The Ox-Bow Incident

Analysis of Robertson v. Wallace

By Brian Ballantyne

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Introduction:

In the film The Ox-Bow Incident (1942), three men are lynched by a mob, which is bent on avenging the murder of a rancher and the theft of his cattle. Unfortunately for the mob, and tragically for the victims, neither the murder nor the theft had actually taken place. The following exchange identifies for the viewer the location of the lynching:

Art: Where are we?

Gil: The ox-bow.

Looking south west across Highwood River and towards former island - June 2000

Critics described the film as "a stark and ironic tragedy" and as "one of the truest pictures of the lawless west." It is also a cautionary tale about the law, for one of the characters identifies the law as "everything people have ever found out about justice and what's right and wrong."

So too is the case of *Robertson v. Wallace* (9701-10813; May 8, 2000)—a cautionary tale about an ox-bow incident and about survey law. It is a case which tells land surveyors a bunch of stuff: that sometimes a fence is just a fence, that ox-bow lakes or cut-offs are created suddenly, that expertise in surficial geology is useful, that clients should be assisted very carefully in amending title, that neighbours should be consulted, that the Land Titles Office cannot be relied upon to monitor the process. Although the only lynching is figurative, the case does serve as a morality play, in which exemplary principles and cautionary lessons are set out.

Facts:

The trial was heard between February 28 and March 10, 2000 in the Alberta Court of Queen's Bench at Calgary before the Honourable Madam Justice Nation. The plaintiff was Phyllis Robertson (who owned a parcel of land south-east of the Highwood River), and the defendants were Donna Wallace (who had owned a parcel north-west of the river), the Registrar of the South Alberta Land Registration District, two land surveying companies, an Alberta Land Surveyor, and the Matwychuk-Goodmans (who purchased from Wallace the parcel of land north-west of the river). There was also a counter-claim by the Matwychuk-Goodmans.

The two parcels lie just north of the town of High River, within the NE1/4 of S7, T19, R28, W4M, through which flows the Highwood River. Township 19, R28, W4M was surveyed in 1890 by James MacMillan DLS, and the township plan was issued in 1893. MacMillan surveyed the westerly bank of the Highwood River. The Crown patent for the north-westerly parcel was issued in 1902, and was described as:

> *All that portion of the North East quarter of Section Seven of the said Township which lies to the West and North of the West Bank of the High River, as shown on a plan of survey ... containing by measurement 111.78 acres more or less.*

Title to the parcel was transferred to Wallace's ancestor in 1914, and then acquired by Wallace according to substantially the same description. In 1994, she transferred the parcel to the Matwychuk-Goodmans.

The fiat for the patent of the south-easterly parcel was issued in 1902, which was described as:

> *All that portion of the North East quarter of Section Seven of the said Township which lies to the East and South of the West bank of the High River as shown on the 1893 township plan.*

Title was issued in 1909 to Robertson's ancestors. Robertson acquired title to a parcel described in the same manner, except for the inclusion of the clause "containing 48.22 acres more or less." The next township plan was issued in 1918, based upon a 1917 survey, and showed that the course of the river had changed **significantly** between 1890 and 1917. Since

1917, there has been insignificant change in the location of the river.

In 1994, Wallace retained an Alberta Land Surveyor (ALS) to survey the boundaries of her parcel so that she might sell it. The ALS was aware that:

- Wallace wanted to sell her parcel;
- there had existed for some time a disagreement between Wallace and Robertson as to the location of the boundary between their parcels;
- a fence existed through Wallace's parcel which kept Wallace's cattle to the north-west and Robertson's cattle to the south-east.

The ALS concluded that the river had slowly and gradually shifted south-easterly and that, therefore, the present westerly bank of the Highwood River was the south-easterly boundary of Wallace's parcel. He then registered his survey as Plan 9412624. Wallace's parcel was shown to contain 132.87 acres, some 21 acres more than was described on her certificate of title. The ALS then assisted Wallace in getting a new certificate of title to the parcel which referenced Plan 9412624. Wallace then sold her interest in the parcel to the Matwychuk-Goodmans.

Meanwhile, Robertson continued to run cattle up to the fence. In 1997, a disagreement arose about the boundary with the Matwychuk-Goodmans. Robertson became aware of Plan 9412624 and of the change to the certificate of title for the north-westerly parcel so as to increase the area. She then brought the action.

Issues:

The court was asked to resolve seven issues:

- Did agreement to the fence constitute agreement to a conventional line boundary, and was such an agreement binding on a purchaser?
- If the west bank of the river is the boundary, then is its location ambulatory or is it fixed in place as of 1893?
- If the boundary is ambulatory, what is its present location?
- Was the ALS negligent in registering his plan or in assisting Wallace, without notice to Robertson?
- Can the Matwychuk-Goodmans retain all the land described in their certificate of title?
- Is the Registrar liable for registering the plan of survey and for issuing the new title, both without the consent of Robertson?
- Which party has trespassed on which land?

What follows is both a short answer and a longer analysis. The short answer to each of the questions is no; ambulatory; the pre-avulsion location; yes; no; perhaps; both parties.

Fence:

Justice Nation reviewed the law relating to conventional boundaries, the evidence of the parties, and the role of conventional boundaries within the land titles system. For our purposes, the two most significant cases cited were *Grasset v. Carter* (1883) and *Flello v. Baird* (1999). The cases set out that the elements required to prove a conventional boundary are: "there must be adjoining land owners, they must have a dispute or uncertainty about the location of the dividing line between the properties, they must agree on a division line, and then recognize it as a common boundary" (para. 5).

The Court was concerned as to whether the doctrine of conventional lines could be imported into the land titles system in Alberta, because the "basic tenant [sic] of the Torrens system is that the title as registered is absolute" (para. 13). On the other hand, there were sound policy reasons for accepting conventional lines, just as adverse possession has been accepted, in that both doctrines serve to quiet title by recognizing in law what is being lived up to on the ground. The Court held, therefore, that a conventional line agreement could be established between two current land holders. If unregistered, however, the agreement cannot be enforced against a third party purchaser for value.

Both Robertson and Wallace testified that the fence which contained each herd of cattle was very old. Robertson knew it existed when she moved onto her parcel in 1957; Wallace admitted that she crossed the fence as a child to pick berries and swim in the river. The fence does not follow the course of the river as it now flows or as it flowed in 1890. The area enclosed between the fence and the current west bank of the river is 32.39 acres. The fence is merely conveniently located both to keep cattle separated and so as not to be washed away in times of flood.

Although Justice Nation acknowledged that there was a disagreement about the boundary, she found no evidence of either an agreement or of conduct that the fence constituted the boundary. Even if such evidence were present, the unregistered agreement would have been lost to the

Looking west across Ox-Bow Lake - June 2000

Matwychuk-Goodmans, as bona fide purchasers for value.

Ambulatory or fixed location:

Robertson argued that the location of the boundary between the two parcels was fixed (or "frozen") according to the 1893 plan which represented the 1890 survey. Both *Rockland Holdings Ltd v. 309458 Alberta Ltd* (1987) and *Hawkes Estate v. Silver Campsites Ltd.* (1991) were used to support this argument. Wallace argued that the river constituted a natural boundary between the two parcels, and relied upon *Clarke v. City of Edmonton* (1930) and *Chuckry v. The Queen* (1973). The Court failed to identify the role that specific legislation played in fixing the boundary in *Hawkes Estate*, alluded to the only slight persuasive value of *Rockland*, and observed that neither case considered the *Clarke* or *Chuckry* decisions.

The latter two were judgments of the Supreme Court of Canada, and both held that parcels bounded by watercourses are upland riparian parcels. Such parcels are subject to increase in area through accretion and to lose area through erosion, even if the parcels are defined by area, by reference to a plan, or by ascertainable boundaries. Justice Nation relied upon the judgments to hold that the westerly bank of the Highwood River was the boundary between the two parcels, and is thus ambulatory in fact.

Present location:

The boundary is only ambulatory in law if its movement is slow, gradual and imperceptible. Both parties agreed that avulsion (a quick change in the river course) would mean that the location of the boundary would not shift with the change in the river. There was agreement that in the south-westerly part of the quarter-section, the river represented the current boundary but dispute as to the river in the north-easterly part of the quarter-section. An ox-bow lake now exists (west of the current river), and a large island had previously existed where the river had formed an east and a west channel. Various expert witnesses weighed in with their opinions and Justice Nation illustrated the risks of proffering such expertise.

The expert called by the ALS was himself a "professional surveyor," and he relied as the "best evidence" upon a 1905 plan of a survey by Albert Talbot of the quarter-section to the east (NW1/4, S8). However, in cross-examination, the expert "correctly pointed out" that Talbot had not surveyed the NE1/4 of S7 where much of the river would have been located (para. 35). Similarly, the same expert "changed his opinion" at trial, from initially arguing that accretion had occurred to accepting that avulsion had occurred. Justice Nation observed that he had "backtracked somewhat" after hearing the evidence of the expert witness called by Robertson (para. 36).

Robertson's expert was qualified in surficial geology, and his evidence was accepted as to the movement of the Highwood River since 1890. Thus Robertson's expert was favoured over the expert of the ALS, "largely as his qualifications are more suited to the assessment" (para. 37). Justice Nation held in favour of the following two opinions:

- that the meander existed before 1890 and was so shown on the 1893 plan, and that as a result of avulsion the neck would have been quickly severed so as to allow the river to move close to its current location. The severing occurred between 1890 and 1917;
- that the large island existed before 1890, and that the west channel was abandoned and the east channel enlarged as the result of a flood between 1890 and 1917.

Thus the court held that the two processes were likely **not** slow and imperceptible.

From the perspective of riparian boundaries, paragraph 32 of the judgment is a wee bit confusing, owing to some ambiguity in the way the surficial geologist's evidence is described. In the space of two sentences Justice Nation explained that the oxbow would have been "cut off" by an avulsive process before 1890, and that the river would have moved to its current location "as a result of a chute cutoff (an avulsive process)" after 1890. At the risk of being pedantic and of relying upon terminology from physical geography, the pre-1890 river contained a meander or incised meander, whereas the post-1890 event resulted in both a straighter river and an ox-bow lake or (cut-off).

An equally significant dispute was over the date at which to define the location of the river. Robertson argued that the principles of avulsion or accretion needed to be applied from 1890, so as to determine the current location. The ALS argued that the relevant time was when title was acquired from the Crown; 1902 for the Wallace parcel, 1909 for the Robertson parcel.

Justice Nation held that although the creation of the ox-bow lake and the loss of the island occurred between 1890 and 1917 (the dates of the two relevant surveys), the exact timing of the avulsion was irrelevant:

> *The determination [of the location of the river] is not frozen at a particular time. The changes in the course of the river from 1890 may or may not affect the boundary, but the description is fluid and meant to continue so, whether or not a title is granted from the fiat for patent. To rule otherwise would lead to an absurd situation where the Crown would own the neck cutoff area and possibly the island if the avulsions occurred before 1909. Also, from a social policy point of view, to rule otherwise would mean that at the time of the title being issued, a survey would be required to know where the natural boundary was at the time. This was and is not traditionally done, and does not accord with the underlying tenants [sic] of a Torrens land holding system (para. 39).*

Thus, the Court held that because the meander existed in 1890, Wallace's parcel was defined by the westerly bank of the meander. The river changed location owing to avulsion (likely during one of the many floods in that period), and thus Wallace's parcel did not increase in area owing to accretion. The Wallace-Robertson boundary remains fixed in location as shown on the ground. Likewise, because the west channel dried up quickly, the island did not accrete to Wallace's parcel. Again, the westerly bank of what was the west channel remains the boundary between the Wallace and Robertson parcels, fixed in location owing to avulsion.

Negligence of ALS:

In the longest part of the judgment, Justice Nation clearly set out that actionable negligence requires that a duty of care exists, that the duty is breached, and that damages are caused as a result of the breach. The argument was not that the ALS was negligent in giving an opinion of the current location of the easterly boundary of Wallace's parcel, but rather that he was negligent in registering the plan of survey and in assisting Wallace to change her certificate of title. Most significantly, it was alleged that the ALS had breached a duty of care to his client (Wallace), to the adjoining land owner (Robertson), and to the third-party purchasers (Matwychuk-Goodman).

The ALS acknowledged that the additional land which accrued to Wallace's parcel as a result of his opinion as to the river having shifted gradually, was land in which Robertson might have had some interest. Despite this knowledge, the ALS asked Land Titles as to how to entitle his plan of survey, and then signed and registered the plan. He had contacted Alberta Environment, given their interest under s.3 of the *Public Lands Act* in the bed of the

river, who indicated no objection to the registration of the plan. More problematic was that the ALS then submitted a request for an updated title, prepared a letter for Wallace's signature, and submitted it to Land Titles. The new certificate of title, which reflected the information on the plan, was issued.

The ALS conceded that he owed a duty of care to Wallace, as she was his client. Justice Nation used the principle from *Donoghue v. Stevenson* (1932) to also find that the ALS owed a duty of care to Robertson:

A duty is owed to someone who is in a position that a duty should exist, in the sense a neighbour or someone with a proximity that there is a duty to take care to avoid causing forseeable damage. It is that the omission or the act complained of is one which had so close or direct an affect on a person that the defendant should have thought of the plaintiff when contemplating the act or omission (para. 58).

Robertson was in such close proximity by virtue of sharing the disputed boundary with Wallace.

The Court also found that the ALS owed a duty of care to the Matwychuk-Goodmans, because they were potential purchasers about whom the ALS knew. Reliance by such purchasers on the plan of survey and on the amended certificate of title was held to be reasonable. Justice Nation was clear that there were no public policy reasons to limit the duty of care; she did not suggest that the ALS was to "be exposed to liability in an indeterminate amount for an indeterminate time to an indeterminate class" (para. 61). The purchasers were **not** unknown members of the public.

In determining the appropriate standard of care which the ALS should have exhibited, the Court relied on legislation, the ALSA *Manual of Standard Practice* (at the time of the survey, the *Manual of Good Practice* was in force), and the evidence of three expert witnesses. The ALS relied upon the same expert witness for determining the present location of the river; Robertson relied upon an expert witness who was also a land surveyor. The Introduction, Code of Ethics, and commentary on Professional Judgment from the *Manual* were all referred to.

The Court found the evidence most compelling from Robertson's expert witness, who testified that a prudent surveyor would have notified Robertson before registering the plan or amending the title. On the other hand, the Court was critical of the ALS's expert witness, whose evidence appeared to be a wee bit inconsistent. First, his evidence was that the ALS's action were "totally without favour" to Wallace; then he acknowledged that the ALS had a duty not to take steps to unilaterally resolve a dispute; then he agreed that the ALS was "a little out of his element" in helping Wallace to amend her title (para. 74).

The Court spent much time interpreting s.90 of the *Land Titles Act*, and in criticizing the actions of the ALS (in not following the provisions of the section) and the opinions of the ALS's expert witness (in reading the section as merely discretionary). Section 90 sets out the procedure for amending the title of a parcel of land to reflect the current location of a natural boundary. The application "shall" be accompanied by a few things, including "the consent of the registered owners of parcels that may be adversely affected by the amendment of the description" (para. 86). The Court held that the ALS:

"had a responsibility to make sure he was complying with proper procedure to have his opinion adopted. He directly contravened the legislative directive in assisting to change the description of Mrs. Wallace's title" (para. 80).

The Court therefore found that the ALS had breached the duty of care owed to Wallace, by leading Wallace to believe that she could rely on his expertise to "fix" the boundary issue. Likewise, the ALS had breached the duty owed to Robertson, by registering the plan and helping to amend the title without seeking her consent. "Every red flag was up" for the ALS, and yet "he said nothing" (para. 84). Justice Nation did acknowledge that breaching a code of ethics and breaching a statute are pieces of evidence to be used in determining the standard of care owed by the ALS. She made the distinction between a mere error of judgment as to the location of the river, and the negligence of the ALS in registering the plan and helping to amend the title. Finally, in helping to get a certificate of title which he knew may be subject to challenge, the Court held that the ALS also broke a duty to the purchasers.

Purchaser's position:

Justice Nation found that the Matwychuk-Goodmans were bona fide third party purchasers for value. However, there were two current titles, both of which included some of the same lands. Given the Court's finding that the ox-bow and the former island were part of the Robertson parcel, could the purchasers rely upon the description in their certificate of title?

Sections 66(1) and 173(1) of the *Land Titles Act* were reviewed. The relevant bits of s.66(1) are that a certificate of title is conclusive proof of entitlement to land, except as to any land being claimed under a prior certificate of title. Section 173(1) sets out that land can be claimed against a certificate of title by anyone claiming under an earlier certificate. Robertson was claiming under a prior certificate of title, and thus had a better claim to the disputed lands than the purchasers from Wallace.

The Matwychuk-Goodmans were unsuccessful in their action against Wallace, both in contract and in tort. Any action had to be brought by the purchasers within one year, and was not done so. Because the warranty as to the "size/measurements of the land" was an express term of the contract, the tort of negligent misrepresentation could not run concurrently. Moreover, the Court held that any misrepresentation was innocent and not negligent.

Liability of Registrar:

The Registrar of the South Alberta Land Registration District admitted that it should have insisted on Robertson's con-

Looking south-west along fence - June 2000

sent before amending Wallace's certificate of title, as required by s.90 of *the Land Titles Act*. The Registrar's liability is set out in sections 158, 161 and 162 of the *Land Titles Act*. Section 158 allows anyone who has sustained loss or damage, or who has been deprived of land through the actions of the Registrar may bring an action against the Registrar. Section 161 sets out that if the loss or damage arises jointly through the wrongful act of another person and the Registrar, then the action shall be brought against both parties. Section 162 sets out that in any such joint action, judgment shall not be entered against the Registrar until the other liable defendant cannot satisfy the judgment.

Any loss or damage sustained by Robertson had not been an issue at the trial. Even if loss or damage were to be proven by Robertson, recovery against the Registrar could only take place if the ALS could not satisfy the judgment (assuming that the loss or damage was jointly caused by the ALS). The purchasers had to be able to prove that they had been deprived of land by an error, omission or misdescription in a certificate of title. The Court held that the Matwychuk-Goodmans did not fall under that definition, because the Robertson's prior certificate of title meant that the purchasers could not be deprived of land to which they had never had title. That is, the statutory exception to the purchaser's indefeasible title meant that they had suffered no loss of land.

Trespass:

In July 1995, Robertson's husband ventured onto the Matwychuk-Goodmans' parcel in order to fetch a bull. In addition, there was evidence of trespass by Robertson's cattle. Finally, the Court found that on a balance of probabilities, the Matwychuk-Goodmans had trespassed upon the former island portion of Robertson's lands.

Conclusion:

The judgment is significant to land surveyors for three reasons. It explains well the law relating to the creation of ox-bow lakes; it clarifies the role of the land surveyor in terms of the duty of care owed and the responsibilities as an expert witness; and it describes the extent to which the Registrar can be held liable for maintaining the land title system.

On the first issue, the Court directed the Registrar to amend the certificates of title of the two parcels to reflect the location of the boundary as determined by the Court. In the south-west, the Highwood River continues to be the boundary, and thus both parcels are afforded riparian rights. However, in the north-east, the boundary is no longer the river, and thus only Robertson's parcel has riparian rights attached to it. This judgment has significantly advanced the law relating to riparian rights and the creation of meanders and ox-bow lakes in Canada, where there have been few cases dealing with similar fact situations.

In the United States, there is a much larger body of case law on the creation of ox-bow lakes and the sudden straightening of watercourses. The Mississippi judgment of *Cox et al v. F-S Prestress Inc* (2000) dealt with a similar series of facts as on the Highwood River. The Court did "not accept that the important event was gradual." Rather, the Court used the garden hose paradigm:

The distinction can be likened to a garden hose lying curved in the yard. Accretion would be the gradual straightening of the hose while it remains on the grass, uprooting dogs and cats, disturbing the grass, and otherwise touching everything between its old and new location. Avulsion in the context of a new channel being dug while the old one remained flowing would be splicing in a new section of hose without disturbing any of the old.

Second, the Court found that the ALS and vicariously his employer, were negligent and breached a duty of care owed in law to Wallace, to Robertson, and to the Matwychuk-Goodmans. Land surveyors have long known (or at least suspected) that they have responsibilities outside the contractual agreement. This judgment describes those responsibilities in the context of the neighbour principle. In owing a duty of care to both the neighbouring land owner and to the third party purchaser, the ALS has been confirmed as one of the custodians of the cadastral framework and thus the land titles system, and not merely as an agent of the client.

More significantly, the Court described both the strengths and the failings of the four expert witnesses, three of whom were land surveyors. A cautionary tale is that expert witnesses must not be advocates for the client; they must be consistent in direct and cross examination; they must be consistent in written reports and oral testimony; they must be qualified to offer the opinions which are being proffered; and they must know the law. If the land surveyor and the expert witness go beyond expressing an opinion, then they become mere advocates for their clients.

Third, the Court held that the Registrar made a mistake in the execution of its duties, by failing to give notice to, and getting consent from Robertson before amending Wallace's title. However, the purchasers were not deprived of land, and Robertson had not shown that she sustained any loss or damage. Even if Robertson is able to so show, the Registrar is only liable to the extent that any other defendant cannot pay. It would thus appear that the vaunted insurance principle of the land title system (as represented by the assurance fund) is a bit illusory. Or at least very similar to how his Aunt's wallet was described by Edmund Blackadder, early 17th century bon vivant: "More capacious than an elephant's scrotum, and just as difficult to get your hands on."

Note: Dr. Brian Ballantyne is the professor in cadastral studies at the University of Calgary and voted professor of the year by the students.

BOOKS

Editors note:
The following books were reviewed in the Professional Surveyor magazine and look quite interesting.

GEODAESIA: OR THE ART OF SURVEYING AND MEASURING OF LAND MADE EASIE. First published in 1688 by John Love, an English land surveyor. The reprinted version is being sold to raise money for the FIG (International Federation of Surveyors) scholarship fund. Contact Walter Robillard by e-mail at robw@mindspring.com

PRACTICAL GEOMETRY translated by Frederick A. Homann from the work of Hugh of St. Victor, dated around 1120 A.D. Check on the website: http://www.mu.edu

The following books can be obtained from Mercator's World online bookstore at www.mercatorsworld.com

GREENWICH TIME AND THE LONGITUDE by Derek House, 1997

THE ILLUSTRATED LONGITUDE: The True Story of a Lone Genius Who Solved the Greatest Scientific Problem of His Time by Dava Sobel and William J.H. Andrewes, 1998