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Adverse Possession and Lasting Improvements

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The topic of adverse possession was left as a loose end when the *Limitations Act* was enacted in 1996. In time, there was some doubt as to what limitation period applies and how the period is calculated.

However, in order to deal with the limitation issue, it is essential to understand precisely how the adverse possession rules have operated in the past, how they fit with other provisions of the *Law of Property Act* and the *Land Titles Act*, and whether and how they should operate in the future.

As a result, the report contains recommendations which we think will restore the appropriate balance between limitations and land titles legislation.

Reforming this task requires a clear understanding of the underlying concepts and an ability to maintain that clarity through a maze of complex and overlapping contexts. We are grateful to our Counsel, Sandra Petersson, for bringing those skills to the task and for guiding the project to completion.

As always, we rely on others for their help – our Project Committee of Mr. Clark Dalton, Q.C., Mr. Alan D. Fielding, Q.C. and Mr. Lyndon Irwin, Q.C.; Professors Robert Chambers and Moe Litman who have provided comment or been available for questions throughout the process. We acknowledge with gratitude the availability and contribution of those we have mentioned and the Institute Board generally.

To the extent that this report summarizes the current law in Alberta, it endeavours to state the law as of 1 April 2003.

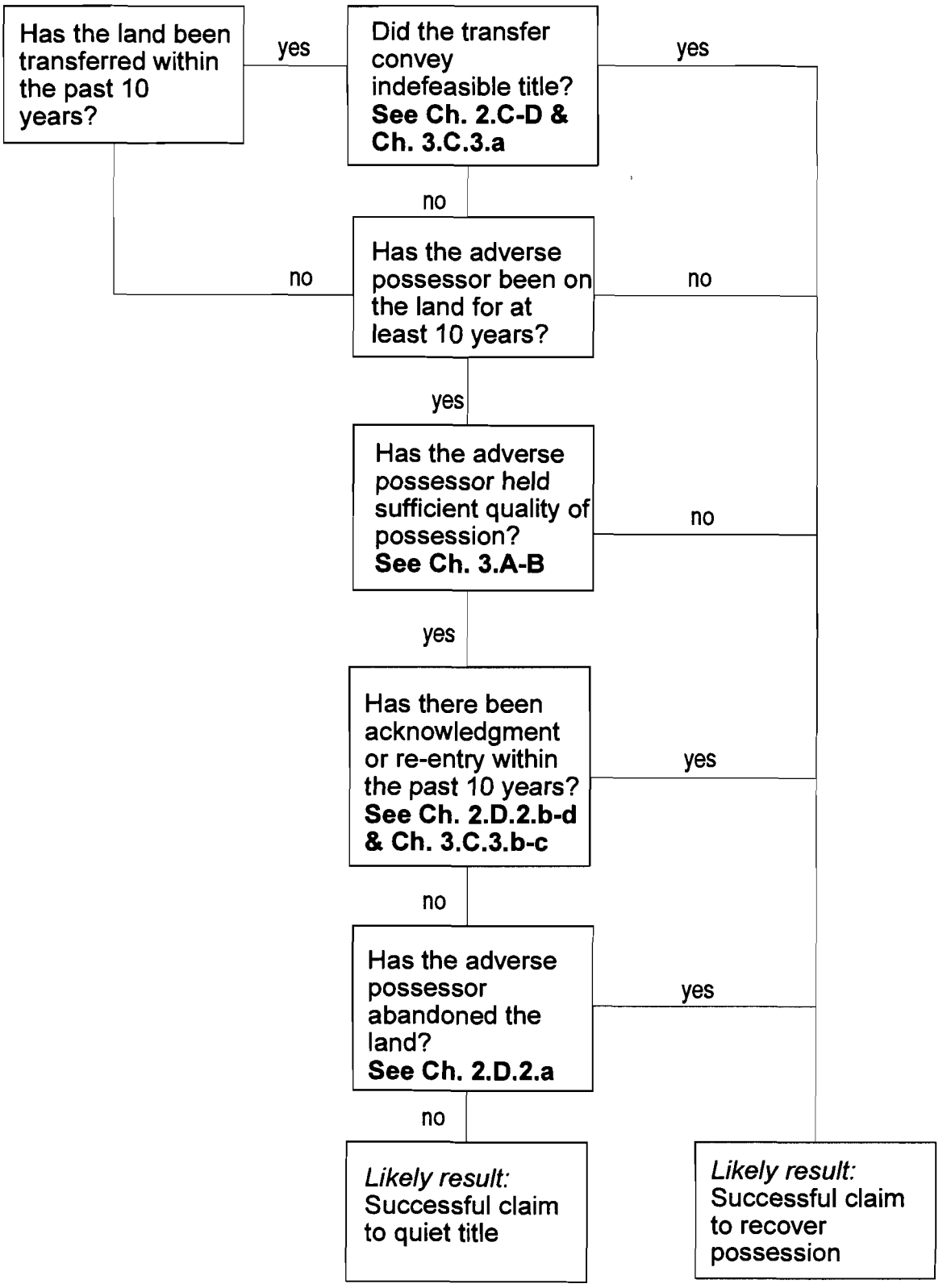
Table of Contents

HOW TO READ THIS REPORT

This Report considers the effect of the *Limitations Act* on the areas of adverse possession and lasting improvements under the *Law of Property Act*. In order to understand how the *Limitations Act* changed the law, it is necessary to outline the previous state of the law in some detail. However, if the recommendations made in this Report are implemented, the law will operate very much as before, with the exception of claims for lasting improvements being subject to a limitation period.

Claims to recover possession of real property and claims to quiet title by adverse possession are closely intertwined. Where a claim to recover possession fails, a claim to quiet title is likely to succeed. Where a claim to recover possession succeeds, there may still be scope for a claim for lasting improvements. In order to manage the discussion of these three claims and the changes made by the *Limitations Act*, and to avoid repetition, it has been necessary to divide the substance of the law across Chapters 2 to 4. However, any such division risks the impression that there are clear lines between the claims. Thus, to fully understand whether a claim to recover possession is likely to succeed, for example, it will be necessary to read through all three chapters.

With respect to claims to recover possession and claims to quiet title, Chapters 2 and 3 develop a flowchart that represents the main issues that need to be considered. For convenience, that flowchart is reproduced here with cross-references to the parts of the Report that discuss each step.


Has the land been transferred within the past 10 years?
yes
Did the transfer convey indefeasible title? See Ch. 2.C-D & Ch. 3.C.3.a
yes
no
Has the adverse possessor been on the land for at least 10 years?
no
no
yes
Has the adverse possessor held sufficient quality of possession? See Ch. 3.A-B
no
yes
Has there been acknowledgment or re-entry within the past 10 years? See Ch. 2.D.2.b-d & Ch. 3.C.3.b-c
yes
no
Has the adverse possessor abandoned the land? See Ch. 2.D.2.a
yes
no
Likely result: Successful claim to quiet title
Likely result: Successful claim to recover possession

ABBREVIATIONS

For brevity, this Report uses short form references for the following frequently cited materials.

Report for Discussion	Alberta Law Reform Institute, *Limitations* (Report for Discussion No. 4) (Edmonton: Alberta Law Reform Institute, 1986)
Limitations Report	Alberta Law Reform Institute, *Limitations* (Report No. 55) (Edmonton: Alberta Law Reform Institute, 1989)
Land Titles Act	*Land Titles Act*, R.S.A. 2000, c. L-4
Law of Property Act	*Law of Property Act*, R.S.A. 2000, c. L-7
Limitations Act	*Limitations Act*, R.S.A. 2000, c. L-12
old Act	*Limitation of Actions Act*, R.S.A. 1980, c. L-15
Municipal Government Act	*Municipal Government Act*, R.S.A. 2000, c. M-26

All statute references are to the R.S.A. 2000 except where the context indicates otherwise.

PART I — EXECUTIVE SUMMARY

In the background material to the *Limitations Act*, it was decided to defer consideration of the law of adverse possession to a later date. The coming into force of the new *Limitations Act* in 1999 raises several issues regarding adverse possession and the related claim for lasting improvements to land under the *Law of Property Act*. This Report addresses the issues raised by the *Limitations Act*. An increasing number of reported cases in recent years makes it additionally appropriate to consider this area of law.

A. Scope

This Report considers three closely related claims that arise between an owner of land and certain persons found in possession of the land. The first claim is the owner's right to recover possession. The second claim arises when the owner fails to bring a claim to recover possession within the prescribed limitation period. This second claim, generally referred to as adverse possession, allows the person in possession to quiet title in his or her own name where the owner does not act in time. The third claim typically arises where the owner is still within time to recover possession but to allow the owner to do so may itself cause injustice. Thus, s. 69 of the *Law of Property Act* offers alternative relief where the person in possession has made lasting improvements to the land in the belief that he or she owned the land.

B. Objectives

Disputes arising from the ownership and use of land are inevitable. 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. Protecting future ownership implies that land can be transferred from the hands of the successful claimant. Consequently, transferability is a further objective the law must ensure. These objectives of protecting future ownership and ensuring transferability are key and guide the discussion in this Report.

From the outset it is relevant to note the argument that all disputes concerning land ownership could be resolved according to the land titles register.

To hold that the owner always has the definitive claim would be an efficient mechanism for resolving all disputes. However, to do so would be contrary to the limitations principle that appropriate resolution demands timely resolution. A third key objective of this Report is, therefore, to prevent the revival of stale claims. Further, to resolve disputes on the sole basis of the register is an arbitrary approach that does not assess competing claims on their merit. Finally, adopting the register for this purpose is not supported by the core principles of land titles legislation and would, over time, produce detrimental results for the register itself with consequences for transferability, future ownership, and the revival of stale claims.

C. Adverse Possession

Claims to recover possession of land were first made subject to limitation periods in the 12th Century. With the early 19th Century enactment of a provision to extinguish an owner's rights when the limitation period expired, limitations legislation provided not only a mechanism for resolving disputes but also protected future ownership and, thereby, improved transferability. However, the later 19th Century enactment of a Torrens land titles system provided a second mechanism for resolving disputes, ensuring transferability, and protecting future ownership.

During the first quarter of the 20th Century, the Alberta courts and legislature arrived at an effective balancing of the potentially conflicting principles of limitations and land titles legislation. An owner's claim to recover land continued to be subject to a limitation period and, thus, registered land could be lost to an adverse possessor with a claim to quiet title. However, in order to protect indefeasibility, a purchase for value would give the new owner the benefit of a new limitation period. In this way, the courts gave effect to both limitations and land titles principles. The balance between the two statutory regimes was completed by enacting a bridging provision to authorise the Registrar to issue a new title to a successful adverse possessor and to cancel the former owner's title. Alongside the provisions of limitations and land titles legislation, common law criteria were used to determine when the owner had been dispossessed and additional events that would stop or restart the limitation period.

D. Lasting Improvements

The goal of protecting indefeasibility and giving priority to a purchaser for value will inevitably cause harm to the person in possession. In one case, the purchasers for value were entitled to a neighbour's residence and farm buildings. Though all parties thought the buildings stood on the neighbour's land, the land was, in fact, included on the certificate of title newly acquired by the purchasers. The neighbour's claim to quiet title by adverse possession was defeated by the purchasers' indefeasible title, leaving no remedy for the loss of his home. The response to this situation was to enact a provision that offered relief where a person had made lasting improvements to land in the belief that the land was his or her own, currently s. 69 of the *Law of Property Act*. The criteria for assessing lasting improvements and mistaken belief are now well-established in the case law and courts have shown flexibility in crafting remedies.

Though s. 69 was not thought to be subject to a limitation period under the old Act, the *Limitations Act* intended to impose one. However, s. 69 must be recognised as an exception to indefeasibility and it has been so applied by the courts. Consequently, it is appropriate to narrow this exception with a limitation period so that future owners of land are not indefinitely subject to s. 69 claims.

E. Effect of the *Limitations Act*

The *Limitations Act* has produced two significant changes regarding the claims discussed in this report. First, under the *Limitations Act,* a claim based on a continuing course of conduct does not arise until the continuing conduct ends. Thus, a claim to recover possession, which formerly arose when the owner was dispossessed, is now postponed until the adverse possessor's continuing trespass ends. The practical result is a limitation period that effectively never runs. The same result arises with respect to claims under s. 69 of the *Law of Property Act*. While the *Limitations Act* intended to impose a limitation period on s. 69 claims, the existence of a continuing course of conduct again postpones the claim arising until the conduct ends.

Second, the *Limitations Act* has not continued s. 44 of the old Act which formerly extinguished an owner's rights in the land when the limitation period

expired. The consequences of this change are not as severe as they might first appear. Though the owner's rights are not extinguished by the *Limitations Act*, s. 74 of the *Land Titles Act* will cancel the owner's rights where the adverse possessor has quieted title and applies for registration. Though there is a risk of reviving stale claims before rights have been cancelled under the *Land Titles Act,* the risk of revival is more effectively addressed within existing limitations principles and does not require the drastic measure of extinguishing rights outside of the *Land Titles Act.*

Finally, the *Limitations Act*'s transitional provision raises a problem of temporary significance. Both claims to recover possession and claims under s. 69 of the *Law of Property Act* would appear to fall under the two year discovery rule in the *Limitations Act*'s transitional provision. Though there is sufficient basis for a court to avoid an unjust result under the two year limitation period, it is appropriate to clarify the application of the transitional provision.

F. Recommendations

In order to restore the law's previous balance between limitations and land titles legislation, and in keeping with the objectives of ensuring transferability and protecting future ownership, this Report recommends as follows.

To avoid the effect of claims being postponed by a continuing course of conduct:

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

To clarify the application of the transitional provision:

- Claims to recover possession of land should not be subject to the two year limitation period in the *Limitations Act*'s transitional provision.
- Claims under s. 69 of the *Law of Property Act* should not be subject to the two year limitation period in the *Limitations Act*'s transitional provision.

To avoid reviving stale claims after the limitation period has expired:

- Where an owner transfers land to a donee, the donee should become the successor owner of any claim to recover possession.
- Re-entry to recover possession should only be effective within the limitation period.
- The principle of acknowledgment should only be effective within the limitation period.

G. Planning Law Considerations

Where claims to quiet title and claims under s. 69 of the *Law of Property Act* extend to only part of the owner's land, a successful claim may effect a subdivision. Subdivision approval will, therefore, be required before any changes may be noted on the register. Though subdivision approval may be refused this protects the public interest in the orderly development and use of land and may also guide the court in crafting remedies.

H. Misconceptions Regarding Adverse Possession

In the course of discussion, this Report also deals with a number of misconceptions regarding the operation of adverse possession. The first is that adverse possession is an exception to indefeasibility and fundamentally inconsistent with our land titles system. Though land may be subject to adverse possession, a purchaser for value will acquire indefeasible title. Consequently, adverse possession is not an exception to indefeasibility. Moreover, even if courts had allowed adverse possession to operate as an exception to indefeasibility, that result in itself would not be inconsistent with land titles registration. The land titles system operates with a number of express and implied exceptions to indefeasibility, including s. 69 of the *Law of Property Act*. Nor is it inconsistent with the land titles system to require land owners to act on their claims in a timely manner; the *Land Titles Act* itself imposes limitation periods. While the *Land Titles Act* is an immensely valuable tool, it is not the only law in our society. As the principles of the *Land Titles Act* and the *Limitations Act* are not in conflict, neither Act demands paramountcy.

The second misconception is that adverse possession amounts to land theft. In the extreme case, this will be true. However, as the law has evolved in Alberta adverse possession based on deliberate encroachment is rarely successful. Rather,

in the typical case, the adverse possessor will have acted in the belief that he or she owns the land. Returning to the theft analogy, the adverse possessor lacks *mens rea*. Further, in appropriate cases, adverse possession allows the register to reflect the long standing status quo of possession, as where the parties have always accepted that the fence accurately marked the boundary between their lands or where a 30 year-old transfer was never registered.[1] Finally, a further point to consider is the basis on which the adverse possessor is able to quiet title. While the owner holds superior rights in the land, possession gives the adverse possessor superior rights against the rest of the world. However, the expiry of the limitation period will give the adverse possessor an immunity against the owner's claim to superior rights. Adverse possession is not a taking of rights that belong to the owner but rather the emergence of a distinct set of rights based on possession.

The third misconception is that an adverse possessor only acquires defeasible title if his or her claim is successful. This conclusion is based on the fact that the adverse possessor is not a purchaser for value and, thus, as with a donee, acquires only the interest that the owner had. However, the adverse possessor is not in the same position as a donee who takes an interest from the owner. Rather, as time passes, the adverse possessor will acquire immunity against claims being brought by anyone else with an interest in the land. Thus, while a donee's interest will be subject to a lien against the property, the adverse possessor's tenure on the land may have been sufficient to gain immunity against both the owner and the lien holder. Where the adverse possessor applies under s. 74 of the *Land Titles Act* to have the existing certificate of title cancelled and new title issued, the practical result will often be that the adverse possessor's title is indefeasible.

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[1] For a similar line of argument against characterising adverse possession as land theft see Ireland, Law Reform Commission, *Title by Adverse Possession of Land* (Report No. 67) (Dublin: Law Reform Commission, 2002) at p. 9.

PART II — LIST OF RECOMMENDATIONS

PART III — REPORT

CHAPTER 1. INTRODUCTION

[1] This Report considers three closely related claims that arise between an owner of land and certain persons found in possession of the land. The first claim is the owner's right to recover possession. The second claim arises when the owner fails to bring a claim to recover possession within the prescribed limitation period. This second claim, generally referred to as adverse possession, allows the person in possession to quiet title in his or her own name where the owner does not act in time. The third claim typically arises where the owner is still within time to recover possession but to allow the owner to do so may itself cause injustice. Thus, s. 69 of the *Law of Property Act* offers alternative relief where the person in possession has made lasting improvements to the land in the belief that he or she owned the land.

[2] This Report is a follow-up to the Institute's work on the *Limitations Act*. In the background material to that Act, it was decided to defer consideration of the law of adverse possession to a later date. The coming into force of the new *Limitations Act* in 1999 raises several issues regarding adverse possession and claims under the *Law of Property Act*, s. 69. This Report addresses the issues raised by the *Limitations Act*. However, to identify the Act's effect on adverse possession and claims for lasting improvement, it has been necessary to study the law's past development and operation in some detail. This result of this research is included in this Report to assist in clarifying the law in this area.

[3] A review is also appropriate due to the increased frequency of reported cases. Admittedly, there are more frequently litigated matters. However, the past two decades have seen more than 30 reported cases of adverse possession and / or s. 69 claims, some eight at the appellate level. Allowing for unreported cases, it is not unreasonable to assume that at least two cases proceed to trial each year. If that

average is again amplified by the anecdotal standard that only 2% of cases proceed to trial, the number of actual disputes becomes significant.[2]

[4] Although we have a definitive system for recording land ownership, the land titles registry does not preclude the emergence of disputes. The finite nature of land, along with our patterns of occupation and personal attachments to particular tracts, provide the basis for competing claims to the same parcel. Although fences, survey monuments, or other physical markers may accurately identify the legal boundaries at the outset, over time they may shift naturally with the land or may be misplaced as they require maintenance. Such changes can also give rise to competing claims. Moreover, competition may arise regardless of the quality or quantity of the land. For example, a few inches of land can cause a dispute that goes all the way to the Court of Appeal.[3]

[5] As disputes arising from the ownership and use of land are inevitable, 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. Protecting future ownership assumes that land can be transferred from the hands of the successful claimant – a further objective the law must ensure. These objectives of protecting future ownership and ensuring transferability are key and guide the discussion in this Report.

[6] The Report begins in Chapter 2 which considers an owner's claim to recover possession. Alongside the common law, two statutory regimes have been enacted to address the objectives of ensuing transferability, and protecting future ownership. The first is limitations legislation, with origins in the 12th Century. The second is the 19th Century adoption of Torrens land titles legislation. It has been the task of 20th Century courts and legislators to deal with the apparent conflict between the two regimes. Chapter 2 outlines how this potential for conflict arises

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[2] See also Alberta, Court of Queen's Bench, *Annual Report of the Court of Queen's Bench* (Edmonton: The Court, 1999) and Alberta, Court of Queen's Bench, *Annual Report 1999-2000* (Edmonton: The Court, 2000).

[3] See *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 (Alta. C.A.).The parties had lived on the adjoining properties for 13 years without dispute, before the slight misplacement of the fence was detected.

and how it was dealt with in a manner that achieves the key objectives without compromising the core principles of either regime. However, the balance between limitations and land titles legislation was upset by the enactment of the new *Limitations Act*. Chapter 2 reaches the conclusion that the key objectives are best served by continuing the previous balance between limitations and land titles principles and makes a recommendation to achieve this result.

[7] Chapter 3 turns to the adverse possessor's claim to quiet title. Chapter 3 begins by outlining the common law criteria used to assess quality of possession. Chapter 3 then examines the concept of acquisition and the basis for quieting title in favour of the adverse possessor once the owner is out of time to recover possession. Finally, Chapter 3 considers the impact of the *Limitations Act* and makes recommendations to restore certain provisions overlooked in the new Act.

[8] Chapter 4 considers claims under s. 69 of the *Law of Property Act*. Section 69 claims are a comparatively recent addition and Chapter 4 begins with a brief historical background. The elements of the claim and the available remedies are described. Chapter 4 then concludes that s. 69 operates as an exception to indefeasibility - a conclusion that affects how the changes made by the *Limitations Act* should be addressed. Chapter 4 concludes with recommendations to narrow s. 69's application in order to protect the concept of indefeasibility and to achieve the objectives of ensuring transferability and protecting future ownership.

[9] Finally, Chapter 5 addresses the planning law considerations that result from claims to quiet title and claims under s. 69 of the *Law of Property Act*. While planning law will pose few problems where a claim extends to a complete parcel of land, where a successful claim will subdivide a parcel, planning requirements become critical.

[10] Adverse possession has been the subject of recent study by law reform agencies in Ireland, England, and Australia.[4] While occasional reference is made to

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[4] Ireland, Law Reform Commission, *Title by Adverse Possession of Land* (Report No. 67) (Dublin: Law Reform Commission, 2002); Ireland, Law Reform Commission, *The Acquisition of Easements*

(continued...)

the law in other jurisdictions, the focus of this Report is on the law in Alberta. This focus is appropriate for two reasons. First, Alberta is unique within Canada in having retained adverse possession within a Torrens system. Second, Alberta differs from many Commonwealth jurisdictions that have also retained adverse possession within a Torrens system as Alberta courts have ensured that adverse possession does not operate as an exception to indefeasibility.[5]

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[4] (...continued)
and Profits à Prendre by Prescription (Report No. 66) (Dublin: Law Reform Commission, 2002); U.K., Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Report No. 271) (London: The Stationery Office, 2001); U.K., Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Report No. 254) (London: The Stationery Office, 1998); U.K., Law Commission, *Limitation of Actions* (Report No. 270) (London: The Stationery Office, 2001); U.K., Law Commission, *Limitation of Actions* (Consultation Paper No. 151) (London: The Stationery Office, 1998); Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)* (Report No. 53) (Brisbane: Queensland Law Reform Commission, 1998); Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)* (Working Papers No. 49 & 50) (Brisbane: Queensland Law Reform Commission, 1997): Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land* (Report No. 73) (Tasmania: Government Printer, 1995).

[5] For example, the *Land Titles Registration Act* 1925 (U.K.), s. 70(1)(f) provided that rights acquired or in the course of being acquired under the Limitation Acts were overriding interests. Similarly, the Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land* (Report No. 73) (Tasmania: Government Printer, 1995) at 32 has only recently recommended that purchasers for value be protected against adverse possession.

CHAPTER 2. LAND TITLES AND LIMITATION PERIODS

[11] This chapter reviews the relationship between limitations and land titles legislation and how each advances the objectives of ensuring land's transferability and protecting future ownership. Section A summarises the role of limitation periods before the enactment of land titles legislation. Section B outlines the basis for potential conflict following its enactment. Before examining how the courts and legislature dealt with the apparent conflict between the two regimes, section C distinguishes the land titles concepts of indefeasible title and registered ownership. Section D then examines the relationship between registered ownership and limitation periods. While limitations legislation prevailed as the means for resolving disputes and served the objective of protecting future ownership, it was necessary to enact a bridging provision to maintain transferability under land titles legislation. Section E then considers the relationship between indefeasible title and limitation periods. Land titles legislation appears to prevail as the basis for resolving disputes and protecting future ownership. However, this result also protects limitations principles by recognising that indefeasibility introduces a new claim and a new limitation period. Finally, section F explains how the *Limitations Act* has inadvertently altered the relationship between limitation periods and both registered title and indefeasibility by postponing the operation of the limitation period. While the *Limitations Act* accepts that some claims will not be subject to limitation periods, section F concludes that claims to recover possession of real property are not appropriate for such exemption. This Chapter concludes and recommends that claims to recover possession should continue to be subject to a limitation period that runs from the time the owner is dispossessed.

A. Historical Background

[12] As part of our inherited common law history, it is important to remember that at one time possession was a key test of land ownership. In a largely illiterate society, possession was strong evidence of ownership and disputes were resolved by giving priority to the claimant who could establish the earliest claim. Not surprisingly, even with written records, claims arising in the distant past were increasingly difficult to prove reliably over time. The 12th Century solution was to reduce the time during which a person could assert a claim – the legal invention of

limitation periods. Rather than being able to rely on a claim arising at any point since time immemorial, claimants had to show a basis for their claim within a prescribed period. By 1540, that period had been limited to 60 years.[6] If the claimant's documents or evidence of possession fell outside this limitation period, then the claimant had no legal remedy to recover possession of the land.[7]

[13] The adoption of limitation periods assisted in the resolution of disputes by reducing the range of claims the court would consider. Priority would still go to the claimant with superior rights as determined by common law, but only as among those claimants within the limitation period. The objectives of ensuring transferability and protecting future ownership were also served by reducing the range of claims. However, the contribution of limitation periods to these two objectives was undermined by the fact that the common law still left transferees vulnerable to self-help.

[14] Although the limitation period would prevent a prior claimant from getting a legal remedy to recover possession, possession could be recovered by self-help. Having both possession and earlier rights in the land gave the prior claimant a superior claim over those newly ousted. The eventual solution for dealing with the threat of self-help and the problem of prior claims was enacted in 1833. The *Real Property Limitation Act* not only reduced the limitation period to 20 years but also provided that prior rights were extinguished when the limitation period ran out.[8] Extinguishing prior rights gave greater security to the subsequent chain of title,

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[6] *The Act of Limitation with Proviso* (Eng.), 32 Hen. VIII, c. 2. For limitation periods applying before 1540, see Sandra Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992) 30 Alta. L. Rev. 1291 at 1296.

[7] Even after the adoption of limitation periods, it takes a considerable time before certain claims to possessory title come to be labelled as "adverse possession". As noted by the Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land* (Report No. 73) (Tasmania: Government Printer, 1995) at 15, the first use of "adverse possession" does not appear until *Taylor d. Atkins v. Horde* (1757), 1 Burr. 60 at 119, 97 E.R. 190.

[8] The *Real Property Limitation Act* (G.B.), 3 & 4 Will. IV, c. 27, s. 34 stated:

> And be it further enacted, that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the rights and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished.

preventing past disputes from disturbing future ownership. Once the limitation period expired, prior claimants stood as strangers to the land. Such was the state of the law as received in Alberta in 1875. Against this backdrop of received law, Alberta adopted a Torrens land titles system, carrying over the Territorial regime first enacted in 1886.[9]

B. Basis for Conflict

[15] Both land titles and limitations regimes operate on a curtain principle to prevent prior claims being acted upon after a specified event. Under land titles legislation, the specified event is the issuing of a new certificate of title. Under limitations legislation, the specified event is the passing of a set time after the claim arises. The objective of a curtain principle is to balance the interests of claimants against those of defendants, and against those of society at large. With respect to land, drawing a curtain against prior claims also has implications for present and future ownership. It is in this regard that the two regimes may come into conflict with each other.

[16] With respect to the resolution of disputes, limitations legislation reduces the range of claims to consider to those within the limitation period. Meanwhile, land titles legislation provides that a certificate of title is conclusive proof of ownership. The potential for conflict arises where the owner registered on title does not bring a claim to recover possession of the land within the limitation period. Though both regimes operate on a curtain principle, each may support a different claim.[10]

[17] It is also appropriate to consider how this potential for conflict is reflected in the two objectives. First, it should be noted that there is no conflict with respect to ensuring transferability. The greater efficiency and security of land titles legislation outstripped the slight contribution of limitations legislation. However,

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[9] *Territories Real Property Act*, S.C. 1886, c. 26. Replaced by the *Land Titles Act*, S.A. 1906, c. 24.

[10] It is important to note that in some a cases, limitations and land titles legislation may also support the same claim. For example, in *Spruce Grove (Town) v. Yellowhead Regional Library Board* (1985), 37 Alta. L.R. (2d) 70 (Q.B.) the plaintiff sought to recover land from the defendant on the basis that the transfer was invalid or *ultra vires*. Dea J. ruled that the plaintiff was out of time to challenge the defendant's status as registered owner.

the two regimes overlap with respect to protecting future ownership. 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 extinguish the prior rights of the registered owner, land titles legislation disregards unregistered rights, such as those of a person in possession of land. Figure 2.1 summarises this overlap in resolving disputes and protecting future ownership.

Figure 2.1

	Limitations legislation	*Land titles legislation*
Resolve present disputes	Claims to be enforced within the limitation period	Certificate of title is conclusive proof of ownership
Protect future ownership	Rights are extinguished when limitation period expires	Transfer to purchaser for value gives indefeasible title

C. Indefeasible Title and Registered Ownership

[18] Before proceeding, it is important to distinguish two core concepts of the land titles system – indefeasibility and registered ownership. The concept of indefeasibility arises in the context of land transfers. Indefeasibility increases the ease and certainty with which land may be transferred by the guarantee that the only valid interests in the land are those registered against the certificate of title. With few exceptions, a purchaser for value will not be bound by any unregistered interests. In balancing land titles and limitations legislation, courts have given land titles priority and have not allowed limitation periods to impugn the concept of indefeasibility. In contrast, while indefeasibility protects against prior claims, registration gives priority against subsequent claims. However, although registration establishes priority, in balancing land titles and limitations legislation, courts have required registered owners to enforce their priority within the limitation period. This difference in approach is discussed in the balance of this chapter.

[19] It is also important to note that the owner may not have acquired indefeasible title. The law distinguishes between transfers that give rise to indefeasible title and those that merely convey defeasible title.[11] For example, where land is inherited under a will, the beneficiary acquires a defeasible title, receiving the testator's interest but no more; thus, the beneficiary will be subject to any unregistered interests that would have bound the testator. Similarly, where land is acquired as a consequence of limitations legislation, the adverse possessor is said to obtain only defeasible title. This distinction between defeasible and indefeasible title becomes relevant to the discussion in Chapter 3. The present chapter focusses on owners who acquired indefeasible title as purchasers for value.

D. Limitation Periods and Registered Ownership

1. Priority of limitations principles

[20] The first case to consider the relationship between land titles and limitations legislation was *Harris v. Keith*.[12] With respect to the application of limitations legislation to registered land, Stuart J. concluded that:[13]

> ... in English law actual possession still counts for a great deal. There is not from beginning to end of our *Land Titles Act* any suggestion, as far as I can find, that the Act intended or attempted to deal with the question of actual possession. Questions of title alone were the subject matter of the Act.

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[11] As noted in Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No. 69) (Edmonton: Alberta Law Reform Institute, 1993) vol. 1 at 64:

> The general law looks more favourably on purchasers who give value for interests in land than upon donees who do not. So do the existing interest recording and title registration statutes. Much of the protection of interest recording and title registration is available only to purchasers who have given value.

[12] *Re Anderton* (1908), 8 W.L.R. 319 (Alta. S.C.) had earlier determined that limitations legislation continued to operate against land held outside the land titles system. Additionally, unregistered land acquired by possession could be brought within the system. As Stuart J. stated at 333-334:

> ... the authorities, the practice in analogous cases, as well as the common sense of the thing, are altogether too strong to permit any other conclusion than that a possessor does by virtue of the consequences of the [limitations] statute, provided the proper conditions are fulfilled, obtain an estate or interest in the land which ought to be treated exactly as if it had originated in a grant from the Crown, and as if it were a technical estate in fee simple.
>
> This being so, it follows, I think, that the possessor may apply to have his estate registered as an estate in fee simple under the *Land Titles Act*.

The *Land Titles Act* also provides for the adjudication of adverse claims in an application for first registration. See S.A. 1906, c. 24, ss. 32-33, now R.S.A. 2000, c. L-4, s. 39.

[13] *Harris v. Keith* (1911), 16 W.L.R. 433 at 441 (Alta. S.C.).

...

> ... I can only conclude, upon the authorities cited, that the *Statute of Limitations* is still effective, in a proper case, to protect the actual possession of a person who has been in continuous adverse possession of land for 12 years or more, even against a person who appears to be the registered owner of that land under the *Land Titles Act*.

Considered in the context of the homestead regime then operating to bring land into production, that *Harris v. Keith* favoured the possession and use of land was hardly surprising.[14] Though the owner initially acquired indefeasible title and held priority against subsequent claims, this did not provide an exemption from the obligation to enforce those rights within the limitation period. Thus, the key question to consider in resolving a dispute was whether the claim to recover possession was brought within the limitation period.

[21] Where the owner did not bring a claim in time, limitations legislation would also protect future ownership. This point was confirmed in *Shirtcliffe v. Lemon* where the owner attempted to reassert title by regaining possession. However, Simmons J. held that:[15]

> It would be a serious curtailment of *The Statute of Limitations* quite inconsistent with the apparent purpose and intent of the statute if the owner of an estate prior in time to the period in which the statute had run could destroy the statutory possession by regaining possession for any period less than the statutory one.

Shirtcliffe v. Lemon confirmed that when the limitation period expired, the owner's rights were extinguished. Though the owner's name might still appear on title, in all other respects, he or she stood as a stranger to the land.

2. Stopping the limitation period

[22] Although the owner was expected to act within the limitation period, time did not run until someone else had exclusive possession of the land.[16] However, even where the owner had been dispossessed, the limitation period could be stopped by abandonment, re-entry, or acknowledgment.

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[14] For example, see the later *Dominion Lands Act*, R.S.C. 1927, c. 113.

[15] *Shirtcliffe v. Lemon*, [1924] 1 W.W.R. 1059 at 1062 (Alta. S.C.T.D.).

[16] The criteria for assessing possession will be discussed in Chapter 3. For the time being, it is appropriate to note that these criteria provide considerable protection against adverse claims.

a. Abandonment

[23] If the adverse possessor abandoned the land, the limitation period would stop. The logic was that in order for the owner to bring a claim to recover land there had to be someone in possession. However, the adverse possessor need not remain on the land continuously for ten years. Where the adverse possessor retained control of the land as landlord there was no break in possession.[17] Even where there was a break in possession, separate periods of possession might be tacked together to make up the limitation period, provided the interval between them was short and the owner's title had not been reasserted.[18]

b. Re-entry

[24] Just as abandonment by the adverse possessor disrupted the limitation period, so too would re-entry by the owner with intent to recover possession.[19] Mere entry did not establish possession.[20] To be effective, re-entry had to take place within the limitation period, as re-entry after the owner's rights had been extinguished amounted to trespass.[21] However, holding that late re-entry was ineffective also advances the limitations goal of preventing the revival of stale claims. The question of late re-entry will be discussed further in Chapter 3.

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[17] *Nessman v. Bonke* (1976), [1979] 1 W.W.R. 210 (Alta. S.C.T.D.).

[18] Though not made out on the facts, this point is discussed in *Lehr v. St. Mary River Irrigation District*, [1993] A.J. 1411 (Q.B.).

[19] Re-entry cases are rare. *Tschritter v. Otto*, 2001 ABQB 10 is cast and decided as a re-entry situation, requiring the owner to show an intention to recover possession from the adverse possessor. However, this approach is not well supported by the facts as discussed in section E. Limitation Periods and Indefeasible Title.

[20] The old Act stated:

> 43(1) No person shall be deemed to have been in possession of land within the meaning of this Act merely by reason of having made entry thereon.

While this provision has not been carried over into the *Limitations Act*, the point is inherently one of common sense. The claim is one to recover possession; thus, the limitation period only stops if re-entry recovers possession.

[21] *Shirtcliffe v. Lemon*, [1924] 1 W.W.R. 1059 (Alta. S.C.); *Lehr v. St. Mary River Irrigation District*, [1993] A.J. 1411 (Q.B.).

c. Acknowledgment

[25] Under the principle of acknowledgement, the limitation period stopped if the adverse possessor recognised the owner's superior claim. Payments made to the owner under an agreement for sale have been held to acknowledge title,[22] as has an offer by the adverse possessor to purchase the land,[23] or a payment that could be considered rent under a tenancy at will.[24] However, a caveat filed to protect the adverse possessor's interest is not an acknowledgment.[25] Limitations legislation previously required that acknowledgment had to be in writing and signed, and made within the limitation period in order to be effective.[26] The absence of an equivalent provision in the *Limitations Act* will be discussed in Chapter 3.

3. Bridging provision

[26] While the objective of protecting future ownership was still met by limitations legislation, transferability was achieved by land titles legislation. However, there was no bridging provision between the two regimes. Although the owner's rights were extinguished by limitations legislation, there was no authority

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[22] *Davis v. Brockway*, [1949] 2 W.W.R. 1078 (Alta. S.C.T.D.). *Davis* is a mortgage case but the principle is the same.

[23] *Dobek v. Jennings*, [1928]1 W.W.R. 348 (Alta. S.C.A.D.).

[24] *Berube v. Cameron*, [1946] S.C.R. 74. Under the *Limitations Act*, s. 8, acknowledgment that rent has accrued may restart the limitation period to claim the liquidated pecuniary sum, though not the limitation period to recover the land.

[25] *Urban v. Urban Estate* (1994), 21 Alta. L.R. (3d) 405 (C.A.).

[26] The old Act stated:

> 32 When an acknowledgment in writing of the title of a person entitled to any land signed by the person in possession of the land or in receipt of the profits thereof or his agent in that behalf has been given to the person entitled to the land or his agent before his right to take proceedings to recover the land has become barred under this Act, then
>
> (a) the possession of the land or receipt of the profits by the person by whom the acknowledgment was given shall be deemed, for the purposes of this Act, to have been the possession of or receipt by the person to whom or to whose agent the acknowledgment was given at the time of giving it, and
>
> (b) the right of the last mentioned person, or of a person claiming through him, to take proceedings shall be deemed to have first accrued at, and not before, the time at which the acknowledgment, or the last of the acknowledgments if more than one, was given.

to indicate this change on the register. As Simmons J. noted in *Wallace v. Potter (No. 2)*:[27]

> ...no provision has been made for enabling a person who has been in adverse possession for the statutory period to put upon the register an entry of any right or interest which he may thereby have acquired....
>
> The result is that the plaintiff has acquired a title to the land which cannot be attacked by the person actually registered as the owner and in whose name a certificate of title is now upon the register. The result is quite an anomalous one but the authority for removing the anomaly is in the legislature and not in the courts.

The ability to transfer land was frustrated until a bridging provision was introduced into the *Land Titles Act* in 1921. The new provision authorised the Registrar to cancel the owner's title and to issue a new title to the adverse possessor, subject to a three month waiting period.[28]

E. Limitation Periods and Indefeasible Title

1. Priority of indefeasibility

[27] Thus far, the discussion has not considered the relationship between indefeasibility and limitation periods. Indefeasibility is a shield against prior claims, not a sword to oppose future ones.[29] Where the limitation period expired against an owner who held title continuously through the limitation period, there is no intervening transfer to raise indefeasibility.

[28] The first case to consider the effect of an intervening transfer was *Sinclair v. McLellan* in 1919. The central issue was whether the adverse possessor could maintain a claim once out of possession. The answer was no, as registered title had

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[27] *Wallace v. Potter (No. 2)* (1913), 4 W.W.R. 738 at 741 (Alta. S.C.T.D.).

[28] *An Act to Amend the Land Titles Act*, S.A. 1921, c. 39. Now the *Land Titles Act*, s. 74. The three month waiting period was repealed by the *Real Property Statutes Amendment Act*, S.A. 1985, c. 48. A comparable bridging provision is now proposed for enactment by Ireland, Law Reform Commission, *Title by Adverse Possession of Land* (Report No. 67) (Dublin: Law Reform Commission, 2002) at pp. 10-13.

[29] As explained by Bruce Ziff in *Principles of Property Law*, 3d ed. (Toronto: Carswell, 2000) 426, "A title is indefeasible when it cannot be vitiated by some antecedent act that might undermine the validity of current rights."

been transferred to a purchaser for value. As Walsh J. concluded, were the result otherwise:[30]

> ... a man buying land [would have to] satisfy himself not only that his vendor is the registered owner, but also that his title has not been extinguished by a possessory title acquired by someone else who after acquiring it vacated the premises and without protecting as he might his claim to or interest in the land by registration of a caveat....

This position was more clearly stated in *Dobek v. Jennings* where the adverse possessor was still on the land when it was purchased for value. The question was whether the adverse possessor could rely on the expired limitation period and its effect of extinguishing the owner's rights before they were transferred to the purchaser. Writing for the Court, Harvey C.J.A. said no:[31]

> The principle of the [*Land Titles*] *Act* is that a person may ascertain the state of the title by a reference to the records of the land titles office and the person who is the registered owner has the right by transfer duly registered to convey a good title to a *bona fide* purchaser subject only to what appears on the register and the reservations and exceptions of sec. 57. It is registration that gives or extinguishes title. A right or interest without title may be protected by caveat but without such protection it may be lost entirely. This has been declared in frequent decisions. It is clear, therefore, that whatever right or interest the plaintiff may have acquired, if any, by his years of possession he lost completely upon the issue to the defendant of his certificate of title in August, 1925, there being no question of any fraud on the part of the defendant or even of knowledge of any claim of interest, and we may go even further and say in the entire absence of any such claim of interest at that time.

[29] This position has been reinforced by a series of cases. In each case, the purchaser for value was found to acquire indefeasible title although the limitation period had expired against the previous owner and despite other qualifying factors. In *Boyczuk v. Perry*, the purchaser took indefeasible title to land the purchaser had not intended to buy but that was, nevertheless, included on the certificate of title.[32] In *Nessman v. Bonke*, the purchaser took indefeasible title despite knowledge of the adverse possessor's claim; the Court ruled that mere knowledge would not

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[30] *Sinclair v. McLellan*, [1919] 2 W.W.R. 782 at 788 (Alta. S.C.T.D.).

[31] *Dobek v. Jennings*, [1928] 1 W.W.R. 348 at 350-351 (Alta. S.C.A.D.).

[32] *Boyczuk v. Perry*, [1948] 2 D.L.R. 406 (Alta. S.C.A.D.). This case leads to the enactment of what is now the *Law of Property Act*, s. 69. See Chapter 4.

impugn the transfer unless the circumstances constituted fraud.[33] In *Lutz v. Kawa*, the purchaser took indefeasible title despite knowledge of the adverse possessor's claim and despite having originally acquired the land as a donee; the Court found that payment on an existing mortgage was sufficient to characterise the transferee as a purchaser for value.[34] Mortgage transactions were also sufficient to turn a continuing registered owner into a purchaser for value in *Boulding v. Crowe* and *Syndicated Mortgage Investment Corp. v. Gal.*[35]

[30] Protecting the ability of a purchaser for value to acquire indefeasible title in these circumstances reflects the law's general approach to indefeasibility. For example, A sells land to B and then purports to sell the same land to C. If C registers title to the land before B, C will have indefeasible title despite the fact that A had already transferred all rights in the land to B. The result is no different where A's rights have been extinguished by limitations legislation.

[31] Two final points should be addressed. The first is a point of interpretation to raise regarding the operation of the extinguishment provision. The old Act provided that:

> 44. At the determination of the period limited by this Act to any person for taking proceedings to recover any land, rent charge or money charged on land the *right and title* of that person to the land, or rent charge or the recovery of the money out of the land is extinguished. [Emphasis added.]

While the extinguishment provision applied to both right and title, "title" was never extended to include registered title within the land titles system. This result implies an historical approach to its interpretation. In other words, the extinguishment provision only applied to the species of title known when the provision was enacted in 1833. It did not extend to registered title introduced by

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[33] *Nessman v. Bonke* (1976), [1979] 1 W.W.R. 210 (Alta. S.C.T.D.).

[34] *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 (Alta. C.A.).

[35] *Boulding v. Crowe*, 1998 ABQB 732; *Syndicated Mortgage Investment Corp. v. Gal*, 1998 ABQB 944.

Torrens legislation in 1886.[36] Otherwise, extinguishing registered title outside the land titles system would undermine the reliability of the register.

[32] Second, it is important to recognise that adverse possession does not operate as an exception to indefeasibility as it has sometimes been labelled.[37] A purchaser for value obtains indefeasible title, free of any unregistered claims such as those that might be brought by an adverse possessor. Although an adverse possessor may have had sufficient possession for 50 years, the effect of an indefeasible transfer is to restart the limitation period in favour of the new claimant.[38] Again, were this not the case, the certainty and relative ease with which we transfer land would have been severely impaired.

2. Priority of limitations legislation

[33] The courts' approach to protecting indefeasible title also takes limitations principles into account. As with the line of cases discussed in section D, the key question is whether the claim to recover possession falls within the limitation period. A purchaser who acquires indefeasible title is a new claimant, one whose claim to recover the land does not arise until he or she has a right to possession. Moreover, as indefeasibility protects against prior unregistered claims, the purchaser for value will have the full length of a new limitation period to recover possession. Thus, whether a claim to recover possession is within time will often turn on whether the land has been transferred to a purchaser for value within the

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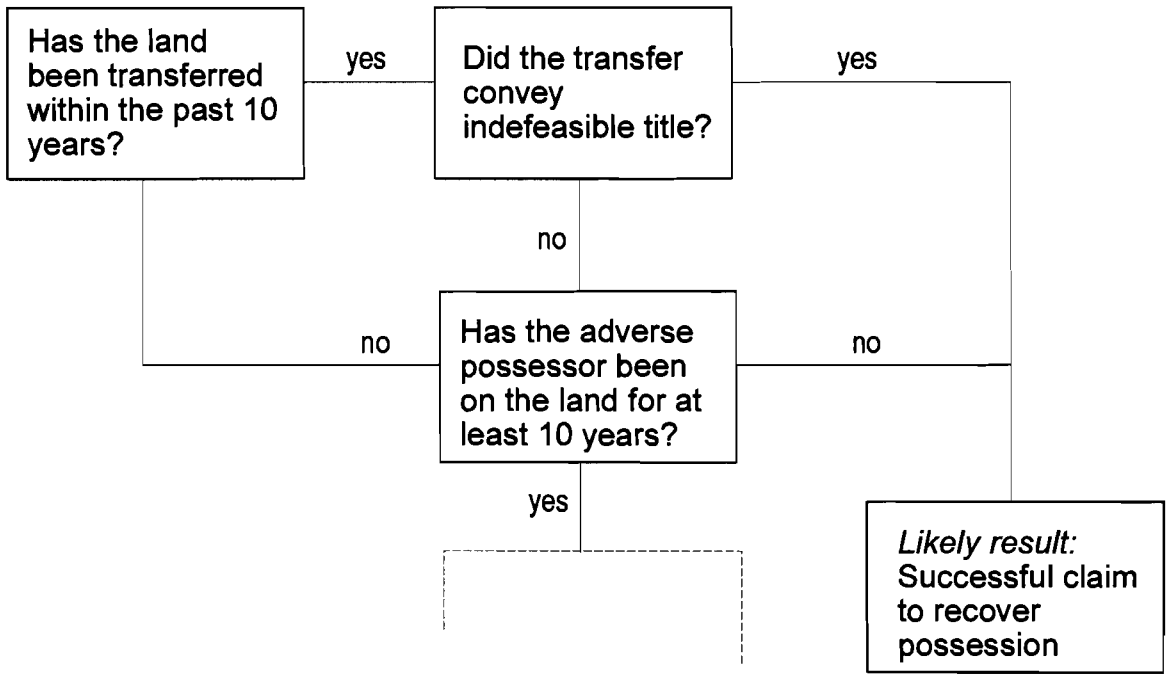
[36] Nor has the extinguishment provision ever been given sufficient legislative consideration such that any post-1886 re-enactment might be said to extend its application to registered title. The only enactment of "new" limitations legislation in Alberta between 1886 and 1996 was the adoption of the Uniform Act in 1935: S.A. 1935, c. 8. However, much of that act was simply a consolidation of existing provisions.

[37] *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 at 277 (Alta. C.A.); Victor Di Castri, *Registration of Title to Land* (Toronto: Carswell, 1987) 18-80.1; J.S. Williams, "Title by Limitation in a Registered Conveyancing System" (1968) 6 Alta. L. Rev. 67; Alberta Government Services, *Land Titles Office Procedures Manual*, procedure ADV-1, online: http://www3.gov.ab.ca/gs/pdf/ltmanual.

[38] Consequently, the reasoning in *Tschritter v. Otto*, 2001 ABQB 10 may be questioned. The owner purchased the land for value in 1986. However, the limitation period was calculated from 1982, when the adverse possessor first began using the land. Both the owner and the adverse possessor made occasional use of the land throughout the year. However, rather than giving the owner the benefit of indefeasible title and requiring the adverse possessor to establish exclusive possession after 1986, the owner was instead required to establish an intention to possess the land after taking registered title.

past ten years. This line of inquiry forms the preliminary basis for a flowchart shown in Figure 2.2.

Figure 2.2



F. Effect of the *Limitations Act*: Claims Postponed

[34] As discussed in sections A through E, the courts and legislature achieved a principled balance between the seemingly conflicting provisions of land titles and limitations legislation. This balance protected both the land titles concept of indefeasible title and the limitations principle that claims should be acted upon within a reasonable time. However, the coming into force of the *Limitations Act* has altered this balance. While the *Report for Discussion* recommended that claims to recover possession should not be subject to limitation periods, this initial recommendation was reversed in the *Limitations Report*.[39] Despite the stated intent to leave the law as it was, the *Limitations Act* has the unintended consequence of postponing the running of the limitation period.

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[39] *Report for Discussion* at 208 and *Limitations Report* at 39.

1. The problem

[35] The *Limitations Act* prescribes two limitation periods – the two year discovery rule and the ten year ultimate rule.[40] Claims to recover possession of real property are exempted from the discovery rule.[41] This exemption leads to the conclusion that claims to recover possession are subject to the ten year ultimate rule, i.e. the same length of limitation period that applied under the old Act.

[36] Having determined the length of the limitation period, the next step is to determine when it begins. Under the old Act, the general rule was that the limitation period began to run when the claim to recover possession arose, i.e. when the owner was dispossessed.[42] The old Act restated both common law and

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[40] The *Limitations Act* states:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> (i) that the injury for which the claimant seeks a remedial order had occurred,
> (ii) that the injury was attributable to conduct of the defendant, and
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
> or
> (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.

[41] The *Limitations Act* states:

> 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*.

[42] The old Act stated:

> 18 No person shall take proceedings to recover land except
> (a) within 10 years next after the right to do so first accrued to that person (hereinafter called the "claimant"), or
> (b) if the right to recover first accrued to a predecessor in title, then within 10 years next after the right accrued to that predecessor.
>
> 19 When in respect of the estate or interest claimed the claimant or a predecessor has
> (a) been in possession of the land or in receipt of the profits thereof, and
> (b) while entitled thereto
> (i) been dispossessed, or
> (ii) discontinued that possession or receipt,
> the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any profits were so received.

(continued...)

common sense.[43] However, the *Limitations Act* has delayed the time at which a claim to recover possession arises.

[37] A claim to recover possession is based in trespass and the duty to stay off another's land.[44] Under the *Limitations Act*, the adverse possessor's continuing trespass will postpone the claim arising until the trespass ends.[45] Consequently, the claim does not arise until the adverse possessor leaves the land. But when the adverse possessor leaves the land, he or she is no longer a defendant from whom the owner may recover possession. This creates the absurd result of a limitation period that effectively never runs. Moreover, the outcome is the same as saying that claims to recover possession are not subject to a limitation period at all, contrary the stated intention that the *Limitations Act* intended no change to the law.

[38] Consequently, owners of land appear to be exempted from the obligation to bring a claim within a reasonable period, an obligation that applies to most other claims. While the *Limitations Report* recognises that some claims should be exempted from limitation periods, any such change should be as the result of a

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[42] (...continued)
With respect to future estates, the common law suggested that a claim to recover possession did not arise until the estate had vested: see *Fodchuk v. Fodchuk*, [1947] 3 D.L.R. 115 (Alta. S.C.) and *Jameson v. Hyslop*, [1950] 2 W.W.R. 1273 (Alta. S.C.T.D.) discussing when a claimant can recover possession of a dower interest. Part 3 of the old Act also contained several rarely-used provisions regarding when the claim arose in specific instances, such as succession on death, successive estates in the same person, etc.

[43] As noted in *Handley v. Archibald* (1899), 20 S.C.R. 130 at 137: "It is now elementary law that the statute does not run against a party out of possession unless there is a person in possession". The criteria for assessing when an owner has been dispossessed will be discussed in Chapter 3.

[44] As stated in *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807 at 817 (C.P.):

> ... our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, tho he does no harm at all; if he will tread upon his neighbour's ground he must justify it by law.

The anomaly that a continuing trespass is rewarded after ten years reflects a balancing between principles of property law and tort. Moreover, the tort law objective of preserving the peace is advanced by a mechanism that allows title to be quieted in favour of the person in possession.

[45] The *Limitations Act* states:

> 3(3) For the purposes of subsection (1)(b),
>
> (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

sound policy decision rather than inadvertence.[46] The next section considers whether there is sufficient reason to make such a policy change or whether claims to recover possession should continue to be subject to a limitation period.

2. Should claims to recover possession be subject to a limitation period?

[39] Three brief reasons may be stated in support of maintaining a limitation period on claims to recover possession. First, no change in the law was intended. Second, limitation periods have continued to apply to claims to recover possession for nearly 900 years and neither the legislature nor the court has taken steps towards an express change. Third, limitation periods apply to nearly every other type of claim, with many claims limited to two years. These reasons alone present a strong basis in support of a limitation period.

[40] However, if there has been a fundamental change in the surrounding law it may now be appropriate to include claims to recover possession in the narrow category of claims exempted from limitations legislation. The adoption of a land titles system is the obvious change that might warrant such an exemption. The register establishes a system of conclusive and enduring proof of land ownership, avoiding the problem of evidence becoming less reliable over time. Indeed, all other Torrens jurisdictions in Canada regard the register as sufficient to allow the owner to recover possession at any time.[47] However, to hold that the owner always has the definitive claim raises other concerns.

[41] First, such an approach ignores limitations principles. As discussed in this chapter, the Alberta courts and legislature have given due weight to limitations principles without detriment to the land titles core concept of indefeasibility. Isolating land owners from the obligation to enforce their rights in a timely manner is not essential to an effective land titles system. Moreover, actions for damages under the *Land Titles Act* itself are subject to a six year limitation period.[48]

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[46] *Limitations Report* at 38.

[47] See Sandra Petersson, "Something for Nothing: The Law of Adverse Possession in Alberta" (1992) 30 Alta. L. Rev. 1291 at 1294-95.

[48] See *Land Titles Act*, s. 178. Section 178 is an ultimate rule and does not have a discoverability

(continued...)

[42] Second, the circumstances that require the owner to bring a claim to recover possession would ordinarily attract the two year discovery rule. As will be discussed in Chapter 3, the criteria specify exclusive, visible and notorious possession. Thus, the circumstances are such that the owner ought to know that someone else is in possession of the land. Where a claimant knows or ought to know of the basis of a claim, it is difficult to argue that the claimant has no obligation to enforce his or her rights within a reasonable period, although the discovery rule period is generally thought to be too short in the circumstances.[49] Of course there will be instances where the claimant does not know that he or she has an interest in the land. However, this point goes to the evidentiary role of the register. If we insist that the register is a conclusive and simple means to determine land ownership, then parties ought to know what land they own. Yet, while parties can verify their ownership against the register, that knowledge must be translated into reality. Land surveying is an expert science and it is not necessarily a simple matter to identify actual boundaries from a legal description cross-referenced to registered plans. Even where survey monuments or physical markers identify the true boundaries, they may shift with the land over time or may be misplaced as they require replacement. The existing body of case law readily indicates that the register's definitive evidence does not prevent disputes arising with respect to the use and occupation of land.[50]

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[48] (...continued)
component. The absence of a knowledge requirement was criticised as unfair in Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No. 69) (Edmonton: Alberta Law Reform Institute, 1993) vol. 1 at 61. However, as will be argued shortly, claims to recover possession satisfy the criteria for discoverability.

[49] Thus, s. 3(4) of the *Limitations Act* exempts claims to recover possession from the discovery rule. A discovery rule for claims to recover possession was also considered and rejected by the U.K., Law Commission, *Limitation of Actions* (Report No. 270) (London: The Stationery Office, 1998) at 134; and Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)* (Report No. 53) (Brisbane: Queensland Law Reform Commission, 1998) at 181.

[50] Indeed, in some cases the circumstances would warrant the label of "adverse registration" rather than adverse possession.

[43] Third, while the *Land Titles Act* guarantees ownership of the land described, it does not guarantee the description itself.[51] Thus, while the register's evidence is conclusive, it may not resolve the dispute if the problem stems from the description.[52]

[44] Fourth, while it will always be possible to identify the owner, there will inevitably be cases where the owner cannot be located and has left no traceable heirs or assigns.[53] In such cases, allowing someone to step into the place of the owner serves the objectives of ensuring transferability and protecting future ownership.[54]

[45] Finally, while resolving disputes on the sole basis of the register would be efficient, it is an arbitrary approach that does not assess the relative merits of competing claims. As will be discussed in Chapter 3, the common law has set onerous criteria for assessing whether the adverse possessor has established sufficient quality of possession. While there is a strong presumption in favour of the owner, where that presumption cannot be sustained, it is appropriate to consider the merits of the competing claim. The adverse possessor who satisfies the criteria will have strong ties to the land and will often have a more sympathetic

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[51] See *Land Titles Act*, s. 62 (re wrong description of boundaries), s. 89 (change in natural boundary), s. 90 (actual area of land), and s. 92 (correction of registered plan). See also M. Sychuk, "Legal Problems in Establishing Boundaries for a Cadastre" (1975), 29 Can. Surveyor 29.

[52] Similarly, see U.K., Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Report No. 254) (London: The Stationery Office, 1998) at 207.

[53] Anecdotal evidence indicates that many actions to quiet title proceed unopposed as *ex parte* chambers applications, reasonable but unsuccessful efforts having been made to locate the owner for purposes of service.

[54] Similarly, see U.K., Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Report No. 254) (London: The Stationery Office, 1998) at 206.

claim than the owner.[55] Consequently, looking only at the register in all situations without considering the merits of the competing claim will produce harsh results.

[46] In conclusion, there is no compelling reason to exempt claims to recover possession from the operation of a limitation period. While imposing a limitation period will sometimes leave the owner without a legal remedy for enforcing his or her rights in the land, this result reflects the normal operation and purpose of the *Limitations Act*, and does so without detriment to the core principles of the *Land Titles Act*. Although the land titles legislation has surpassed limitations legislation as a means for determining land ownership, the subsequent extension of limitation periods as a means to balance parties' rights in all manner of potential claims should now be reflected in their original sphere of application. This Report recommends that claims to recover possession of real property should continue to be subject to a limitation period. To restore the effectiveness of the current limitation period, claims should not be postponed by s. 3(3)(a) of the *Limitations Act*. As before, claims to recover possession should be held to arise when the owner has been dispossessed.

RECOMMENDATION No. 1
Claims to recover possession of real property should be subject to the *Limitations Act*'s ultimate rule. For limitations purposes, such claims should arise when the owner has been dispossessed and should not be postponed by the fact of continuing trespass.

3. Transitional claims

[47] The *Limitations Act* contains a transitional provision that potentially shortens the limitation period where the owner knew or ought to have known of the claim

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[55] As stated by the Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land* (Report No. 73) (Tasmania: Government Printer, 1995) at 22:

> Adverse possession can be used to avoid difficulties between neighbours in relation to boundaries. Where a particular set of circumstances has existed for a considerable period of time, the adverse possession rule essentially legitimises the *status quo*.... In this way the title is made to follow the physical occupation or the actual boundaries of a property rather than the "paper title". The rule of adverse possession allows inaccurate property descriptions to eventually be cured by the passage of time.

before 1 March 1999.[56] In the extreme case, an owner's ability to recover possession could be shortened to a mere two years by s. 2(2)(b). For example, if the owner was put out of possession on 28 February 1999, he or she would have to bring a claim by 1 March 2001. Between the requirement of open and notorious possession and the register's definitive evidence of ownership, the owner *ought* to have known of the claim from 28 February 1999 onwards.

[48] The problem of deemed knowledge in adverse possession situations has already been noted and justifies excluding claims to recover possession from the two year discovery rule in s. 2(2)(b). The risk of an owner's claim being foreclosed after two years creates a strong temptation to avoid such a result. However, the statutory interpretation arguments for avoiding this result are not ideal. As claims to recover possession are expressly excluded from the general discovery rule it is a weaker argument to hold they are impliedly excluded from the transitional discovery rule. While courts could readily find that the adverse possessor's short tenure on the land did not establish sufficient quality of possession, this confuses the distinction between quality and duration of possession. Thus, in the interests of maintaining clarity it is appropriate to recommend that claims to recover possession be expressly excluded from the discovery rule in the transitional provision.

RECOMMENDATION No. 2
Claims to recover possession of real property should be excluded from the discovery rule in the *Limitations Act*'s transitional provision.

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[56] The *Limitations Act* states:

> 2(2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of
>
> (a) the time provided by the *Limitation of Actions Act*, R.S.A. 1980 c. L-15, that would have been applicable but for this Act, or
>
> (b) two years after the *Limitations Act*, S.A. 1996 c. L-15.1, came into force, [i.e. 1 March 1999]
>
> the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

4. Immunity to liability

[49] The effect of the expiry of the limitation period is to provide the adverse possessor with a defence against the owner's claim.[57] The defence is not automatic. If the adverse possessor fails to plead the *Limitations Act*, the owner may still recover possession even though the limitation period has expired. However, where the defence is raised successfully, the adverse possessor will generally seek to quiet title as will be discussed in Chapter 3. Where the defence is not successful, the owner may still face a claim under the *Law of Property Act* as will be discussed in Chapter 4.

5. Summary

[50] The *Limitations Act* applies to claims for remedial orders brought on or after 1 March 1999, regardless of when the claim itself arose. Claims filed before 1 March 1999, therefore, proceed under the old Act. With respect to claims filed after 1 March 1999, however, it is appropriate to summarise how the *Limitations Act* will apply in light of the recommendations made by this Report. Four scenarios are shown in Figure 2.3 and discussed below.

[51] With respect to claims filed after the *Limitations Act* came into effect, it is relevant to consider whether the claim arose before 1 March 1999. Claims that arose before 1 March 1999 are subject to the limitation period triggered under the old Act by s. 2(2)(a) of the *Limitations Act*. In scenario A, where the owner was dispossessed in 1985, the limitation period expired in 1995 and the owner is out of time to recover possession.[58] In scenario B, the limitation period began in 1995 but was still current when the *Limitations Act* came into effect. Were the transitional discovery rule in s. 2(2)(b) to apply, the owner would only have until 2001 to act on the claim. However, if Recommendation 2 is implemented the owner would have the full benefit of the ten year limitation period triggered under the old Act and would have until 2005 to act on the claim.

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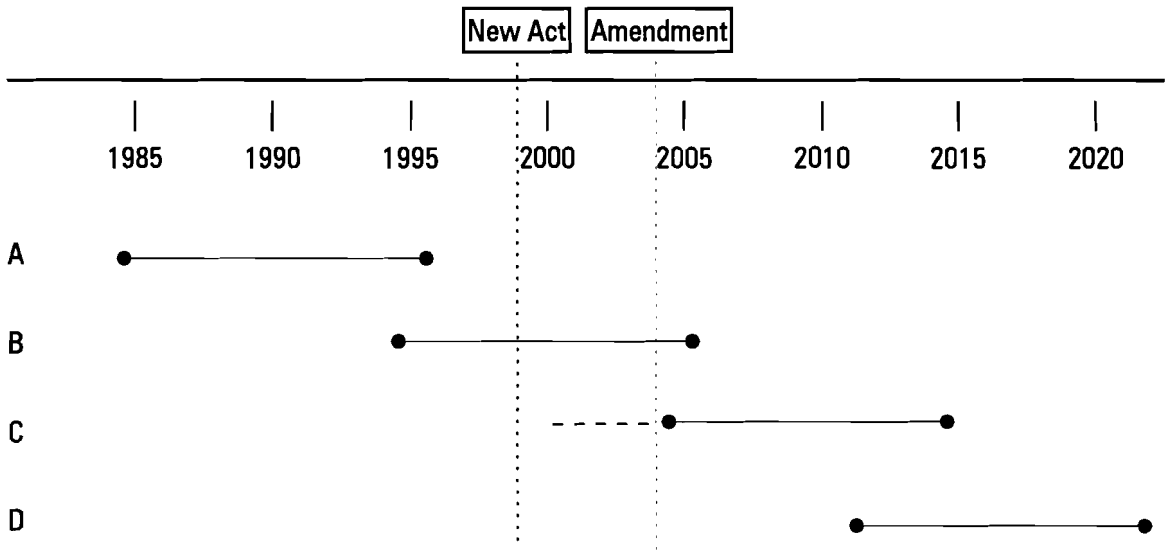
[57] The *Limitations Act* states

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within ... 10 years after the claim arose, ... the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[58] *Bennett v. Butz*, 2003 ABQB 84. The owner's rights will also have been extinguished under the old Act and are not revived by the *Limitations Act*.

[52] Claims that arise on or after 1 March 1999 will be subject to the limitation period set by the *Limitations Act*. The effect of amending the *Limitations Act* to implement Recommendation 1 is that the ten year limitation period will run, as before, from the time of dispossession, as shown in scenario D. However, until this is done, the owner will effectively have the benefit of a longer limitation period to recover possession as shown in scenario C. In scenario C, where the owner was dispossessed in 2000, the claim will be postponed and will only run once the Act is amended. For example, were Recommendation 1 implemented by an amendment brought into force in 2004, C would have ten years from 2004 to recover possession. Given that the effect on such interim claims will be merely to extend the limitation period, it is not appropriate to require the exceptional measure of retroactive legislation.

Figure 2.3



CHAPTER 3. ADVERSE POSSESSION

[53] Limiting the time for the owner to bring a claim to recover possession, requires that the law address what to do with the land where the owner does not act in time. This chapter considers the claim that arises when the owner is out of time to recover possession, that being the adverse possessor's claim to quiet title. Quieting title is an exceptional remedy for exceptional circumstances but one that has allowed for a balancing of rights over the course of the Torrens system's first century in Alberta. Section A begins by summarising the criteria for assessing whether the owner has been dispossessed. These criteria are stringent and provide considerable protection for the owner's rights. Section B then examines the basis for quieting title in favour of the adverse possessor where the criteria have been sustained for the duration of the limitation period. Section B also considers whether a claim to quiet title should be exempted from limitations legislation. Section C considers the consequences for quieting title of the fact that the owner's rights are no longer extinguished as a consequence of the limitation period's expiry. While cancelling the owner's rights in an application under s. 74 of the *Land Titles Act* will have the same effect as the former extinguishment provision, until title is quieted there is a risk of reviving stale claims. Section C identifies problems regarding transfers to donees, late re-entry, and late acknowledgement but recommends that less drastic means than extinguishing rights will address the problem.

A. Quality of Possession

1. General requirement

[54] As the law previously provided and as recommended in Chapter 2, a claim to recover possession only arises when someone else's possession of the land is effective to dispossess the owner. The general requirement is that the adverse possessor must be in "actual possession, an occupation exclusive, continuous, open or visible and notorious" and one which is not "equivocal, occasional, or for a specific or temporary purpose."[59] The requirement of open and notorious

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[59] *Sherren v. Pearson* (1887), 14. S.C.R. 581 at 585. This definition has been adopted by the Court of Appeal in *Duncan v. Joslin*, (1965) 51 W.W.R. 346 (Alta. S.C.A.D.); *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 and *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329, and by the Queen's

(continued...)

possession will generally preclude the application of s. 4 of the *Limitations Act* to suspend the limitation period in cases of fraudulent concealment.

[55] Within the general requirement, whether the adverse possessor has established sufficient possession will turn on the acts undertaken towards the land.[60] For example, where the adverse possessor resides on[61] or farms[62] the land, possession is more likely to be sufficient than if the adverse possessor only uses the land for storage or access to other property.[63] Fencing is typically taken as evidence of intent to establish exclusive possession.[64] However, aside from these general criteria, whether the limitation period to recover possession has been triggered depends additionally on the nature of the land and the owner's intention towards it. The circumstances by which the adverse possessor came to the land also appear to have a role in the assessment of competing claims. The criteria identified in this paragraph and discussed under the next three headings are related to the traditional concept that possession must be "adverse". Adverse possession has been

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[59] (...continued)
Bench in numerous decisions.

[60] In assessing quality of possession at common law, cases from other jurisdictions will carry some weight, although Alberta's legislative treatment of adverse possession is unique within Canada. However, a thorough survey of all common law cases assessing quality of possession is beyond the scope of this Report.

[61] *Re Anderton* (1908), 8 W.L.R. 319 (Alta. S.C.); *Harris v. Keith* (1911), 16 W.L.R. 433 (Alta. S.C.); *Boyczuk v. Perry*, [1948] 2 D.L.R. 406 (Alta. S.C.A.D.); *Zbryski v. Calgary* (1965), 51 D.L.R. (2d) 54 (Alta. S.C.); *Zekonja v. Donald* (1983), 50 A.R. 379 (Q.B.); *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329 (Alta. C.A.); *Urban v. Urban Estate* (1994), 21 Alta. L.R. (3d) 405 (C.A.).

[62] *Wallace v. Potter (No. 2)* (1913), 4 W.W.R. 738 (Alta. S.C.T.D.); *Saturley v. Young*, [1945] 3 W.W.R. 110 (Alta. S.C.T.D.); *Rosebud Seed Cleaning Plant Ltd. v. Martin*, [1979] A.J. 381 (Dist. Ct.); *Tarcon v. Kerr* (1981), 36 A.R. 282 (Q.B.); *Lehr v. St. Mary River Irrigation District*, [1993] A.J. 1411 (Q.B.); *Bennett v. Butz*, 2003 ABQB 84.

[63] *Zekonja v. Donald* (1983), 50 A.R. 379 (Q.B.); *Condominium Plan No. 7810477 (Owners of) v. Condominium Plan No. 7711723 (Owners of)* (1997), 55 Alta. L.R. 198 (Q.B.).

[64] *Re Anderton* (1908), 8 W.L.R. 319 (Alta. S.C.); *Wallace v. Potter (No. 2)* (1913), 4 W.W.R. 738 (Alta. S.C.T.D.); *Shirtcliffe v. Lemon,* [1924] 1 W.W.R. 1059 (Alta. S.C.T.D.); also *obiter* in *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 (Alta. C.A.) and *O'Brien v. Fox*, 2000 ABQB 1002. However, absence of fencing is not conclusive: *Bennett v. Butz*, 2003 ABQB 84.

rejected in some jurisdictions.[65] Whether or to what extent adversity remains an express requirement in Alberta is currently unclear and best left for the courts to determine. However, it is noted that current case law may be interpreted as inconsistent on the issue of adversity.[66]

2. Nature of the land

[56] Different types of land support different types of possession. Acts which are sufficient to establish possession of a narrow strip of land along an adjoining residential lot may not be sufficient to establish possession of an uncleared quarter section. As noted by Lord Shaw:[67]

> Possession must be considered in every case with reference to the peculiar circumstances ... the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of possession.

Thus, for example, the nature of the land might be such that cattle grazing for various months of the year will establish sufficient possession, even though such possession is characterised by periods of absence from the land.[68] However, in contrast, recreational use of the same land for various months of the year is less

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[65] *Wickham Estate v. Wickham Estate (No. 1)* (1977), 17 Nfld. & P.E.I.R. 452.

[66] In particular, the results in *Edwards v. Edmonton Beach Resorts Ltd.* (1992), 130 A.R. 375 (Q.B.); *Tschritter v. Otto*, 2001 ABQB 10, and *Bennett v. Butz* , 2003 ABQB 84 are difficult to reconcile. Adversity has also been considered by the House of Lords in *J.A. Pye (Oxford) Ltd. v. Graham*, [2002] 3 All E.R. 865 at paras. 32-46. While the Lords Justice reluctantly found in favour of the adverse possessors, it is doubtful whether their claim would have succeeded in Alberta.

[67] *Kirby v. Cowderoy*, [1912] 2 W.L.R. 723 at 726 (P.C.), cited in *Duncan v. Joslin*, (1965) 51 W.W.R. 346 at 352 (Alta. S.C.A.D.).

[68] *Wallace v. Potter (No. 2)* (1913), 4 W.W.R. 738 (Alta. S.C.T.D.); *Rosebud Seed Cleaning Plant Ltd. v. Martin*, [1979] A.J. 381 (Dist. Ct.); *Tarcon v. Kerr* (1981), 36 A.R. 282 (Q.B.); *Tschritter v. Otto*, 2001 ABQB 10; *Bennett v. Butz*, 2003 ABQB 84.

likely to establish sufficient possession.[69] It should also be noted that public land has statutory protection against adverse possession.[70]

3. Owner's intention

[57] The owner's intention regarding the land is also a factor in assessing whether the owner has been dispossessed. Minimal acts of actual possession are generally sufficient to maintain the owner's possessory rights and to prevent someone else acquiring sufficient possession.[71] As stated by Dea J. in *Edwards v. Edmonton Beach Resorts Ltd.*:[72]

> It is not enough for the applicants to show that the degree or kind of possession exercised by the respondent is spotty or inconsistent. The respondent is the registered owner of the land. It is not his possession which is at issue. The possession at issue is the applicants.

Thus, it is not a matter of the adverse possessor showing more or better possession than the owner. Rather the adverse possessor must meet a higher threshold and establish possession that is outwardly inconsistent with the possibility that anyone else exists as the owner.[73]

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[69] *Edwards v. Edmonton Beach Resorts Ltd.* (1992), 130 A.R. 375 (Q.B.); *Tschritter v. Otto*, 2001 ABQB 10; *cf. Edwards v. Duborg*, [1982] 6 W.W.R. 128 (Alta. Q.B.) and *O'Brien v. Fox*, 2000 ABQB 1002.

[70] *Public Lands Act*, R.S.A. 2000, c. P- 40, s. 4.
Municipal lands are protected by the *Municipal Government Act*, s. 609. See also *Zbryski v. Calgary* (1965), 51 D.L.R. (2d) 54 (Alta. S.C.) and *Mund v. Medicine Hat* (1988), 59 Alta. L.R. (2d) 199 (C.A.).

Irrigation district lands are covered by the *Irrigation Districts Act*, R.S.A. 2000, c. I-11, s. 182. Section 182 first enacted in S.A. 1999, c. I-11.7, s. 182 in apparent response to *Lehr v. St. Mary River Irrigation District*, [1993] A.J. 1411 (Q.B.) and *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329 (Alta. C.A.).

[71] For example, in the trial decision in *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329 (Alta. C.A.) receipt of rent was suggested as sufficient to maintain the owner's possession. In *O'Brien v. Fox*, 2000 ABQB 1002, granting an easement maintained the owner's possession. However, filing a defence where the adverse possessor has prematurely brought a claim to quiet title does not re-assert possession: *Urban v. Urban Estate* (1994), 21 Alta. L.R. (3d) 405 (C.A.).

In *Bennett v. Butz*, 2003 ABQB 84, the owner sold part of the adversely possessed land to the Crown and retained the rest under a new certificate of title. As the sale and subdivision occurred after the limitation period had expired, the owner arguably no longer had rights to assert. Thus, the Court did not need to consider whether the sale or subdivision asserted the owner's rights.

[72] (1992) 130 A.R. 375 at 378 (Q.B.).

[73] In *Tschritter v. Otto*, 2001 ABQB 10, both the owner and the adverse possessor used the land

(continued...)

[58] The relationship between the owner and the adverse possessor is also relevant in assessing the owner's intention with respect to the land. Certain relationships by their nature preclude adverse possession. For example, in a joint tenancy all the tenants have the same unity of possession, such possession preventing a claim in trespass by one joint tenant against another. Even where one joint tenant has been absent from the property for ten years the other cannot claim a defence resulting from the limitation period.[74] Similarly, adverse possession is difficult to establish where the adverse possessor is found to be a licensee[75] or tenant[76] whose possession derives from the owner.[77]

[59] Situations may arise where the owner has neither made any use of the land nor established any relationship with the adverse possessor. While the adverse possessor still has to establish exclusive possession this will be an easier task if the owner is completely absent from the land. These situations raise the presumption that any use of land is preferable to non-use, i.e. that occupation trumps conservation. This presumption is not necessarily consonant with modern land use principles. However, the owner's intention with respect to the land is still a key factor. Where the owner's non-use is intentional, for example where land is left fallow or held for speculative purposes, this should operate in the owner's favour, impeding the adverse possessor's claim to exclusive possession.[78] Where the

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[73] (...continued)
throughout the year. The owner's occasional use of the land should have been sufficient to prevent anyone else acquiring exclusive possession.

[74] *Deal v. Deal* (1974), 50 D.L.R. (3d) 564 (Alta. S.C.T.D.).

[75] *Brogden v. Brogden*, [1920] 2 W.W.R. 803 (Alta. S.C.A.D.); *Robertson v. King Estate*, 1999 ABQB 167.

[76] *Dobek v. Jennings*, [1928] 1 W.W.R. 348 (Alta. S.C.A.D.); *Berube v. Cameron*, [1946] S.C.R. 74; *Shillabeer v. Diebel* (1979), 9 Alta. L.R. (2d) 112 (S.C.T.D.).

[77] In *Bennett v. Butz*, 2003 ABQB 84, the adverse possessor's tenancy of the land was based on a grazing lease granted by the Crown. However, the Crown was not the owner and had no interest to lease. However, Foster J. concluded that the invalid tenancy did not prevent the adverse possessor from acquiring sufficient possession against the owner.

[78] The owner caught in this situation would also have recourse to the *Judicature Act*, R.S.A. 2000, c. J-2, s. 5(3)(j) which confirms the court's jurisdiction to "grant an injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse title."

owner's non-use is unintentional, for example where the owner does not know that he or she has any rights in the land, such non-use currently operates in the adverse possessor's favour, facilitating a claim to exclusive possession.

4. Circumstances of entry

[60] The traditional criteria that consider the adverse possessor's use of the land, the owner's intention, and the nature of the land are not always a sufficient indicator of how a court will assess competing claims. The law appears confused and unpredictable, a state which does not promote the resolution of disputes without litigation. However, when examined from a results perspective the Alberta case law suggests that the circumstances by which the adverse possessor came into possession of the land are also relevant in assessing competing claims. Is the adverse possessor a deliberate trespasser or does the adverse possessor have a reasonable belief (though mistaken) that he or she is entitled to be on the land?

[61] A claim to recover possession is more likely to succeed against a claim to quiet title where the adverse possessor has deliberately or carelessly encroached on the owner's land. In other words, where the adverse possessor knows that title to the land rests elsewhere, a claim to quiet title will likely fail.[79] In contrast, a claim to quiet title is more likely to succeed against a claim to recover possession if the adverse possessor has a reasonable belief that he or she is entitled to be on the land. The cases suggest three scenarios where this is so. First, where the adverse possessor's presence on the land is due to an honest but mistaken belief in the boundary – i.e. situations where, as between adjoining land owners, a defining physical boundary (eg. fence, roadway) does not sit on the true property line.[80]

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[79] It should be noted that quality of possession need not be addressed in all cases. For example, where the limitation period is still current, courts need not consider the quality of possession. Where courts have assessed the quality of possession even though the limitation period is still current the case is marked *obiter*. *Edwards v. Edmonton Beach Resorts Ltd.* (1992), 130 A.R. 375 (Q.B.); *Edmonton (City) v. Alberta (Registrar of Land Titles)*, [1995] 3 W.W.R. 543 (Alta. Q.B.); *Condominium Plan No. 7810477 (Owners of) v. Condominium Plan No. 7711723 (Owners of)* (1997), 55 Alta. L.R. 198 (Q.B.). *Cf. Re Anderton* (1908), 8 W.L.R. 319 (Alta. S.C.) – *obiter*; *Revelstoke Cos. Ltd. v. Lindsay* (1981), 17 Alta. L.R. 339 (Q.B.); *Lehr v. St. Mary River Irrigation District*, [1993] A.J. *1411* (Q.B.).

[80] Again, where courts have assessed the quality of possession within a current limitation period, the case is marked *obiter*. *Wallace v. Potter (No. 2) (1913)*, 4 W.W.R. 739 (Alta. S.C.T.D.); *Boyczuk v. Perry*, [1948] 2 D.L.R. 406 (Alta. S.C.A.D.) – *obiter*; *Zybriski v. Calgary* (1965), 51 D.L.R. (2d) 54

(continued...)

Second, where there are equitable circumstances that support the adverse possessor's presence on the land – i.e. situations where, in addition to possessory title, the adverse possessor has some other claim on the land such as an unregistered agreement for sale or entitlement under an unprobated will.[81] Third, where there has been a third party error prejudicial to the adverse possessor – i.e. situations where there has been a title error in a tax sale or a Registrar's correction.[82] In considering the circumstances of the adverse possessor's entry, the Alberta courts have developed a common law model that finds a close parallel in the recent legislative reform of adverse possession in England.[83]

[62] Considering the circumstances of entry in addition to the other criteria provides a more reliable basis for predicting how competing claims will be assessed. Thus, if the adverse possessor makes residential use of the land in honest reliance on mistaken boundaries – as where the adverse possessor's house sits within a 50m x 55m fence on a lot only 50m² – the adverse possessor has a good chance of quieting title to the additional 5m strip. However, although the adverse possessor makes the same residential use of the land, the chance of success is reduced if the adverse possessor knew the lot's true dimensions and deliberately extended the fence by 5m.

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[80] (...continued)
(Alta. S.C.); *Canada Permanent Trust Co. v. Herron*, [1975] A.J. 61 (Alta. S.C.T.D.); *Rosebud Seed Cleaning Plant Ltd. v. Martin*, [1979] A.J. 381 (Dist. Ct.) – appears to be a mistaken boundary case though this is not entirely clear on the facts; *Lutz v. Kawa* (1980), 12 D.L.R. (3d) 271 (Alta. C.A.) – *obiter*; *Tarcon v. Kerr* (1981), 36 A.R. 282 (Q.B.); *O'Brien v. Fox*, 2000 ABQB 1002 – *obiter*. *Cf. Rockland Holdings Ltd. v. 309458 Alberta Ltd.*, [1987] A.J. 1359 (Q.B.).

[81] Again, where courts have assessed the quality of possession within a current limitation period, the case is marked *obiter*. *Harris v. Keith* (1911), 16 W.L.R. 433 (Alta. S.C.); *Sinclair v. McLellan*, [1919] 2 W.W.R. 782 (Alta. S.C.T.D.) – *obiter*; *Brogden v. Brogden*, [1920] 2 W.W.R. 803 (Alta. S.C.A.D.); *Shirtcliffe v. Lemon*, [1924] 1 W.W.R. 1059 (Alta. S.C.T.D.); *Saturley v. Young*, [1945] 3 W.W.R. 110 (Alta. S.C.T.D.); *Urban v. Urban Estate* (1994), 21 Alta. L.R. (3d) 405 (C.A.); *Tschritter v. Otto*, 2001 ABQB 10.

[82] *Edwards v. Duborg*, [1982] 6 W.W.R. 128 (Alta. Q.B.); *Zekonja v. Donald* (1983), 50 A.R. 379 (Q.B.).

[83] *Land Registration Act 2002* (UK), c. 9, ss. 96-98. The situations that justify adverse possession of registered land are best described in Law Commission, *Land Registration for the 21st Century: A Conveyancing Revolution*, Report No. 271 (London: T.S.O., 2001) 206-208.

5. Statutory possession

[63] Statutory definitions of "possession" have also been used to determine who has possession and who has been dispossessed. For example, the *Land Titles Act*, s. 1(s) defines possession to include the receipt of rents and profits:

> 1 In this Act...
>
> (s) "possession" when applied to persons claiming title to land means also alternatively the reception of the rents and profits of the land.

Although this definition is stated to apply to the *Land Titles Act* only, receipt of rent has been accepted as sufficient possession to support an adverse claim.[84]

6. Mines and minerals

[64] Separate comment is required on the question of subsurface mines and minerals. To date, where mines and minerals have been claimed by adverse possession, it has been by the owner of the surface lands against the owner of the mineral title. The basis for the surface owner's claim is that possession of the

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[84] *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329 (Alta. C.A.) is a complex and result-driven case involving an instance of adverse repossession. The adverse possessor [Tooke] came into possession of the owner's [the E.I.D.'s] land in 1943. The adverse possessor lived on the land until 1978 and continued afterwards to control the land though no longer resident on it. On appeal, counsel for the owner conceded that the adverse possessor had exercised the necessary quality of possession between 1943 and 1953 so as to extinguish the owner's rights. However, on the basis that the owner began to collect rent from the adverse possessor from 1958 onwards, the Court of Appeal considered that the owner had sufficient possession to adversely re-possess the adverse possessor. The Court noted the *Land Titles Act* definition of "possession" and concluded at 335:

> It has been suggested that this repossession by E.I.D. lacked the quality of possession required in that the Tookes were not excluded. I do not agree. The occupation by the Tookes for the term of the leases was as E.I.D.'s tenant only and did not constitute the kind of possession that would negate the exclusivity of E.I.D's possession as landlord.

However, by using the *Land Titles Act* definition of "possession" as a means to restore the land to the owner, *Tooke* makes it possible to claim adverse possession through mere receipt of rent, not only where rent is nominally set at $10 / year, but also contrary to the wording of the *Land Titles Act*, s. 1(s). Despite the concession that adverse possession had been established between 1943-53, there were other arguments that would support returning the land to the registered owner. The trial judge, for example, found that either the lease operated by means of estoppel to prevent the adverse possessor calling evidence to challenge the owner's title, or that the lease undermined the adverse possessor's quality of possession. The facts of the case additionally suggest that the adverse possessor originally entered into possession as a licensee.

It remains to be seen whether *Tooke* will be restricted to the narrow facts of adverse repossession by the owner or whether it extends to any adverse possessor receiving rent from leasing another's land. In *Bennett v. Butz*, 2003 ABQB 84, the Crown (wrongly) leased the owners' land and received the rent. When the owners' brought a claim to recover possession, the Crown's tenants' counter-claimed to quiet title by adverse possession. The Crown was not a party to either suit and the effect of its purported lease was not considered.

surface extends to the subsurface.[85] The scenario is typically complicated by the further fact of mines and minerals having at one time been mistakenly included on the surface title and only later restored to the mineral title by a Registrar's correction. However, courts have consistently held that neither holding surface title nor being in possession of the surface establishes sufficient possession of subsurface mines and minerals. As with any other land, adverse possession of mines and minerals requires exclusive, open and notorious possession.[86] Neither granting a mineral lease,[87] nor payment of mineral taxes,[88] nor exploratory drilling[89] amounts to sufficient possession and without sufficient possession the limitation period does not begin to run.[90] This is still a developing area of the law and the balance of this Report confines its scope to the adverse possession of surface land.

B. The Concept of Acquisition

[65] Limiting the time for an owner to bring a claim to recover possession requires that the law have a mechanism for dealing with the land where the owner does not act in time. This is where statutory limitation principles overlap the acquisition of rights by possession at common law. The basis for allowing the adverse possessor to quiet title where limitations legislation prevents the owner from pursuing a legal remedy is considered below.

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[85] *Duncan v. Joslin* (1965), 51 W.W.R. 346 (Alta. S.C.A.D.); *Re Panther Resources*, [1984] 2 W.W.R. 247 (Alta. Q.B.); *King Estate v. Buckle Estate*, 1999 ABCA 343, rev'g *Liebing v. Alberta (North Alberta Land Registration District)*, 1999 ABQB 55. Query whether *King* is appropriately framed as an adverse possession case. King was a purchaser for value of a surface title that included mineral title and that was two steps along the chain of title from the problematic tax sale. King should have been able to rely on the register and claim the benefit of indefeasible title.

[86] Applied to mines and minerals in *Duncan v. Joslin* (1965), 51 W.W.R. 346 (Alta. S.C.A.D.); *Re Panther Resources*, [1984] 2 W.W.R. 247 (Alta. Q.B.).

[87] *Duncan v. Joslin* (1965), 51 W.W.R. 346 (Alta. S.C.A.D.); *Re Panther Resources*, [1984] 2 W.W.R. 247 (Alta. Q.B.).

[88] *Re Panther Resources*, [1984] 2 W.W.R. 247 (Alta. Q.B.); *King Estate v. Buckle Estate*, 1999 ABCA 343.

[89] *Duncan v. Joslin* (1965), 51 W.W.R. 346 (Alta. S.C.A.D.).

[90] Query whether sufficiently exclusive, open, and notorious possession could be exercised before minerals are severed from the land such that they are no longer real but rather personal property.

1. Basis for quieting title

[66] While possession is no longer our key test of land ownership, possession still confers rights. A person in possession of land acquires rights that may be enforced as against all the world except those with superior rights. Thus, for example, if B is in possession of A's land, A still has superior rights to B. However, B may sue C for trespass or may even claim to recover possession if ousted by D. Although A's rights remain superior to B's (and C's and D's), the law imposes a temporal limit on A's ability to bring a claim. When the limitation period expires, B obtains a defence against any claim by A to recover possession. B, therefore, gains immunity from liability against A, in addition to having superior rights against C, D, and the rest of the world.[91]

[67] Without more, the situation described above creates unsatisfactory results in a land titles system. Although B has immunity against A's claim and superior rights as against the rest of the world, without a certificate of title, B's practical ability to transfer the land is limited by the lack of title protection that will be available to B's transferees. The objectives of ensuring transferability and protecting future ownership are both frustrated in this situation. While A still has the ability to transfer the land, this result would allow A to circumvent the operation of limitations legislation. This situation has already been identified as undesirable and was addressed by enacting a bridging provision between limitations and land titles legislation.[92] Thus, where B has immunity against A and superior rights as against the rest of the world, s. 74 of the *Land Titles Act* may be used to bring B within the land titles system. Section 74 is the only basis by which

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[91] The conclusion that the adverse possessor does not acquire the owner's rights is also stated in Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Report No. 254) (London: The Stationery Office, 1998) at 212:

> It is the squatter's fee simple that ripens into ownership when the rights of the true owner have been extinguished under the Limitation Act 1980. There is no "parliamentary conveyance" of the true owner's estate to the squatter. The latter has a wholly new estate, but one that is subject to those rights that burdened the estate of the former owner that have not been barred by the lapse of time, such as easements or restrictive covenants.

See also the Law Reform Commissioner of Tasmania, *Report on Adverse Possession and Other Possessory Claims to Land* (Report No. 73) (Tasmania: Government Printer, 1995) at 23.

[92] *An Act to Amend the Land Titles Act*, S.A. 1921, c. 39. See Chapter 2, section D. Limitation Periods and Registered Ownership.

an adverse possessor may apply to have the registered owner's title cancelled.[93] Unless and until such an application is made, adverse possession has no effect on the register.

[68] Thus far, the status of A's rights after the limitation period expires has not been addressed. Assume for the moment that A retains rights and that those rights remain superior to B's, although A has no remedy by which to enforce them. What are the consequences for transferability and protecting future ownership once B is issued a certificate of title? Whatever rights A retains have been cancelled on the register. As an unregistered interest, A's rights will not affect those who rely on the register. Nor can A expect to re-register any remaining rights; B's immunity to A's claim will prevent A from maintaining a caveat. Moreover, any purchaser for value will take the benefit of indefeasible title from B. Thus, from a land titles perspective, A no longer has any effective rights in the land.[94]

[69] It is also relevant to consider the nature of B's rights. As indicated, the basis for allowing B to quiet title is B's immunity against A's claim and B's superior rights against the rest of the world. As B did not acquire rights in reliance on the register, B's title will be defeasible. However, where B has acquired an immunity against A's ability to recover possession of a fee simple, there is a very good possibility that B will also have acquired immunity against any other registered or

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[93] The *Land Titles Act* states:

> 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*, R.S.A. 1980 c. L-15, may file a certified copy of the judgment in the Land Titles Office.
>
> (2) Subject to section 191, 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.

The reference to the old Act was expressly retained in the R.S.A. 2000 consolidation due to the uncertainty regarding the effect of the *Limitations Act*. However, even without this reference rights extinguished under the old Act would remain extinguished and not be revived by the repeal of s. 44: *Interpretation Act*, R.S.A. 2000, c. I-7, s. 31; *Bennett v. Butz*, 2003 ABQB 84. Where the limitation period expired before 1 March 1999, s. 44 of the old Act will continue to operate, regardless of when the claim is filed. The cross reference should now be updated to the *Limitations Act*.

[94] However, A's rights may still be relevant for purposes outside the *Land Titles Act* as considered in section C. Effect of the *Limitations Act*.

unregistered claims against the land. For example, if there is a mortgage against the land, whether B will be bound by it will depend on whether the mortgagee still has a legal remedy. If the mortgage has been in default for ten years and the mortgagee has not taken steps to secure its rights, then B likely has a defence to the mortgagee's claim.[95] As B acquires immunity and is entitled to quiet title against individual claimants, there comes a point at which B's title must be regarded as indefeasible.[96]

2. Should claims to quiet title be subject to a limitation period?

[70] Having acquired both immunity against the owner's claim to recover possession and holding superior rights against the rest of the world, gives rise to the adverse possessor's claim to quiet title. Should the adverse possessor's claim be subject to a limitation period?

[71] The limitation periods prescribed in s. 3(1) of the *Limitations Act* apply to claimants seeking remedial orders. It is difficult to characterise a claim to quiet title as seeking an order to require the defendant, in this case the owner of the land "to comply with a duty or to pay damages for the violation of a right".[97] Moreover,

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[95] If the mortgage is current, the question of who has made the payments will likely be determinative. If the owner has made the payments, this will likely be sufficient to maintain the owner's rights against an adverse claim of exclusive possession. The issuing of a new certificate of title to the owner upon discharge of the mortgage will restart the limitation period: *Croft v. Mudie* (1986), 76 A.R. 26 (Q.B.); *Boulding v. Crowe*, 1998 ABQB 732. If the adverse possessor has made the payments, at the very least, the adverse possessor should be bound by the mortgage. The adverse possessor paid off the mortgage in *Syndicated Mortgage Investment Corp. v. Gal*, 1998 ABQB 944, but lost any interest acquired when the owner remortgaged to a *bona fide* third party. However, mortgage payments by the adverse possessor could also be characterised as rent, sufficient to maintain the owner's rights: *Berube v. Cameron*, [1946] S.C.R. 74, payment of taxes held as rent; *Shillabeer v. Diebel* (1979), 9 Alta. L.R. (2d) 112 (S.C.T.D.), payment of insurance held as rent.

For further discussion on the position of mortgagees and mortgagors regarding adverse possession see Ireland, Law Reform Commission, *Title by Adverse Possession of Land* (Report No. 67) (Dublin: Law Reform Commission, 2002) at pp. 33-42.

[96] However, non-possessory interests such as easements and estates vesting in the future may be general exceptions to this conclusion. For assistance see *Canadian Western Natural Gas Co. Ltd. v. Empire Trucking Parts (1985) Ltd.* (1998), 61 Alta. L.R. (3d) 1, 1998 A.B.Q.B. 463 (easement) and *Fodchuck v. Fodchuck*, [1947] 3 D.L.R. 115 (Alta. S.C.) (future estate).

[97] However, s. 2(4) continues to use "remedial order" in reference to the Crown's immunity from adverse possession.

The *Limitations Act* defines "remedial order"

(continued...)

the *Land Titles Act*, s. 74(1), frames a claim to quiet title as resulting in a declaratory judgment.[98] If claims to quiet title are declaratory rather than remedial, they will not be subject to a limitation period.[99]

[72] Regardless of whether claims to quiet title are best described as seeking declaratory or remedial relief, there are two further reasons to exempt them from limitation periods. First, to attach a limitation period to claims to quiet title would produce absurd results. For example, having been in possession from 2000 to 2010, the adverse possessor would have until 2020 to quiet title. What are the

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[97] (...continued)

1 In this Act ...

(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status

The *Limitations Report* at 37, n. 23 considers that a remedial order is:

> ...either performance-oriented or substitutionary in nature. That is to say, it either compels a defendant to comply with his duty to the claimant or to compensate the claimant, in money, for the violation of his right by the defendant. The court order creates a new right-duty relationship between the claimant and defendant.

[98] *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 at 274 (Alta. C.A.) also describes the remedy as a declaratory judgment.

[99] However, the *Report for Discussion* argues that they are remedial. At 222 it states that a "judicial order directing the Registrar to make a revision will be a remedial order because it will direct the Registrar, albeit as a nominal defendant, to perform a duty". However, the *Land Titles Act*, s. 74 allows the Registrar to revise the register on the basis of a declaratory judgment without the additional device of holding the Registrar out as a nominal defendant. In any event, the *Report for Discussion* further recommended at 220-226 that claims requesting a remedial order for revision of the land titles register be excluded from the *Limitations Act*. This latter recommendation was excluded from the *Limitations Report*.

With respect to declaratory relief, the *Limitations Report* states at 38 that the category should be a narrow one:

> A declaration defines right-duty relationships, clarifies them and may recognise the existence of a right-duty relationship sufficient to justify granting a remedy. ...In the Report for Discussion, we excepted them on the basis that a declaration merely defines rights. While we continue to recommend this exception, we think it only fair that we do so recognizing the potential of the declaration for use to circumvent the limitation periods set out in the Act. Declarations constitute a growth area in the law, rendering the effect of their exception from the Act something of an unknown factor. For example, what would be the result were a claimant to seek remedial relief that is ancillary to a declaration? The definition of "remedial order" in s. 1(i) of the Act is the control mechanism.

Consequently, neither the *Report for Discussion* nor the *Limitations Report* is particularly clear on the status of the resulting orders in a claim to quiet title.

consequences if title is not quieted by 2020? Does possession from 2010 to 2020 give rise to a new limitation period or must possession continue until 2030 to support a claim to quiet title? The difficulty in imposing a limitation period is compounded by the strong likelihood that neither the owner nor the adverse possessor realise that there is any basis for a claim between them. This peculiar result could be avoided by imposing a knowledge requirement before the adverse possessor is required to quiet title. For example, once the adverse possessor discovers the claim it would be consistent with the goal of limitations legislation to require title to be quieted quickly. However, imposing a discovery rule would be meaningless in many situations. The adverse possessor's knowledge often arises when the land is transferred to a purchaser for value – a transfer that defeats the claim to quiet title. Thus, neither a discovery rule nor an ultimate rule type of limitation period produces an appropriate result.

[73] Second, it must be asked whether there is any need to impose a limitation period on claims to quiet title? The central goal of limitations legislation is to require claimants to act on their rights in a timely manner to secure defendants against stale claims. However, a claim to quiet title contains its own motivation to act quickly. Until the adverse possessor is registered on title, his or her claim is highly defeasible and is easily defeated by a purchaser for value. The law already motivates prompt action without putting others at risk of stale claims if the adverse possessor delays. Consequently, the best conclusion is that claims to recover possession are not subject to a limitation period.

C. Effect of the *Limitations Act*: Rights not Extinguished

1. Rights vs. remedies

[74] The *Limitations Act* does not contain an extinguishment provision equivalent to s. 44 of the old Act. The reasons for this omission relate to the role of a limitations system as stated in the *Report for Discussion*:[100]

> Extinguishing rights is not an objective of a limitations system. Rather, its objective is to force the timely litigation of disputes if there is to be litigation. Nevertheless, if, pursuant to a limitations statute, a defendant gains immunity from liability to any remedy which the law provides for the enforcement of the right upon which the claim was based, the right, although

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[100] *Report for Discussion* at 325.

> not extinguished, will usually have become sterile. Indeed, we believe it is accurate to say that a right without a legal remedy is not a legal right at all. Should rights which have become unenforceable under the legal system be statutorily extinguished?

In answer to this question, the *Report for Discussion* considered that a general extinguishment provision was not necessary, nor was there reason to carry forward the specific extinguishment provision from s. 44 of the old Act:[101]

> We gave serious consideration to recommending a general extinguishment provision along the following lines:
>
> > If a defendant is entitled to immunity from liability under a claim by this Act, the right upon which the claim was based is extinguished to the extent that the remedial order requested was based on that right.
>
> However, there have been exceedingly few cases in Alberta in the ten situations in which an unextinguished right could be significant [as identified in the Ontario Law Reform Commission's 1969 *Report on Limitation of Actions*]. Our preference for a provision stating a general principle is based on our belief that, given the infrequency of cases, it would be easier for the courts to work with than would a series of complex provisions geared to specific types of claims. Although section 44, which is a narrow provision, has not created problems, it is the only extinguishment provision in the present Alberta Act. We doubt that a broad extinguishment provision would be very helpful. Indeed, it could create unanticipated problems, although this too is unlikely because the cases are so rare.
>
> We have decided not to recommend any extinguishment provision. In paragraphs 3.65-73 we recommended that claims, whether legal or equitable, for the possession of property, whether real or personal, be excluded from the coverage of the new Alberta Act, for we wish to eliminate the acquisition of ownership through adverse possession. For this reason a provision analogous to section 44 will no longer be necessary.

Although the *Limitations Report* declined to abolish adverse possession, s. 44 of the old Act was not carried forward to the *Limitations Act*.[102]

[75] However, the decision to continue adverse possession does not necessarily require the existence of an extinguishment provision equivalent to s. 44 of the old Act. As discussed in Chapter 2, the extinguishment provision was originally enacted in 1833 to address the problem of self-help. Future ownership was compromised by the risk that a prior claimant could revive a claim after the limitation period had expired by regaining possession of the land. To what extent

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[101] *Report for Discussion* at 326-327. See also *Limitations Report* at 66-67.

[102] *Limitations Report* at 39.

is similar mischief still possible such that the extinguishment provision needs to be restored to protect future ownership and also ensure transferability?

2. Extinguishment and indefeasible title

[76] In considering whether the extinguishment provision should be restored it is important to recall that, since 1886, indefeasibility has also operated to preclude revival and to protect future ownership. As concluded in section B, cancelling title under s. 74 of the *Land Titles Act* effectively extinguishes the owner's rights for land titles purposes. In most cases, the practical result is that the new title issued to the adverse possessor will be an indefeasible one. Even where the adverse possessor's title remains defeasible, the next purchase for value will trigger indefeasibility. Future ownership based on indefeasibility will, therefore, be secure against the mischief of prior claims without the additional protection of extinguishing rights under limitations legislation. However, there will be circumstances where indefeasibility is not raised, either because title has not been quieted or where there is a transfer to a donee. In such cases, there may be a risk of claims being revived or future ownership being put at risk.

3. Extinguishment and defeasible title

a. Transfers to donees

[77] Indefeasibility is not raised where land is transferred to a donee. As regards the revival of stale claims, it is important to consider both the timing of the transfer and whether the land is transferred by the owner or the adverse possessor.

i. Adverse possessor to donee

[78] The effect of a transfer from an adverse possessor to a donee depends on timing. First, where the transfer occurs within the limitation period, time will continue to run against the owner out of possession if there is sufficient continuity of possession between the adverse possessor and the donee.[103] Within the limitation period, the donee's interest remains defeasible and will be unregistered. Second, where the transfer occurs after the limitation period has expired but before title is quieted, the fact of the transfer does not change the result of the owner

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[103] See Chapter 2, section D.2.a Abandonment. If there is not sufficient continuity of possession, the donee will have to trigger a new limitation period to run against the owner.

being out of time to recover possession. The donee should be entitled to immunity under the *Limitations Act*. The donee's interest is defeasible but should support a claim to quiet title. Third, where the transfer occurs after the adverse possessor has quieted title, the donee's title will have the same practical indefeasibility as the adverse possessor's. In all three scenarios, the result is the same as it would have been were the extinguishment provision still in effect. As regards a transfer from the adverse possessor to a donee there is no reason to restore the extinguishment provision.

ii. Owner to donee

[79] Timing is also relevant if the owner transfers the land to a donee. First, if the owner (purportedly) transfers the land after the adverse possessor has quieted title, the (former) owner has little, if anything, to transfer. The donee's interest will be defeasible and, notably, defeasible by the adverse possessor who now holds registered title. Again the result is the same as it would have been were the former owner's rights extinguished by the expiry of the limitation period. However, in the second and third scenarios where the owner transfers the land before title has been quieted, there is a risk of reviving stale claims.

[80] Both the old Act and cases decided under it suggested that the limitation period would continue to run where the owner transferred the land to a donee.[104] However, there is no express ruling on this point in Alberta.[105] Nor is there any

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[104] The old Act stated:

> 18 No person shall take proceedings to recover land except
> (a) within 10 years next after the right to do so first accrued to that person (hereinafter called the "claimant"), or
> (b) if the right to recover first accrued to a *predecessor in title*, then within 10 years next after the right accrued to that predecessor. [Emphasis added.]
>
> 19 When in respect of the estate or interest claimed the claimant or a predecessor has
> (a) been in possession of the land or in receipt of the profits thereof, and
> (b) while entitled thereto
> (i) been dispossessed, or
> (ii) discontinued that possession or receipt,
>
> the right to take proceedings to recover the land shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any profits were so received.

[105] In *Lutz v. Kawa* (1980), 112 D.L.R. (3d) 271 (Alta. C.A.), the donee took under a will; however, (continued...)

express provision in the *Limitations Act* that would achieve this result. While the two year discovery rule will bind successor owners of a claim, the ten year ultimate rule does not.[106] This raises the question of whether a donee is a new claimant entitled to a new limitation period or whether a donee is a successor owner of the existing claim?

[81] There are several points to consider in answer to this question. As with a purchaser for value, a donee only has a claim to recover possession once he or she has a right to possession as a consequence of the transfer. However, purchasers for value acquire indefeasible title and are treated as new claimants in order to protect the concept of indefeasibility.[107] In contrast, the defeasible title acquired by a donee is, by definition, subject to the same interests that attached to the transferor's title. Moreover, treating a donee as a new claimant for limitation purposes will give the donee a greater interest than the transferor had. For example, consider the

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[105] (...continued)
the donee became a purchaser for value by assuming the mortgage payments. In *O'Brien v. Fox*, 2000 ABQB 1002, the transfer lacked sufficient evidence of value; however, granting an easement was found to have reasserted title. The best statement that time continues to run against a donee is the *obiter* conclusion in *Boulding v. Crowe*, 1998 ABQB 732 at paras. 20-23:

> Section 18(b), read literally, seems to contemplate that once the limitation period has commenced, it will continue to run even though a new title has issued to a successor in title. That continues to be inconsistent with the principles of the Torrens system. In *Lutz v. Kawa* the Court of Appeal does not articulate a rationalisation of s. 18(b) to those principles.
>
> The only rationalisation that occurs to me is that s. 18(b) refers only to situations where title has passed to a volunteer and not a *bona fide* purchaser. I do not think such a restrictive interpretation of the words "predecessor in title" would accord with the meaning those words are generally understood to have.
>
> It appears to me that in *Lutz v. Kawa* the Court of Appeal again chose to achieve a workable accommodation of adverse possession to Torrens principles by giving no effect to s. 18(b). In any event, the *ratio* of *Lutz* is clear and binding on me. When a *bona fide* purchaser takes title from one against whom a s. 18 limitation period was running, the limitation period begins again.

Recognising that "predecessor in title" should not be read in its ordinary meaning but should be read in its historic pre-Torrens sense addresses the inconsistency.

[106] The *Limitations Act* states:

> 3(2) The limitation period provided by subsection (1)(a) begins
> (a) against a successor owner of a claim when either a predecessor owner or the successor owner of the claim first acquired or ought to have acquired the knowledge prescribed in subsection (1)(a).

There is no equivalent provision for the subsection (1)(b) limitation period.

[107] See Chapter 2, section E. Limitation Periods and Indefeasible Title.

second scenario where the donee acquires the land after the limitation period had expired but before title is quieted. If the donee has a further ten years to bring a claim to recover possession, the donee's position is significantly better than the transferor's. Not only is putting the donee in a better position than the transferor contrary to property law principles but it creates an opportunity to revive stale claims and circumvent limitations legislation. For example, if A is out of time to recover possession, by gifting the land to D on the agreement that D will gift the land back to A, A can avoid the limitation period.[108] A will also obtain back from D a greater interest than A had to transfer to D. If a donee is to be treated as a new claimant after the limitation period has expired, the donee would also have to be treated as a new claimant in the third scenario where the transfer takes place within the partially run limitation period. While a transfer within the limitation period does not revive a stale claim, alleging that such a transfer took place once the limitation period had expired could lead to revival. Thus, the mischief of reviving stale claims is a possibility in some transfers from an owner to a donee.

[82] Though there is the potential for reviving stale claims, avoiding this mischief does not require that rights be extinguished as a consequence of limitations legislation. The problem may be addressed by the less drastic measure of providing that a limitation period will continue to run against a donee. This result would be consistent with the wording in ss. 18 and 19 of the old Act and the courts' implied interpretation. This Report recommends that, as regards a claim to recover possession, a donee transferee should be treated as a successor owner of the claim. This already appears to be the case at common law where the adverse possessor transfers his or her interest to a donee. To prevent the revival of stale claims, the same approach should apply where the owner transfers to a donee. While being a successor owner of a claim will limit some donees' ability to recover possession, this hardship is balanced by the courts' generous approach to donees to date. Where possible, courts have considered whether a donee "re-qualified" as a purchaser for value entitled to the protection of indefeasible title.

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[108] There is also a potentially important difference in the fact that gift transfers are more likely to take place off the register. While gift transfers may be registered, it would be convenient to allege an unregistered transfer as a means of circumventing limitations legislation.

RECOMMENDATION No. 3
Where an owner has a claim to recover possession of real property and the property is transferred to a donee, the donee should be treated as successor owner of the claim.

b. Late re-entry

[83] A further mischief addressed by the extinguishment provision was to block the effectiveness of self-help by re-entry after the limitation period expired. Late re-entry was ineffective as the owner no longer had any rights in the land.[109] Late re-entry will still be ineffective once the owner's rights have been cancelled under s. 74 of the *Land Titles Act*. However, until title is quieted re-entry may again be effective to revive a claim.

[84] What are the consequences of late re-entry before title is quieted? The expiry of the limitation period gives the adverse possessor a defence against the owner's claim to recover possession. However, the owner is now back in possession, leaving the adverse possessor with a claim to recover possession. However, if the owner in possession still has rights in the land and is still registered on title, the claim will likely fail. Thus, although the owner no longer had a legal remedy to pursue, by regaining possession the owner's position is again relatively secure. Despite the consequent risk of disturbing the public peace and circumventing limitations legislation, late re-entry could once again be an effective means of reviving a claim.

[85] However, as with transfers to donees, the mischief of late re-entry can be avoided by less drastic means than extinguishing rights. Indeed, extinguishing rights is an indirect solution to the problem. Rather than holding that late re-entry is ineffective because rights have been extinguished, the direct and simpler solution is to hold that late re-entry is ineffective because it is late. This Report recommends that, to be effective, re-entry should occur during the limitation period. Re-entry that takes place after the limitation period expires should be of no

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[109] *Shirtcliffe v. Lemon*, [1924] 1 W.W.R. 1059 (Alta. S.C.); *Lehr v. St. Mary River Irrigation District*, [1993] A.J. 1411 (Q.B.).

effect.[110] This result is consistent with both the law's previous operation and with current limitation principles.

RECOMMENDATION No. 4
Re-entry should only be effective to recover possession of real property if re-entry is made within the limitation period. Late re-entry should be of no effect.

c. Late acknowledgment

[86] As noted in Chapter 2, the old Act required acknowledgment within the limitation period and in the proper form in order to stop the limitation period. The old Act, therefore, provided double protection against late acknowledgment. Not only did the extinguishment provision leave no rights to acknowledge but the old Act specifically required acknowledgment within the limitation period.

[87] While s. 8(2) of the *Limitations Act* provides that acknowledgment will restart the limitation period, s. 8(1) narrows the range of claims to which s. 8(2) applies, excluding claims to recover possession.[111] While there is nothing that expressly excludes claims to recover possession from the formal requirements set out in s. 9, there is no point in observing the form if acknowledgment will have no substance under s. 8(2). While the *Limitations Act* did not intend to change the law relating to claims to recover possession or acknowledgement, the Act is inadvertently silent on their intersection.[112]

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[110] On the possibility of late re-entry becoming adverse repossession see *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329 (Alta. C.A.).

[111] The *Limitations Act* states:

> 8(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them.

[112] The *Report for Discussion* states at 314:

> We believe that the doctrines of acknowledgment and part payment should be applicable to the same claims under the new Alberta Act as they are under the present Act, if the claim will remain subject to a limitation period under the new Act at all.

Similarly, as the *Limitations Report* confirmed at 42:

> The law that applies to acknowledgments and part payments under the present Alberta Act

(continued...)

[88] The absence of an acknowledgment provision regarding claims to recover possession raises two problems. First, on what basis is acknowledgment possible within the limitation period? In all likelihood, a court presented with evidence that the adverse possessor had acknowledged the owner's title would want to give the owner the benefit of the acknowledgment. However, what evidence of acknowledgment will the court accept? The former provision requiring signed written acknowledgment set an appropriate standard. Second, there is the problem of whether acknowledgment has to occur within the limitation period. While timely acknowledgment was doubly ensured under the old Act, requiring acknowledgment within the limitation period will be sufficient to prevent the revival of stale claims. Extinguishing rights is, once again, not necessary to prevent the mischief. In response to both these problems, this Report recommends that acknowledgment should be possible if made in the proper form and within the limitation period; however, late acknowledgment should not be held to be effective. With respect to implementation, this recommendation may be achieved by amending the *Limitations Act*, s. 8 definition of "claim" to include claims for the recovery of possession of real property. Such an amendment would not only clarify the availability and timing of acknowledgment but would also attract the formalities set out in the *Limitations Act*, s. 9.

RECOMMENDATION No. 5
The principle of acknowledgment should apply to claims to recover possession of real property. Acknowledgment should only be effective if made in the proper form within the limitation period. Late acknowledgment should be of no effect.

4. Summary

[89] For the reasons outlined above, there is no reason to restore an extinguishment provision similar to s. 44 of the old Act. Where title is cancelled under s. 74 of the *Land Titles Act* the result will be the same as that of an

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[112] (...continued)
will not change. Rather the new Alberta Act attempts to restate that law in a more organised and comprehensible manner, and hence to clarify it.

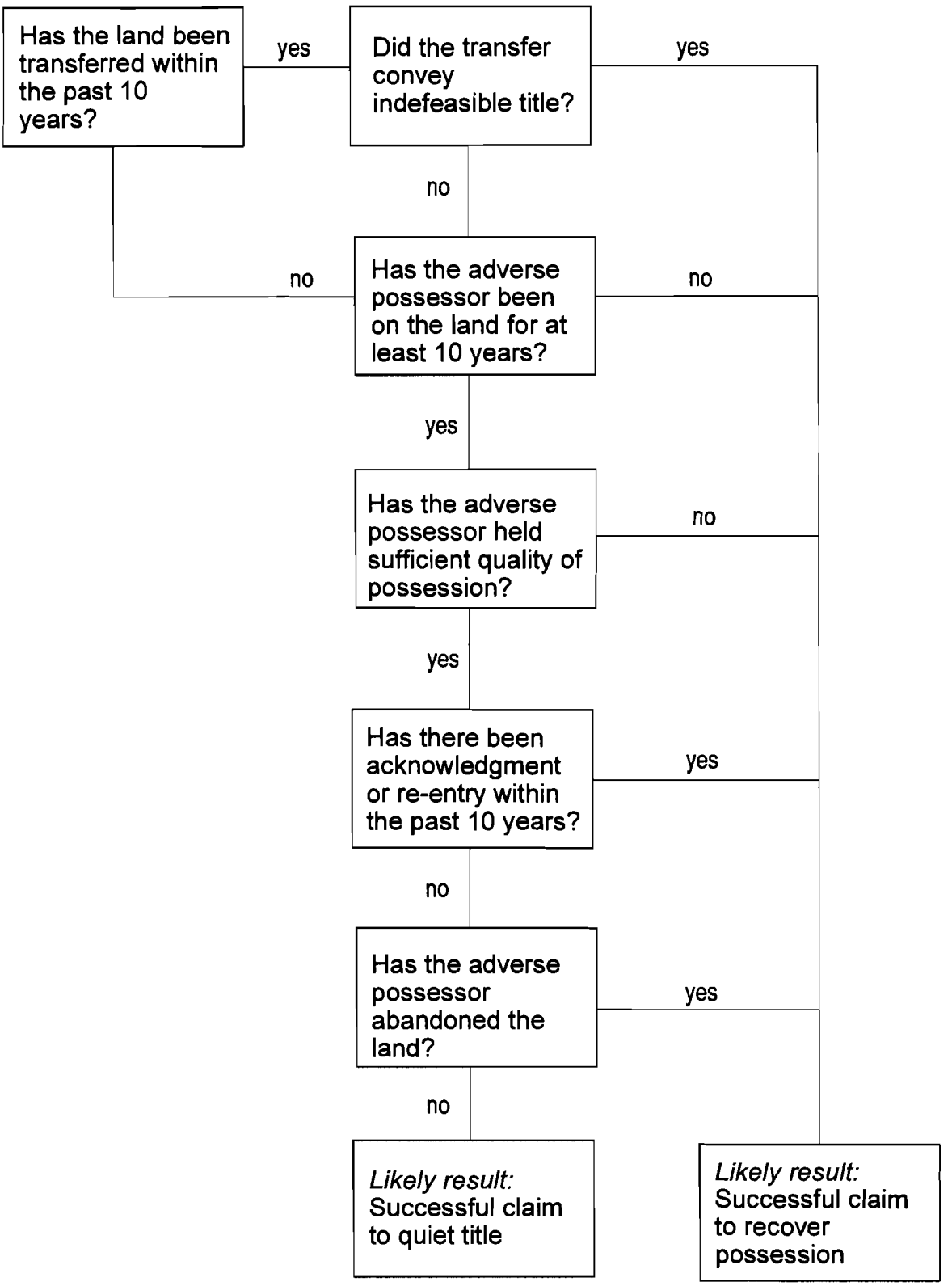
extinguishment provision. While there are situations involving transfers to donees, late re-entry, or late acknowledgment that may revive stale claims, these problems may be addressed by simpler and more direct means than an extinguishment provision.

[90] In addition, not having an extinguishment provision avoids two further difficulties. First, a new extinguishment provision would have to be carefully worded so as not to extinguish title under the *Land Titles Act*. The distinction between common law rights and Torrens title was implicit in the old extinguishment provision as its enactment pre-dated Torrens legislation by half a century. However, to expressly perpetuate such a distinction in modern legislation should be avoided.

[91] Second, not having an extinguishment provision better reflects the law's operation. For example, an owner will still have rights to transfer to a purchaser for value. While indefeasibility will protect the purchaser regardless, continuing the owner's rights avoids the theoretical problem of "late abandonment". For example, if the adverse possessor abandoned the land after the limitation period expired, who has the better claim to the land? If the owner's rights are extinguished, then the owner is a stranger to the land. However, if the owner were to claim the land, he or she would likely succeed. Although the owner's rights have been extinguished, if the adverse possessor has abandoned the land, the fact of extinguishment will be difficult to prove. Not extinguishing the owner's rights better explains this result.

[92] After examining the relationship between limitations and land titles legislation in Chapter 2, it was possible to outline the law's operation by means of a simple flowchart [Figure 2.2]. This flowchart may now be expanded to accommodate the criteria for assessing possession and events that will stop the running of the limitation period. Figure 3.1 offers a general overview of the law's operation and the likely results.

Figure 3.1


Has the land been transferred within the past 10 years?
yes
Did the transfer convey indefeasible title?
yes
no
no
Has the adverse possessor been on the land for at least 10 years?
no
yes
Has the adverse possessor held sufficient quality of possession?
no
yes
Has there been acknowledgment or re-entry within the past 10 years?
yes
no
Has the adverse possessor abandoned the land?
yes
no
Likely result: Successful claim to quiet title
Likely result: Successful claim to recover possession

CHAPTER 4. LASTING IMPROVEMENTS

[93] Section 69 of the *Law of Property Act* provides relief where a person has made lasting improvements to land under a mistaken belief in ownership. As noted at the end of Chapter 2, even if the owner is within time to recover possession, he or she may still face a claim under s. 69 of the *Law of Property Act*. Similarly, where an adverse possessor fails in a claim to quiet title, relief may still be available under s. 69. Indeed, as will be discussed in section A, s. 69 was specifically enacted to provide an opportunity for relief where adverse possession could not succeed. Sections B and C summarise the elements of the claim. Section B reviews what amounts to mistaken belief in ownership and Section C reviews what amounts to lasting improvement. Section D reviews the remedies available for a successful s. 69 claim. Section E then considers the relationship between s. 69 and indefeasibility. The conclusion that s. 69 is an exception to indefeasibility is relevant to the discussion of the effects of the *Limitations Act* in section F. The *Limitations Act* intended the change of imposing a limitation period on s. 69 claims. However, the limitation period is postponed such that s. 69 claims may effectively still be brought at any time. As an exception to indefeasibility, it is appropriate to narrow the application of s. 69 claims by imposing an effective limitation period.

A. Historical Background

[94] Section 69 of the *Law of Property Act* is a legislative response to the perceived harsh result in *Boyczuk v. Perry*.[113] Boyczuk had purchased a parcel of land, believing that an existing fence accurately marked its boundaries. Some 15 years later, the Perrys purchased adjoining land. Later on, the Perrys discovered that their title included land which all parties had believed to be Boyczuk's. Indeed the land in dispute was the land on which Boyczuk had built his house and five other farm buildings. Boyczuk brought a claim to quiet title but was unsuccessful at trial and on appeal. The majority found that, as purchasers for value, the Perrys acquired indefeasible title, even though they had not intended to purchase the lands in question.

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[113] *Boyczuk v. Perry*, [1948] 2 D.L.R. 406 (Alta. S.C.A.D.).

[95] However, as the dissenting judgment highlights, there is a risk in preferring the *Land Titles Act*:[114]

> The parcel of land in question here is worth less than $600 but the principle involves much more. Many large buildings have been erected in Alberta cities on sites surveyed by local surveyors. Some of these surveyors are dead. Others are very old. It is highly probable that new surveys would show that many walls are encroaching on adjacent land.
>
> The *Limitation of Actions Act* was designed to protect *inter alia* the owners in such a case but if an intervening certificate of title is an answer to the *Limitation of Actions Act* in a case where the transferor did not intend to sell or the transferee intend to buy the encroaching wall, that is, where there is a mutual mistake or a wrong description of boundaries or parcels included in the certificate of title then no property owner is safe, because the intervening certificate of title may be readily and legally procured by an unscrupulous owner.

The problem identified in *Boyczuk v. Perry* prompted a legislative response two years later. In 1950, the *Land Titles Act* was amended to assist those who had made lasting improvements to another's land believing it to be their own.[115] Claimants could apply to retain the land or to be compensated for the value of the improvements. Transferred to the *Law of Property Act* in the R.S.A. 1980 revision, the provision currently states:

> 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 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.

B. Mistaken Belief in Ownership

[96] Section 69 is only available where a person has made improvements on the land "under the belief that the land was the person's own". The mistake may be either a mistake of title [e.g. confusing lot A for lot B] or a mistake as to the

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[114] *Boyczuk v. Perry*, [1948] 2 D.L.R. 406 at 417-418 (Alta. S.C.A.D.) per O'Connor J.A.

[115] *An Act to Amend the Land Titles Act*, S.A. 1950, c. 35, s. 11. Now the *Law of Property Act*, s. 69.

identity of the property covered by the title [e.g. reliance on a misplaced fence].[116] Belief in ownership is objectively assessed:[117]

> ... the "belief" must in any case be real, *bona fide* and reasonable. It must be more than an honest guess, or a fervent hope. It must be founded upon information or assurances such as would guide an ordinarily careful and competent man. Surely "belief" cannot be predicated on the absence of information or lack of inquiry, especially where inquiry is suggested by the very nature of the circumstances.

A belief will not be reasonable and thus not honestly held where circumstances warrant inquiry on the point of ownership.[118] The need to inquire does not extend to require a full survey of the property before making improvements, though this is prudent practice.[119] In most cases, sufficient belief arises on one of two grounds. Either the improver relies on the validity of a transaction transferring ownership[120] or relies on reasonable evidence of the land's boundaries.[121] Sufficient belief does not arise where the improver knows that the boundary is in dispute,[122] where the

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[116] *Mildenburger v. Prpic*, [1976] 4 W.W.R. 67 at 72 (Alta. S.C.).

[117] *Canada Permanent Trust Co. v. Herron*, [1975] A.J. No. 61 at para 11 (Alta. S.C.T.D.), Milvain C.J.T.D. adopting the test set out by Dysart J. in *Aumann v. McKenzie*, [1928] 3 W.W.R. 233 at 238 (Man. K.B.).

[118] *Maly v. Ukrainian Catholic Episcopal Corporation* (1976), 70 D.L.R. (3d) 691 (Alta. Dist. Ct.); *Mund v. Medicine Hat* (1988), 59 Alta. L.R. (2d) 199 (C.A.); *Community Credit Union Ltd. v. Otto*, 2002 A.B.Q.B. 317.

[119] *Jones v. Semen*, 1999 ABQB 473.

[120] In *Nova Holdings Ltd. v. Western Factors Ltd.*, [1965] 51 W.W.R. 385 (Alta. S.C.T.D.), the claimant believed it held title under a purchase agreement. In *Herman v. Blomme* (1991), 115 A.R. 371 (Q.B.), the claimant believed property had been given to settle debts.

[121] In *Mildenburger v. Prpic*, [1976] 4 W.W.R. 67 (Alta. S.C.), the claimant relied on the position of a sidewalk. In *Croft v. Mudie*, (1986), 76 A.R. 26 (Q.B.), the true boundary lines were irregular and claimant judged the boundary from the placement of existing buildings. In *Sel-Rite Realty Ltd. v. Miller* (1994), 20 Alta. L.R. (3d) 58 (Q.B.), the claimant relied on fences surrounding an irrigation canal right of way. In *344408 Alberta Inc. v. Fraser*, 1999 ABQB 84, the claimant's land had shifted over time. In *Jones v. Semen*, 1999 ABQB 473, the claimant's measuring of the lot was honest although in error due to conversions between feet and metres. *Cf. Canada Permanent Trust Co. v. Herron*, [1975] A.J. No. 61 (Alta. S.C.T.D.), where the claimant was unreasonable in relying on an old and meandering fence as marking the true boundary.

[122] *Woodsworth v. Harvey* (1976), 1 A.R. 241 (S.C.T.D.); *Condominium Plan No. 7810477 (Owners of) v. Condominium Plan No. 7711723 (Owners of)* (1997), 55 Alta. L.R. 198 (Q.B.).

encroachment is deliberate,[123] or where precluded by the relationship between the parties.[124] Despite the claimant's belief in ownership, s. 69 will not be available where improvements have been made on public land.[125]

C. Lasting Improvements

[97] Whether something qualifies as an "improvement" is an objective test and does not hinge on either party's opinion of the change. That the improver has brought a claim under s. 69 presumes that he or she considers that the land has been improved. However, that the owner takes the opposite view is not determinative. For example, in *Herman v. Blomme*, while the owner found the improver's campground aesthetically displeasing, it was held to be an improvement as it generated income that was not available before.[126] Whether the improvement enhances the value of the encroached land is a separate question, relevant to the choice of remedy.

[98] As to the element of "lasting", the most quoted test is that a lasting improvement "must be permanent in the sense of not being easily removable".[127] The mere fact that an improvement will be damaged or destroyed by moving it, does not mean that is not removable.[128] Buildings or parts of buildings are generally lasting improvements;[129] however, renovations to existing buildings are

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[123] *Moore v. Else*, [1981] A.J. 335 (Q.B.); *Mund v. Medicine Hat* (1988), 59 Alta. L.R. (2d) 199 (C.A.).

[124] In *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329 (Alta. C.A.), the claimant held the land under a long-term lease. See also *Western Surplus Sales Ltd. v. Fender Menders*, [1986] A.J. No. 237 (Q.B.).

[125] The *Public Lands Act*, R.S.A. 2000, c. P- 40, s. 4, *Municipal Government Act*, s. 609, and the *Irrigation Districts Act*, R.S.A. 2000, c. I-11, s. 182, protect public lands against the acquisition of interests by unauthorised possession. See also *SW Properties Inc. v. Calgary (City)*, 2003 ABCA 10; *Palmer v. Alberta (Sustainable Resource Development)*, 2003 A.B.Q.B. 348.

[126] (1991), 115 A.R. 371 at 379 (Q.B.).

[127] *Mund v. Medicine Hat* (1988), 59 Alta. L.R. (2d) 199 at 207 (C.A.)

[128] *Mund v. Medicine Hat* (1988), 59 Alta. L.R. (2d) 199 (C.A.).

[129] *Maly v. Ukrainian Catholic Episcopal Corporation* (1976), 70 D.L.R. (3d) 691 (Alta. Dist. Ct.);

(continued...)

not.[130] A campground will be a lasting improvement if the structures have permanency.[131] A roadway qualifies as lasting,[132] but sidewalks or driveways are replaceable.[133] As regards landscaping activities, while clearing trees is a lasting improvement,[134] planting them is not,[135] nor is clearing undergrowth.[136] Fences or retaining walls are replaceable[137] and excavations are readily filled in and, thus, are not considered lasting improvements.[138] As will be discussed in Chapter 5, changes likely to qualify as lasting improvements under the *Law of Property Act* will often require a development permit.

D. Remedies

[99] Where lasting improvements have been made under a mistaken belief in ownership, s. 69 offers two types of remedy. The improver, or his or her assigns, may be entitled to a lien for the value of the improvements [i.e. a forced sale of the improvements to the owner] or to retain the encroached land with compensation to the owner [i.e. a forced sale of the land by the owner]. For example, B mistakenly builds a lasting improvement that encroaches on C's land. The value of the

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[129] (...continued)
Croft v. Mudie (1986), 76 A.R. 26 (Q.B.); *Jones v. Semen*, 1999 ABQB 473; *344408 Alberta Inc. v. Fraser*, 1999 ABQB 84; *SW Properties Inc. v. Calgary (City)*, 2003 ABCA 10.

[130] *Olson v. Augart*, [1982] A.J. 368; *Croft v. Mudie* (1986), 76 A.R. 26 (Q.B.); *344408 Alberta Inc. v. Fraser*, 1999 ABQB 84.

[131] *Herman v. Blomme* (1991), 115 A.R. 371 (Q.B.), aff'd in part (1992), 127 A.R. 151 (C.A.); *Eastern Irrigation District v. Tooke*, [1993] 3 W.W.R. 329 (Alta. C.A.); *Mund v. Medicine Hat* (1988), 59 Alta. L.R. (2d) 199 (C.A.).

[132] *Maly v. Ukrainian Catholic Episcopal Corporation* (1976), 70 D.L.R. (3d) 691 (Alta. Dist. Ct.).

[133] *Jones v. Semen*, 1999 ABQB 473; *cf. Mildenburger v. Prpic*, [1976] 4 W.W.R. 67 (Alta. S.C.).

[134] *Maly v. Ukrainian Catholic Episcopal Corporation* (1976), 70 D.L.R. (3d) 691 (Alta. Dist. Ct.).

[135] *Croft v. Mudie*, (1986) 76 A.R. 26 (Q.B.); *Mund v. Medicine Hat* (1988), 59 Alta. L.R. (2d) 199 (C.A.); *Jones v. Semen*, 1999 ABQB 473.

[136] *Maly v. Ukrainian Catholic Episcopal Corporation* (1976), 70 D.L.R. (3d) 691 (Alta. Dist. Ct.).

[137] *Woodsworth v. Harvey* (1976), 1 A.R. 241 (S.C.T.D.); *Jones v. Semen*, 1999 ABQB 473; *cf. Croft v. Mudie* (1986), 76 A.R. 26 (Q.B.).

[138] *Croft v. Mudie* (1986), 76 A.R. 26 (Q.B.); *Condominium Plan No. 7810477 (Owners of) v. Condominium Plan No. 7711723 (Owners of)* (1997), 55 Alta. L.R. 198 (Q.B.).

improvement is $3,000 and the value of the land encroached is $5,000. Section 69 offers two straightforward outcomes: (1) a $3,000 lien in B's favour against C's land or (2) an order that B is entitled to retain the encroached land with compensation to C (i.e. $5,000). These results represent opposite poles of a spectrum of ownership, ie. either B will end up with both the land and the improvement or C will. However, the subtleties of property law permit many other possibilities for resolving disputes as to the land's ownership and its use. For example, it is possible for B to own the improvements with compensation to C for the use of the land. Though not express in the structure and wording of s. 69, courts have crafted such remedies, presumably under paragraph (1)(b)'s provision for the land to be retained. Recent cases have shown s. 69 to be a very flexible tool, both in addressing the parties' circumstances and the requirements of planning law.

1. Lien

[100] Section 69(1)(a) provides for "a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements". As linked to the enhanced value of the encroached land, a lien will only be a satisfactory remedy where the value is enhanced. Otherwise, as stated in *Maly v. Ukrainian Catholic Episcopal Corporation*:[139]

> Where a great deal of work has been expended but it is work of limited value, the appropriate application is to seek the alternative relief of, in effect, a forced sale.

Accordingly, the value of the improvements must be put in evidence by the claimant. As noted earlier, while "improvement" is judged objectively, whether value is enhanced contains a subjective element in the owner's favour. Thus, where value is not enhanced from the owner's perspective, e.g. the land is encroached by a house or garage, a lien is not appropriate and the owner will not be forced to purchase improvements that bring no benefit to the land. For example, in *Jones v. Semen*, while the encroaching house and garage were improvements

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[139] (1976), 70 D.L.R. (3d) 691 at 694 (Alta. Dist. Ct.). See also *SW Properties Inc. v. Calgary (City)*, 2003 ABCA 10.

objectively considered, they decreased the overall value of the owner's land by impeding its use for farming.[140]

2. Retention of the land

a. Ownership or use?

[101] Where the improvement does not enhance the value of the encroached land, the court may turn to s. 69(1)(b) which allows for a finding that the claimant is "entitled to or may be required to retain the land". The phrasing is somewhat ambiguous. Is there entitlement to the land (i.e. ownership) or simply an entitlement to retain the land (i.e. mere use)? The cases suggest both, courts having crafted remedies ranging from an outright conveyance to lesser possessory interests. The description of these other interests is confusing. Where the s. 69 claimant only retains the use of the land, courts have often used the term "lien" but alternately also describe the interest as an "easement" or "licence".[141] However, where the remedy carries rights to possession that would exclude the owner from the land, as where the encroaching improvement is the improver's home, the interest created more closely resembles a lease, than a lien, licence, or easement. As courts have additionally directed a s. 69 claimant to compensate the owner for the use of the land, these use-based remedies should be understood as falling under s. 69(1)(b); s. 69(2) does not extend compensation to the owner for liens granted under s. 69(1)(a).[142] The statutory basis of these remedies should also be understood as derived from the land's improvement and principles of unjust

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[140] 1999 ABQB 473.

[141] For example, *Sel-Rite Realty Ltd. v. Miller* (1994), 20 Alta. L.R. (3d) 58 at 70 (Q.B.), refers to a lien, constructive trust, easement, and license; *344408 Alberta Inc. v. Fraser*, 1999 ABQB 84, consistently uses "lien or easement" in the alternative. *SW Properties Inc. v. Calgary (City)*, 2003 ABCA 10 at para. 12, characterised the chambers order as an easement before setting it aside for lack of jurisdiction.

[142] It has been noted that there is no statutory mechanism in the *Land Titles Act* comparable to s. 74 to require the Registrar to cancel one title and issue a new one as a result of a successful claim under the *Law of Property Act*, s. 69: W.H. Hurlburt, "Improvements Under Mistake of Ownership: Section 183 of the *Land Titles Act*" (1978) 16 Alta. L. Rev. 107 at 115. While this is so, where courts have found the improver entitled to the land they have ordered a conveyance and directed compensation: *Jones v. Semen*, 1999 ABQB 473; *Croft v. Mudie* (1986), 76 A.R. 26 (Q.B.); *Mildenburger v. Prpic*, [1976] 4 W.W.R. 67 (Alta. S.C.).

enrichment rather than the doctrine of prescription, there being no time requirement involved.[143]

[102] A remedy under s. 69(1)(b) requires courts to consider what is "just under all circumstances of the case." The circumstances of the case are relevant, firstly, to determining whether s. 69(1)(a) or s. 69(1)(b) offers a more appropriate remedy. For example, in *Herman v. Blomme*, as the s. 69 claimant had a similar income generating property nearby, the Court declined to impose a forced sale on the owner and granted a lien instead.[144] Secondly, the circumstances of the case are relevant to determining the nature of an appropriate remedy under s. 69(1)(b). In *Jones v. Semen*, for example, the Court weighed the s. 69 claimants' longstanding residence on the land against the owner's property speculation and farming enterprise, finding in the claimants' favour:[145]

> Because of their strong connection to this parcel of land, their retention of it should not be restricted to an easement or a right of way. They should own the land. Land should be transferred to them that will maintain the integrity of the home site.

Thirdly, the circumstances of the case also determine how much land is retained. Again, as noted in *Jones v. Semen*, there is:[146]

> ... a tremendous amount of discretion in determining what amount of land should be retained by the successful applicant. 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 by Mr. Semen, 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".

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[143] Prescriptive easements were abolished in Alberta in 1903: *An Ordinance Respecting Limitation of Action in Certain Cases*, O.W.N.T. 1903(2), no. 7. s. 1. The enactment of the *Limitations Act* moved this provision to the *Law of Property Act*:

> 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.

[144] (1991), 115 A.R. 371 (Q.B.), aff'd in part (1992), 127 A.R. 151 (C.A.). The lien imposed a forced purchase on the owner of improvements he found aesthetically displeasing. However, the improvements generated income and the case notes the owner's preference for a lien over a forced sale.

[145] 1999 ABQB 473 at para 29.

[146] 1999 ABQB 473 at para 34.

b. Compensation

[103] Section 69(2) additionally allows a court to require compensation to the owner in conjunction with a remedy under s. 69(1)(b). Where the land is conveyed to the claimant, compensation has been calculated on evidence as to the fair purchase value of the land, rather than the amount by which the claimant's land is increased.[147] Where the claimant only receives the use of the land, compensation has been similarly calculated, even though the claimant takes a reduced interest.[148]

E. Indefeasible Title and Lasting Improvements

1. Priority to s. 69

[104] The cause of the hardship in *Boyczuk v. Perry* was that Boyczuk's claim to quiet title was foreclosed when the Perrys purchased the land for value and acquired indefeasible title. Similarly, claims 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*:[149]

> 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.[150] As such, it should be recognised that s. 69 operates as an exception to indefeasibility, in contrast to the limits placed on adverse possession. As O'Leary J. concluded in *Sel-Rite Realty Ltd. v. Miller*, the *Law of Property Act* "appears to contemplate in express terms that to the extent that it permits a lien and may

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[147] *Jones v. Semen*, 1999 ABQB 473. Presumably, the value by which the owner's land is decreased by the loss of the land is also an inappropriate test, at least where the owner's loss is slight.

[148] In *344408 Alberta Inc. v. Fraser*, 1999 ABQB 84, the value of the "lien or easement" was calculated according to a municipal formula used for conveyancing purposes.

[149] (1994), 20 Alta. L.R. (3d) 58 at 67 (Q.B.).

[150] Section 69 was raised despite an intervening transfer in the following cases: *Mildenburger v. Prpic*, [1976] 4 W.W.R. 67 (Alta. S.C.); *Croft v. Mudie* (1986), 76 A.R. 26 (Q.B.); *Sel-Rite Realty Ltd. v. Miller* (1994), 20 Alta. L.R. (3d) 58 (Q.B.); *344408 Alberta Inc. v. Fraser*, 1999 ABQB 84.

require a conveyance that title may be defeasible to the extent required to accommodate that section."[151]

2. Stopping the limitation period

[105] As to what events might stop the running of the limitation period, courts should be free to develop the law in this area. However, an issue that will need to be addressed at some point is the question of acknowledgment. If the owner acknowledges that lasting improvements have been made on his or her land but does nothing further to oust the improver, is the limitation period restarted?

F. Effect of the *Limitations Act*: Limitation Period Imposed, Claims Postponed

1. The problem

[106] Section 69 speaks of *lasting* improvements being made *at any time*. The remedies provided in s. 69 are also continuing remedies, either a lien against the property or its retention. Moreover, these remedies apply not only to the original improver but are extended forward to his or her assigns. Consistent with these factors, s. 69 claims were not expressly subject to a limitation period under the old Act. Indeed, the very existence of mistaken belief raises a problem of discoverability. As noted by W.H. Hurlburt:[152]

> The imposition of a limitation period would go a long way towards defeating the purpose of section 183 [of the *Land Titles Act* now the *Law of Property Act*, s. 69], as by its very nature it applies in cases of mistake in which the error may be undetected for many years.

Imposing a limitation period, therefore, carries a strong risk of claims being foreclosed before anyone had knowledge of the situation. This problem has been avoided as the courts have accepted claims for lasting improvements made more

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[151] *Sel-Rite Realty Ltd. v. Miller* (1994), 20 Alta. L.R. (3d) 58 at 69 (Q.B.). In an earlier decision in *Sel-Rite*, MacLean J. reached a contrary conclusion at [1991] A.J. 25 at para 11 (Q.B.): "The defendants' title to Parcel No. 2 is indefeasible under the *Land Titles Act* and the encroachment provisions of the *Law of Property Act* and the doctrine of unjust enrichment are not an exception to that indefeasibility." However, O'Leary J.'s conclusion, though *obiter*, accurately states s. 69's application in the cases noted above.

[152] "Improvements Under Mistake of Ownership: Section 183 of the *Land Titles Act*" (1978) 16 Alta. L. Rev. 107 at 115.

than ten years prior.[153] However, the *Limitations Act* takes a different approach to knowledge and discoverability.

[107] Under the *Limitations Act*, claims for remedial orders under the *Law of Property Act*, s. 69 are expressly excluded from the discovery rule.[154] It is, therefore, reasonable to conclude that s. 69 claims are now subject to the ultimate rule. Indeed, this was the intended outcome, as stated in the *Limitations Report*:[155]

> The new Alberta Act specifically excepts claims based on the adverse possession of land from the operation of the 2-year discovery limitation period. However, the 15-year ultimate limitation period will still apply. The *Law of Property Act*, s. 60 [now s. 69], will be subject to the same exception.

However, as with claims to recover possession, s. 69 claims are based on a continuing trespass.[156] Consequently, s. 69 claims will also trigger s. 3(3)(a) of the *Limitations Act*. The result will be to postpone the claim arising until the conduct ends – again, creating the practical result of a limitation period that effectively never runs. Thus, despite the intention to change the law and to impose a limitation period, s. 69 claimants are effectively exempted from the obligation to bring a claim within a reasonable period.

2. Should s. 69 claims be subject to a limitation period?

[108] Although s. 69 claims were not subject to a limitation period under the old Act, it was not widely recognised that s. 69 is an exception to indefeasibility. Allowing s. 69 to operate indefinitely, widens this exception with consequences for the security of future ownership and transferability. In contrast, limiting the

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[153] Lasting improvements appear to have been made outside of the ten year period in *Canada Permanent Trust Co. v. Herron*, [1975] A.J. No. 61 (Alta. S.C.T.D.), *Croft v. Mudie*, (1986) 76 A.R. 26 (Q.B.), *Herman v. Blomme* (1991), 115 A.R. 371 (Q.B.), *Sel-Rite Realty Ltd. v. Miller* (1994), 20 Alta. L.R. (3d) 58 (Q.B.); *344408 Alberta Inc. v. Fraser*, 1999 ABQB 84, although the improvement in *Fraser* had shifted over time onto the adjoining land; *SW Properties Inc. v. Calgary (City)*, 2003 ABCA 10.

[154] The *Limitations Act* states:

> 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*.

[155] *Limitations Report* at 39.

[156] At a minimum, the lasting improvements will be an indirect trespass on the encroached land.

time for bringing a s. 69 claim narrows this exception. For the benefit of protecting the concept of indefeasibility, increasing the security of future ownership, and ensuring transferability, it is appropriate to impose a limitation period on s. 69 claims. While this approach will leave some claimants without remedy under the *Law of Property Act*, s. 69, when the limitation period expires some claimants will acquire a new claim to quiet title as an adverse possessor.

[109] The *Limitations Act* places s. 69 claims under the ten year ultimate rule. The ultimate rule is preferable to the discovery rule for two reasons. First, s. 69 claims do not fit easily within the injury-based approach of the discovery rule; a s. 69 claimant is, at least in part, the cause of his or her own "injury". Second, the discovery rule is problematic given the s. 69 element of mistaken belief. If we insist that the register is a conclusive and simple means of identifying ownership, then we ought to know what lands we own. Moreover, the construction of lasting improvements will often trigger permit requirements under planning law, helping to identify mistaken ownership before improvements are made. Thus, on the one hand, s. 69 accepts a reasonable, though mistaken belief, in ownership while, on the other hand, a discovery rule will attribute deemed knowledge of ownership to the s. 69 claimant. Consequently, the better approach is for s. 69 claims to remain under the ten year ultimate rule.

[110] If s. 69 claims are to be subject to an ultimate rule, it is necessary to consider what event will trigger the limitation period. The main elements of the claim are a mistaken belief in ownership and the making of lasting improvements. Between these two, the making of lasting improvements is the appropriate trigger. This Report, therefore, recommends that claims under s. 69 of the *Law of Property Act* should be subject to a ten year limitation period that runs from the making of lasting improvements and that is not postponed by s. 3(3)(a) of the *Limitations Act*.

RECOMMENDATION No. 6
Claims under s. 69 of the *Law of Property Act* should be subject to the *Limitations Act*'s ultimate rule. For limitations purposes, such claims should arise when the improvements are made and should not be postponed by the fact of continuing trespass.

3. Transitional claims

[111] As with claims to recover possession, s. 69 claims also fall within the *Limitations Act* transitional discovery rule.[157] The problem of deemed knowledge in s. 69 situations has already been noted, making it inappropriate to apply a discovery rule to s. 69 claims. Moreover, there is an issue to be raised with respect to giving adequate notice to s. 69 claimants. It does not appear to have been widely recognised that the *Limitations Act* intended to subject s. 69 claims to a ten year limitation period. The additional conclusion that s. 69 claims are subject to the two year transitional discovery rule and that claimants should have acted before 1 March 2001 may be seen as an undue hardship. Therefore, although the fact that s. 69 claims are an exception to indefeasibility that would warrant their being treated differently than claims to recover possession, this Report recommends that s. 69 claims also be exempted from the transitional discovery rule. This recommendation will have the added educational value of both claims to recover possession and s. 69 claims being subject to a prospective limitation period if this Report's recommendations are implemented.

> **RECOMMENDATION No. 7**
> **Claims under s. 69 of the *Law of Property Act* should be excluded from the discovery rule in the *Limitations Act*'s transitional provision.**

4. Summary

[112] The *Limitations Act* applies to claims for remedial orders brought on or after 1 March 1999, regardless of when the claim itself arose. Claims filed before 1 March 1999, therefore, would proceed under the old Act. With respect to claims filed after 1 March 1999, however, it is appropriate to summarise how the

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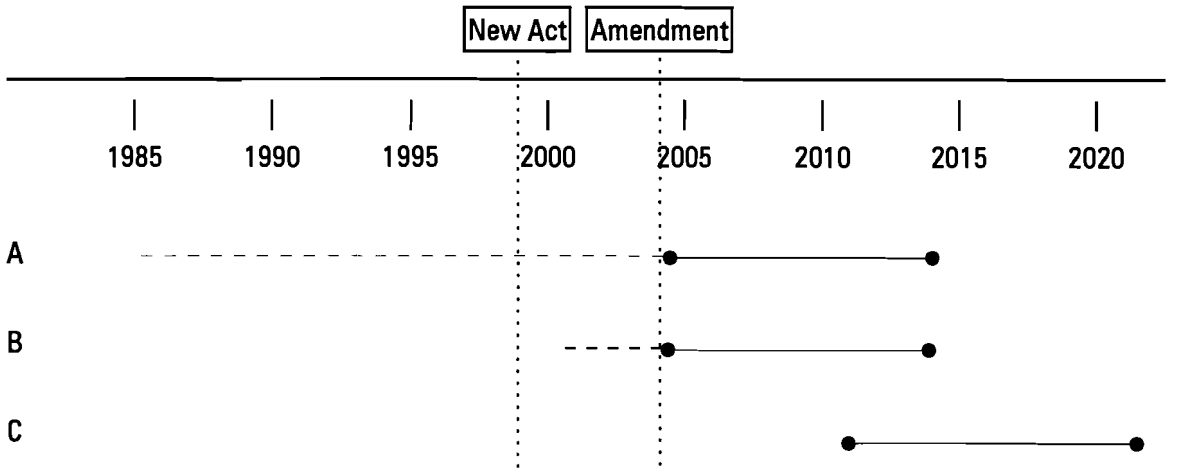
[157] The *Limitations Act* states:

> 2(2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of
>
> (a) the time provided by the *Limitation of Actions Act*, R.S.A. 1980 c. L-15, that would have been applicable but for this Act, or
>
> (b) two years after the *Limitations Act*, S.A. 1996 c. L-15.1, came into force,
>
> the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Limitations Act will apply in light of the recommendations made by this Report. Three scenarios are shown in Figure 4.1 and discussed below.

[113] With respect to claims filed after the *Limitations Act* came into effect, it makes little difference whether the claim arose before or after 1 March 1999. Claims that arose before 1 March 1999 do not appear to have been subject to a limitation period under the old Act.[158] Claims that arise on or after 1 March 1999 are postponed. Thus, neither claim will be subject to an effective limitation period until Recommendation 6 is implemented. As shown in scenarios A and B, were Recommendation 6 implemented by an amendment brought into force in 2004, A and B would have ten years from 2004 to claim for lasting improvements. Given that the effect on such interim claims will be merely to extend the limitation period, it is not appropriate to require the exceptional measure of retroactive legislation. Once Recommendation 6 is implemented, the ten year limitation period will run from the time the improvements are made as shown in scenario C.

Figure 4.1



[158] However, were the transitional discovery rule in s. 2(2)(b) to apply, the claimant would only have until 2001 to act on the claim.

CHAPTER 5. PLANNING LAW CONSIDERATIONS

A. Introduction

[114] Where a claim to quiet title or a claim under the *Law of Property Act* s. 69 succeeds, an application to amend the register will trigger planning law requirements. The *Land Titles Act* requires that all instruments comply with the *Municipal Government Act*.[159] The *Municipal Government Act* prevents the registration of instruments that will have the effect of subdividing land unless they have subdivision approval.[160] Thus, where a successful claim extends to only part of the land covered by the owner's certificate of title, subdivision approval will be required before registration. This further step of review protects and advances the public interest in land use and development.

B. Adverse possession

[115] Where a claim to quiet title effects a subdivision, s. 654(2) of the *Municipal Government Act* is relevant:

> 654(2) A subdivision authority may approve an application for subdivision approval even though the proposed subdivision does not comply with the land use bylaw if, in its opinion,
>
> (a) the proposed subdivision would not
>
> (i) unduly interfere with the amenities of the neighbourhood, or

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[159] The *Land Titles Act* states:

> 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.
> (2) Notwithstanding subsection (1), if a registration of an instrument or caveat is made in contravention of subsection (1), that registration ceases to be voidable when any person has in good faith acquired rights for value in the subdivided land.

[160] The *Municipal Government Act* states:

> 652(1) 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.
> ...
> (5) A Registrar may not accept a caveat for registration that relates to an instrument that has the effect or may have the effect of subdividing a parcel of land unless ... subdivision approval has been granted in respect of that subdivision.

Section 616 defines "subdivision" as "the division of a parcel of land by an instrument..." and "parcel" refers to the "aggregate of one or more areas described in a certificate of title...". "Instrument" is defined with reference to the *Land Titles Act* and includes a court order or judgment.

> (ii) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,
>
> and
>
> (b) the proposed subdivision conforms with the use prescribed for that land in the land use bylaw.

Adverse possession represents a situation where there will have been a long-standing use of the land within openly (though mistakenly) held boundaries. In many cases, the use of the land will already be within the prescribed use, non-conforming use being likely to have attracted attention raising the issue of ownership within the limitation period. Moreover, even as regards boundaries, the "proposed" subdivision will already be an established part of the neighbourhood – a factor to take into account in assessing the subdivision's impact on the relevant amenities and on the use, value, and enjoyment of neighbouring parcels. This is not to suggest that subdivision approval is assured, but nor does it imply that approval is impossible.

C. *Law of Property Act*, s. 69

1. Lasting improvements and development permits

[116] Changes likely to qualify as lasting improvements under the *Law of Property Act*, s. 69 will often require a development permit. The match between s. 69 and planning law is not exact but the overlap should assist to identify mistaken ownership before the improvement is made. For example, the *Municipal Government Act* definition of "development" is broad enough to catch most lasting improvements.[161] Where municipal bylaws specify exemptions to development permit requirements, the exempted changes tend to be non-lasting improvements outside the scope of the *Law of Property Act*, s. 69. For example, most of the

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[161] Section 616 of the *Municipal Government Act* defines "development":

> 616(b) "development" means
>
> (i) an excavation or stockpile and the creation of either of them,
>
> (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 buildings, 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.

changes exempted by the City of Edmonton Zoning Bylaw would not qualify as lasting improvements.[162]

2. Subdivision approval

[117] As discussed, s. 69 offers flexibility in crafting remedies outside of a straight conveyance. While a conveyance of a part of a parcel is likely to meet resistance, planning requirements can better accommodate the registration of lesser interests in land.

a. Lease

Where the remedy takes the form of a lease, subdivision approval may not be required in some narrow circumstances. Though noting a fair amount of uncertainty in the law, F.A. Laux draws the following conclusions:[163]

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[162] City of Edmonton Zoning Bylaw No. 12800, s. 12.2 exempts the following changes from obtaining a development permit:

> (1) farm buildings, other than those used as Dwellings;
> (2) flood control and hydroelectric dams;
> (3) single Storey Accessory Building not greater than 10.0 m^2 in Floor Area;
> (4) interior alterations and maintenance to a residential building ...;
> (5) interior alterations and maintenance to a non-residential building, including mechanical or electrical work...;
> (6) the use of a building or part thereof as a temporary polling station...;
> (7) the erection of any fence, wall or gate ...;
> (8) a temporary structure, the sole purpose of which is incidental to the erection, alteration or marketing of a building ...;
> (9) the erection of towers and poles, television and other communication aerials, masts or towers...;
> (10) the parking or storage ... of any uninhabited Recreational Vehicle...;
> (11) the construction and maintenance of an Essential Utility Services development;
> (12) Landscaping, where the existing grade and natural surface drainage pattern is not materially altered ...;
> (13) minor structures ... ancillary to Residential Uses, such as a barbecue, dog house, lawn sculpture or bird feeder;
> (14) demolition of a building or structure ...;
> (15) the Temporary Use of a portion of a building or structure ...for the marketing of the building or structure; and
> (16) the erection of an uncovered deck ...;
> (17) the following Signs/Activities ....

[163] Frederick A. Laux, *Planning Law and Practice in Alberta* (3d ed., Edmonton: Juriliber, 2002) 11-24 [Laux].

> A lease of part of a parcel to accommodate any use, where the lease term does not exceed three years, requires no subdivision approval to be fully effective and enforceable.
>
> A lease for any duration of a second (or more) dwelling where a development permit was issued for the dwelling probably requires no subdivision approval.
>
> A lease of any duration of a building or a part of a building, regardless of use, probably requires no subdivision approval.
>
> Any bare-land lease of a portion of a parcel for a term in excess of three years probably requires subdivision approval unless it is patently clear that no planning or subdivision concerns arise out of the lease. The proprietary interests arising from the lease, the intended use of the leased land and the duration of the lease are relevant factors in assessing its planning impact.

As regards lasting improvements to land, the third and fourth paragraphs are significant in light of the remedies crafted to date. For example, the remedy in *Sel-Rite Realty Ltd. v. Miller* was limited to the time that the house remained in its present position.[164] In theory this reduces the potential conflict with planning requirements, though given the test of "lasting" improvement the remedy nevertheless has an aspect of permanency that may still conflict with long-term planning and development.

b. Easement

[118] Remedies in the nature of easements may also avoid the requirement of subdivision approval in some cases. As Laux explains:[165]

> [A]s a matter of practice, registrars of titles treat an instrument that creates an interest in part of a parcel as a subdivision only where the granting instrument confers unto the grantee an exclusive right of use and enjoyment of the part which is covered by the instrument. Since a conventional easement or right of way generally leaves the grantor with the right of use and enjoyment of the land affected by the granting instrument, subject only to the right of limited use on the part of the grantee, registrars take the view that no "division" of land occurs in a grant of a right of way or easement. Consequently, no subdivision approval is required. Such an interpretation, while not giving effect to the literal meaning of the word "divide", appears to

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[164] (1994), 20 Alta. L.R. (3d) 58 at 70 (Q.B.). As O'Leary J. observed:

> I do feel, however, that the Millers should not be required to give up permanently a piece of land, an odd-shaped piece and, at the same time, I do not feel that the planning authority should be required to abide by a court order that does not satisfy its requirements. For that reason I think that this should be more or less in the form of an easement or license or something of that nature that runs with the land, both the benefit and the burden, but that will only last so long as the house remains in its present position.

[165] Laux at 11-11.

> be consistent with the spirit and intent of the subdivision provisions of the *Municipal Government Act*. A major reason for controlling subdivisions through an approved process is the concern over their impact on municipal infrastructure (e.g. roads, utilities, and park reserves). A right of way or easement generally does not create a need for or put a demand on such infrastructure. Thus, no subdivision approval ought to be required.

However, as with a lease, easements can nevertheless obstruct long-term planning and development.

c. Conclusion

[119] While the *Law of Property Act* affords the flexibility to craft remedies that might not require subdivision approval as a condition to registration, avoiding subdivision approval should not be taken as the overriding criterion in crafting a remedy in doubtful cases.[166] Such an approach might impair the fair balancing of the rights between the owner and the claimant, while still frustrating planning goals. Further, crafting the remedy to avoid subdivision approval creates additional problems. As Laux describes:[167]

> [T]he problem with engaging a court in assessing the impact of an unapproved lease in terms of its planning consequences for purposes of deciding whether it required subdivision approval is that the court, in essence, assumes the very function of a subdivision approving authority. Yet, it has neither the expertise nor the resources of the authority. That is, the court will exempt the lease from the subdivision approval process where it finds no adverse planning impact. That is the very circumstance that would motivate a subdivision authority to grant subdivision approval of the lease. In effect, the court would become the approving authority and that ought not to be the case.

Thus, a remedy should be crafted, in the first instance, to resolve the dispute between the parties, leaving the subdivision authority to determine whether subdivision approval is required and if the resulting subdivision meets the criteria for approval.

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[166] However, where the likelihood of obtaining subdivision approval is slight, this result suggests a lien under the *Law of Property Act*, s. 69(1)(a) as a more appropriate remedy.

[167] Laux at 11-19 to 11-20.

[120] Moreover, planning requirements exist to protect and advance the public interest in land use.[168] The laws should not be stretched to accommodate an interest in land that would undermine these goals, regardless of how that interest arises. As Laux explains:[169]

> Any instrument (no matter what the underlying transaction or motivation for it may have been) that has the effect of creating a separate fee simple interest in part of a parcel of land is unquestionably a subdivision and, subject to the s. 652(2) exceptions, requires subdivision approval before it may be registered. To illustrate, a testamentary bequest of a fee simple interest in part of a parcel can only give title to the beneficiary if subdivision approval is granted. If approval cannot be obtained by the executor or administrator of the estate, the complete implementation of the bequest may be frustrated from a practical point of view. Similarly, consensual property settlements arising in divorce proceedings that involve dividing the fee simple interest in a parcel between husband and wife and creating separate titles cannot be effected without subdivision approval. The same holds true if the division of a fee simple interest in a parcel is ordered by a court adjudicating a property dispute. Indeed, any court-ordered division of a fee simple interest in a parcel is subject to subdivision approval if the order is to be registered so as to create separate titles, as in the case of a partition order pursuant to Pt. 3 of the *Law of Property Act*.

As with any other land transactions, s. 69 claims will have to satisfy subdivision approval.

[121] What if subdivision approval is refused? Laux comments:[170]

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[168] The *Municipal Government Act* states:

> 617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
>
> (b) 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.

[169] Laux at 11-8. The *Municipal Government Act*, s. 652(2) exceptions mentioned involve large parcels of land (eg. ½ section) that are generally outside the scope of *Law of Property Act*, s. 69 claims.

[170] Laux at 11-4 to 11-5. The *Planning Act* provision referred to is R.S.A. 1970, c. 276, s. 16(d):

> 16. Land shall not be subdivided unless ...
>
> (d) the proposed subdivision complies in all respects with this Act and The Subdivision and Transfer Regulations, and is approved in the manner described in those regulations.

> ... transactions between parties amounting to an unapproved subdivision are probably not *ipso facto* rendered void by the *Municipal Government Act*. The Act simply prohibits registration of an instrument that has the effect of subdivision in the absence of prior subdivision approval. It does not purport to prohibit parties from entering into an unapproved transaction that has the effect of subdivision. If the Legislature had intended to outlaw such transactions it would have carried forward the wording contained in an earlier *Planning Act*.
>
> Although a transaction amounting to a subdivision that has not been approved under Pt. 17 of the *Municipal Government Act* may confer some rights on the parties *inter se*, because the grantee is unable to register his interests effectively as against third parties, the Act creates a substantial deterrent to informed persons entering into such transactions without subdivision approval. As illustrated above, if they do so, many perils await them.

Though the transaction in a s. 69 claim is based on a court order, the improver will nevertheless be left in the position of not being able to register his or her interest in the encroached land. In some circumstances it might be possible to vary the order in response to the subdivision authority's concerns, perhaps to the extent of opting for a lien under s. 69(1)(a).

CHAPTER 6. CONCLUSION

[122] This project has proceeded from the proposition that disputes arising from the ownership and use of land are inevitable. Despite our land titles and land surveying systems, our actual, and sometimes practical, occupation of land may not correspond with the technical language of legal descriptions on certificates of title.

[123] This project has also proceeded from the position that the *Land Titles Act* and the *Limitations Act* both contain valuable principles of broad application. In considering how best to resolve disputes regarding the ownership and use of land, these principles should be protected. Accordingly, the objectives for this project have been:

- to protect future ownership of land;
- to ensure land's transferability; and
- to prevent the revival of stale claims.

[124] With these principles in mind, the recommendations in this Report provide a system for resolving certain land disputes with appropriate protection for both the land titles core concept of indefeasibility and the limitations requirement that disputes be resolved in a timely manner. Between the common law and statutory requirements, registered owners are well-protected against claims of adverse possession or claims under s. 69 of the *Law of Property Act*. However, the law retains scope for deserving claims to be fairly assessed. However, as with any type of land transfer, even where successful such claims must still be weighed against the public interest in land use and development and must be consistent with planning law requirements.

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May 2003

APPENDIX

Summary of proposed changes to the *Limitations Act*, R.S.A. 2000, c. L-12

Legislation	Proposed Change
***Limitations Act*, R.S.A. 2000, c. L-12** **Application** 2(2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of (a) the time provided by the *Limitation of Actions Act*, R.S.A. 1980 c. L-15, that would have been applicable but for this Act, or (b) two years after the *Limitations Act*, S.A. 1996 c. L-15.1, came into force, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.	Exempt claims for remedial orders for possession of real property
Limitation periods (3) For the purposes of subsection (1)(b), (a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs; (b) a claim based on a breach of a duty arises when the conduct, act or omission occurs; (c) a claim based on a demand obligation arises when a default in performance occurs	Exempt claims for remedial orders for possession of real property Exempt claims for remedial orders under section 69 of the *Law of Property Act* Provide that donees are successor owners of claims for a remedial order for possession of real property

after a demand for performance is made; (d) a claim in respect of a proceeding under the *Fatal Accidents Act* arises when the conduct that causes the death, on which the claim is based, occurs; (e) a claim for contribution arises when the claimant for contribution is made a defendant in respect of, or incurs a liability through the settlement of, a claim seeking to impose a liability on which the claim for contribution can be based, whichever first occurs.	
(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.*	Replace the word "including" with "or"
Acknowledgment and part payment	
8(1) In this section, "claim" means a claim for the recovery, through the realization of a security interest or otherwise, of an accrued liquidated pecuniary sum, including, but not limited to a principal debt, rents, income and a share of estate property, and interest on any of them.	Include claims for remedial orders for possession of real property in the definition of "claim"
(2) Subject to subsections (3) and (4) and section 9, if a person liable in respect of a claim acknowledges the claim, or makes a part payment in respect of the claim, before the expiration of the limitation period applicable to the claim, the operation of the limitation period begins again at the time of the acknowledgment or part payment.	
Persons affected by exceptions for agreement, acknowledgment and part payment	
9(1) An agreement and an acknowledgment must be in writing and signed by the person adversely affected. (2) An agreement made by or with an agent has	Claims for remedial orders for possession of real property will be included as a consequence of

the same effect as if made by or with the principal. (3) An acknowledgment or a part payment made by or to an agent has the same effect as if it were made by or to the principal. (4) A person has the benefit of an agreement, an acknowledgment or a part payment only if it is made (a) with or to the person, (b) with or to a person through whom the person derives a claim, or (c) in the course of proceedings or a transaction purporting to be pursuant to the *Bankruptcy and Insolvency Act* (Canada). (5) A person is bound by an agreement, an acknowledgment or a part payment only if (a) the person is a maker of it, or (b) the person is liable in respect of a claim (i) as a successor of a maker, or (ii) through the acquisition of an interest in property from or through a maker who was liable in respect of the claim.	changes to s. 8(1)
Re-entry (new provision)	Provide that re-entry is only effective to recover possession of land within the limitation period
***Land Titles Act*, , R.S.A. 2000, c. L-4** **Registration of judgment quieting title, etc.** 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	Update cross-reference

recovering the judgment be quieted in the exclusive possession of the land, pursuant to the *Limitation of Actions Act*, RSA 1980 c. L-15, may file a certified copy of the judgment in the Land Titles Office.	