# Riparian Rights and Public Foreshore Use in the Administration of Aquatic Crown Land

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## Contents

## 1. Introduction

*In British Columbia, the Ministry of Agriculture and Lands administers aquatic Crown lands.[1] This paper reviews the riparian rights of property owners adjacent to aquatic Crown lands and provides guidelines on how to protect these rights and the privilege of public access, while making such land available for other uses.*

Aquatic lands are the foreshore and beds of streams, rivers, lakes and coastal waters, such as Georgia Strait, the Strait of Juan de Fuca and inlets. In British Columbia, the Crown retains ownership of lands below the natural boundary, except in very rare instances.

The Ministry of Agriculture and Lands administers these aquatic lands and provides for various commercial, industrial, conservational and recreational uses. In doing so it respects the common law rights of waterfront property owners and recognizes the importance of public access to and passage along the foreshore.

Owners of waterfront property enjoy certain riparian rights.

Riparian rights, which run with an upland property, include access to and from navigable water, protection of the property from erosion, and ownership of accretion once it takes on upland characteristics.

This paper reviews these rights and demonstrates the ways in which they affect and, in turn, are affected by the administration of Crown land.

The guidelines provided explain how the ministry can protect riparian rights in carrying out its administrative function and how it can assert the Crown's right to eroded land. The paper also describes the mechanisms by which the Crown can retain or acquire riparian rights.

While much of the information in the paper is based on case law concerning riparian rights, the conclusions and administrative guidelines outlined are not legal opinions on either the nature or the extent of such rights.

[1] In 1995 when this document was last revised, administration of aquatic Crown lands was under the jurisdiction of the Ministry of Environment, Lands and Parks. From 1995 to 2001, aquatic Crown lands were administered by Land and Water BC. Since 2005, the Ministry of Agriculture and Lands has assumed jurisdiction over aquatic Crown land. For reasons of historical accuracy, the references to the former Ministry of Environment, Lands and Parks have been left in this document.

## 2. Riparian Rights and Public Foreshore Use: Historical and Legal Foundations

### The Origin of Riparian Rights

For centuries it has been recognized that water bodies and watercourses are essential for marine commerce. Non-navigable streams have also received special attention because of their value in supplying potable water for domestic use and for irrigation. Over time, certain rights have been established for these uses.

Access to navigable waters from waterfront property, protection of waterfront properties from wind and wave action and ownership of accreted material which takes on upland characteristics are not rights granted by statute. Instead, they developed as common law rights, and the courts have defined their nature and extent in numerous legal proceedings.

Some of the original riparian rights, such as the right to take water, have been specifically or incidentally eliminated by statute. Others remain entrenched as common law rights incidental to ownership of waterfront property and "run with the land". They are not associated with or recorded upon the certificate of title to the land maintained in the Land Title Registry.

### The Rights of the Crown and Public Use of and Access to Aquatic Crown Land

The *Land Act* and *Land Title Act* provide the authority under which the Ministry of Agriculture and Lands administers aquatic Crown land.

The ministry recognizes and respects the riparian rights of waterfront property owners. In special cases it may assert its own right to protect the public interest or to make aquatic Crown land available for commercial, industrial, conservational or recreational purposes.

The Crown recognizes the importance of providing for public use of aquatic Crown lands and public access to and along the foreshore, but these are not public rights, and they cannot be guaranteed in all cases.

The public does enjoy a privilege or bare licence to use the foreshore and other aquatic lands held by the Crown. The only rights that exist, however, are the right to land boats and to embark from the foreshore in cases of emergency, and the rights of navigation, anchoring, mooring, and fishing over those lands covered by water.

Navigation is under federal rather than provincial control. The Canadian Coast Guard exercises this management responsibility under the authority of the federal *Navigable Waters Protection Act.*

Anyone who wishes to build structures in navigable waters must obtain approval from the federal government and the provincial government. If the building causes special damage, however, this approval does not guarantee protection from legal action.

## 3. The Nature and Extent of Riparian Rights in British Columbia and in Other Jurisdictions

Riparian rights involve the relationship between water and the land beside which or over which it rests or flows. Historical or traditional riparian rights which apply in British Columbia include the following:

- Protection from erosion by an upland property owner.
- Accretion and Erosion - ownership of naturally accreted material which has taken on upland characteristics (or loss of land through slow and natural removal of material).
- Ingress and Egress - access to and from navigable waters from all points along the natural boundary of the upland parcel.

As defined in section 1 of the Land Act, *natural boundary means 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.*

### Protection of Land

British Columbia recognizes the right of upland property owners to protect their land from erosion or flooding by building embankments, dykes, or other protective improvements. This right may be exercised only on the upland property. Owners have the right to install protective structures on their own land; but they require the consent of the Crown to extend any structures below the natural boundary.

### Accretion and Erosion

Land abutting a body of water is subject to accretion and erosion.

A waterfront property owner owns land that has slowly and naturally accreted once that land takes on upland characteristics. In some situations this can include new land where the material has gradually and imperceptibly accreted as a result of a structure placed by another party or where the level of the body of water was lowered.

This situation can also operate in reverse. When the upland is slowly and naturally eroded, the land lost becomes part of the foreshore or bed of the adjacent water body. The Crown then owns the land below the natural boundary.

In accordance with common law the waterfront property owner does not own land created by a sudden deposit of material caused by flood or by an artificial interference in natural processes.

An upland property owner does not own fill placed in the foreshore in front of their property. Fill must be purchased in fee simple from the Crown.

Where erosion or accretion has occurred, the certificate of title to the upland property recorded in the land title registry will not reflect the actual extent of ownership. In order for the property's title to reflect the actual extent of ownership the upland property owner will have to

retain the services of a British Columbia land surveyor to redefine the property and deposit an updated legal survey plan into the land title registry.

**Access: Ingress and Egress**

Waterfront property owners have the right to unimpeded access to and from their property to deep water for the purposes of navigation. This right exists separate and apart from the public right of navigation.

This right of access to and from the water applies to every point along the natural boundary of the waterfront property.

In respect of this right, if an improvement is constructed in the foreshore fronting one waterfront property it must be situated so as not to interfere with the right of access of neighbouring properties. The types of obstruction likely to constitute interference are discussed in Section 4.

Information is provided below on three historical or traditional riparian rights which do *not* apply in British Columbia.

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**Extension of Property Rights -** *ad medium filum aquae*

The question of how far property rights extend out into a river or other body of water is often included in discussions of riparian rights.

Similarly, constructing facilities on the foreshore below the natural boundary to enhance access to and from the water is also often thought of as a riparian right. In British Columbia, such construction requires the consent of the Crown and is not a right of the upland owner.

As these two subjects arise so often, they have been included in this analysis.

The extent of private property rights upon land that is covered by water is an important issue in British Columbia.

In the case of properties that reached to the edge of non-navigable bodies of water, the property was considered at common law to extend to a line equidistant from each bank to the centre or middle thread of the watercourse. This principle is known as *ad medium filum aquae* (literally, "to the middle thread of the stream").

In Canadian Exploration Ltd. v. Rotter, [1961] S.C.R. 15 the Supreme Court of Canada confirmed that the principle of *ad medium filum aquae* may apply to properties that border non-tidal bodies of water.

This particular right is usually not available in British Columbia as a result of s. 55(1) of the *Land Act*. This section precludes private rights of ownership or control over the beds of streams, lakes, rivers, and other water bodies in the province.

## Construction of Facilities for Access

Waterfront property has always had strategic importance for the conduct of marine commerce. As a consequence, the traditional right of access to deep water for navigation has often been interpreted to include the right to construct facilities on the foreshore to provide such access.

Case law suggests that riparian owners have a limited right to construct *floating* wharves or docks that do not interfere with the public right of navigation and that are only affixed to their own upland property (Booth v. Ratte (1890), 14 A.C. 612 P.C.). However, this right does not extend to facilities that are anchored or in any way affixed to the foreshore or bed of the adjacent water body.

Ownership of most of the foreshore and beds of water bodies in British Columbia is vested in the Crown. Some private moorage facilities may be constructed over the Crown's foreshore by upland property owners if the facilities meet a prescribed set of standards. For any other kind of facility, owners will require the express consent of the Crown.

## Quality and Quantity of Surface Water Flow

The original and fundamental riparian right was the right to use and divert water in a stream or river for domestic purposes.

Since many people used a common stream traversing their lands for domestic supply and irrigation, their right to water of undiminished flow and quality became a basic riparian right.

This right was abrogated in British Columbia with the passage of the *Water Act*.

The water-licensing system now in place still retains concern for the quality of water enjoyed by downstream users, but users are limited in the amount of water they may take for their own use and cannot divert water without consent of the Crown.

## Riparian Rights In Other Jurisdictions

Most of the riparian rights reviewed are recognized in other jurisdictions. The three riparian rights still observed in British Columbia are all recognized in England under common law. The principles covering accretion and erosion, access to water, and protection from erosion of property are similar to those recognized here, as are the legal and jurisdictional arrangements for guaranteeing those rights.

In the United States, the right to accreted land is essentially the same as it is in Canada and in England. Similar principles are used in these jurisdictions to differentiate gradual and imperceptible accretion or erosion from sudden or artificial processes.

However a large percentage of the foreshore is privately owned in many states, property owners have greater rights to protect their land and to build facilities for access to deep water, and public rights are more restricted.

In general, the position adopted by British Columbia with respect to the three types of riparian rights it continues to recognize is consistent with that of other jurisdictions--both in the way in

which these rights are defined and the legal and institutional arrangements used to ensure their protection.

## Summary

Of the historical or traditional riparian rights and related property rights mentioned here, three have been abrogated by statute;

- The principle of *ad medium filum aquae.*
- The right to water flow of undiminished quality and quantity.
- The right to construct facilities on the foreshore to provide for access to deep water.

Three riparian rights that *do* apply in British Columbia are:

- Protection from erosion by an owner.
- Accretion and Erosion - ownership of naturally accreted material which has taken on upland characteristics.
- Ingress and Egress - access to and from navigable waters.

The right to protect waterfront property from erosion is relatively well established. The limits of that right are defined by the boundaries of the upland property being the location of the present natural boundary as it exists from moment to moment. To erect protective works beyond the present natural boundary needs the consent of the Crown.

In order to have accreted land included in the title, the owner must demonstrate that accretion occurred slowly and imperceptibly over time.

The right of access has been specifically defined with respect to the waterfront property. Ingress and egress must be possible from every point along the water frontage over every part of the foreshore.

In administering and protecting these rights, there are three areas where difficulties may arise for the ministry:

- Issuing foreshore and nearshore tenures while avoiding interference with the riparian right of access.
- Claiming ownership of eroded lands.
- Retaining riparian rights for the Crown through the mechanism of a statutory right-of-way over the riparian right of a waterfront property.

Guidelines for dealing with these issues are discussed in Section 5.

## 4. The Relationship between Riparian Rights, Public Foreshore Use, and *Land Act* Tenure Administration

Under its mandate to administer aquatic Crown land, the Ministry of Agriculture and Lands employs various mechanisms to provide for public foreshore access, where feasible, and to protect the riparian rights of waterfront property owners. It also facilitates other uses of the foreshore and nearshore by providing various types of tenure granted under the *Land Act* and by implementing the specific commercial, industrial and recreational land use policies developed by the ministry.

In granting tenure to aquatic land, the Crown makes every effort to facilitate public access to and along the foreshore. However, there are instances where it is not possible to accord this privilege.

Most tenures created over the foreshore or nearshore have specific limits on their nature and duration. The various types of tenure are described here in general terms.

In almost all cases, tenures granted by the ministry over foreshore or nearshore areas are separate and distinct from the ownership of the upland property. The fact that a waterfront property owner has obtained tenures over the adjacent foreshore does not mean that those tenures are automatically assigned to future purchasers of the upland property.

Confusion sometimes arises when prospective buyers of waterfront property are mistakenly led to believe that ministry tenures held by the owner "go with the property". The ministry must give its permission to transfer tenure from one party to another. This permission is not to be withheld unreasonably. If the former owners retain the leasehold of the foreshore after selling the property, they may have the right to restrain the new owner from trespassing on those leases. Of course, the leaseholder will also have to respect the riparian rights of the new upland owner, including the right of access to and from the property.

Prospective buyers should check with the ministry to ensure that any development on the foreshore or nearshore adjacent to the property is legitimate. Also, such purchasers should not assume that any tenures in front of that property will be automatically assigned to them. Assignment may be possible, and it will be considered upon application to the ministry.

### The Nature and General Provisions of Tenure Issued Under the *Land Act*

#### Temporary Permit

A temporary permit to occupy aquatic Crown land may be issued to allow investigation or to authorize temporary short-term use. Generally, temporary permits are issued for commercial or industrial foreshore operations.

Investigative uses may be authorized for periods up to one year, while other temporary uses may be authorized for up to six months. This type of permit does not necessarily include the right to construct facilities or improvements on the land.

### Licence of Occupation

A Licence of Occupation authorizes the holder to occupy Crown land for a given purpose for a period usually not exceeding ten years. The Licence is contractual and non-exclusive. It conveys a mere "right to occupy," and not an "interest" in the land. As a result, major improvements - including structures, buildings, and modifications to the land - are not likely to be permitted under this form of tenure.

To protect the public interest, the ministry often issues a Licence of Occupation where the tenure-holder does not require long-term security. Because it does not convey an interest in the land, a Licence of Occupation does not give the holder a right to restrict public access across the licence area.

### Lease

Lease tenure conveys a limited interest in the land and also allows for the construction of improvements on the land or for modifications to it. Often the applicant will have to provide a management or development plan to ensure appropriate and efficient use of a lease. The maximum term for foreshore leases is normally thirty years.

As with other forms of tenure, a lease may be issued for a part of the foreshore or for submerged land. The latter is usually physically distinct from and not abutting the mean ordinary low water mark.

The ministry uses leases where the land is to be developed or improved over time and/or where the applicant requires a measure of security of tenure to obtain financing or liability insurance before undertaking development.

The long-term nature of such development makes lease tenure the most likely type to be involved in an infringement of the riparian rights of adjacent waterfront property owners.

Since lease holders have an interest in the land, they may acquire a right to restrict public access to and across the tenure area by posting or other notice if provided for in the tenure document. Ministry staff may require leaseholders to provide public access where it is clearly not detrimental to the interests of the leaseholder.

### Statutory Right of Way over the Riparian Rights of Waterfront Property

Under s. 218 of the *Land Title Act*, the Crown may acquire a statutory right of way that takes precedence over the riparian rights of a waterfront parcel, thus securing the riparian rights associated with that parcel to the Crown. It can do so either by gaining the consent of the incumbent waterfront property owner or, where the Crown still owns the waterfront parcel, by registering the statutory right-of-way charge against the parcel before it is sold or leased. The circumstances where the Crown may decide to seek a statutory right of way on its own behalf are discussed in Section 5 of this document.

### Disposition of Crown land

In instances where Crown upland will be sold, the Crown retains ownership of water bodies. Maintaining lands below the natural boundary is considered to be of prime importance.

Even long-term uses of the foreshore are almost always accommodated by lease tenure rather than by complete sale.

## Riparian Rights and *Land Act* Tenure Administration in British Columbia

In granting foreshore and submerged land tenure and ensuring public access to and along the foreshore, the ministry takes the riparian rights of waterfront owners into account in the following general ways:

### Protection of Land from Erosion

The ministry generally does not authorize the construction of improvements or the placing of fill below the natural boundary for protection of waterfront property from erosion or flooding, particularly if such improvements or fill would infringe on the right of access from adjacent upland property owners or upon the public right of navigation, or if they unduly affect public passage along the foreshore.

Since the right to protect waterfront property is generally exercised above its natural boundary, this right does not usually conflict with the ministry's administration of land. However, where such improvements or fill have been located on the foreshore without the consent of the ministry (that is, in trespass), decisions about legalizing them will not be made until the riparian rights of any adjacent waterfront property owners and the public interest are considered.

Where waterfront property has suffered some degree of erosion and as a result the natural boundary has changed over time, owners will generally not be authorized to place fill, retaining walls or similar improvements below the current natural boundary.

In general, if the ministry approves improvements or fill below the natural boundary, it will ensure that public passage along the foreshore is maintained.

### Accretion and Erosion

#### *Accretion*

Where material gradually and imperceptibly accretes to a waterfront property common law holds that the property owner owns all the accreted land that lies above the natural boundary. Section 94 of the *Land Title Act* provides a mechanism through which accretion can be brought into the certificate of title of the adjacent upland property.

The upland property owner will need to retain the services of a British Columbia land surveyor to make an appropriate application to the Land Title and Survey Authority of British Columbia should they wish to pursue placing accretion within their title.

### *Erosion*

In accordance with common law it is the province's opinion that, as upland is slowly and naturally eroded the extent of the upland parcel diminishes and the eroded lands become part of the foreshore and bed of the aquatic lands.

The Crown cannot remove eroded land from the upland title to such land without a new land survey and the consent of the upland property owner or until a court declaration has been obtained. However, the ministry may proceed to make land administration decisions in the interim.

There are however, mechanisms within the *Land Title Act* that deal with titled land which has been submerged by water.

In the case of a property being subdivided, upon the subdivision plan being filed in the Land Title Registry, section 108(2) of the *Land Title Act* may provides that the owner's title is extinguished over land that was covered by water at the time of subdivision.

If the submerged land is reasonably meant to be part of the subdivision (for example, a water lot), then this rule may not apply and the land remains with the property owner (Pacific National Investments v. Victoria (City) [2000] 2 SCR 919).

If, at the time that titled land is subdivided, a portion of the originally titled land has become submerged, then that portion could revert to the Crown if tests of common law are met and/or, in certain situations, in accordance with section 108(2) of the Land Title Act (R. in Right of British Columbia v. Ogopogo Investment (1980), 23 B.C.L.R. 43 (B.C.S.C.)).

The ministry takes the view that where section 108(2) of the *Land Title Act* has effect, title is extinguished even if the submerged land had not gradually and imperceptibly disappeared but, rather, had avulsed.

(Avulsion, as defined in Black's Law Dictionary, 5th Edition, means *A sudden and perceptible loss or addition to land by the action of water, or a sudden change in the bed or course of a stream…..)*

The ministry may have to act in the public interest on instances of erosion of property.

### **Access: Ingress and Egress**

The final remaining riparian right - unimpeded access to and from every point along the foreshore adjacent to a waterfront property - has a significant impact on the ministry's administration of land.

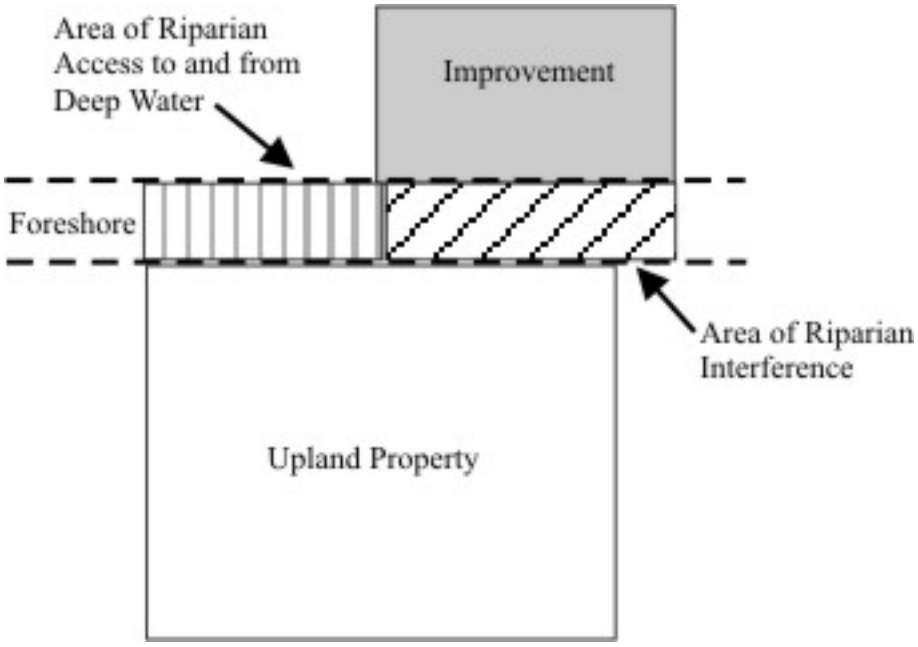


***Figure 1: Tenure with Improvements Located Adjacent to the Foreshore in Front of a Riparian Owner***

**Tenure Abutting or Covering the Foreshore**

Refer to Figure 1 above. This diagram shows an upland property and the adjacent foreshore and nearshore areas.

The improvement that abuts the low water mark in Figure 1 would undoubtedly constitute an obstruction and an actionable interference with the upland owner's right of access. In this case, the property owner would not have access to deep water for the purposes of navigation from every point along the foreshore in front of the property.

It is not enough that the property owner could get to deep water from every point along the natural boundary of his property. The improvement would still constitute an infringement of the riparian right of access.

In Attorney General of the Straits Settlement v. Wemyss (1888), 13 A.C. 192 (P.C.), it was held that the riparian right of access extends "from every part of the frontage, over every part of the foreshore". Thus, if the improvement only covered part of the foreshore, it would make no difference. The improvement would still constitute an interference.

Therefore, if a foreshore lease were to abut the low water mark or cover part of the foreshore and also extend in front of privately owned waterfront property, it is likely that any improvement placed upon that lease will constitute an interference with the owner's right of access.

## Tenure Located Nearshore or Offshore

Baldwin v. Chaplin (1915), 21 D.L.R. 846 (Ont. S.C.) indicates that whether an interference with the riparian right of access has occurred will always be a question of fact. Thus, the circumstances and resolutions will differ from case to case.

In cases where a water lot lease does not abut the low water mark or cover part of the foreshore but rather extends in front of privately owned waterfront property the Crown must be very careful to maintain the upland property owner's ability to access navigable waters.

To make sure there is no infringement on an upland owner's right of access, the ministry takes a conservative approach. Foreshore leases in front of private waterfront are not normally issued to a party other than the waterfront property owner. This policy has been based on the finding in Redwood Park Motel Limited v. British Columbia Forest Products Limited (1953), 8 W.W.R. (NS) 241 B.C.S.C.). The decision in this case held that the Crown has no power to authorize a lessee to obstruct navigation or to unduly interfere with a riparian proprietor's right of access.

In Figure 2, an offshore lease extends in front of a privately owned waterfront property. Any improvement on that lease (such as a log boom) would interfere with the upland owner's ability to travel directly to the point marked "X" on the diagram. However, it would not prevent the upland owner from having access to deep water from every point along the foreshore (indicated by the shaded area on the diagram).

While this type of improvement might not constitute an interference with the waterfront property owner's right of access, it could be actionable as an interference with their public right of navigation. The decision in Redwood Park (p. 242) affirmed that the Crown has no power to authorize an interference with navigation:

"The right of navigation in tidal waters is a right of way there over for all the public for all purposes of navigation, trade and intercourse. It is a right given by the common law, and is paramount to any right that the Crown or a subject may have in tidal waters, except where such rights are created or allowed by an Act of Parliament. Consequently every grant by the Crown in relation to tidal waters must be construed as being subject to the public rights of navigation. It is not a right of property; it is merely the right to pass and to re-pass and to remain for a reasonable time."

When the ministry locates water lot tenures, it must ensure that any improvements will not constitute an interference with the public right of navigation. According to common law, the waterfront property owner's right of navigation is equivalent to that enjoyed by any other member of the public.

The ministry cooperates with the provisions of the federal *Navigable Waters Protection Act* in locating foreshore and water lot leases and licenses.

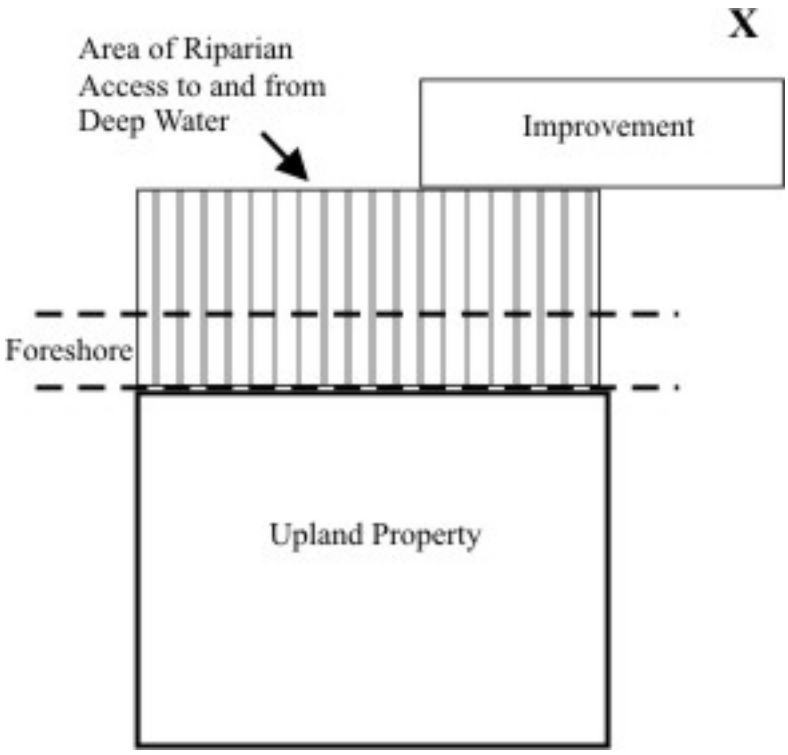


***Figure 2: Tenure with Improvements Located Nearshore in Front of a Riparian Owner***

Provided that an improvement, such as the one shown in Figure 2, is far enough away from the low water mark to allow the adjacent waterfront property owner access to deep water from every point along the foreshore in front of the property, and provided that the improvement does not hinder the public right of navigation, the improvement should not infringe on the waterfront property owner's riparian rights.

The Baldwin decision was appealed to the Ontario Supreme Court Appellate Division in 1915. In dismissing the appeal, Justice J. Hodgins noted that:

*... interference with the right of navigation which only renders access more difficult, but not impossible, is an interference with a public and not a private right and special damage must be proved by the riparian owner who complains of such interference.*

While no case law precedent establishes how far offshore such an improvement would have to be located to ensure that it does not interfere with the property owner's rights of access or navigation, the ministry has developed a guideline based on the decision of justice MacFarlane in Nicholson v. Moran (1950), 1 W.W.R. 118 (B.C.S.C.). This guideline is described in Section 5.

In questions of navigation, the federal Minister of Justice and provincial Attorney General are the only authorities able to take action where the breach of navigation affects the public but does not affect particular individuals. Individuals can only take action in situations where they can show special damage affects them. This damage usually involves interference with a commercial operation.

## Summary

The riparian right of access and the right to navigation enjoyed by riparian owners, in common with the public, have the greatest impact on the ministry's administration of land.

The riparian right of access requires that the waterfront property owner be able to get to and from deep water in a craft of reasonable size from every point along the waterfront property.

Any obstruction that makes it impossible to reach every point along the adjacent foreshore from deep water is likely to be actionable. The obstruction is an infringement of the waterfront property owner's riparian right of access.

An obstruction located in front of privately owned waterfront property, which does not infringe upon the riparian right of access, may nonetheless constitute an impediment to the owner's public right of navigation. However, the owner must be able to show special damage or the owner will only receive the same consideration as the general public.

## 5. Administrative Guidelines

The following guidelines are designed to help the ministry recognize and protect the rights of riparian property owners, as well as the interests of the general public in administering aquatic Crown land. These guidelines are general in nature. More specific procedural policies covering these matters are set out in the ministry's Land Administration Manual.

### Accretion and Change of the Natural Boundary in Favour of the Waterfront Property Owner

Where an upland property owner believes that lawful accretion has occured against the natural boundary of their property or that the receding of the adjacent body of water has resulted in new land forming against their property the owner may retain a British Columbia land surveyor to make application to the Land Title and Survey Authority of British Columbia to determine if this new land can be included in the title. The Surveyor General makes this decision according to the provisions of section 94 of the *Land Title Act*.

If it is determined accretion has occurred, that the new land has taken on upland characteristics, that it has occurred slowly and naturally, and if it is in the public interest to do so, the Surveyor General may approve the accretion application.

Factors used to decide if the accretion may be included in the upland owner's title include:

- Has the land formed gradually and imperceptibly?
- Has the land grown outward from the bank, or has it emerged from the bed of the water body?
- Is the land above the present natural boundary as that term is defined in section 1 of the *Land Act*?
- What is the character of the soil and vegetation now found on the land?

If the application is approved the accretion will be consolidated with the upland owner's property by a new legal survey conducted by the owner's land surveyor. Although there is no charge for the land, the owner will be required to pay land survey costs and administrative fees.

### Erosion and Acquisition of Land by the Crown in the Public Interest

On occasion, the ministry will find it necessary to take formal notice of the fact that a waterfront property owner's natural boundary has moved inland as a result of gradual and imperceptible erosion.

To protect the interests of the public (particularly in attempting to maintain the privilege of public foreshore access and use) and also to provide for other uses of aquatic Crown land, the ministry may lay claim to eroded land.

In accordance with common law it is the province's opinion that, as upland is slowly and naturally eroded the extent of the upland parcel diminishes and the eroded lands become part of the foreshore and bed of the aquatic lands and therefore Crown land (Southern Theosophy v. South Australia (1982), 1 All E.R. 283 and Bruce v. Johnson (1953), O.W.N. 724 (Ont. Co. Ct.)). The requirement for **gradual** encroachment is specified in A.G.B.C. v. Nielson (1956), 5 D.L.R. (2d) 449 (S.C.C.).

The Crown cannot remove eroded land from the upland title to such land without a new land survey and the consent of the upland property owner or until a court declaration has been obtained. However the ministry may proceed to make land administration decisions in the interim.

There are, however, mechanisms within the *Land Title Act* that deal with titled land which has been submerged by water.

Section 108(2) of the *Land Title Act* provides that in certain situations where titled land becomes submerged, by any cause, natural or manmade, whether slowly or suddenly, ownership of the submerged portions of titled land reverts to the Crown upon deposit of a subdivision plan of the titled property.

Staff of the ministry's regional offices may monitor areas of shoreline that are particularly subject to forces of erosion. Where erosion has clearly occurred over time and where any action by a waterfront property owner to reclaim the eroded area to the former property boundary by improvements or fill would have a negative impact on public use of the foreshore or on other uses of the aquatic Crown land, the ministry may assert its claim to that land. It would then seek the necessary adjustments to the title of the property.

## Retaining the Riparian Rights of a Waterfront Property for the Crown

The ministry is aware that retaining the riparian rights of waterfront property in the name of the Crown through the use of s. 218 of the *Land Title Act* is sometimes in the public interest. In such cases the ministry may seek a statutory right of way from a waterfront property owner. Where the upland is still owned by the Crown the ministry may choose to establish such a right-of-way before selling the parcel.

## Protecting the Right of Access in the Case of Foreshore Tenures Involving Improvements

Unless the Crown has secured the riparian rights of the adjacent waterfront property, the ministry will not allow foreshore tenures (on which improvements may be added) in front of privately owned upland. Where the upland is held in some form of tenure but not in fee simple, the ministry attempts to ensure that the term of tenure issued on adjacent aquatic Crown land is concurrent with the term of the upland tenure.

## Protecting the Right of Access in the Case of Nearshore and Offshore Tenures Involving Improvements

No firm guidelines exist for determining how far out into the water an improvement must be located so that it does not interfere with either the waterfront property owner's right of access or the public right of navigation.

In order to "err on the side of caution", the ministry follows the remarks of Justice MacFarlane in Nicholson v. Moran (1950), 1 W.W.R. 118 (B.C.S.C.) as a policy guideline. In discussing interference and reasonable access, Justice MacFarlane used a boat 30 to 40 feet long with a draught of from 3.5 to 5 feet as a standard to determine reasonable access. Such a boat is "a

boat of reasonable size to use in safety in the adjacent waters, being the waters of the Gulf Islands, on practically all occasions".

The ministry recognizes that interference with access and navigation has to be assessed differently in every situation because of variables such as the shape of the coastline, depth of water, tides, and so forth. However, ministry staff will generally attempt to locate nearshore and offshore tenures so that at lowest tide a 40-foot boat could still have comfortable access to every point along the foreshore adjacent to the waterfront property, and to and from deep water with enough room to manoeuvre and turn around.

Providing that these guidelines are followed and that the tenure does not create an interference with the public right of navigation or specially damage the waterfront property owner, consent of the owner should not be required.

## The Right of Access and Tenure Not Involving Improvements

Temporary permits and licences of occupation issued for the foreshore or restricted to nearshore or offshore Crown land should not require the consent of the property owner, if they do not involve improvements that would impede access.

If such tenures do involve improvements, however, even temporary ones, the guidelines given above would apply.

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