RIGHTS OF LANDOWNERS IN NEW BRUNSWICK RESPECTING WATER IN STREAMS ON OR ADJOINING THEIR LANDS

Even a cursory examination of Canadian cases dealing with the rights of a landowner respecting water on his land reveals that the divergencies between our law and English law are so substantial that English authorities may, on certain aspects of the subject, be misleading. Not only are our statutes on the matter quite different from the English, but one cannot feel too certain to what extent the Common Law of England will be followed. Our Canadian courts have felt far freer in modifying the Common Law on this subject than perhaps any other branch of the law. And that is only natural. The physical characteristics of our rivers and lakes are vastly different from those of England. To apply to inland seas like the Great Lakes rules developed in connection with even the largest British lakes would be unthinkable. And the same applies to mighty rivers like the St. Lawrence. England is, after all, part of a small island; Canada is half a continent.

Further, the economic needs of a young developing country are entirely different from those of a land that has known good means of communication since Roman times. Our rivers and lakes were often virtually the only mode of transport for our pioneering forefathers. These were facts our courts could not well ignore in determining whether English law was applicable to our situation and conditions.

In their search for solutions, our judges directed their gaze to the experience of other countries, and as is often the case with us, it was the experience of our American cousins that, next to the English, made the greatest impact on our law. Our courts, especially the Supreme Court of Canada, have also been greatly influenced by the French law of Quebec. In cases of doubt, then, American and Quebec cases may well be of equal persuasive authority with English law.

For these reasons, it may be useful to examine, in outline, the rights of a landowner respecting water in streams on or adjoining his land by reference to New Brunswick cases and statutes. This is not intended to be an exhaustive study, but rather a preliminary orientation.

I will first deal with riparian rights.

Riparian Rights

The owner of land adjoining a river or other stream has certain rights respecting the water therein, whether or not he owns the bed.[1] These rights arise by virtue of his ownership of the bank,[2] and from the Latin word for bank, *ripa*, they derive their name of riparian rights. The owner is similarly referred to as a riparian owner.

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(1) **Byron v Simpson (1878) 17 N.B.R. 697; Attrill v Platt (1883) 10 S.C.R. 425; Municipality of Queen's County v Cooper 1946 S.C.R. 584.**

(2) **Ibid.**

The riparian rights may be classified under the following heads:

(1) the right of access to the water;

(2) rights relating to the manner in which the water reaches and leaves a riparian owner's land; and

(3) rights relating to the use of the water.

Of these, the most basic is the right of access; for without it a riparian owner could not enjoy the others. He may therefore maintain an action or obtain an injunction against anyone,[3] even the owner of the bed,[4] who interferes with this right.

Coming to the second head, a riparian owner is, first of all, entitled to have the water flow down the stream to his land along its regular channel. This is a proprietary right; anyone who diverts the water from its regular course may, therefore, be restrained from doing so without proof of damage, actual or apprehended.[5] Similarly, a riparian owner has the converse right of having the water flow from his land without obstruction.[6] If, therefore, a riparian owner obstructs the flow of the water by means of a dam or boom or otherwise and causes the water to back up on an upper riparian owner's land, the latter is entitled to an action. Indeed, apart altogether from riparian rights, there is the general rule of *Rylands v Fletcher* that anyone who collects anything on his land that is likely to cause damage if it escapes is absolutely liable for any damage caused by its escape, unless the escape resulted from an Act of God or the action of a third person.[7]

Not only has a riparian owner the right to have the water flow in its regular channel, he is also entitled to have it flow in the manner in which it has been accustomed to flow,[8] substantially undiminished in quantity[9] and without appreciable change in quality.[10] But in order to obtain an injunction restraining an interference with the water, otherwise than by diverting it from its course, the riparian owner must prove damages, or at least a reasonable apprehension of injury. What amounts to a reasonable apprehension of injury can be demonstrated by the case of *City of Saint John v Barker*,[11] where the City prayed for an injunction to restrain an upper riparian owner from allowing outhouses to drain into Loch Lomond which flows into a river on the banks of which the City owned land. The amount of offensive matter introduced into the stream was too small to do any harm, but Barker, J., held

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(3) **Byron v Simpson (1878) 17 N.B.R. 697; Irving Oil Company Limited v Rover Shipping Co. (1935) 36 M.P.R. 180.**

(4) **See Merritt v The City of Toronto (1913) 48 S.C.R. 1.**

(5) **Saunders v William Richards Company, Limited (1901) 2 N.B. Eq. 303.**

(6) **Smith v Scott and Crandall (1840) 3 N.B.R. 1; Lawlor v Potter (1869) 12 N.B.R. 328.**

(7) **Wade et al v Nashwaak Pulp & Paper Company, Limited (1918) 46 N.B.R. 11.**

(8) **Saunders v William Richards Company, Limited (1901) 2 N.B. Eq. 303; Brown v Bathurst Electric & Water Power Company, Limited (1907) 3 N.B. Eq. 543.**

(9) **Keith v Corey (1877) 17 N.B.R. 400.**

(10) **The City of Saint John v Barker (1906) 3 N.B. Eq. 358.**

(11) **Ibid.**

that if all upper riparian owners did the same, the Lake (from which, incidentally, the City obtained its water supply) would become polluted, and he granted the injunction.

Even if a riparian owner suffers injury from an interference with the flow of the water — other than a diversion from its normal channel —, he has no remedy against an upper riparian owner who can show that the injury resulted from a reasonable use of the water in connection with the upper riparian land. A riparian owner does not own the water in a running stream,[12] but he may use it for ordinary purposes connected with the riparian land, such as the supplying of water to persons and animals thereon. And if, in making such use of it, he completely exhausts the supply, he is not liable to an action by a person living further down the stream.[13]

In addition, a riparian owner has the right to take water for extraordinary purposes.[14] What amounts to an extraordinary purpose depends upon the general conditions in the area and the uses to which the stream has previously been put. A common example in this province is the use of water for working a mill. Unlike an owner who uses the water for ordinary purposes, a person who uses it for an extraordinary purpose must restore it to the stream substantially undiminished in quantity and quality.[15] But the use of water for extraordinary purposes will frequently interfere with the manner in which it reaches land lower down the stream. If, for example, he dams the water, its flow will be interrupted from time to time. For injury caused in this manner he is not liable if, having regard to all the circumstances, he has acted reasonably.[16] Whether a person has acted reasonably is always a difficult question, but it is particularly so in this connection. For this and other reasons, it is usual to obtain statutory powers whenever it is desired to undertake works of considerable magnitude, as for example, hydro-electric development, on a river.

The mere fact that a person has for many years been using the water to run a mill (or for some other extraordinary purpose) does not preclude an upper riparian owner from himself using the water for extraordinary purposes and thereby interfering with the running of the mill so long as he acts reasonably. Long user can only mature into an easement if the person against whom the easement is claimed could have complained of the use.[17]

Finally, a riparian owner has no right whatever to take water for purposes unconnected with the riparian land.[18] Thus a city or town

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(12) **Keith v Corey** (1877) 17 N.B.R. 400.

(13) **Ibid**; **Brown v Bathurst Electric Water Power Company, Limited** (1907) 3 N.B. Eq 543.

(14) **Ibid.**

(15) **Ibid.**

(16) **Ibid.**

(17) **Ibid**; see also **McLean v Davis** (1865) 11 N.B.R. 266; **Lawlor v Potter** (1860) 12 N.B.R. 328.

(18) **The City of Saint John v Barker** (1906) 3 N.B. Eq. 358.

is not justified in extracting water from a stream to supply its waterworks system simply because it owns riparian land. Statutory power must be obtained for the purpose.

Ownership of the Bed

Riparian rights, we saw, arise by virtue of the ownership of the bank of a stream, but it is evident that a riparian owner can make more effective use of these rights, particularly for extraordinary purposes, if he owns the bed of the stream. A man who wishes to use water to operate a mill needs must construct a dam, but if the bed of the stream belongs to another, he cannot do so without committing a trespass. More important, if he erects any fixture in the stream, it becomes the property of the owner of the bed.[19]

The owner of the bed of a stream is, in general, entitled to use it in the same manner as any other landowner. This is subject, however, to the riparian rights of other landowners along the stream and to certain public rights that will be discussed later. Further, under the Waters Storage Act, no dam, boom or other work impounding or holding back water is to be constructed until approved by the Lieutenant Governor in Council.[20] The Act does not, however, apply to driving dams on brooks and small streams, nor to reservoirs for the supply of water to cities, towns or municipalities.[21]

In addition to the ordinary rights of other landowners, the grant of the bed of a stream ordinarily carries with it the exclusive right to fish in the waters flowing over it,[22] unless the stream at the point in question is tidal or, possibly, navigable.[23] The right to fish may be expressly excluded from the grant of a stream and its bed and exist as a *profit à prendre* called a several fishery, if vested in one person, and a common of piscary or common fishery if vested in several persons.

Frequently in a grant of land adjoining a stream, or through which a stream flows, no specific mention is made of the bed. For this reason the law has devised a group of *prima facie* rules to determine whether the bed is included in the grant. It must be emphasized that these are rules of construction that may be overridden by express terms or by clear implication.[24]

The rule to be applied depends on the nature of the stream. If it is tidal at the point in question, a grant of land adjoining the stream extends only to the high water mark, or more accurately, to the medium

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(19) **Quiddy River Boom Co. v Davidson** (1886) 25 N.B.R. 580.

(20) R.S.N.B. 1952, c. 248, s. 1.

(21) **Ibid**, s.5.

(22) **The Queen v Robertson** (1882) 6 S.C.R. 52; **In re Provincial Fisheries** (1895) 26 S.C.R. 444; some early New Brunswick cases assert that the right of fishing is a riparian right; see, for example, **Byron v Stimpson** (1878) 17 N.B.R. 697, but these cases would now clearly not be followed on this point.

(23) **In re Provincial Fisheries** (1895) 26 S.C.R. 444; see below under public rights.

(24) **Saunders v William Richards Company, Limited** (1901) 2 N.B. Eq. 303 (fresh water); **Quiddy River Boom Co. v Davidson** (1886) 25 N.B.R. 580 (tidal).

high tide line between the spring and neap tides.[25] Unless expressly granted,[26] the shore[27] and bed[28] remain vested in the Crown—in the Crown in right of the Dominion in a public harbour,[29] and in all other cases, in right of the province.[30]

If the stream is navigable, though not tidal, there are *dicta* in the *Reference re Provincial Fisheries* (1885) asserting that the rule is similar to that relating to tidal waters.[31] It was there said that *prima facie* a riparian owner owns only to the bank of the stream. If the statement is correct,[32] it constitutes a local variation of the Common Law.

As regards non-navigable fresh water rivers, our courts have followed the English Common Law. The owner of land through which the stream flows owns the bed of the stream unless it has been expressly reserved, and if the stream forms the boundary between lands owned by different persons, each proprietor *prima facie* owns the bed of the river *ad medium filum aquae* — to the centre thread of the stream.[33]

Public Rights

Reference has been made to public rights in a stream. These must now receive attention in so far as they affect landowners along a stream.

First, of the right of navigation. In England the public has a natural right to navigate in tidal navigable water, but though non-tidal streams may be *de facto* navigable the public may not navigate there, except by statute or custom or unless the stream has been dedicated as a highway.[34] Judges frequently speak as if this were the rule here also,[35] but there are weighty *dicta* in the Supreme Court of Canada asserting that if waters are *de facto* navigable, the public right of navigation exists there.[36] That is, I understand, the law of Ontario and Quebec and

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(25) **Lee v Arthurs et al** (1919) 46 N.B.R. 185 and 482; **Lee v Logan** (1919) 40 N.B.R. 502, **Turnbull v Saunders** (1921) 48 N.B.R. 502.

(26) **Brown v Reed et al** (1874) 15 N.B.R. 206; **Magee v City of Saint John** (1883) 23 N.B.R. 275; **Quiddy River Boom Co. v Davidson** (1886) 25 N.B.R. 580; **Saint John Harbour Commissioners and Attorney General of Canada v Eastern Coal Docks, Limited** (1935) 8 M.P.R. 499.

(27) **The Queen v Taylor** (1862) 10 N.B.R. 242.

(28) **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(29) S. 108, Schedule 3, British North America Act, 1867; **Holman v Green** (1881) 6 S.C.R. 707.

(30) S. 109, British North America Act, 1867. **In re Provincial Fisheries** (1895) 26 S.C.R. 444; for pre Confederation cases, see **Doe dem Fry v Hill** (1853) 7 N.B.R. 587; **The Queen v Taylor** (1862) 10 N.B.R. 242.

(31) **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(32) The judges based their finding on Ontario cases which were based on old French law. They did, however, indicate that this was the Common Law of Canada. It should be noted that the statement appears in a reference, not a case.

(33) **Byron v Stimpson** (1878) 17 N.B.R. 697; **The Queen v Robertson** (1882) 6 S.C.R. 52; **Saunders v William Richards Company, Limited** (1901) 2 N.B. Eq. 303; **Watson v Patterson** (1903) 2 N.B. Eq. 488; **Roy v Fraser** (1903), 36 N.B.R. 113.

(34) See **Byron v Stimpson** (1878) 17 N.B.R. 697.

(35) See, for example **Queddy River Boom Company, Limited v Davidson** (1883) 10 S.C.R. 222.

(36) **The Queen v Robertson** (1882) 6 S.C.R. 52; **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

the continental part of Canada, at least where the stream is naturally navigable; the English rule seems clearly inappicable to their state and conditions.[37] But our maritime situation is not unlike that existing in England, and the statement should not, therefore, be accepted too readily. Whatever test is adopted a stream may well be navigable by the public for part of its course, and not for its whole length, and it is sufficient to give the right if it is a navigable at high tide.[38]

The public right of navigation is a paramount right, that is, whenever it conflicts with the rights of the owner of the bed or a riparian owner, it will prevail.[39] Thus even the owner of the bed is not entitled to erect anything thereon that interferes with navigation, notwithstanding that the structure erected is of greater public benefit.[40] The right is similar to the public right of passing and repassing on a highway without interference from the owner of the land forming the highway.[41] Permission to build in navigable waters may, however, be obtained by application to the Governor General in Council under the Navigable Waters Protection Act.[42] It should be noticed in passing, however that such permission does not authorize any interference with the private rights of others. It does not, for instance, authorize a person to build on another's land or to interfere with the right of access of a riparian owner.[43]

Somewhat similar to the right of navigation is the public right to float logs and other property on navigable and floatable streams. A floatable stream is one that is not navigable in the strict sense but is navigable by canoes and other small craft and is capable of floating logs and other property.[44] It is sufficient to give the public right if the capacity to float only exists at times of freshet.[45] The right to float also includes the right to go on riparian land when necessary to remove logs that have been cast on the shore.[46]

This right to float, if it exists in England at all, has not been developed there because, whenever it is necessary to establish such a right, reliance is had upon the better recognized devices of custom and dedication.[47] Since this country was settled long after the beginning of legal memory in 1189, it is impossible to establish a customary right here. As

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(37) **In re Provincial Fisheries** (1895) 26 S.C.R. 52 and the cases therein cited; the court appears to have relied heavily on the fact that French Law was once applicable to the rivers of which it spoke.

(38) **The Queen v Robertson** (1882) 6 S.C.R. 52.

(39) **Brown v Reed et al** (1874) 15 N.B.R. 206; **Queddy River Boom Company, Limited v Davidson** (1883) 10 S.C.R. 222; **Saint John Harbour Commissioners and Attorney General of Canada v Eastern Coal Docks, Limited** (1935) 8 M.P.R. 499.

(40) **Ibid.**

(41) **Byron v Stimpson** (1878) 17 N.B.R. 697.

(42) R.S.C. 1952, c. 193.

(43) **Irving Oil Company, Limited v Rover Shipping Company** (1935) 36 M.P.R. 180.

(44) **The Queen v Robertson** (1882) 6 S.C.R. 52; **Roy v Fraser** (1903) 36 N.B.R. 113; **Watson v Patterson** (1903) 2 N.B. Eq. 488; **Bathurst Lumber Company v Harris** (1919) 46 N.B.R. 411.

(45) **Esson v M'Master** (1842) 3 N.B.R. 501.

(46) **Quiddy River Boom Company, Limited v Davidson** (1886) 25 N.B.R. 580.

(47) **Caldwell v McLaren** (1884) 9 A.C. 392.

to dedication, many of our rivers were used to transport property long before there were owners who could dedicate them. Yet in a young country like ours, the right to float logs and timber on streams is an economic necessity, and the courts have met the challenge by developing a variation from the English Common Law.[48]

Unlike the right of navigation, the right to float is not paramount; it does not prevail over the rights of the owners of the bed and bank but is concurrent with them.[49] One who floats logs or other property down a stream must do so in a reasonable manner,[50] interfering as little as possible with the rights of landowners along the stream, and if he injures the property of a landowner the onus is on him to show that his conduct was reasonable. This is evidenced by *Roy v Fraser* where the defendant was held liable for damage resulting to the plaintiff's dam from the driving of logs.[51] Had the defendant been exercising the right of navigation, he would not have been liable.

Riparian owners must on their part exercise their rights reasonably, so as to hinder as little as possible persons floating logs on the stream. Thus if a person builds a dam, he is under a Common Law duty to provide sluiceways or other reasonable means to allow logs and timber to pass.[52] In New Brunswick the Dams and Sluiceways Act provides a procedure whereby a person wishing to drive logs may compel a dam owner to make sluiceways to permit him to do so.[53] The statute was mentioned in *Roy v Fraser* but it is not clear from that case whether the statutory remedy is in addition to, or in derogation of, the Common Law remedy.

Finally, the public has the right to fish in all tidal waters up to the point where the tide ebbs and flows.[54] The grant of land over which tidal water flows does not automatically carry with it the exclusive right to fish in that water, as it does in the case of fresh water.[55] Indeed, in England, the Crown since Magna Charta has no power apart from stat-

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(48) The early cases on the subject purported to follow English Law, but they clearly do not accord with modern English Law: see **Esson v M'Master** (1842) 3 N.B.R. 501; **Rowe v Titus** (1849) 6 N.B.R. 327.

(49) **Roy v Fraser** (1903) 36 N.B.R. 113; **Watson v Patterson** (1903) 2 N.B. Eq. 488; **Bathurst Lumber Company v Harris** (1919) 46 N.B.R. 411.

(50) In **Bathurst Lumber Company v Harris** (1919) 46 N.B.R. 411, at pp. 442-3, Grimmer J., giving the judgment of the Supreme Court of New Brunswick had this to say about reasonableness: "The degree of care, skill and diligence required of the log owners depends largely on the circumstances surrounding each case, and the rule applicable to riparian proprietary interests and log owners is equally applicable to cases of owners of legally constructed bridges crossing the river for public or private use or convenience. What might rightly constitute reasonable and proper skill and diligence in one case might quite easily assume and become negligence in another. If from the conformation of the land the river runs through narrow places and gorges where jams may easily form even under ordinary conditions....a greater deal of care, diligence and skill is required by the log owner....than in and along the broader and more open reaches of the river." See also Barker, J., in **Watson v Patterson** (1903) 2 N.B. Eq. 488 at pp. 491-2 citing from **Davis v Winslow** 51 Me. 291.

(51) **Roy v Fraser** (1903) 36 N.B.R. 113.

(52) **Ibid.**

(53) R.S.N.B., 1952, c. 56.

(54) **Steadman v Robertson et al; Hanson v Robertson et al;** (1879) 18 N.B.R. 580; **Nash v Newton** (1891) 30 N.B.R. 610; **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(55) **Ibid.**

ute to grant a several fishery in tidal waters either to the person who owns the land beneath or to anyone else. This has been said to apply to New Brunswick,[56] but the point has been doubted in the Supreme Court of Canada.[57] However that may be, unless the right to fish is expressly granted to the owner of the bed, he cannot interfere with the public fishing there.[58]

Section 60, Crown Lands Act

An important qualification to the law as above stated must be made in regard to much of the land originally granted from the Crown since 1884. The qualification arises out of section 60 of the Crown Lands Act[59] and its predecessors. The section now provides that all Crown grants issued after the passing of the Act shall be subject to a reserve in full ownership by the Crown of a strip of land three chains (198 feet) in depth from each bank of any river or lake in the province.

The history of the section is both interesting and instructive. Shortly after Confederation the federal and provincial governments began a protracted dispute respecting legislative jurisdiction over, and the proprietary rights to the inland fisheries. The province was desirous of retaining as much control over the fisheries as it could because of their economic importance to the province. The new Parliament at Ottawa, on its part, was very jealous of its legislative jurisdiction, so shortly before vested in the various provinces. By 1884, it had become clear that while the Federal Parliament had legislative authority over all fisheries, the proprietary interest in the inland fisheries not previously granted was vested in the province.[60] Now by virtue of section 92 (5) of the British North America Act, 1867, the province may legislate respecting the management of provincial public lands, which, of course, includes fisheries.[61] By retaining the ownership of the fisheries, the province could ensure itself some measure of jurisdiction over them as well as revenue derived from leasing the fisheries.[62]

Accordingly, in 1884 a section was passed providing that in all future Crown grants there should be reserved a strip of land four rods (66 feet) in width adjacent certain rivers therein named and such other

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(56) **Wood v Esson** (1883) 9 S.C.R. 239; **Nash v Newton** (1891) 30 N.B.R. 610; the statements are obiter. In **Attorney for British Columbia v Attorney General for Canada** [1914] A.C. 153 the restriction in Magna Charta was said to apply to British Columbia; the statement is not binding since it appears in a reference.

(57) **In re Provincial Fisheries** (1895) 26 S.C.R. 444.

(58) In **In re-Provincial Fisheries** (1895) 26 S.C.R. 444 it was asserted that the public may also fish in navigable non-tidal waters, but the contrary was put forward in **Attorney General for British Columbia v Attorney General for Canada** [1914] A.C. 153. Since both statements are in references, neither is binding.

(59) R.S.N.B., 1952, c. 53.

(60) See, for example, **The Queen v Robertson** (1882) 6 S.C.R. 52.

(61) **Attorney General for Canada v Attorney General for Ontario, Quebec and Nova Scotia** [1898] A.C. 700.

(62) The reason for passing the section may be seen in the Synoptic Report of the Proceedings of the House of Assembly for 1884. The practice of leasing the fisheries was provided for in 1884 also; see 47 Vict., c. 1.

rivers, lakes and streams as might be declared by proclamation, together with the riparian ownership of the streams.[63] The section, however, gave the owners or occupiers of any land abutting the strips a right of way to and from the streams. The streams mentioned in the section are well known fishing rivers in the northern part of the province, for example, the Tobique, the Restigouche, the North West Miramichi.[64]

The section was modified in 1887 to provide that grants of islands in rivers could be made without the reservation, provided such grants expressly reserved the fishing privileges contigous to the islands,[65] and in 1890 it was again amended to provide that grants might be made without the reservation if application had been made therefor before the passing of the section in 1884.[66]

Following these amendments the provision remained substantially unchanged,[67] and no further streams or lakes appear to have been added to the list[68] in the section until 1927. In the revised statutes of that year, the provision was re-enacted as section 62 of the Crown Lands Act,[69], but the following important modifications were made:

(a) the strip was reserved from all rivers, lakes and streams;[70]

(b) the breadth of the strip was increased from four rods (66 feet) to three chains (198 feet);

(c) no right of way was preserved for the owner or occupier of land adjoining the strip; and

(d) the Minister of Lands and Mines was empowered to reduce the breadth of the strip or dispose of it altogether in sales of islands, lands of small extent and, more important, whenever he considered it in the public interest.

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(63) 47 Vict., c. VII, s. 4.

(64) The rivers listed are: Nepisguit River; Jacquet River; Upsalquitch River; Quatawamkedgwick River; Restigouche River; Charloe River; Patapedia River; Middle River: Little River; Tattagouche River; Big Tracadie River; Tabcintac River; Dungarvon River; Renous River; North West Miramichi River and branches; Kouchibouguac River; Kouchibougacis River; Richibucto River; Green River and branches; Tobique River and branches.

(65) 50 Vict. c VII, s. 2.

(66) 53 Vict. c. XVII.

(67) It was re-enacted by C.S.N.B. 1903, c. 27, s. 4.

(68) The Department of Lands and Mines has informed me that it has never found any proclamation adding to the list in the original section. However, it became the departmental policy sometime between 1884 and 1920 to reserve a strip on lots fronting on the Southwest Miramichi, but the Department has found no proclamation making the policy mandatory.

(69) R.S.N.B. 1927, c. 30.

(70) The section speaks only of rivers and lakes, but s. 8(42) of the Interpretation Act. c. 1, R.S.N.B. 1927, provides that "'River' may mean creek, stream, or brook". It is suggested that it would probably have that meaning in this case. Many of the doubts that might be had about the section are settled by the practice of making the reservation expressly in each grant.

Section 60 of the Crown Lands Act of 1952,[71] though differing markedly in phraseology, in effect reproduces the 1927 section, except that

(a) whenever the strip is reduced or disposed of in the case of an island in a river, the grant must expressly reserve to the Crown all fishing privileges contiguous to the island,[72] and

(b) a right of way to and from the stream is given to owners of land abutting on the strip.[73]

Since the Minister of Lands and Mines has had the power since 1927 to grant all or any part of the reservation provided by the section whenever he considers it in the public interest, it is evident that he could entirely change the effect of the section. The Department advises me, however, that the power is very rarely exercised.

It is now possible to summarize the effect of the section upon water rights since its original enactment. Apart from a few exceptional cases, no grant made between 1884 and 1927 of land adjoining the northern New Brunswick rivers set forth in the original section has given any of the valuable water rights arising out of the ownership of the bank and bed of a stream. Since 1927 the same may be said of any grant of land adjoining any lake or stream in the province.

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(71) R.S.N.B. 1952, c. 53. The section speaks only of rivers and lakes but s. 38(41) of the Interpretation Act, R.S.N.B. 1952. c. 114 defines river as including creek, stream and brook. It is open to question whether the word "lake" includes a pond. The section also fails to make specific mention of the bed. It might possibly be doubted whether the bed would be excepted in certain cases under the statutory reservation. However, the practice is to expressly reserve the beds of streams and lakes as well as the adjoining strip in each grant.

(72) The Legislature may have intended that the fisheries be reserved in all cases, but the section is clumsily worded and it seems doubtful that it is necessary to reserve the fisheries except in the case of small islands. The Department of Lands and Mines has advised me that the fisheries are invariably reserved.

(73) It is usual to reserve the strip expressly, and in the grants I have seen no reference is made to the right of way. It is doubtful if the right of way exists in such cases.