in 2006.⁹⁹ To determine whether the plaintiffs had title to the disputed lands through 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.

⁹⁷ Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada, 2018) at 167, fn 63. In his example, Professor Ziff refers to the Ontario *Land Titles Act*, RSO 1990, c L.5, sub 51(2), *Heng v Rodriguez*, 2015 ONSC 1677.

⁹⁸ *Nelson (City) v Mowatt*, 2017 SCC 8 at para 9.

⁹⁹ *Mowatt v British Columbia (Attorney General)*, 2014 BCSC 988 at paras 60–62. The plaintiffs also brought a petition pursuant to the *Land Titles Inquiry Act* in 2013. Both proceedings were heard together.

b. Retrospective abolition

[175] 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 based on existing possession 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.

[176] The previous bills to abolish adverse possession also took a retrospective approach to transition. The amendment to section 74 of the *Land Titles Act* provided that:¹⁰⁰

74(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.

[177] We suggest that the proposed amendments include a set transition period – for example, two years – to allow parties time to bring their claims before adverse possession is abolished. The consultation results suggest that many Albertans are unaware of the law of adverse possession, so a transition period may give people time to determine whether they have a valid claim or not. A transition period may also prevent a rush of litigation being brought by parties hoping to preserve what might turn out to be tenuous claims. That said, the decision of whether to allow any transition period is ultimately rooted in policy and therefore best left to the legislative drafters.

[178] Lastly, we suggest that the date of abolition be specifically included in the *Land Titles Act* so that potential litigants do not need to search another source for when the amendments come into force.

RECOMMENDATION 3

The amendments to the *Land Titles Act* to abolish adverse possession should apply retrospectively so that no new claims may be brought once abolition is in force.

¹⁰⁰ 2018 Bill, note 24, cl 1(2). The 2018 Bill included a coming in force date of January 1, 2019.

2. RENEWED CLAIMS TO RECOVER POSSESSION

[179] 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.

[180] However, it is easy to foresee undesirable complications if an existing claim for adverse possession co-exists with a renewed 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.

[181] 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. In this context, it is worth noting that adverse possession claims are not often successful in Alberta and that the courts are best placed to deal with the specific facts of any overlapping claims.

RECOMMENDATION 4

The amendments to the *Limitations Act* to allow claims to recover possession of real property to be brought at any time should not apply where a claim based on adverse possession was commenced before abolition is in force. In such circumstances, the 10-year limitation period for claims to recover possession of real property should continue to apply.

3. PREVIOUSLY RESOLVED CLAIMS

[182] During the consultation period, we were asked about whether the reforms mentioned in RFD 33 ought to apply to previously resolved claims. Specifically, whether registered owners who had previously lost land due to adverse possession ought to be able to reclaim their lost land once adverse possession is abolished in Alberta. This would amount to retroactive abolition rather than the retrospective abolition we have recommended.

[183] It might be possible to temper the effects of retroactive abolition. For example, one survey respondent suggested that any reforms to adverse possession include limited circumstances for former landowners to reclaim lost property:

The system needs to be set up to allow previous landowner victims of this awful legal policy to reclaim their lost legal property. This is a fault of the current legal framework and not of the owner, and therefore a change in legislation must allow past wrongs to be redressed. Perhaps a time limit (10 years?) could be set up to challenge previous losses of property, after which reclaiming property could fall under the statute of limitations as most other legal matters are.

[184] However, it is not difficult to see how creating a method to allow registered owners to reclaim lost land would result in mischief and uncertainty. As stated in the introductory chapter of this Final Report, the “curtain principle” is a fundamental element of a Torrens land registration system. The effect of the curtain principle is to protect future owners from prior claims. Allowing registered owners to reclaim lost land would effectively unravel the curtain, as all titles would be subject to these prior unregistered claims.

[185] The matter becomes even more complicated if title has changed hands multiple times after the adverse possession claim was resolved. Consider the following example. Registered Owner A is the former owner of the Disputed Land. Occupier B brought a successful claim to quiet title to the Disputed Land based on adverse possession. Occupier B then obtained registered title to the

Disputed Land under section 74 of the *Land Titles Act*. Many years pass, and Occupier B eventually decides to sell their property, including the Disputed Land, to Purchaser C. If adverse possession is abolished, should Registered Owner A be able to bring a claim against Purchaser C to recover the Disputed Land lost to Occupier B all those years ago?

[186] It may be possible to resolve these complexities by establishing a time limit within which registered owners can bring claims to recover possession of lost land, or by limiting such claims to cases in which the land in question has not changed hands since the adverse possession claim was resolved. Even with such limits, any process that would allow former registered owners to reclaim lost land now registered to another owner would introduce new uncertainty in violation of the curtain principle of the Torrens system.

[187] The reforms contained in this Final Report are intended to protect future ownership, ensure transferability, and promote effective and equitable resolution of disputes. For these reasons, ALRI does not recommend any reforms that would allow former registered owners to reclaim land they have lost due to adverse possession. This approach was reflected in the previous bills to abolish adverse possession. For example, the proposed amendment to section 74 of the *Land Titles Act* would read:¹⁰¹

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.

[188] The previously proposed amendment leaves a gap with respect to a judgment issued in favour of an adverse possessor, but a certificate of title has not yet been issued to the adverse possessor. Such judgments should not be invalidated by a later change in the law. The adverse possessor should be able to apply to have title changed based on the judgment.

RECOMMENDATION 5

The amendments to the *Land Titles Act* to abolish adverse possession should not affect a certificate of title acquired by adverse possession and issued before abolition is in force, or a judgment issued in favour of an adverse possessor before abolition is in force.

¹⁰¹ 2018 Bill, note 24, cl 1(2). The 2018 Bill included a coming in force date of January 1, 2019.

CHAPTER 5

Lasting Improvements to Wrong Land

[189] 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.

[190] As detailed in RFD 33, with the exception of *Koziey*, 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 RFD 33, reliance on section 69 would not have led to an inequitable result.

A. What is a Claim Regarding Lasting Improvements?

[191] Claims regarding lasting improvements are available under section 69 of the *Law of Property Act*. This provision deals with situations in which an occupier makes lasting improvements on the wrong land because of mistaken belief in ownership:¹⁰²

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
- (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

¹⁰² Section 69 includes a third subsection which is discussed in chapter 6.

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.

[192] Claims regarding lasting improvements were introduced by amendment to the *Land Titles Act* in 1950,¹⁰³ as a legislative response to the 1948 decision of the Alberta Court of Appeal in *Boyczuk v Perry*.¹⁰⁴ 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.

[193] 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.¹⁰⁵ 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 is just and equitable under the circumstances for the occupier to retain the land, the court can direct the occupier to compensate the registered owner.¹⁰⁶ Retention of

¹⁰³ *An Act to amend the Land Titles Act*, SA 1950, c 35, s 11.

¹⁰⁴ *Boyczuk v Perry*, [1948] 2 DLR 406 (Alta SCAD).

¹⁰⁵ Claims regarding lasting improvements under s 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*, 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 s 609 of the *Municipal Government Act* trumps s 69 of the *Law of Property Act* (then s 60); and *Palmer v Alberta (Sustainable Resource Development)*, 2003 ABQB 348, in which the Court held that the Crown is not subject to s 69 claims based on s 14 of the *Interpretation Act*, RSA 2000, c I-8.

¹⁰⁶ *Law of Property Act*, s 69(2).

the land will usually occur where the lasting improvement adds value to the adjoining land rather than the encroached land.

[194] 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.¹⁰⁷ 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.¹⁰⁸

[195] 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.

[196] 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 69.¹⁰⁹ In his remarks during the second reading of the 2012 Bill, Mr Allred praised section 69 as striking the right balance:¹¹⁰

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

¹⁰⁷ See for example, *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 s 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.

¹⁰⁸ See *Medicine Hat (City of) v Mund* (1988), 86 AR 392 (CA).

¹⁰⁹ The 2012 Bill did propose striking out the words “including a remedial order” in s 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 s 69: see 2012 Bill, note 15, cl 2(3)(b).

¹¹⁰ Alberta, Legislative Assembly, *Hansard*, 27th Leg, 5th Sess, No 15 (12 March 2012) at 437 (Ken Allred).

[197] 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.¹¹¹

[198] Section 69 is not unique to Alberta. Other jurisdictions have similar provisions – for example, the equivalent provision in Saskatchewan came into force in 1926,¹¹² while Manitoba’s provision came into force in 1910.¹¹³ Ontario’s equivalent can be traced back to at least 1914.¹¹⁴ 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.¹¹⁵

¹¹¹ *SW Properties Inc v Calgary (City of)*, 2003 ABCA 10 at para 16. The 2003 Report detailed the historical background of s 69, along with the elements that make up a s 69 claim and the remedies available if a claim is successful: see 2003 Report at paras 93–103.

¹¹² See *The Improvements Under Mistake of Title Act*, RSS 1978, c I-1, s 2:

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.

¹¹³ See *The Law of Property Act*, RSM 1987, c L90, s 27:

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.

¹¹⁴ 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.

¹¹⁵ 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

[199] Unlike adverse possession, claims regarding lasting improvements are an exception to indefeasibility. As such, section 69 will create a problem for an intervening *bona fide* purchaser for value who would otherwise obtain title free of adverse possession:¹¹⁶

[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.

[200] 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.¹¹⁷ The impact of this result is discussed further in the next chapter.

C. Elements of the Claim

[201] 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.” 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

[202] 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 constitutes a lasting improvement. There does not appear to be a clear

¹¹⁶ 2003 Report at para 104, citing *Sel-Rite Realty v Miller* (1994), 20 Alta LR (3d) 58 (QB) at 67.

¹¹⁷ See for example, *Land Titles Act*, ss 61(1), 183.

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.

[203] 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.”¹¹⁸ 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.¹¹⁹

[204] 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.¹²⁰ In *Power*, a party wall separating two duplex units was a lasting improvement.¹²¹ 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.

[205] 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.¹²² For example, trimming back vegetation or filling in low spots on a gravel driveway are not lasting improvements.¹²³

[206] 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.

¹¹⁸ 2003 Report at para 99, citing *Medicine Hat (City of) v Mund* (1988), 86 AR 392 (CA).

¹¹⁹ 2003 Report at para 98. Some improvements are not easily characterized. See, for example, note 141 for conflicting authority regarding driveways.

¹²⁰ *Deguire* at paras 39-41.

¹²¹ *Power* at para 190.

¹²² See *Deguire* at para 40.

¹²³ *Goertz* at para 53.

2. MISTAKEN BELIEF BY THE PERSON WHO MADE THE IMPROVEMENT

[207] 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:¹²⁴

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].

[208] 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.

[209] The requirement of belief has been described as follows:¹²⁵

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.

[210] The belief must be honest and *bona fide*, but it does not need to be reasonable:¹²⁶

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

¹²⁴ 2003 Report at para 96.

¹²⁵ *Bank of Montreal v 1323606 Alberta Ltd*, 2013 ABQB 596 at para 46 [references omitted] [*Bank of Montreal*].

¹²⁶ *Deguire* at paras 28–9.

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

[211] In this way, reasonableness plays a secondary role, namely as a factor relevant to the honesty of the belief:¹²⁷

- (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.

[212] 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.

[213] 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.¹²⁸ 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:¹²⁹

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.

[214] A similar fact scenario arose in *Bank of Montreal*. 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 show home approximately

¹²⁷ *Deguire* 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 30–36.

¹²⁸ *Community Credit Union Ltd v Otto*, 2002 ABQB 317.

¹²⁹ *Community Credit Union Ltd v Otto*, 2002 ABQB 317 at para 16.

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.

[215] 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.¹³⁰ The Court agreed that the approach taken in *Community Credit Union Ltd v Otto* was correct where a person builds an improvement on land that is not their own and fails to register the interest.¹³¹ 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.

[216] 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 69.¹³² In that case, the Court held that the tenants knew that the matter of ownership was in dispute:¹³³

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.

[217] 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.¹³⁴ Evidence of a third-party mistake would go to establishing that the occupier's belief was honest and *bona fide*.

¹³⁰ *Bank of Montreal* at para 44.

¹³¹ *Bank of Montreal* at para 45.

¹³² *Jusza v Dobosz*, 2003 ABQB 512, supplemental reasons 2003 ABQB 582.

¹³³ *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 s 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.

¹³⁴ See *Deguire*. 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."

[218] 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.¹³⁵

3. WHO CAN BRING THE CLAIM?

[219] 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?

[220] In *Goertz*, the driveway which formed the centre of the dispute was built before the occupiers purchased their land in 2007. 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.

[221] A subsequent occupier was able to bring a successful claim regarding lasting improvements in *Power*. 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 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.

¹³⁵ *Bank of Montreal* at para 30.

¹³⁶ *Goertz* 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.

[222] 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:¹³⁷

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.

[223] 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.

[224] 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.¹³⁸

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

¹³⁷ *Power* at paras 191–93. 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.

¹³⁸ See *Sel-Rite Realty v Miller* (1994), 20 Alta LR (3d) 58 (QB).

[226] 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:¹³⁹

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

[227] 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.”¹⁴⁰

[228] 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.

[229] 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.

[230] 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.

[231] 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 the occupiers had themselves made a lasting improvement by maintaining the

¹³⁹ *Land Registration Act*, SNS 2001, c 6, s 76(1).

¹⁴⁰ *Land Registration Act*, SNS 2001, c 6, s 76(2).

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.¹⁴¹ 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

[232] 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.

[233] 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.

[234] 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.¹⁴²

[235] 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 belief would have failed as the lasting improvement – the duplex party wall –

¹⁴¹ 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.

¹⁴² For example, in *Power*, 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 s 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 s 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.

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.

[236] In most cases, the person to whom the lasting improvement is transferred will not know that they are the assignee of a 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.

[237] 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 lasting improvement.

[238] 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. Consultation results

[239] A former Alberta MLA supported this recommendation, noting that:

The fact may very well be that the person who made the improvement on the wrong property may not even be available to testify as to when and why the improvement was erected in error. The object of section 69 is to fix a problem that was constructed on the wrong property in error. Unless there is clear evidence that the person applying was not under the belief that it was his own property the court should be empowered to make an equitable decision based on the circumstances.

d. Aligning section 69 with court interpretation

[240] To date, courts have generally achieved appropriate results in cases where a lasting improvement made on the 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.

[241] 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 6

Section 69 of the *Law of Property Act* should be amended to provide that an assign should not have to prove the belief of the person who made the improvement.

D. Remedies

[242] 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:¹⁴³

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 built. 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

¹⁴³ 2003 Report at paras 99-102.

force the sale of the disputed lands from the registered owner to the occupier.

[243] Consequently, courts have a “tremendous amount of discretion” in determining when a remedy should be granted.¹⁴⁴

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”.

[244] 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.¹⁴⁵ 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.¹⁴⁶

[245] The available remedies for 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.

[246] 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.

¹⁴⁴ *Jones v Semen*, 1999 ABQB 473 at para 34.

¹⁴⁵ *SW Properties Inc v Calgary (City of)*, 2003 ABCA 10 at para 11.

¹⁴⁶ 2003 Report at para 99.

E. Planning Law Implications

1. LAND USE PLANNING

[247] Part 17 of the *Municipal Government Act* provides statutory authority for planning and land use controls by local governments in the province.¹⁴⁷ 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.”¹⁴⁸ The two main instruments for regulation are land use bylaws and subdivision controls.

[248] The *Municipal Government Act* requires every municipality to adopt a land use bylaw.¹⁴⁹ 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.¹⁵⁰ A land use bylaw may additionally prescribe the subdivision design standards applicable in the municipality.¹⁵¹

[249] 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:¹⁵²

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

¹⁴⁷ 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.

¹⁴⁸ *Municipal Government Act*, s 617.

¹⁴⁹ *Municipal Government Act*, s 639.

¹⁵⁰ *Municipal Government Act*, ss 640(1)-(2).

¹⁵¹ *Municipal Government Act*, s 640(4)(a).

¹⁵² 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 (Toronto: Carswell, 2005) [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.

[250] 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.¹⁵³ 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.¹⁵⁴

[251] Development undertaken in contravention of regulation is subject to enforcement proceedings, including a stop order and demolition.¹⁵⁵

2. LASTING IMPROVEMENTS AND PLANNING LAW

[252] 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.¹⁵⁶ The property will usually be identified or referred to in the application by its postal address or

¹⁵³ See *City of Edmonton, bylaw No 12800, Zoning Bylaw (May 2017)*, s 5.1.

¹⁵⁴ *City of Edmonton, bylaw No 12800, Zoning Bylaw (May 2017)*, s 12.2(1).

¹⁵⁵ *Municipal Government Act*, ss 645–46.

¹⁵⁶ Different types of lasting improvements may have different requirements when applying for a development permit. For example, the City of Edmonton requires a plot plan prepared by an Alberta Land Surveyor to be submitted before approving a developmental permit for a garden suite: see <www.edmonton.ca/residential_neighbourhoods/application-requirements-house-permits.aspx> [<https://perma.cc/FRS4-MGA5>]. In contrast, the permit application process for a garage or garden shed requires a site plan, which could be prepared by the property owner or contractor: see <www.edmonton.ca/residential_neighbourhoods/service-detached-garage-carport-permit.aspx> [<https://perma.cc/ZNC6-7QML>]. It is also worth noting that even if dealing with similar types of lasting improvements, there may be a wide range of permit requirements given the large number of municipalities in province.

legal description, and depicted on a site plan which is not approved by a land surveyor.¹⁵⁷

[253] 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 results in 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*.

[254] In *Moore*, an adverse possession case discussed in RFD 33, 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*:¹⁵⁸

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....

¹⁵⁷ As noted at page 5 of the ALSA Supplemental Report, note 35, a real property report or survey prepared by an Alberta Land Surveyor “will certainly show the location of a lasting improvement relative to the boundary.”

¹⁵⁸ *Moore* at paras 153–56. See also Alberta, Service Alberta, *Alberta Land Titles and Procedures Manual*, ADV-1 (Alberta: Service Alberta, 2002), online: <www.servicealberta.ca/pdf/ltmanual/ADV-1.pdf> [<https://perma.cc/SD5B-FNMD>] which states at point 5 of the registration procedure: “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 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 exceptions to the requirement to obtain subdivision approval.

A judgment is an instrument subject to s 652 of the *Municipal Government Act* (*Land Titles Act*, s 1(k)(ii)¹⁵⁹, 76(1); *Municipal Government Act*, s 616(i)¹⁶⁰, 652¹⁶¹).

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).

[255] 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. 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:¹⁶²

- 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

¹⁵⁹ *Land Titles Act*, s 1(k)(ii) defines “instrument” as including “a judgment or order of a court.”

¹⁶⁰ *Municipal Government Act*, s 616(i) provides that “‘instrument’ means a plan of subdivision and an instrument as defined in the *Land Titles Act*.”

¹⁶¹ 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.”

¹⁶² 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.

[256] 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.¹⁶³ 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 claimant is the owner of neighbouring land - as will be the case in a section 69 claim - 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.

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

[258] 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*. 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

¹⁶³ Theoretically, the claimant can establish adverse possession in several non-contiguous parts of a parcel, subdividing the parcel into multiple parcels.

¹⁶⁴ *Koziey* at para 24.

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.

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

[260] The apparent conflict between registering an adverse possession judgment under section 74 of the *Land Titles Act*, and the need to first seek subdivision approval as required by section 652 of the *Municipal Government Act*, was most recently considered in *Bretin*. Mr Bretin had obtained an earlier order to quiet title, which directed him to apply to the Registrar for consideration of the subdivision and issuance of legal title.¹⁶⁵ Mr Bretin then came before the Court to ask it to simply direct the issuance of separate title, as the Registrar was concerned about resolving any outstanding subdivision questions before issuing a new title.

[261] In coming to its decision to maintain the requirement for subdivision approval, the Court reviewed the decisions of *Moore* and *Koziey* and held that:¹⁶⁶

In all of the circumstances, at this time, I am not prepared to make an order dispensing with any requirement for subdivision approval or directing the issuance of title without subdivision approval or otherwise. On the face of the *Land Titles Act*, the court's role after a finding of adverse possession is to grant the judgment and declaration contemplated in section 74(1) of the *Land Titles Act*. After that, filing and registration are up to the party that recovered the judgment and the Registrar.

[262] While *Moore*, *Koziey*, and *Bretin* all involved adverse possession claims, it is not difficult to see how a successful claim to retain the land under section 69 could raise similar registration issues. However, it is important to remember that there is a significant difference in the very nature of the two claims: claims regarding lasting improvements, unlike adverse possession, allows courts wide discretion in granting the appropriate remedy. For example, a court could make a section 69 order conditional on receiving subdivision approval. The apparent

¹⁶⁵ Mr Bretin's earlier application to quiet title was unopposed by his neighbours, who were the registered owners of the land in question. The land was a triangle in the southeast corner of the neighbours' property, which abutted Mr Bretin's own property. Given the nature of the land, the order quieting title was subject to Mr Bretin obtaining a survey of the property and applying for subdivision approval.

¹⁶⁶ *Bretin* at para 69. The Court also noted at para 68 that it had not been pointed to any provision in the *Municipal Government Act* that would permit a court to waive compliance with that Act.

conflicts in *Moore*, *Koziy*, and *Bretin* may have been avoidable if adverse possession was a discretionary remedy.

[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,¹⁶⁷ and subject to payment of any outstanding property taxes,¹⁶⁸ and proof 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.¹⁶⁹ 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, in certain cases where the proposed subdivision does not comply with the land use bylaw. The authority can do so 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 to the use prescribed for that land in the land use bylaw.¹⁷⁰

[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 the result of a judgment or order of the court, rather than a voluntary conveyance.¹⁷¹ 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 a section 69 order is an explicit consideration. For example, a successful section 69 claim would likely have a negative effect on the use, enjoyment, and value of the encroached parcel. In such

¹⁶⁷ *Municipal Government Act*, 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.

¹⁶⁸ *Municipal Government Act*, 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.

¹⁶⁹ See for example, Edmonton Subdivision Authority, file no. LDA19-0052 (14 March 2019).

¹⁷⁰ *Municipal Government Act*, s 654(2).

¹⁷¹ Section 654(3) of the *Municipal Government Act* gives the subdivision authority the discretion to approve or refuse an application for subdivision approval.

cases, a court ought to take into account this negative effect when determining the amount of compensation payable to the owner of the neighbouring parcel.

[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

[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.¹⁷² 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*."¹⁷³

[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.

¹⁷² The second step would also likely result in additional costs to the occupier.

¹⁷³ *Land Registration Act*, SNS 2001, c 6, s 76(4).

[271] ALRI did not take a position in RFD 33 on whether judgments under section 69 ought to be accepted for registration on title without first undergoing the subdivision approval process.

a. Consultation results

[272] Compared to the other issues identified in RFD 33, we received little feedback on the question of whether subdivision approval of a court-ordered remedy under section 69 should be necessary before being registered on title. The few comments we did receive did not point to a clear direction on this issue.

[273] An individual who had been involved in an adverse possession claim told us in an email that:

I believe subdivision should be pursued. However, if it cannot be obtained, the section 69 judgment should be maintained. The claimant could seek other remedies to establish an interest in land through licensing or other forms of agreements.

[274] A former Alberta MLA reserved his support of the issue, stating that:

It is noted that no recommendation has been made on this issue, however the *Municipal Government Act* seems to make it clear that subdivision is required. In some cases, it could be argued that this is not a subdivision but merely a boundary adjustment. That however is an argument for another day.

[275] The ALSA Supplemental Report recommended that section 69 judgments should not be required to obtain subdivision approval for the following reasons:

- The narrow definition of a lasting improvement
- The need for the belief to be an honest mistake
- The wide range of remedies available to a potential claimant
- The small areas of land that are usually in dispute
- The rarity of taking a strip of land from one parcel and added to another parcel
- The discretionary nature of subdivision approval

[276] We also contacted the Director of Land Titles & Surveys North who confirmed that section 69 judgments, which allow the occupier to retain the land associated with the lasting improvement, follow the same process as adverse possession before they are accepted for registration: both cases require a court

order and, where there is the establishment of new boundary, the submission of a plan of survey.

[277] It is important to note that we did not receive any specific feedback about this issue from any subdivision or planning authorities.

4. CONCLUSION

[278] In deciding a claim under section 69 of the *Law of Property Act*, a court will only have the evidence of the parties before it. Parties resolving a dispute on their own will likely only take their own interests into account. However, there are broader societal issues that arise in planning law. Although it may be seen as cumbersome to have a two-step process that would require subdivision approval in addition to a judgment or settlement resolving the dispute between the parties, subdivision approval maintains the public interest. While many situations are not likely to raise issues that would preclude subdivision, some may.

[279] As such, ALRI does not consider that any change is needed to exempt judgments under section 69 of the *Law of Property Act* from subdivision approval. We are not prepared to make a recommendation that would change the current subdivision requirements given that we did not receive feedback from subdivision or planning authorities during our consultation process. Any changes to the two-step process for section 69 judgments ought to be made in consultation with subdivision and planning authorities.

CHAPTER 6

Limitation Periods for Claims Regarding Lasting Improvements

A. Introduction

[280] 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 rationale underlying limitation periods identified in RFD 33, 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.

B. Current Situation

[281] 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.¹⁷⁴ 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

[282] In the 2003 Report, ALRI noted that allowing section 69 to operate indefinitely has a negative effect on promoting future ownership and ensuring transferability.¹⁷⁵ 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:¹⁷⁶

¹⁷⁴ *Limitations Act*, s 3(4).

¹⁷⁵ 2003 Report at paras 106–08.

¹⁷⁶ 2003 Report at para 110.

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.

[283] 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

[284] 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.

[285] 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.¹⁷⁷ 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.¹⁷⁸

¹⁷⁷ 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, s 178 of the *Land Titles Act* 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.

¹⁷⁸ 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

[286] Currently, claims brought under section 69 of the *Law of Property Act* are exempt from the two-year limitation period based on discoverability.¹⁷⁹ The current project provides an opportunity to consider whether the two-year discoverability rule ought to apply to such claims.

[287] 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.

[288] 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.

[289] 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

¹⁷⁹ *Limitations Act*, 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

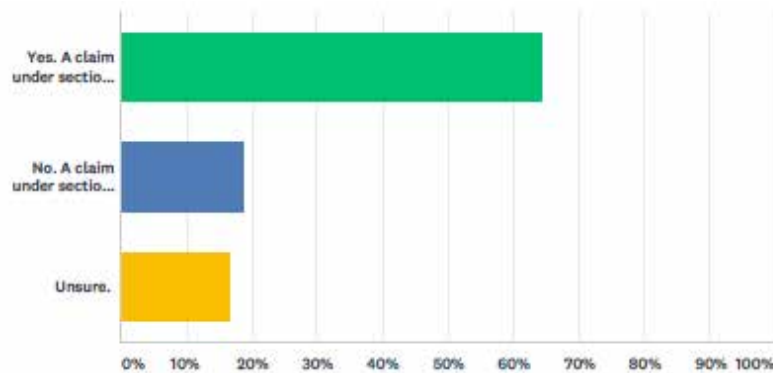
[290] As discussed earlier, section 69 claims are subject to the 10-year ultimate limitation rule. The 2003 Report noted that this limitation period is indefinitely postponed as it is based on a continuous trespass. The 2003 Report further recommended that the triggering event ought to be when the lasting 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.

[291] 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. SURVEY RESULTS

[292] The survey asked the following question:

Q6: Should a claim regarding a lasting improvement under section 69 of the *Law of Property Act* be excluded from the *Limitations Act*?



[293] As the chart above indicates, 64.2% of respondents agreed that claims regarding lasting improvements should be excluded from the operation of the *Limitations Act*.¹⁸⁰ The qualitative data did not include much feedback specific to the question of whether claims regarding lasting improvements ought to be subject to a limitation period. Instead, many respondents focused instead on whether claims regarding lasting improvements ought to be allowed at all. The following comments are a representative sample of those respondents who seemed to disagree with the availability of section 69 claims:

- An honest mistake is still a mistake.
- If the trespasser made an honest mistake and mistakenly believed they owned the land - too bad for them. They messed up. They should have gotten a legal survey and done the job properly. They should be liable for their mistakes just like anyone else.
- You would be a fool to build a lasting structure right up against a property line without being absolutely sure where that property line is.

¹⁸⁰ In comparison, 39.2% of respondents in the commissioned survey answered in favour of excluding claims regarding lasting improvements from the operation of the *Limitations Act*. The commissioned survey also indicated that approximately 28.4% of respondents answered that claims regarding lasting improvements should continue to be subject to a limitation period, while 32.4% were unsure.

If you encroached on a property line, you are at fault, other people should not be forced to pay for your mistakes or negligence.

- If people followed the rules and got development permits this shouldn't be a problem. They should not be rewarded for not following the rules.
- If you build a structure on my land that does not entitle you to claim my land, thanks for the improvement – burn it down, move it, or lose it.
- If I paid for land I want the right to keep it all regardless of what someone who has not paid for the land wants. If they are dumb enough to put improvements on someone else's property then it should just be forfeited to the titles owner of the land in question.

[294] Some respondents shared their views that using section 69 to resolve disputes is preferable to adverse possession:

- Section 69 of the *Law of Property Act* gives the Court discretion to award compensation to a deprived owner. It is therefore a more equitable solution for the resolution of property disputes involving adverse claims. The law of adverse possession is in effect land theft.
- Section 69, with its greater flexibility in crafting equitable remedies to resolve disputes seems to be a superior option.

[295] A few respondents did focus their comments on the limitations question:

- These claims are likely to result from often tiny building encroachments (as little as 2 cm). In many cases these encroachments are not uncovered until decades after their construction.
- The intent shouldn't be to punish someone for doing something improper in error. That said, they still made an error. There should be mechanisms to deal with these situations.
- A 10-year limitation on land claims seems rather short. However, an unlimited time frame opens things up to potential chaos.
- A limitation timeline is needed to prevent abuse by the person who occupied the wrong land with a lasting improvement. Perhaps a shorter limitation period can be used to maintain fairness on both sides if a dispute ever comes up – 3-5 years could be a reasonable time?

4. CONCLUSION

[296] 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.

[297] 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.

[298] 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.

[299] 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.

[300] While section 69 claims are exceptions to indefeasibility, the impacts 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 7

The *Limitations Act* should be amended so that there is no limitation period on claims regarding lasting improvements under section 69 of the *Law of Property Act*.

F. Treating Section 69 as an Exception to Indefeasibility

[301] 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.

[302] Further, the current placement of section 69 in the *Law of Property Act* does not adequately recognize the effect of this section on indefeasibility:¹⁸¹

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.

[303] A former Alberta MLA encouraged ALRI to consider making a recommendation to move section 69 from the *Law of Property Act* to the *Land Titles Act*:

In view of the fact that a claim regarding a lasting improvement under the *Law of Property Act* is an exception to indefeasibility under the *Land Titles Act*, it should not just be excluded from operation of the *Limitations Act* but should also be moved from the *Law of Property*

¹⁸¹ *Bank of Montreal* at paras 43–44.

Act to the *Land Titles Act*, where it originally was located. It is noted that ALRI has not recommended that section 69 of the *Law of Property Act* be moved to the *Land Titles Act*, but it appears that ALRI is supportive of that objective.

[304] 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.¹⁸² 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 ejection), which alerts registered owners to exceptions to indefeasibility.

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

G. Prohibiting Prescriptive Easements

[306] The common law doctrine of prescription recognizes that certain rights to land, such as easements, may be acquired based on a person’s long-term use of the land. In Alberta, prescriptive easements were abolished in 1903.¹⁸³ Currently, the prohibition against acquiring certain rights by prescription is found in section 69(3) of the *Law of Property Act*:

¹⁸² *Revised Statutes 1980 Act*, SA 1979, c 66 (assented to 16 November 1979).

¹⁸³ See *An Ordinance Respecting Limitation of Action in Certain Cases*, ONWT 1903(2), c 7, s 1:

No right to the access and use of light or any other easement, right in gross or profit *a prendre* shall be acquired by any person by prescription and no such right shall be deemed to have been so acquired prior to the coming in force of this Ordinance.

69(3) 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.

[307] During the consultation period, we were asked about whether there is any interaction between the remedies available for claims regarding lasting improvements, and the prohibition against acquiring rights by prescription. More specifically, we were asked about whether an easement granted as a remedy for a claim regarding a lasting improvement would unintentionally violate the prohibition set out in section 69(3).¹⁸⁴

[308] To answer this question, it is important to take a step back to consider the doctrine of prescription, particularly in comparison to limitations legislation:¹⁸⁵

The concept of limitation must be contrasted with the concept of prescription. The former was unknown to the common law and is wholly a creature of statute. The latter was a common law rule of evidence based on the presumption of lost modern grant. The former abolishes stale or obsolete claims and operates in a negative fashion, extinguishing the true owner's title. The latter creates or establishes rights in land such as easements, and operates in a positive fashion. Prescription does not extinguish title.

[309] The doctrine of prescription is also conceptually distinct from adverse possession, as noted by Professor Ziff:¹⁸⁶

Although prescription resembles adverse possession, the two doctrines are quite distinct. Prescription, as that term is used in this context, involves the recognition of a right; adverse possession works to remove one. Prescription is premised on a presumed entitlement – the fable of some earlier grant – and so is conceived of as arising to perfect an existing right. Adverse possession is based on a continuing wrong which, by operation of the statute of limitations, can no longer be stopped. It is therefore “possession as of wrong”.

¹⁸⁴ For the purposes of this section, s 69(3) will be discussed only with reference to prescriptive easements. The other rights mentioned in 69(3) – access and use of light, right in gross, and profit a prendre – will not be discussed in this Final Report.

¹⁸⁵ Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed (Toronto: Thomson Reuters Canada, 2016) (looseleaf updated December 2016), vol 3, ch 29 at 9 [29:60:10]. Footnotes omitted.

¹⁸⁶ Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada, 2018) at 432.

[310] Before 1999, the prohibition against prescription was included in limitations legislation in Alberta.¹⁸⁷ In its 1989 Report, ALRI recommended moving prescription to the *Law of Property Act*, while declining to consider the doctrine more substantively.¹⁸⁸

The doctrine of prescription has its origin in the common law. It is extremely complex, and although not properly part of limitations law, it operates in much the same way. We do not wish to consider this subject, on the merits, in this report, for we believe that the issues which would be raised concern substantive property law rather than limitations law.

[311] In the 2003 Report, ALRI briefly considered the relationship between the remedies available to resolve claims regarding lasting improvements and section 69(3).¹⁸⁹

The statutory basis for these remedies should also be understood as derived from the land's improvement and principles of unjust enrichment rather than the doctrine of prescription, there being no time requirement involved.

[312] There is little judicial interpretation of section 69(3), or its previous incarnations.¹⁹⁰ In *Koziey*, the Koziey Estate sought to quiet title to a road used to access the Koziey Lands. On appeal, Mr Taylor, the registered owner, argued that the Koziey Estate's claim was actually a claim to a prescriptive easement, which is barred by section 69(3). The Court of Appeal rejected this argument, given the trial court's finding the Koziey Estate had exclusive possession of the road.¹⁹¹

The appellant correctly states the law, but the Koziey Estate did not ask for an easement by prescription. It asked for full ownership based on its adverse possession. Section 69(3) prevents the establishment of a right to cross over the property of another where that right is not exclusive, or does not exclude the owner... For example, a right to use

¹⁸⁷ The prohibition against prescription was moved to its present location in 1999 with the reform of limitations legislation in Alberta: see *Limitations Act*, SA 1996, c L-15.1, s 15, which came into force on March 1, 1999.

¹⁸⁸ Alberta Law Reform Institute, *Limitations*, Report No 55 (1989) at 44-45.

¹⁸⁹ 2003 Report at para 101.

¹⁹⁰ Previous versions of s 69(3) include: *The Limitation of Actions Act*, RSA 1922, c 90, s 4; *Limitation of Actions Act*, RSA 1942, c 133, s 51; *Limitation of Actions Act*, RSA 1955, c 177, s 49; *Limitation of Actions Act*, RSA 1970, c 209, s 50; *Limitation of Actions Act*, RSA 1980, c L-15, s 50. The provision has remained essentially unchanged since it was first adopted in 1903.

¹⁹¹ *Koziey* at para 9, citing Sandra Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992) 30 Alta L Rev 1291 at 1293-94.

an access road also in use by the registered owner cannot be obtained by prescription. A right to cross the land of another cannot be obtained by prescription if the owner still has use of the right of way land for other purpose.

[313] In *Watchorn v Brouse*, the Brouses mistakenly thought that a shelterbelt area on the north-south boundary of their property belonged to them instead of to their neighbours, the Watchorns.¹⁹² The Brouses had planted 60-70 evergreen trees in the shelterbelt, which the Watchorns wished to clear in order to farm the property. The Brouses' claim for adverse possession was dismissed for two reasons: they were unable to establish that their occupation was open and continuous, and the Watchorns took steps to recover their land before the 10 year limitation period had expired. While the Court briefly considered whether the Brouses might be entitled to a lesser interest that would allow them to continue enjoying the shelterbelt, it was quick to note that section 69(3) prevents granting an easement by prescription.

[314] In *Power*, the Court ordered mutual easements as a remedy under section 69(1). Before choosing this remedy, the Court also noted that section 69(3) does not allow prescriptive easements in Alberta. The Court then went on to confirm that section 69 permits a court to order a lien or easement where a lasting improvement was made to land under a mistaken belief of ownership.¹⁹³ Given the flexibility afforded by section 69(1), the Court applied a pragmatic lens to determine that mutual easements were the most appropriate remedy.¹⁹⁴

After reviewing the circumstances of this case, I further find that it is just to create an easement or lien to clarify the status of the encroachments and to resolve any practical issues related to the two neighbouring properties...

Accordingly, the Plaintiff is entitled to an easement on the property owned by the Goodrams to permit access to her utilities in the basement of the building. I also order that the Goodrams are entitled to an easement on the Plaintiff's property to the extent necessary to accommodate the encroachments which extend over the property line into the Plaintiff's unit.

¹⁹² *Watchorn v Brouse*, 2019 ABQB 834.

¹⁹³ *Power* at para 186.

¹⁹⁴ *Power* at paras 194, 196. The Court further ordered that the mutual easements were only valid while the encroachment exists, and will lapse if the encroachments are removed or the duplex is demolished, damaged, or renovated in a way that cures the issue. The Court directed that the easements should be registered on title in accordance with s 67 of the *Land Titles Act* (Memorandum of easements on title): *Power* at para 217.

[315] In this way, the prohibition against prescriptive easements set out in section 69(3) does not bar a court from ordering an easement for a lasting improvement made to the wrong land. Unfortunately, placing the prohibition against prescriptive easements in the same legislative provision dealing with lasting improvements may create unnecessary confusion.

[316] There are two potential solutions to this problem. The first is to move the prohibition of prescriptive rights to land so that it immediately follows the prohibition of adverse possession. In Chapter 4, we discussed the importance of including in any legislative reform a positive statement to abolish the common law doctrine of adverse possession. Prescription, which is also a common law doctrine based on the long-term use of land, has long been abolished through use of a positive statement in section 69(3). Although adverse possession and prescription involve different interests in land – the former is possessory, while the latter is incorporeal – legislative provisions abolishing both would live nicely next to each other.

[317] The second potential solution is clarifying the language in section 69(1)(b) to expressly include easements – among other options - as an available remedy for lasting improvements. An express reference to easements in the statute would remove any doubt about whether such a remedy could be considered a prescriptive easement.

[318] As discussed earlier, section 69(1)(b) is broad enough to include a number of potential remedies within the phrase “retain the land.” Further, the effect of section 69(1)(b) is to create a possessory right, not an incorporeal one. In this way, most remedies would likely involve a right to exclusive possession more akin to a lease or a license.

[319] ALRI suggests that the first option, namely to move the prohibition of prescriptive rights to land so that it immediately follows the prohibition of adverse possession, is to be preferred. This will require moving the provision contained in section 69(3) from the *Law of Property Act* to the *Land Titles Act*. In our opinion, this is a drafting question that does not require a formal recommendation.

CHAPTER 7

Dispute Resolution

A. Promoting Efficient and Cost-Effective Dispute Resolution

[320] Even if adverse possession is abolished in Alberta, claims regarding lasting improvements will still require resolution. Often, neighbours will resolve these claims between themselves with little outside intervention. However, neighbours who reach an impasse may find themselves engaging in a formal dispute resolution mechanism that requires the assistance of lawyers or a judge. Resolving disputes through a formal court process can result in significant costs to the parties, which may outweigh the actual value of the lasting improvement itself.

[321] One of the primary objectives of these reforms is to promote the effective and equitable resolution of disputes. During our consultation process, a number of individuals and survey respondents shared their concerns about the expense associated with resolving adverse possession claims.

[322] Regarding dispute resolution, the ALSA Report included the following recommendation:

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

[323] This recommendation appears to have been based on the authors' interviews with landowners who had been involved in adverse possession claims:

A common recommendation was to find a way to deal with the matter more efficiently and in a cost-sensitive manner. The combined costs for the court cases are well over \$150,000 for the landowners. The cases dragged on for over five years. For situations that have not gone to court, the costs for legal fees were around \$10,000 for each landowner.

[324] Concerns about costs to resolve claims were also mentioned by a number of survey respondents. For example, two different respondents in favour of abolition pointed to the expense associated with resolving an adverse possession claim:

I am going through this nightmare right now with my own neighbour who is refusing to leave and the lawyer wants a \$3500.00 retainer just to write a demand letter!

...

We are being taken to court by neighbour claiming adverse possession because he doesn't want us to remove trees from our farmland. [H]e has been warned not to trespass many times, the ten year limitation has not been met and yet we find ourselves financially encumbered with lawyers trying to defend our property over what we believe is a false claim. [We] formally placed a charge of trespass against him, this should never have happened.

[325] One individual who contacted ALRI told us that while she knows that her neighbour is encroaching upon her land, she does not have the financial means to retain legal representation to help her recover her property.

[326] As the Provincial Court of Alberta does not have jurisdiction to determine claims in which title to land is called into question, claims to quiet title or to recover possession of real property are heard by the Court of Queen's Bench.¹⁹⁵ Similarly, claims regarding lasting improvements have also been determined at the Court of Queen's Bench.¹⁹⁶ It may be worth considering whether the option of bringing a section 69 claim before the Provincial Court of Alberta ought to be available, particularly where the value of that claim is below \$50,000.¹⁹⁷

[327] Allowing claims regarding lasting improvements to be determined by the Provincial Court could result in many benefits to potential litigants. For example, it is generally accepted that Provincial Court civil claims can be resolved more quickly and cost-effectively than claims commenced in the Court of Queen's Bench.¹⁹⁸

[328] ALRI recognizes that there is a cost – both time and money – associated with resolving disputes relating to lasting improvements made to the wrong land. In some cases, the cost of resolving a dispute may outweigh the value of the lasting improvement. We encourage the government to consider whether these

¹⁹⁵ See *Provincial Court Act*, RSA 2000, c P-31, s 9.6(2)(a).

¹⁹⁶ However, this may be the case because claims regarding lasting improvements have been often brought as an alternative to adverse possession.

¹⁹⁷ The \$50,000 limit on the Provincial Court's civil jurisdiction is set by regulation: see *Provincial Civil Procedure Regulation*, AR 176/2018, s 2. If a claim is worth more than \$50,000, parties can choose to abandon the extra amount or to go to the Court of Queen's Bench.

¹⁹⁸ There are many factors that can affect how quickly a claim can be resolved in Provincial Court. In addition, there are a number of available resolution tracks, including mediation: see <www.albertacourts.ca/pc/areas-of-law/civil/claims/resolution-tracks> [<https://perma.cc/7W5F-SXEL>].

types of disputes could be resolved equitably using a more efficient and cost-effective method.

CHAPTER 8

Summary of Proposed Reforms

A. Proposed Reforms

[329] The proposed reforms contained in this Final Report are based on the recommendation that the law of adverse possession no longer has compelling policy reasons to continue in Alberta. Our consultation process confirms 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.

[330] 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. Correspondingly, 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.

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

Act	Amendment to provide that:
<i>Limitations Act</i> , various sections	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	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	An assign can bring a claim without having to establish the improver's belief.

[332] ALRI has also indicated that section 69 of the *Law of Property Act* should be returned to the *Land Titles Act*.¹⁹⁹ We have not made a formal recommendation to this effect as it is a matter of drafting rather than a substantive legal change.

[333] 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.

[334] Bringing occupiers' claims under section 69 also allows courts to exercise broader discretion in determining the appropriate remedies. Currently, courts do 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*:²⁰⁰

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

¹⁹⁹ We have indicated that returning s 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. Section 69(3), which precludes acquiring easements by prescription, might be appropriately placed alongside the abolition of adverse possession in s 74 of the *Land Titles Act*.

²⁰⁰ *Moore* at para 179.

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.

[335] 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 leases, 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.

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, RSA 2000, c L-4, s 74</i>	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, RSA 2000, c L-12, s 3(1)(b)</i>)
Northwest Territories	<i>Limitation of Actions Act, RSNWT 1988, c L-8, ss 2(1)(e), 18, 19, 43</i>	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, RSNWT 1988, c L-8, s 18</i>)
Nunavut	<i>Limitation of Actions Act, RSNWT 1988 (Nu), c L-8, ss 2(1)(e), 18, 19, 43</i>	Available against: <ul style="list-style-type: none"> Privately owned land in the land titles system Note: Nunavut is an exceptional jurisdiction due to lack of fee simple property ownership; most individuals “equity lease” their property from the municipality.	10 years from when the right first accrued (<i>Limitation of Actions Act, RSNWT 1988 (Nu), c L-8, s 18</i>)
British Columbia	<i>Limitation Act, SBC 2012, c 13, s 28</i>	Available only against: <ul style="list-style-type: none"> Land not in land titles system (i.e. Crown land) when the claim arose before July 1, 1975 Unregistered interests on the parcel Abolished against other land by <i>Limitations Act, 1975 SBC, c 37, s 12</i>	20 years from when the right first accrued (<i>Statute of Limitations, RSBC 1948, c 191, s 16</i>) prior to amendment about claims that arose pre-1975
Nova Scotia	<i>Land Registration Act, SNS 2001, c 6, s 74(1)</i>	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 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 	10-year limitation for land in land title system (<i>Land Registration Act, SNS 2001, c 6, s 74(2)</i>) 20-year limitation for land in deed system (<i>Of The</i>

Jurisdiction	Provision(s)	Availability of Adverse Possession	Time Period(s)
		<ul style="list-style-type: none"> Presumably land still in the deeds system <p>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</p>	<i>Limitations of Actions</i> , RSNS (5th) (1884), c 112, s 11)
Saskatchewan	<i>Land Titles Act</i> , SS 2000, c L-5.1, s 21(1)	Not available. Abolished by <i>Land Titles Act</i> , SS 2000, c L-5.1, s 21(1).	n/a
Yukon	<i>Land Titles Act</i> , SY 2015, c 10, s 44	Not available. Abolished by <i>Land Titles Act</i> , SY 2015, c 10, s 44.	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 <p>Abolished against other land by <i>Lands Act</i>, SNL 1991, c 36, s 36(1).</p>	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 <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>	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, RSO 1990, c L5, s 51(1)</i>	Available only against: <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 Abolished against other land by <i>An Act to Simplify Titles and to Facilitate the Transfer of Land, SO 1885, c 22, s 25</i>	10 years (<i>Real Property Limitation Act, RSO 1990, c L.15, s 4</i>)
New Brunswick	<i>Land Titles Act, SNB 1981, c L-1.1, s 17(1)</i>	Not available. Abolished by <i>Land Titles Act, SNB 1914, c 22, s 44.</i>	n/a