Accretion and the Torrens System

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INTRODUCTION

Applying the common law of accretion to a natural world overlaid with complex situations of land ownership, changing natural boundaries, and the Torrens system under the land titles legislation has resulted in a number of court challenges over the last few years. These challenges have invited creative judicial activity as the courts attempt, and in some cases struggle, to reconcile common law accretion with these complex situations.

This paper reviews and discusses the evolution of the conflicts between applying the common law of accretion within a Torrens system, in particular, Alberta. It begins with the reception of common law in the prairie provinces and raises the question as to whether the law of accretion was appropriate for the provinces that adopted the Torrens system. It then details the Dominion Lands Survey, the Alberta Township Survey systems, and the Torrens system itself, in preparation for a discussion of accretion cases. Next it reviews key accretion cases, from foundational ones in western Canada, to the most recent court declarations regarding how common law accretion may be reconciled with Torrens based legislation. Given the apparent struggle that courts have dealing with novel situations concerning accretion/land titles intersections, and given the likelihood of further accretion/land titles intersections and puzzles, the paper suggests that it might be time for a legislated solution.

THE RECEPTION OF COMMON LAW IN THE CANADIAN PRAIRIES AND ACCRETION

Common Law Applicable to the Dominion Lands

The Dominion of Canada's acquisition of Rupert's Land and the North-west Territory from the Hudson's Bay Company in 1870 included what are now the prairie provinces (the "Dominion lands"). Under the *North-west Territories Act* of 1870, the acquired area received all English law except where such laws were deemed to be "inapplicable"[1] A very important area of English common law was included --- the English common law relating to water received by the Northwest Territories -- the common law of riparian rights. A riparian owner is a person whose land abuts the shore of a natural watercourse, such as a river or a creek, or a natural body of water, such as a lake. At English common law, riparian owners or occupants possessed "riparian rights." Either legislature or the

[1] *North-west Territories Act, (Can.)* 49 Victoria c 25, s 3. *See also* J.E. Cote, "The Introduction of English Law into Alberta" (1964), 33 ALR 3(1964): 262-291, 263. Note: Some of the text in the first part of this paper is based on the author's chapter, "The Supreme Court of Alberta and Water Law" in *The Alberta Supreme Court at 100,* ed by Jonathan Swainger (University of Alberta Press, The Osgoode Society for Canadian Legal History, 2008), pp 193-26.

courts eventually determined that some areas of English common law relating to riparian rights were not acceptable or appropriate for the prairie provinces. For example, regarding legislature, at common law only an owner of occupier of riparian lands had the right to withdraw surface water for domestic or commercial purposes.[2] The Dominion realized early on that water use rights based on riparian ownership or occupancy would not be appropriate for settlers in this arid region. Given the lack of water in the prairies, early settlers could not expect that individual holdings would have a water source enabling them to exercise riparian rights. In 1894 the Dominion passed the *North-west Irrigation Act*[3] which introduced a water-rights system that did not depend on riparian ownership or occupancy. A court example concerns the law of drainage. In the early twentieth century, the Alberta Supreme Court legally recognized that given Alberta's geological, hydrological, and agricultural realities the English common law regarding drainage was not appropriate for the province. In the 1917 decision *Makowecki v. Yachimyc*[4] the Alberta Supreme Court determined that the English common law that a lower proprietor need not accept water draining from a natural drainage path from the land of an upper proprietor was not appropriate for this hilly province. Instead, the Court adopted the civil law rule that the lower proprietor must accept such water.

Accretion and the Reception of the Common Law

This takes us to accretion. As stated by Justice Lamont for the Supreme Court of Canada in *Clarke v, Canada (Attorney General):*

> The term "accretion" denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substance, or the permanent retiral of the waters. This increase must be formed by a process so slow and gradual as to be, in a practical sense, imperceptible, by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour, although, after a certain period, it can be observed that there has been a fresh addition to the shore line. The increase must also result from the action of the water in the ordinary course of the operations of nature and not from some unusual or unnatural action by which a considerable quantity of soil is

[2] For use for domestic purposes on the land itself, generally there is no limitation on how much a riparian could take. "Domestic purposes" meant household purposes such as water for drinking, cooking, fire control, and for watering domestic livestock. If a use was for what was called an "extraordinary" purpose, such as a commercial enterprise, the riparian use had to be reasonable, and water had to be returned to the watercourse substantially unaltered in quantity and quality. *See* for example, *Miner v. Gilmour* (1858), 12 Moore's Privy Council Cases, PC

[3] The *North-west Irrigation Act, 1894*, 57-58 Victoria, 1894, c 30. The Act introduced a water rights system largely on the principle of 'first in time, first in right.' Priority to water was based on the date of completed application to the public authority. In times of shortage, junior licensees—those with a later-dated priority—had no right to water until all more senior rights were satisfied.

[4] *Makowecki v. Yachimyc* (1917), 10 ALR 366; 1 WWR (1917) 1279; 34 DLR (1917) 130 (ASC, App Div).