

Wading in to Riparian Rights

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Riparian Rights - Terminology

- “*Ripa*” – Latin for “bank of a river”
- Riparian owner – owner whose land abuts water
- “High water mark” or “natural boundary”

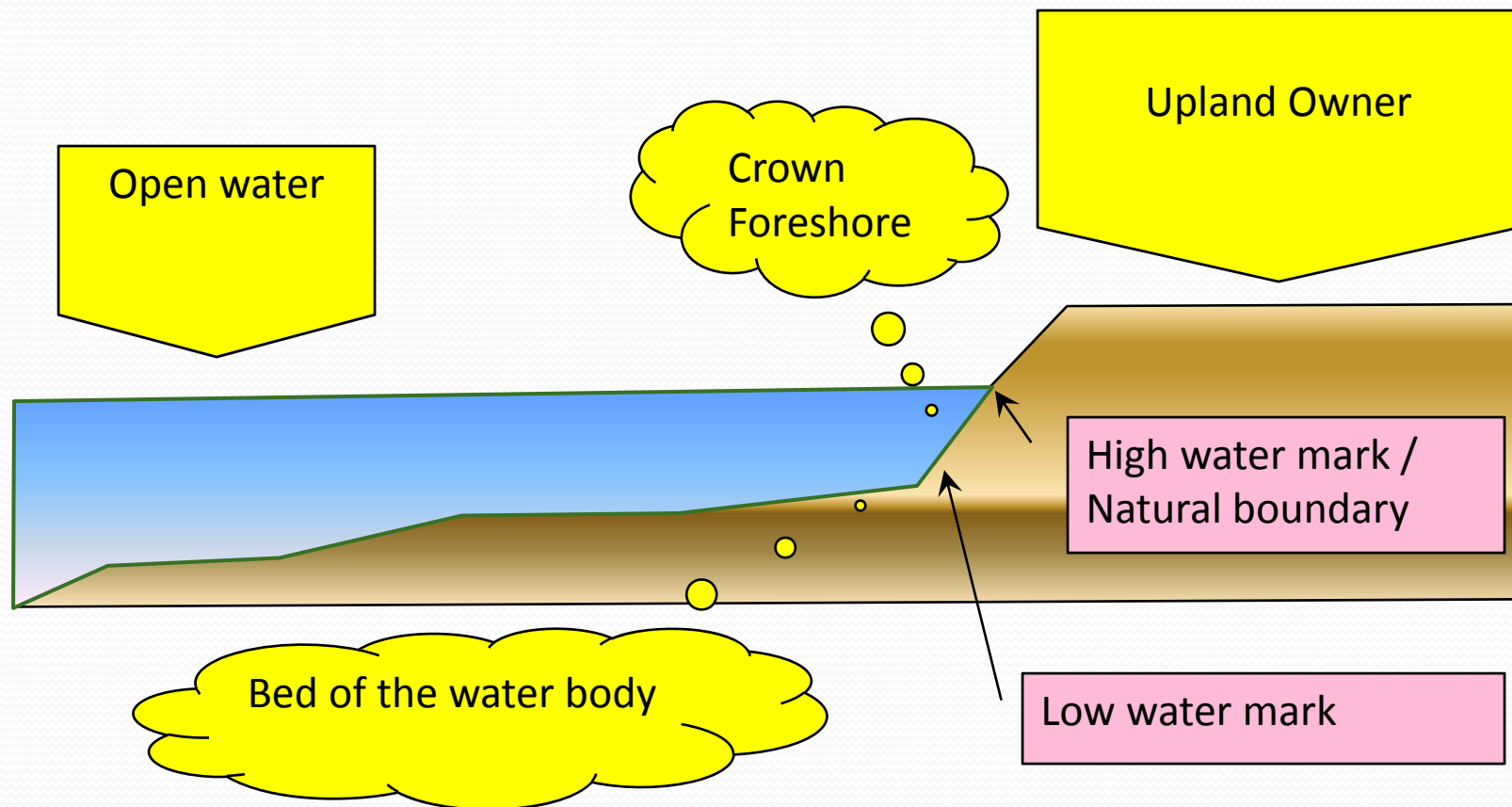
“The visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself” (s. 1, B.C. *Land Act*)



Riparian Rights - Terminology

- Upland property – Land above the natural boundary
- Foreshore - Area between high & low water marks
- Accretion – The action of an imperceptible increase of land bordering a water body through natural silting up, takes on qualities of the upland property
- Erosion – Natural diminishment of the upland property, becomes part of the foreshore and bed of the aquatic lands

General concepts





What are Riparian Rights?

1. Right to the flow and use water
2. Right to drainage
3. Right to protect upland property from erosion
4. Doctrine of accretion
5. Right of access to navigable waters from all points along the upland property's frontage



Riparian Rights

- Complex area of law
- Have their roots in common law
- Some common law rights extinguished by statutes
- Additional complexity of divided jurisdiction:
 - i. Federal – navigation and shipping, fishing
 - HADD
 - ii. Provincial – property and civil rights
 - land use development, riparian regulations
 - ownership of local water bodies



Extinguished Rights

- No adverse possession or prescriptive rights

8(1) A person may not acquire by prescription, occupation not lawfully authorized or a colour of right, an interest in Crown land, or in any land as against the government's interest in it. (B.C. *Land Act*)

24 All existing methods of acquiring a right in or over land by prescription are abolished and, without limiting that abolition, the common law doctrine of prescription and the doctrine of the lost modern grant are abolished. (B.C. *Land Title Act*)



Extinguished Rights

- No *ad medium filium* – presumption that the bed of a stream belongs to the riparian owner
- Land below the “natural boundary” belongs to the Crown
“Despite a rule of law to the contrary, if Crown land bordering on a lake, river, stream or a body of water is or has been granted by the government, in the absence of an express provision in the Crown grant to the contrary, no part of the bed or shore of the body of water below its natural boundary passes or is deemed to have passed...”(s. 1, B.C. *Land Act*)
McLeay v. Kelowna (City), 2004 BCSC 325

Extinguished Rights

- No Right to the Flow & Use of Water

2(1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

(2) No right to divert or use water may be acquired by prescription.

(B.C. Water Act)



Right to Protect from Erosion

- Right to construct embankments, dykes, or other improvements to protect upland from erosion
Laxton & Company v. West Vancouver (District), 2010 BCSC 1297
- Improvements must be made within the boundaries of the upland property
- Structures on the foreshore subject to regulatory approval (foreshore lease, DFO, local government, etc.)
Salt Spring Island Local Trust Committee v. B&B Ganges Marina Ltd., 2007 BCSC 892, aff'd 2008 BCCA 544



Ownership of Eroded Lands

- Crown becomes the owner of eroded lands below the high water mark
- But eroded lands are not automatically removed from upland owner's title, new survey is required



Doctrine of Accretion

- Slow and gradual process, not sudden action
 - Imperceptible
 - Cannot be observed from moment to moment or from hour to hour, although, after a certain period, it can be observed that there has been an addition to the shore line
- Accreted land takes on characteristics of the upland
- Accreted land accrues to the upland owner. Guarantees the riparian character of the land (i.e., that a person's land runs to the water)

Clarke v. Canada (Attorney General), [1930] S.C.R. 137



Doctrine of Accretion

- Gain in land that is the result of (unlawful) artificial reclamation or deposit is not “accreted” land
McLeay v. Kelowna (City), 2004 BCSC 325
- Area of accreted land to be established by survey
- Upland owner can apply to the B.C. Surveyor General for natural boundary adjustment or to the court for declaration as to ownership of the accreted land
Bryan’s Transfer Ltd. v. Trail (City), 2010 BCCA 531

Boundaries

- Surveyor practice is to consider:
 - where is the established upland vegetation, decaying vegetation build-up
 - is there vegetation that only grows above sea level (i.e., salt intolerant)
 - change in soil type caused by sea or water action

Lawrence v. British Columbia (Attorney General), 2010 BCSC 309

Merritt v. Toronto (City) (1913), 48 S.C.R. 1



Right of Access to Upland from the Water

- Unobstructed access from every point along the riparian owner's frontage to the deeper waters where navigation practically begins

Graham v. Andrusyk, 2006 BCSC 1614

- Right of access is not an ownership right. Riparian owner does not own or control the foreshore

Minor v. Van Ewyk, 2008 BCSC 558



Right of Access to Upland from the Water

- Test is whether the waterway is “capable of navigation”
- Not a question of navigability for trade and commerce or the traditional “commercial test”
- Can be seasonal navigability

Simpson v. Ontario (Ministry of Natural Resources), 2011 ONSC 1168



Right of Access to Upland from the Water

- “Reasonable” access to an upland owner’s property - boat of 30’ – 40’ with a draught of 3’ – 3.5’

Nicholson v. Moran (1950), 1 W.W.R. 118 (BCSC)

- Crown licence/lease to occupy foreshore does not confer a right to impede access

Redwood Park Motel Ltd. v. British Columbia Forest Products Ltd., [1953] B.C.J. No. 20 (SC)



Right of Access to Upland from the Water

- Temporary, moving obstruction may not be interference
Graham v. Andrusyk, 2006 BCSC 1614
- Unclear if upland owner must actually use the riparian access for there to be compensable damages
Mitchell Island Holdings Inc. v. Howe Sound Pulp and Paper Limited et. al., 2006 BCSC 1121



Public Rights

Public has, subject to various regulations, a right to:

- navigation of waters
- anchoring & mooring
- fish
- land boats and embark from the foreshore in emergencies



Things that make you go hmmm...

- Must the upland property always touch the water?
- Do riparian rights exist if laws (eg., DFO or environmental regulations) preclude owner from actually accessing the waterway?
- Can riparian rights be severed and vested in a non-riparian owner? Sold or transferred?
- What will be the impact of rising sea levels on the ownership of upland properties? Land values? Buildable area?

Aye aye, and good bye.
Thank you