

AN EXAMINATION OF THE LAW OF WATER BOUNDARIES AND ACCRETIONS IN MANITOBA.

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Riparian rights have been defined as "the rights of the owners of lands on the banks of watercourses, relating to the water, its use, ownership of soil under the stream, accretions, etc."¹ This rather imprecise definition gives some idea of the scope of the area. This analysis will deal only with the determination of boundaries of lands fronting on watercourses and changes to those boundaries. All other riparian rights, which include the use of water, drainage, water in a natural state of purity, access to water, navigation and construction of wharves, must necessarily be omitted.²

To be riparian, land must be on the banks of a watercourse or body of water.³ Therefore, swamp or boggy land not usually covered by water is to be treated as land, and not as water, for the purpose of determining the rights of proprietors bordering on it.⁴ Furthermore, riparian rights are not restricted to natural

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1. *Black's Law Dictionary* Revised Fourth Edition (1968), citing *Mobile Transportation Co. v. Mobile*, 128 Ala. 335
2. See generally,
 - H.P. Farnham, *The Law of the Waters and Water Rights*, (1904) three volumes (U.S.).
 - R.E. Clark, Editor-in-Chief, *Waters and Water Rights: a treatise on the Law of Waters and Allied Problems*; (1967-70) seven volumes (U.S.).
 - J.M. Gould, *A Treatise on the Law of Waters*, (3rd ed. 1900), (U.S.)
 - Per Gisvold, *A Survey of the Law of Water in Alberta, Saskatchewan and Manitoba*, (May 1959).
3. What is a watercourse? Martin, J.A. gave this definition in *Edward v. Scott R.M.*, [1934] 1 W.W.R. 33 at 38, affirmed [1934] S.C.R. 332:

A watercourse is defined as a stream, usually flowing in a definite channel, having a bed and sides or banks and discharging itself into some other stream or body of water. It must be something more than surface water, spread over a tract of land, caused by unusual freshets or other extraordinary causes. A depression or natural draining which merely carries water in a rainy season is not a watercourse; nor is a ravine which at certain seasons facilitates the drainage of the country a watercourse. A watercourse must have the characteristics of a flowing stream, it must have source, outlet and channels; the water need not, however, flow continually; *Farnham on Waters and Water Rights*, vol. II, pp. 1554-1562. In *Kerr on Injunctions*, 6th ed., p. 229, the learned author states:

"As distinguished from water of a casual or temporary character a water course is a flow of water usually flowing in a certain direction and by a regular channel, having a bed, banks and sides, and possessing that unity of character by which the flow on one man's land can be identified with that on the land of his neighbour."

The passage was quoted with approval in *Brown v. Morden (Town)* (1958), 24 W.W.R. 200 at 205-6 (Man. Q.B.) and *Lee and Radcliffe v. Arthur R.M.* (1965), 52 W.W.R. 166 at 169-70 (Man. C.A.). These cases also discuss other Manitoba cases. Further if the watercourse changes temporarily into a slough with no defined banks and then changes back into a watercourse, it is still defined as a watercourse for that distance, as long as there is a slight current. *Hudson's Bay co. v. Horanin*, [1926] 1 W.W.R. 460 at 463 (Man. K.B.).

4. *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), accord *Merritt v. City of Toronto* (1913), 12 D.L.R. 734 (S.C.C.) affirming 6 D.L.R. 152 (Ont. C.A.).

That case held that a person whose land was separated, by wet, marshy boggy land, from navigable waters was not a riparian proprietor or owner of land with rights of access to the deeper navigable waters outside and beyond his land.

watercourses and bodies of water. They may apply to artificial waterways.⁵ Most importantly, one need not own the bed under the water to have these rights. It is sufficient to have land bounded by water.⁶

Finally, for lands abutting on water, the watercourse or body of water must determine the boundary. If the boundary is described by monuments placed in the ground without regard to the natural boundary, it is submitted that the following discussion is not applicable.⁷ If, however, the watercourse or body of water will determine the boundary, then riparian law as to boundaries applies as follows.

The English Common Law

The English common law determined riparian boundaries by distinguishing between tidal and non-tidal waters. If tidal, then prima facie, the boundary would be the ordinary or medium high tide mark. The bed and shore of the body of water belonged to the Crown. This was, however, only a presumption and could be rebutted if the wording of the deed indicated otherwise. If the body of water was non-tidal then prima facie, the boundary was to the centre of the stream or lake (*ad medium filum aquae*). This, too, was only a presumption.

The law as to tidal boundaries applies in Canada but the law as to non-tidal boundaries does not; at least in Manitoba. If non-tidal, there is instead a distinction between navigable and non-navigable waters. This part of the discussion will deal with tidal, navigable and non-navigable boundaries as they relate primarily to Manitoba, and with relevant Manitoba legislation which may affect their determination.

MANITOBA LAW

Tidal Waters

There are no cases in Manitoba to this date on tidal boundaries. However, Manitoba adopted the law of England as of July 15, 1870 as far as applicable. There does not appear to be any legislation preventing the common law from applying to tidal boundaries. Its application may have been modified by *The Crown Lands Act*⁸ which, from every disposition of Crown land bordering on a sea, reserves to the Crown a ninety-nine foot strip measured from the ordinary high water mark. That section was enacted in 1930. The common law principles would likely apply

5. *Epstein v. Reymes*, [1973] S.C.R. 85.

6. *Lyons v. Fishmonger Co.* (1876), L.R. 1 A.C. 662.

7. cf. *Kipp v. Simpson*, [1928] 3 W.W.R. 331 (B.C.C.A.)

Land was described as a certain quarter section in the deed and more particularly by plan annexed. On the plan, a creek which deviated from the section line at one point, was used to describe one boundary. The court held that the plan should govern. But it also could be inferred that if the deed had governed, then the quarter section line would have determined the boundary.

8. *Infra* n. 62

to grants prior to that time. Following are cases which illustrate how the common law was applied in other Canadian jurisdictions. If a case should arise in Manitoba, they would be of assistance in determining the law as it relates to Manitoba.

The presumption here is that the boundary extends to the shore: that is, to the medium high tide mark. The Crown owns the foreshore — that area between high and low tide water marks. The owner may rebut the presumption by proving a grant or prescription.⁹ However, where indicated in the deed that the line is a fixed and permanent one at the date of granting, the water mark at that time governs.¹⁰

Words used in descriptions have been judicially interpreted. "High water mark" means the medium high tide line between spring and neap tides.¹¹ "Low water mark" when used as a boundary in a grant is prima facie to be taken as meaning the ordinary or mean low mark.¹² Where "coast line" was used to describe the boundary, on tidal waters it could have no wider meaning than "coast." The "coast" was reached at the high water mark.¹³

These definitions may in fact be difficult to apply. In *Nelson v. Pacific Great Eastern Railway Co.*,¹⁴ there was no record of the tides for that area. For want of a better test, the court relied on evidence as to the visible high water mark, such as the state of vegetation, accumulation of driftwood and debris. Although such a test was satisfactory there, it may not be so in all cases. Difficulties will arise where there is little rise in the land. Vegetation, such as seaweed, may be similar in appearance whether usually under water or not, and there may be no clear line of debris.

Non-Tidal Waters

(i) Navigable Waters

In Manitoba, where non-tidal water boundaries are involved, the distinction is between navigable and non-navigable waters. In *Re Iverson and Greater Winnipeg Water District*¹⁵ held that the *ad medium filum aquae* presumption did not apply to the Red

9. *Young v. McIsaac* (1910), 8 E.L.R. 245 at 250 (P.E.I.S.C. Full Court). By prescription the court may have meant adverse possession for more than 60 years. eg. *In Re Quieting Titles Act; In Re Hirst Estate Land Co.*, [1943] 2 W.W.R. 686 (B.C.S.C.)

10. *Delap v. Hayden* (1924), 57 N.S.R. 346 at 350 and 356-7, (C.A.)

11. *Turnbull v. Saunders* (1921), 48 N.B.R. 502 at 508-10 (C.A.). *Webster's Third New International Dictionary* (1967), defines spring and neap tides:

Spring tide: a tide of greater-than-average range between high and low tide that occurs twice each synodic month around the times of new and full moon when the tidal actions of the sun and moon are nearly in the same direction.

Neap tide: a tide of minimum range occurring at the first and the third quarters of the moon.

12. *Supra* n. 10.

13. *Esquimault and Nanaimo Railway Co. v. Treat*, [1918] 3 W.W.R. 686 (B.C.C.A.).

14. [1918] 1 W.W.R. 597 (B.C.S.C.).

15. [1921] 1 W.W.R. 621 (Man. C.A.).

River, a navigable river. The applicable law of Manitoba in 1870 could not affect federal rights, that is, jurisdiction over navigation. The case contains a policy discussion of why the rule does not apply. Because the Red and Assiniboine Rivers are very crooked and because of the river lot system of land holding, the *ad medium filum aquae* presumption would make difficult the determination of the ownership of the river bed. The case discussion also suggests that, if applicable, the *ad medium filum aquae* presumption would seriously interfere with the system of land registration under the *Real Property Act*.¹⁶

The reasoning of the court is not particularly strong. There would be the same problem of division of the ownership of beds of waters whether or not the *ad medium filum aquae* presumption applied. The principle is accepted in other cases as law in Canada.¹⁷ A justification has been that private rights in the soil under navigable non-tidal waters existed in England before the public right of navigation was asserted. However, in Canada the public right of navigation has always existed and been recognized. Therefore, the rights of navigation interfere with no vested interests. Thus similar rules as apply to tidal waters should apply to navigable waters.¹⁸ This argument is also not very persuasive. Owners of lands subject to an easement giving a public tow path, retain their property rights under that land.¹⁹ Why, then, should a public right of navigation preclude the adjacent owners from owning the land under the navigable water? The distinction remains, however, and will not likely be changed. The *ad medium filum* presumption also does not apply to navigable lakes²⁰ nor to rivers subject to *The Irrigation Act*.²¹

In law, to be navigable, a river must be navigable in fact and have commercial utility.²² One of the tests is that given by Davies J., in *The Montello*.²³

The true test of navigability of a stream does not depend on the mode by which commerce is, or may be, conducted nor the difficulties attending navigation. . . . It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true

16. R.S.M. 1970, c. R30.

17. *Accord Keewatin Power Co. v. Kenora* (1907), 13 O.L.R. 237, where Anglin, J., at trial discusses the cases up to that time adopting this principle.

contra, reversed (1908), 16 O.L.R. 184 (Ont. C.A.).

That court found that Ontario adopted the law of England as of 1792 including the *ad medium filum aquae* presumption on non-tidal water whether navigable or not.

18. *Supra* n. 17 (1907), 13 O.L.R. 237 at 260 and following.

19. *Massey Harris Co. v. Elliot* (1902), 1 O.W.R. 65.

20. *Kennedy v. Husband*, [1923] 1 D.L.R. 1069 (B.C. Co. Ct.).

21. R.S.C. 1927, c. 104.

See *Flewelling v. Johnston*, [1921] 2 W.W.R. 374 (Alta. S.C. App. Div.).

22. *Simpson Sand Co. v. Black Douglas Contractors Ltd.*, [1964] S.C.R. 333.

23. 20 Wallace 430 (1874)(U.S.S.C.), adopted by Anglin, J. *supra* n. 17 and referred to *supra* n.22.

criterion of the navigability of a river, rather than the extent and manner of that use.

If the non-tidal water is navigable then it is presumed that the boundary extends only to the ordinary high water mark.²⁴ This may be rebutted, if for example, the deed describes the boundary as "along the shore" of a navigable lake. In that case, the low water mark is considered to be the boundary.²⁵

These words, "bank", "bed" and "shore" are defined in the Manual of Instructions for Survey of Dominion Lands²⁶ as follows:

"134. The courses of a traverse are not boundaries of the parcels fronting on bodies of water. Lands abutting on tidal waters are bounded by the line of ordinary high water mark. In the case of a lake or navigable stream, the boundary is the edge of the bed of the lake or stream, which edge is called the *bank*. The *bed* of a body of water has been defined as the land covered so long by water as to wrest it from vegetation, or as to mark a distinct character upon the vegetation and upon the soil itself where the vegetation extends into the water. According to this definition the limit of the bank is the line where the vegetation ceases, or where the character of the vegetation and soil changes.

The foreshore or shore is the strip of land lying along tidal water, over which the daily tide ebbs and flows; it is the space between high and low water marks at ordinary tides."

These definitions have been influential in judicial determination of the meanings of those words in patents and grants from the federal government.²⁷

(ii) Non-Navigable Waters

On non-navigable waters, the boundary is presumed to extend *ad medium filum aquae*. The deed or plan may clearly show the middle of the stream as the boundary. However, there may be nothing to indicate that intention. Lord Moulton in *MacLaren v. Attorney-General for Quebec*²⁸ gives the test for those cases as follows:

In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquae*

24. *Flewelling v. Johnston*, supra n. 18.

25. Supra n. 20. "Shore" must be synonymous with "bank" when referring to a non-tidal lake.

26. Supra n. 21 at 382.

Accord *Manual of Instructions for the Survey of Dominion Lands*, c. B-6 (1963)

18. The "bed" of a body of water has been defined as the land covered so long by water as to wrest it from vegetation, or as to mark a distinct character upon the vegetation where it extends into the water or upon the soil itself.

19. The "ordinary high water mark" of a body of water is the limit or edge of the bed of the body of water and in the case of non-tidal waters may be called the "bank".

22. The "foreshore" or "shore" is the strip of land lying along tidal water over which the daily tide ebbs and flows; it is the space between high and low watermarks at ordinary tides.

27. Supra n. 21 at 384.

Accord *Clarke v. Edmonton*, [1930] S.C.R. 137 at 153.

28. [1914] A.C. 258 at 273.

or viae the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream.

In *The King v. Fares*,²⁹ the application of the doctrine appeared to be restricted in Western Canada. Fractional sections of land were granted to the Canadian Pacific Railway and a land company. The land abutted on (non-navigable) Rush Lake. A survey had been done prior to this, but only of the lands *not* covered by water. The patents made no reference to Rush Lake or to the survey. The land company paid \$1.50 per acre and the C.P.R. selected the land under a prior agreement with the Canadian Government. Neither company paid for or selected land under Rush Lake. In 1903-04 the C.P.R. made a drain which lowered the level of Rush Lake and uncovered a considerable amount of land. Fares purchased the land in 1909 with the same description as the prior grant. He claimed the uncovered land; either to the centre of Rush Lake or as a lesser claim up to the remainder of the full section in which his fractional section was located.

The Supreme Court held that the *ad medium filum aquae* rule applied to the Northwest Territories unless excluded by the language of the conveyance or if the Dominion Statute law disclosed an inconsistent intention. Three of the five judges felt the statute law did exclude this rule, at least to those commoner transactions (homestead entry, pre-emption entry, sale at a given price per acre) under the *Dominion Lands Act*. However four of the five judges were of the opinion that Fares was not entitled under the patents and agreements between the companies and the Crown. The previously described circumstances of the grant, in the light of statutory provisions, indicated that the *ad medium filum aquae* presumption did not apply. In the result, the lands extended only to the acreages as set out in the grant.

This case was explained and distinguished in *Canadian Exploration Ltd. v. Rotter*.³⁰ The former case was said to have been decided on the construction of the grants. Section 29 of the *Dominion Lands Act*³¹ would not allow conveyance of unsurveyed lands without consideration. In the *Rotter Case*, the

29. [1932] S.C.R. 78.

30. [1961] S.C.R. 15.

31. R.S.C. 1886, c.54.

Supreme Court held that the *ad medium filum* rule applied. Land was described on a registered plan with a red colouring which ended at the bank of a river. This was not sufficient to rebut the presumption that the defendant owned the bed *ad medium filum aquae*.

How far, then, does *The King v. Fares*³² apply? The limitation, to unsurveyed lands granted without consideration, in *Rotter*³³ still leaves it applicable to a potentially large part of western Canada. The Supreme Court's desire not to allow Mr. Fares to gain enormous amounts of land without payment is understandable. But the reasoning is not particularly satisfactory in light of the definition given in the *McLaren Case*.³⁴ There was no *express* statement declaring that the *ad medium filum aquae* presumption was not applicable, either in the deeds or in the legislation. The clearest limitation of the presumption would have been in section 29(2) of *The Dominion Lands Act*,³⁵ that no sale to one person was to exceed 640 acres unless the Governor-General in Council otherwise ordered. Section 32 of that act limits the quantity of land to one quarter section where there is a homestead entry. This would provide a convenient rule for settling disputes in the usual case; that of a small slough or pothole drying up. Thus the landowner would only be entitled to the land within an extension of the section or quarter section lines.

The presumption, where applicable, may be used to resolve a dispute over ownership of an island in a river. Such a case was *Wason v. Douglas*.³⁶ The court here determined that the center line of the river, was in the center of the channel which had most of the water-flow. The court was influenced by the other channel being almost dry. *The Manual of Instructions for the Survey of Dominion Lands*³⁷ however, describes the "middle thread" of a stream as the line midway between the banks. It may be difficult to reconcile these tests in certain cases.

Manitoba Statute Law

Two sections of *The Crown Lands Act*³⁸ are relevant to the

32. *Supra* n. 29.

33. *Supra* n. 30.

34. *Supra* n. 28.

35. *Supra* n. 31.

36. (1904). 3 O.W.R. 456 (Ont. C.A.).

37. *Supra* n. 26, 1963 edition.

38. R.S.M. 1970, c. C340 ss. 5(1)(c), 7(1)(g).

Reservations.

5(1) In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown land,

(c) where the land borders a body of water,

(i) the bed of the body of water below ordinary high water mark; and

(ii) the public right of passage over a portage road or trail in existence at the date of the disposition;

boundaries of lands adjacent to navigable and non-navigable waters.

Section 5(1)(c)(i) reserves the bed of the body of water below ordinary high water mark from every disposition of Crown land unless there is an express provision to the contrary in the deed. This resolves the navigable/non-navigable distinction in grants by the province since the enactment of that Act in 1930. The title to the beds of all bodies of water abutting on those lands remains in the Crown. However, there does not appear to be a comparable section under the *Dominion Lands Act*.³⁹ Therefore, it might be argued that the *ad medium filum* presumption may apply to federally granted lands prior to 1930 which were bounded by non-navigable waters. Otherwise, owners who had acquired the adjacent lands before 1930 would be deprived of vested rights to the bed. Mr. Justice Dickson in *Chuckry v. The Queen* leaves this question open while discussing the comparable section 9 of *The Water Rights Act*⁴¹ (now section 5(1) of *The Crown Lands Act*). Whether the section applies to all lands or only those granted after 1930 however, is a matter of statutory interpretation and beyond the scope of this discussion.

Section 7(1)(g) gives the Lieutenant-Governor in Council the power to grant swamp lands to persons engaged in draining them. On fractional parcels of land bounded by swamp, this section might support an argument that the swamp was to be excluded from the grant. Thus the swamp would be a natural boundary as evidenced by a line of distinct vegetation.⁴² There may be problems in determining the bounds of these swamps in the present day because of improved drainage and more extensive cultivation.

Accretions and Derelictions

This section deals only with accretions (which term includes derelictions — the withdrawal of waters).⁴³ The test of an accretion is given in the leading case of *Clarke v. Edmonton*⁴⁴ by Lamont, J., after a review of the authorities at page 144.

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

Powers of L.G. in C.

7(1) The Lieutenant Governor in Council may

(g) subject to subsection (2), dispose of, for such consideration as he determines, to persons engaged in a project of draining and reclaiming swamp lands, the lands so reclaimed or a portion thereof;

39. R.S.C. 1927, c. 113.

40. [1972] 3 W.W.R. 561 (Man. C.A.).

41. R.S.M. 1970, c. W80.

42. *Niles v. Cedar Point Club*, supra n. 4.

43. *Infra* n. 44.

44. [1930] S.C.R. 138.

other substance, or the permanent retrial 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 suddenly swept from the land of one man and deposited on, or annexed to, the land of another.

The fact that the increase is brought about in whole or in part by the water, as the result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion, for the doctrine of accretion applies to the result and not to the manner of its production. *Stanley v. Perry* (7); *Brighton and Hove General Gas Co. v. Hove Bungalows, Limited* (8).

The doctrine of accretion has broad applications as well as several limitations. It applies to tidal and non-tidal, navigable and non-navigable rivers and also to the sea.⁴⁵ It does not depend on ownership of the bed of the river. It is one of the riparian rights incidental to all lands bounded by water.⁴⁶ But no accretion occurs where a road across the shore prevents the shore behind the road from being covered at medium high tide between spring and neap tides.⁴⁷ It is not an accretion if the land rises out of the water independently of the mainland and subsequently joins to the land.⁴⁸ Whether the land is arable, or whether it has similar qualities to the adjoining land, is not relevant.⁴⁹ Rand, J. in *A.G.(B.C.) v. Neilson*⁵⁰ said,

The trial judge and O'Halloran, J.A. in the Court of Appeal introduced into the idea of accretion elements which, while they may have been considered pertinent to the formulation of the rule, are not embraced within it nor can they be taken into account to supply a want of what the rule calls for as its necessary condition. These elements are of a practical nature: the general advantage from the standpoint of utility of giving the adjacent owner the added land which otherwise would remain less usable; and the maniorableness of the reclaimed portion, that is, its capacity to be worked by hand for ordinary land purposes such as the raising of herbage or crops. But these features of convenience and utility are irrelevant when the change of the tide line is perceptible, and they must be taken to be equally so when the change is imperceptible.

Further, sudden erosions of the bank will not deprive the adjacent owner of title⁵¹ even though the erosion is of a relatively permanent nature. An example of this is a winding prairie

45. *Foster v. Wright* (1878), 4 C.P.D. 438.

46. *Chuckry v. The Queen*, [1972] 3 W.W.R. 561 (Man. C.A.) per Dickson, J.A., dissenting, reversed [1973] 5 W.W.R. 339 (S.C.C.).

47. *A.G. of B.C. v. Neilson*, [1956] S.C.R. 819.

48. *Re Bulman's petition*, (1966), 56 W.W.R. 225 (B.C.S.C.).

49. *Supra* n. 48.

50. *Supra* n. 47 at 826.

51. *Yukon Gold Co. v. Boyle Concessions Ltd.*, [1919] 3 W.W.R. 145 (S.C.C.).

river. There may be gradual changes which do change the natural boundaries. However, oxbows are often formed. In times of flood, the river may form a new, shorter channel across the neck of the oxbow, leaving the old channel dry. This change will not affect the former boundaries.⁵² A similar situation is land subject to a flooding caveat. This gives the Crown the right to inundate lands subject to the caveat (for example, the Crown cutting a dike during a flood and flooding a farmer's land). While the owner may not be able to use this land, he still retains the beneficial interest. In both these cases, while the results might be permanent, the boundaries do not change.

The question is, of course, whether the doctrine of accretion applies to Manitoba. The Supreme Court in *Chuckry v. The Queen*⁵³ held that it did. The dissenting opinion of Mr. Justice Dickson in the Court of Appeal was adopted on this matter. He reasons that Manitoba adopted the law of England as of July 15, 1870 as far as applicable. Nothing precluded the accretion doctrine from applying here. There are no express words in either *The Manitoba Act*⁵⁴ or *The Water Rights Act*⁵⁵ to change the common law. Also, he stated that ownership of the shore by the Crown does not prevent a landowner from claiming an accretion. Accretions are to the bank. The shore moves with the accretion.

There are problems in applying this doctrine. These include: a) declaring title in accreted lands; b) determining boundaries through accretions; c) accretions or erosions to Crown shore-land reserves; and finally, d) derelictions of land caused (at least in part) by drainage programs.

- a) There are essentially two ways of declaring or settling title where there is a dispute as to accreted lands. The first is by grant or transfer. The Crown, however, may not want to give a quit claim deed. The other method is a declaratory order by a court. All interested parties must be present to determine these rights, including the Crown.⁵⁶ This is a potentially expensive method of declaring title to property, which may be of little value in itself. There seems to be need for reform to provide an expedient and inexpensive method of amending the records in the Land Titles Office.⁵⁷

52. *County of York v. Rolls*, (1900) 23 O.A.R. 72.

53. *Supra* n. 46.

54. S.C. 1870, c.3.

55. R.S.M. 1970, c. W80.

56. *Re Land Registry Act; Re Lot 21, Map 455* (1956), 19 W.W.R. 427 (B.C.C.A.).

Accord Lang v. Graves, [1923] 2 W.W.R. 907 (Man. K.B.).

57. It is known this problem has been considered by the Province's Land Titles officials. It is understood that a recommendation is under consideration. The effect would be to add the accreted land to the adjacent title after proper notice and opportunity to object.

- b) Another problem area is determining boundaries through an accretion where two or more owners have claims to the accreted land. There are many possibilities; some are: one owner may get much more land in front of the old shore than his neighbour; one may get much more shore than his neighbour; land may even be added to one owner's land laterally to form a peninsula which deprives the neighbour of all access to the open water.

This is a very large subject in itself and there is only room here for a brief discussion. There are many cases and articles from the United States.

There seems to be four basic ways of dividing the accretion.⁵⁸ Which method applies in any particular circumstance will depend on what is the most practical and equitable.⁵⁹ First, each owner might get a new distance of shore line proportionate to what he had before. Another way is by extending the existing boundary lines. The third way is to give frontage proportionate to acreage of land held. The fourth is to make a line perpendicular to the average line of the coast at that point. When applied to land bordering on a seashore, the last test was adopted as follows:

... [T]ake a line representing the line of the shore drawn at such distance seawards as to clear the sinuosities of the coast, and let fall a perpendicular from the end of the land boundary.⁶⁰

- c) The third area is Crown reservations of land along bodies of water. What interests in land are these reservations and do they move as the shoreline moves? Two types will be contrasted here. One is under *The Planning Act*⁶¹ and the other is in *The Crown Lands Act*⁶².

Section 1(cc) of *The Planning Act*⁶³ contemplates "shoreland reserves". Section 74(4) requires dedication of land for shore land reserves.

74(4) Notwithstanding subsection (1), where land adjacent to surface water or adjacent to any other body of water, is to be subdivided for other than public recreational uses, the approving authority shall require, as a condition of approving a subdivision the following dedication of land by the owner with compensation:

58. C.M. Brown, *Boundary Control and Legal Principles* (2nd ed. 1969) 309-18.

59. One possible limitation might be where the acreage to be gained would give the owner more acreage in total than a homestead grant (a quarter section). This would be parallel reasoning to that of several judges in *The King v. Fares*, supra n. 29. This is not a consideration applicable to the accretion doctrine. By the doctrine's very nature, an owner gets more land than the deed describes.

60. *M'Taggart v. M'Douall* (1867), 5 M. 534 at 540 adopted in *Paul v. Bates* (1934), 48 B.C.R. 473 at 479 (B.C.S.C.).

61. S.M. 1975, c. P80.

62. R.S.M. 1970, c. C340.

63. Supra n. 61.

- (a) A parcel of land, of such dimensions as may be determined by the approving authority lying between the shoreline of the land containing the water and the land to be retained by the owner, for the preservation of the shoreline, control of erosion, the protection of environmental degradation of the shore line and access along the shoreline.
- (b) Other land as may be required to provide access to the shoreline of the land containing the water to serve the proposed subdivision.

Because the owner dedicates the land and because of the purposes indicated, it seems that the owner has no proprietary interest in the land bordering the water. The Crown, as the owner of the public land, would be the riparian owner and as such would be entitled to any accretions.

A possible contrast to that section is Section 5(1)(a) of *The Crown Lands Act*.⁶⁴

5(1) In the absence of express provision to the contrary therein, there is reserved to the Crown out of every disposition of Crown land.

- (a) in case the land extends
 - (i) to the sea or an inlet thereof; or
 - (ii) to the shores of any navigable water or an inlet thereof; or
 - (iii) to the boundary line between Canada and the United States of America, or between the province and the provinces of Ontario or Saskatchewan, or the Northwest Territories;

a strip of land one and one-half chains in width, measured from ordinary high-water mark or from the boundary line, as the case is;

What is the Crown's interest in these lands? The section seems to mean that it is an absolute interest and not just a public right of way or easement.⁶⁵ This may be important in determining if the owner adjacent to the reserve has a riparian interest. It is clear that if it is only an easement, then the adjacent owner is a riparian owner and would likely be entitled to the accretions.⁶⁶

But what if the interest is reserved to the Crown? The section does not mention fixing the line at the date of grant. Rather, the section reads in the present tense. Boyd C., in *Herriman v. Pulling & Co.*⁶⁷ found where there was a similar reservation, that the land was the plaintiff's as against trespassers. He left open the question of whether the landward boundary of the reservation moved, as the shoreline moved or whether the

64. *Supra* n. 62.

65. See *Hawkins v. Mahaffy* (1881), 29 Gr. 326.

Massey Harris Co. v. Elliot (1902), 1 O.W.R. 65. Reservations, being easements only, did not deprive the adjacent owners of their riparian rights.

66. *Supra* n. 65.

67. (1906), 8 O.W.R. 149.

boundary was fixed at the date of grant.

The moving reservation has the merit of being determinable at any given time, simply by measuring ninety-nine feet landward from the bank. It might be argued that this reservation is really like the shore and the true bank is really ninety-nine feet inland from the actual one. For the doctrine of accretion to apply, ownership of the bank, and not of the bed or shore, is important.⁶⁸

The cases on similar reservations however, have, on the wordings of the particular deeds, fixed the line at the date of granting.⁶⁹ There is no authority on the wording of Section 5(1)(a). But there is some merit in fixing the line at the date of grant. The adjacent owner has no greater rights than the rest of the public on the reserved land. This includes the ability to prevent erosions. Since the Crown has control of the land, it should be the one to bear losses from erosion rather than an adjacent landowner.

Assuming a fixed boundary, if the Crown's reservation is completely eroded, does the adjacent owner become liable to accretions or erosions? One case⁷⁰ held that since the non-riparian owner was not entitled to accretions, he could not lose land by erosion. Title remained even though the land was under a navigable water. There was, however, a public right of navigation.

- d) Finally, what is the effect of water control works which affect the levels of bodies of water more or less permanently? There is no clear authority. The test in *Clarke v. Edmonton*⁷¹ allows accretions by artificial means provided that the means are legitimate. Most of these projects are statutorily authorized and therefore legitimate. Secondly, the accretion must not be the primary purpose. Some projects, such as those for flood control, may not be primarily intended to change the water level. Further, the change must be so slow as to be imperceptible, which will be a question of fact in each particular case. There are cases where accretions caused by artificial means were held to be valid.⁷² Changes in the water level which cause derelictions or, conversely,

68. Supra n. 46 per Dickson. J.A.

69. See *Canadian International Paper Co. v. Paquette* (1930), 39 O.W.N. 231 (First Div. Ct.).
Smith v. Renwick, [1882] 3 N.S.W.R. 398 (S.C.).

70. *Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 484 (D.C.)
reversed on the facts, [1914] 31 D.L.R. 364.

71. Supra n. 44.

72. *Standly v. Perry* (1877), 2 O.A.R. 195, affirmed (1879), 3 S.C.R. 356.

encroachments, should be based on the same test as for accretions. A further problem in these cases may be in showing that the water control works were in fact responsible for the change in the water level or the boundary line.

Conclusion

These areas of riparian law, water boundaries and accretions, may well become more important in the near future. Due to the increased pressure on the availability of land, especially for recreational and cottage use, values will necessarily rise. Variations in frontage and area will be more significant in determining those values.

The basic principles have been developed in this area. But the factual possibilities are almost endless. I have only named a few. One must, in the final analysis, be guided by these principles as they apply to particular facts.