Andriet v. County of Strathcona No. 20: Court of Appeal Conjures a Creative Accretion Approach
by Arlene Kwasniak and Jonnette Watson Hamilton

Andriet v. County of Strathcona No. 20, 2008 ABCA 27
http://www2.albertacourts.ab.ca/jdb%5C2003-%5Cca%5Ccivil%5C2008%5C2008abca0027.pdf

In this important reserved judgment, the Alberta Court of Appeal applied a creative approach to attempt to reconcile uncertainties relating to common law accretion with a Torrens Land Titles system, and in doing so once again found for private ownership of accreted lands over Crown ownership of exposed beds and shores.

Andriet v. County of Strathcona No. 20 began as an application by a number of owners of lots which abutted the shore of Grandview Bay on Cooking Lake, just east of Edmonton. Or rather, their lots had in the past abutted the lake's shore. Like many shallow prairie lakes, the waters of Cooking Lake had receded significantly. The shore is now about 1,000 feet lakeward from where it was when titles to the lots were first surveyed, which was over one hundred years ago, in 1902. The lake is a popular summer cottage resort area, especially for nearby Edmontonians.

The lot owners all applied to the Registrar of Land Titles to have the former lake bed accreted to their lots, thereby preserving their access to the lake and their other riparian rights. While the trial judge denied the lot owners riparian rights and awarded the additional land to the Crown, the Court of Appeal reversed that decision. It held that the former lake bed had accreted to the lot owners and that each was entitled to their proportionate share of the current shoreline. Each lot owner therefore had their access to the lake and the status of their lots as water frontage re-established.

By way of background, disputes over accreted land in Alberta have always been framed as contests between the Crown, as owner of all beds of lakes and rivers, and of permanent and naturally occurring bodies of water (currently under s. 3 of the *Public Lands Act,* R.S.A. 2000, c. P-30), and riparian owners who sought to acquire title to exposed land under the process prescribed in the *Land Titles Act* (R.S.A. 2000, c. L-4, s. 89). Riparian owners, by definition, are owners or occupiers whose land abuts the shore of natural water bodies, such as lakes, and water courses, such as rivers. At common law, riparian owners possessed riparian rights such as the right to use water. The doctrine of accretion states that the size of the parcel of land owned by riparian owners is increased by the gradual, imperceptible retreat of the water abutting that parcel of land.

Very early in the history of what became the province of Alberta, the Dominion government determined that a water rights system based on common law riparian rights was not suitable for this arid region. In order to entice settlers here to farm, they would need access to water that would not necessarily be flowing adjacent to their land. It was thought that only full Crown ownership and control of water, and of beds and shores, would make feasible the irrigation that would stimulate settlement. Hence the Dominion passed the *North-west Irrigation Act of 1894* (57-58 Victoria, 1894, c. 30) to assert Crown ownership of water resources and of beds and

shores, and to create a water rights system to replace riparian rights. However, notwithstanding this legislation, it became clear that at least some common law riparian rights persisted.

Did the riparian right of accretion persist? The first and the key case concerning the doctrine of accretion is a 1928 decision by the Court of Appeal, *Clark v. Edmonton (City)*, [1928] 1 W.W.R. 553. That dispute involved a riparian owner, Clark, who claimed ownership of a one-and-a-half acre bench of land on the North Saskatchewan River as a result of accretion. The court first had to decide what principles of law to use to determine ownership. Would it be the doctrine of accretion that had developed in England when riparian land was slowly added to as a result of alluvian or detritus accumulation or by the recession of waters? The majority determined that they did not need to answer this question because they found that Clark had not established accretion. Nevertheless, they made clear that if the doctrine were to apply in Alberta, the owner would have to be a riparian in the sense that the watercourse or water body formed the boundary of the owner's or occupier's land. The Supreme Court of Canada overturned the Alberta Court of Appeal's decision: *Clark v. Edmonton (City)*, (1930) S.C.R. 137. The Supreme Court determined that the English doctrine of accretion applied in Alberta because it had not be specifically altered by legislation, and, departing from the Court of Appeal, that Clark had established accretion. However they agreed with the Court of Appeal that a water body or watercourse had to form the natural boundary of the land in order for the owner to have riparian rights, and consequently for accretion to be possible.

The doctrine of accretion, with its reliance on changing natural boundaries, sits uneasily within the certainty and fixed nature of the survey grid that defined the physical extent of land ownership in Alberta in the first days of homesteading. In 1871, the Dominion of Canada developed a grid for what were then the North-West Territories which was known as the Dominion Land Survey (DLS). About 800,000 square miles of prairie was divided into 36-square-mile townships, each of which was divided into 36 one-square-mile sections, each of which was further divided into the familiar four 160-acre quarter-sections. Homesteaders who completed the legislated homesteading requirements were awarded one quarter section. Today in this province, these survey lines and grids are collectively referred to as the Alberta Township Survey System (ATS). The ATS continues to form the basis for land title descriptions in the province.

The Torrens land titles system was made possible by the accuracy of the original surveys. The Torrens system virtually guarantees that prospective purchasers, mortgagees and other interested parties may rely on the tile to accurately describe property boundaries. The doctrine of accretion, however, may render natural boundaries set out in land titles inaccurate, disturbing, if not destroying, the simplicity and certainty of the Torrens system built upon the DLS system. As decided in the *Clark* case, accretion is only possible when there is riparian ownership or occupancy, and when a water body or watercourse boundary forms a boundary of the property. But how must a title or documents supporting title describe the natural boundary to establish riparian ownership and thus make accretion possible? The leading case on this aspect is another Supreme Court of Canada case, *Chuckery v. The Queen*, [1973] S.C.R. 694. In that case the court found that where the boundary of a parcel, as set out in the relevant survey or plan, is expressed as being a river bank or lake shoreline, then the boundary will vary as the water advances or recedes. However if a boundary is expressed as a line other than a shoreline or river bank, the

boundary is fixed at that line, and will not vary. Although this principle was reasonable and intuitive on the facts, later courts, such as those in *Andriet,* struggled to apply it.

In *Andriet v. County of Strathcona No. 20*, 2005 ABQB 848, the trial judge, Mr. Justice D.W. Perras, in denying the lot owners riparian, and therefore accretion, rights, based his decision on the way the lots were described on the owners' titles. The descriptions were based on a 1936 survey of the eastern shoreline of Cooking Lake. The survey drawing indicated the 1936 shoreline to be the boundary of the lots. The only land description provided in the judgment was that of Andriet, which referred to "all that portion of the north west quarter of [13-51-22-W4] not covered by any of the waters of Cooking Lake, as shown on a plan of survey of the said township . . .". Despite this language, the trial judge held that the title referred to a fixed boundary, being the shoreline as fixed in the 1936 survey, and not to the natural shoreline, which receded over time. Therefore, the owners had to be content with their lot boundaries as fixed when registered. The trial judge decided this to avoid what he thought would be the only result of granting the landowners' applications, namely a confusing mess of overlapping interests where more than one applicant could legitimately claim ownership of the same accreted land.

The trial decision was a departure from the previous law since the land description indicated that the lake was the boundary to the applicants' titles. On the appeal, even the Crown agreed that the trial judge had erred in failing to find the lot owners had riparian rights. The frustration of the trial judge with trying to meld the common law principles associated with riparian owners and accretion with a grid survey system and a Torrens land titles system had been evident in his judgment. The trial court found no way to rationalize the situation and therefore refused to apply the doctrine of accretion and the previous Supreme Court of Canada and Alberta Court of Appeal decisions which did so.

The Court of Appeal (per Justice Clifton O'Brien, with Justices Ellen Picard and Jack Watson concurring) allowed the appeal and found that the actual shore of Cooking Lake was the natural boundary of the lots, based on its interpretation of the title documents. In doing so, the Court of Appeal brought the doctrine of accretion back into conformity with its earlier decisions including those of the Supreme Court of Canada.

A key question remaining was how were the lot owners to divide the former lake bed land to avoid overlapping interests? This issue of practical application was the one that had bedeviled the trial judge. The Court of Appeal considered a number of different ways to divide up the accreted land and held that the owners were entitled to an "equitable division." Each was to maintain their proportionate share of the shoreline, based upon the length of shoreline the owner had enjoyed over the years, as shown on the various surveys plans of the lots. The actual drawing of lines in order to reflect equitable division was, for the most part, left to the lot owners to sort out. The Court optimistically indicated its hope that the lot owners could agree to use a common surveyor.

The Court of Appeal did consider one specific line drawing issue that affected the division of the accreted lands. In previous cases — *Pitt v. Red Deer (City*), 1998 ABQB 724, affirmed 2000 ABCA 281 and *Johnson v. Alberta*, 2001 ABQB 642, affirmed 2005 ABCA 10 — the Court of Appeal had held that an owner's entitlement to accreted land was limited by the legal description

in the owner's title. The ATS lines limited the extent of the accretion. The Andriets' lawyer had argued that these two cases resolved any potential conflict between the certainty of title that a Torrens system promised and the potential uncertainty introduced by the common law doctrine of accretion changing the descriptions of land on those titles. The Court quoted from this argument (at para. 56):

> The solution is essentially to say that a given title registered at the Land Titles Office has two types of boundaries. There are fixed immovable boundaries usually having reference to sections, townships, legal subdivision lines, quarter section lines and then there are movable boundaries, which are usually spoken of in relation to lakes and rivers. The solution is that the movable boundaries cannot pass over the immovable boundaries. This gives effect to the doctrine of accretion but still limits it to the maximum bounds provided for in the titles registered at the Land Titles Office.

The Court of Appeal took this argument seriously and analyzed the *Pitt* and *Johnson* decisions and the application of their principles to the Cooking Lake situation. They noted that in *Pitt* neither the trial judge nor the Court of Appeal gave special status to the ATS lines. Instead, both focused on the description in the title, which just happened to be ATS lines. In the *Johnson* case, the parcels of land which formerly bordered on Buffalo Lake were described in the owners' titles by reference to ATS lines, followed by the phrase "not covered by the waters of Buffalo Lake." The heart of the *Johnson* decision, according to the Court of Appeal in *Andriet*, was what is now section 90 of the *Land Titles Act*:

> Every parcel of land described in a certificate of title consists only of the actual area within its legal boundaries and no more or less, notwithstanding that a certificate of title or other instrument that describes the parcel expresses an area that is more or less than the actual area.

It was held in *Johnson* that this section provides owners of certificates of title with certainty, applying legally described boundaries under the ATS to define titles. The doctrine of accretion cannot extend land boundaries beyond the ATS descriptions in the title.

In *Andriet*, however, the Court of Appeal refused to hold that only ATS lines can limit the extent of accretion. Only ATS lines were at issue in *Pitt* and *Johnson*, but ATS lines were not the only way to constitute the "legal boundaries" referred to in section 90 of the *Land Titles Act*. The Court of Appeal noted that *Pitt* and *Johnson* were more concerned with certainty in land descriptions than they were with elevating the legal status of ATS lines. In the end, however, the Court did not finally resolve this issue as it was unnecessary to do so on the facts. The Court did not, therefore, voice its opinion on the Andriets' lawyer's argument that distinguishing between two types of boundaries — fixed, immoveable boundaries that were usually ATS lines and moveable boundaries — resolved the potential conflict between the Torrens system and the doctrine of accretion. However the Court did introduce a novel approach to avoid overlapping titles: equitable division. The Court did not, unfortunately, address how the accretion issues would be resolved if the applicants failed to agree on a common surveyor.

This latest decision confirms that the Alberta courts continue to struggle with an appropriate balance between the common law doctrine of accretion and the Torrens system and Crown ownership. Geological, hydrological and climatic realities in this province will continue to cause rivers to shift their course and lakes to recede. Climate change may hasten the processes and we may see cases that challenge whether an accretion resulting from climate change was "slow and imperceptible". More cases based on overlapping titles, and on the issue of whether land may accrete beyond ATS lines, also seem inevitable. Given the wealth of issues associated with accretion, perhaps it is time for the legislature to address the appropriate balance in a definitive manner for lands which have not yet accreted.