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The Potential Impact of Aboriginal Title on Aquaculture Policy

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Introduction

This chapter discusses the potential impact of aboriginal property rights on the development of aquaculture policy by considering whether such rights could provide a basis for First Nation peoples to participate in aquaculture or to manage the participation of others in this industry. The purpose of the chapter is to describe the relevant law as it now stands, to identify issues that have not yet been decided and to consider how the courts might approach such issues in the future.

There are two categories of property-based[1] claims which First Nation peoples might consider using in relation to areas in which aquaculture is or could be carried out: claims based on aboriginal title and claims based on common law riparian rights. In an aboriginal title claim, a First Nation would argue that because of its historical use of an aquaculture area, it holds that area by way of aboriginal title. Given that the doctrine of aboriginal title has developed in relation to dry land, the first question to be addressed is whether the courts are likely to apply the doctrine to water areas. The first part of this chapter outlines the current law on aboriginal title; discusses the applicability of that law to rivers, lakes and marine coastal areas, reaching the tentative conclusion that the doctrine of aboriginal title could apply; and considers how recognition of aboriginal title in such areas might affect aquaculture policy. The second part considers whether property-based arguments might be made based on the common law concept of riparian rights to the land beneath rivers. At English common law,[2] the owner of land bounded by the non-tidal portion of a river or stream was presumed to own the waterbed to the center line of the river, while the Crown was presumed to own the land beneath the tidal portion of rivers. The latter part of this chapter outlines the issues that would have to be decided if a First Nation attempted to use the concept of riparian rights to claim a portion of a riverbed. There are so many unanswered questions in this area that it is difficult to predict how courts would respond to such a claim; however, aquaculture policy-makers should be aware of the issues and watch how the law develops in this area.

Aboriginal title

The doctrine of aboriginal title

Section 35(1) of the *Constitution Act 1982*[3] states, "Existing treaty and aboriginal rights are hereby recognized and affirmed." The source of treaty rights is self-explanatory: these are rights that have been recognized in a treaty (whether a historic agreement or a modern land claims agreement) between the Crown and a particular aboriginal nation or community. Aboriginal rights, however, do not have their source in any document or agreement; instead, these rights arise from the occupation of what is now Canada by aboriginal nations at the time of the British assertion of sovereignty. "Aboriginal rights" is thus an umbrella term that includes both activity rights (such as rights to hunt, fish or gather) and aboriginal title to land.[4]

The most thorough discussion by the Supreme Court of Canada on aboriginal title is the 1997 decision of *Delgamuukw* v. *British Columbia*.[5] Combining what is said in *Delgamuukw* with discussion in several other cases, we can say that aboriginal title, as currently conceptualized by Canadian courts, has dual sources: first, historic use and occupation of the land by First Nations,[6] and, second, the relationship between the common law and pre-existing aboriginal systems of law.[7] Aboriginal title is more than simply a right to carry out certain activities on the land: it is title to the land itself.[8] This form of title is *sui generis* (that is, unique),[9] communal and inherent.[10] Furthermore, aboriginal title is an exclusive form of title; that is, it carries with it the right to exclude others from using or occupying the area covered by aboriginal title.[11] Aboriginal title confers the right to use land for a variety of activities. Thus, a First Nation holding aboriginal title is not limited to traditional uses of the land. There is, however, one inherent limit: aboriginal title land cannot be used in ways that are "irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title."[12] Aboriginal title exists in conjunction with underlying or radical Crown title[13] and can be alienated (transferred) only to the federal Crown.[14] With the protection afforded by s. 35(1) of the *Constitution Act*, existing aboriginal title can now be extinguished only with the consent of the First Nation involved, by way of a land claims agreement or other bilateral instrument.[15] Prior to 1982, federal jurisdiction over "Indians and lands reserved for the Indians"[16] was seen as permitting the federal government to extinguish aboriginal title unilaterally as well, so long as the intent to do so was "clear and plain."[17] Finally, because aboriginal title represents a relationship between common law principles and aboriginal systems of law, it "must be understood by reference to both common law and aboriginal perspective."[18]

Application of the doctrine of aboriginal title to water areas

If a First Nation makes a claim of aboriginal title to a terrestrial area, it is clear that the doctrine is applicable, and the question becomes one of evidence: what evidence is there of historic use of the area and what evidence is there of extinguishment? At present, however, no Canadian case law directly addresses the question of whether the doctrine of aboriginal title can be applied to water areas.[19] First Nations have made several aboriginal title claims to rivers and portions of the sea but the issue has not yet been decided by Canadian courts. The best-known such claim is probably the one filed by the Haida Nation in 2002[20] claiming aboriginal title to land, internal waters and a portion of the seabed and seas off the coast of British Columbia. However, the Haida case has not yet come to trial. In other cases where a decision has been rendered, it has been on other (usually preliminary or procedural) grounds.[21] Thus, the question of whether aboriginal title can exist in water areas has still not been resolved.

Courts in both Australia and New Zealand have heard aboriginal title claims to the seabed. In 2002, the High Court of New Zealand heard an appeal from a 1997 decision of the Maori Land Court, which recognized the possibility that the foreshore and seabed of the Marlborough Sounds could be held by way of customary Maori title.[22] The High Court reversed this finding.[23] With respect to the seabed,[24] the Court focused on the wording of s. 7 of the *Territorial Sea and Fishing Zone Act* (now the *Territorial Sea and Exclusive Economic Zone Act*, 1977), which states:

> Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown.[25]

According to the High Court of New Zealand, this title was vested in the Crown for the benefit of all subjects and could not be granted to anyone, including Maori, in fee simple, as that fee simple would conflict with the public right of navigation.[26]

In 2003, the Court of Appeal of New Zealand reversed the High Court,[27] and found that the Maori Land Court did have jurisdiction to determine whether portions of the foreshore or seabed were held by Maori customary title. The Court of Appeal cautioned that the outcome was not a finding of customary title,[28] only a finding that "the Maori Land Court can enter into the substantive inquiry."[29] The Court of Appeal rejected the idea that property law principles applicable to terrestrial land were inapplicable to the

foreshore and seabed,[30] and the argument that legislation such as the *Territorial Sea and Exclusive Economic Zone Act* precluded a claim of customary title.[31]

In a 2001 decision, the High Court of Australia considered a native title claim to "the seas in the Croker Island region of the Northern Territory."[32] The case was heard in the first instance by Olney J of the Federal Court, who held that native title extended only to the low-water mark, although he recognized the claimants as having a right to fish, hunt and gather in the claimed area, to travel through it, and to "visit and protect places within the claimed area which are of cultural or spiritual importance [and] to safeguard the cultural and spiritual knowledge of the common law holders."[33] On appeal to the full court of the Federal Court, a majority of the court upheld Olney J's decision. Both the claimants and the defendants appealed to the High Court.

The High Court of Australia held that the idea of title – even radical title in the Crown – was not an appropriate concept for the seabed. The Court considered the wording of the *Sea and Submerged Lands Act, 1973*, s. 11 of which states:

> The sovereign rights of Australia as a coastal state in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth.[34]

The court concluded that this "did not amount to an assertion of ownership of or radical title in respect of the seabed or superadjacent sea in that area, whether as a matter of international law or municipal law."[35] The court then held that "[a]s a matter of international law, the right of innocent passage is inconsistent with any international recognition of a right of ownership by the coastal state of territorial waters."[36] Further, the existence of title in the seabed was negated by "the recognition of public rights of navigation and fishing."[37] Thus, exclusive native title in the seabed could not be recognized because it would be inconsistent with the right of innocent passage and the rights of public navigation and fishing.[38] Olney J's order recognizing non-exclusive native interests was upheld.

Leaving aside issues of evidence, how is a Canadian court likely to respond to aboriginal title claims to water areas? Given that Canadian jurisprudence characterizes aboriginal title as a "burden" on the underlying radical title of the Crown, the first step in considering whether aboriginal title could exist in water areas is to ask whether the Crown holds title to those areas. The second step is to ask whether there are aspects of the doctrine of aboriginal title (particularly the concept of exclusivity) that would be more problematic in the context of water areas than on dry land. Before we address these issues, however, a word about terminology: should aboriginal title claims in aquatic areas be described as claims to the subaquatic land, or to the water and waterbed as a whole?

The common law position in Britain and Canada is that running or percolating water cannot be owned, although the land beneath it can.[39] Thus, at common law, the concept of proprietary rights is applied to the underlying land, rather than the water itself. On the other hand, it is certainly possible that some First Nations may conceive of a river or marine area as a unified resource. Since aboriginal title has been described by the Supreme Court of Canada as based in both aboriginal legal systems and the common law,[40] aboriginal perspectives on use of and control over water areas would have to be taken into account and should be reflected in the development of the law of aboriginal title in aquatic areas.

In this chapter, however, I focus on title to the waterbed, for three reasons. First, it cannot be assumed that all First Nations would view water resources in exactly the same way, and therefore, in the context of a claim, the perspective of the particular First Nation making the claim would have to be explored, rather than trying to factor in some sort of generic "aboriginal perspective." Second, Lamer CJC's wording makes it clear that the common law will still have to be considered, although not privileged, so it is necessary to consider how an aboriginal title claim to submerged land would fit with Canadian law generally. Third, it may be that the distinction between title to the waterbed alone versus title to the bed and the water together would not actually have much impact on the consequences of a successful claim. If it were established that a First Nation held unextinguished aboriginal title to a riverbed or a portion of the seabed, use of that submerged land would seem inevitably to carry with it use of the water flowing over it – in other words, use of the water resource as a whole.

Crown title to submerged land

As has been noted already, aboriginal title – at least as currently conceptualized by Canadian courts – coexists with underlying fee simple in the Crown. Therefore, to consider whether aboriginal title might be found to exist in submerged lands, one must first inquire as to the existence of Crown title in those areas.

The English common law distinguished among land beneath non-tidal waters, land beneath tidal waters to the low-water mark, and land below the low-water mark. Land beneath non-tidal waters was presumed to lie with the owners of the adjacent river or stream bank, while land beneath the tidal portions of rivers lay, prima facie, with the Crown. According to the common law, the territory of the realm extended only to the low-water mark, so no one owned the seabed. The common law position was adopted, with some variations, in Canada, but, more to the point here, has been largely overridden by legislation. Most jurisdictions in Canada have passed legislation vesting the ownership of waterbeds within the province in the provincial Crown. In the case of the territories, title now lies with the federal Crown. Arguably, Canada also holds title to the land beneath

Canada's 12-mile territorial seas, by virtue of ss. 7 and 8 of the *Oceans Act*, which state:

> 7. For greater certainty, the internal waters of Canada and the territorial sea of Canada form part of Canada.
> 8(1) For greater certainty, in any area of the sea not within a province, the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada are vested in Her Majesty in right of Canada.[41]

Where the fee simple to subaquatic land in Canada lies with the Crown,[42] whether federal or provincial,[43] it seems possible that, as with dry land, this title could be subject to aboriginal title. In fact, one of the *sui generis* aspects of aboriginal title is that it exists as a burden or limitation on the underlying Crown title. Certainly, existence of Crown title is likely to be seen by courts as a precondition for any consideration of aboriginal title in submerged land. If, as has been suggested here, the Crown holds title to most waterbeds within Canada, as well as the bed of Canada's territorial seas, this precondition has been met. The next question to consider, then, is whether the various aspects of aboriginal title, as described by the courts, raise any greater or different conceptual problems in relation to submerged lands, as compared to terrestrial areas.

The nature of aboriginal title

Aboriginal title has been described as flowing from historic use and occupation and from the relationship between aboriginal systems of law and the common law. Nothing about this aspect of the doctrine seems inherently inconsistent with a First Nation being able to claim aboriginal title in a riverbed or a portion of the seabed.[44] Nor would Lamer CJC's comments in *Delgamuukw* concerning the purposes for which aboriginal title land can be used seem to cause any greater interpretational difficulties for subaquatic lands than for terrestrial lands.

It seems likely that the Supreme Court of Canada's characterization of aboriginal title as exclusive might well be the most problematic issue, at least with regard to those portions of rivers that are at common law subject to public rights of fishing and navigation, and those portions of the seabed, that are subject to the international right of innocent passage. As noted above, the High Court of Australia held in the Croker Island case that the recognition of any title – even Crown title – in the seabed is irreconcilable with the right of innocent passage, and that aboriginal title could not coexist with common law rights of public fishing and navigation. It is this author's position however, that these conclusions should not be seen as persuasive by Canadian courts, partly because of differences in the legal framework, but also because of flaws in the court's reasoning.

INNOCENT PASSAGE

Thinking first about the right at international law for ships of one nation to make innocent passage through the territorial waters of other nations, it is unclear why this would negate the possibility of title in the seabed. Certainly, the language of ss. 7 and 8 of the *Oceans Act*, cited on p. 276, would seem to indicate that Canada intended to acquire property rights over the bed of its territorial sea. The fact that international law places some limits on a title-holder's power to exclude others (in this case, ships of other nations) is not irreconcilable with the existence of title. As to the impact of the right of innocent passage on the possible existence of aboriginal title, the short answer would seem to be that if Crown title can coexist with such a right, so could aboriginal title, and it, like Crown title, would be subject to the international right. Where the exclusivity of the underlying Crown title is curtailed by international law, it seems logical that any aboriginal title which exists as a burden on that title would be similarly curtailed. While the right of innocent passage would limit the rights otherwise associated with aboriginal title, it should not, however, be seen as preventing courts from recognizing aboriginal title in the bed beneath Canada's territorial seas.

PUBLIC RIGHTS

Public rights of fishing and navigation in the tidal portions of rivers have been entrenched in English common law since the Magna Carta. This is based on an interpretation of s. 47 of Magna Carta, the modern translation of which states: "All forests that have been created in our reign shall at once be deforested. River-banks that have been enclosed in our reign shall be treated similarly."[45] In Canada, the Supreme Court of Canada has held that rivers "so far as the ebb and flow of the tide" are

> open to public use and enjoyment freely by the whole community, not only for the purposes of passage, but also for fishing, the Crown being restrained by Magna Charta from the exercise of the prerogative of granting a several fishery in that part of any river.[46]

This does not mean that public rights of fishing and navigation are sacrosanct; only that if the Crown wishes to curtail such rights, it must do so through legislation rather than through an exercise of the royal prerogative. Nor has the common law viewed the existence of such rights as irreconcilable with the concept of title. As noted earlier, the prima facie assumption is that the title to land beneath the tidal portions of rivers lies with the Crown. Thus, at common law, title exists to the riverbed but the otherwise exclusive character of that title is subject to Magna Carta rights. Where there is a conflict between the rights associated with title, and the public rights of fishing and navigation, the latter prevail.[47]

Extrapolating from this, it seems logical that aboriginal title could coexist with the common law public rights of navigation and fishing. In fact, there is even a possible argument that if a court recognized aboriginal title with relation to the bed of the tidal portion of a river, this would oust any rights based on Magna Carta.[48] The argument here would be that Magna Carta is irrelevant when the title being claimed arises not from a Crown grant but from use and occupation of the land before British sovereignty. Based on the Supreme Court of Canada's approach in *R.* v. *Gladstone*[49] to reconciling aboriginal fishing rights with Magna Carta rights, it seems doubtful, however, whether courts would currently be willing to accept such an argument. In *Gladstone*, Lamer CJC stated:

> [T]he aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the competent legislation. . . . While the elevation of common law rights to constitutional status obviously has an impact on the public common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed. . . . [I]t was not contemplated by *Sparrow* that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.[50]

On the other hand, while courts may be unwilling to see aboriginal rights as extinguishing the common law rights of navigation and fishing, clearly these common law rights should not be seen as negating the possibility of aboriginal title. It is noteworthy that in the Marlborough Sounds case, the New Zealand Court of Appeal rejected the notion that "public interests" in navigation would "make private property interests somehow unthinkable."[51] Even if a court felt compelled to construct the rights associated with aboriginal title in such a way that the common law public rights were not completely ousted, *Gladstone* makes it clear that constitutionally protected rights would have some degree of priority over those grounded only in the common law – which is very different than saying that aboriginal title cannot exist in areas subject to public rights.[52]

Implications for aquaculture policy

A 1982 publication, *Aquaculture: The Legal Framework*, noted the relevance of aboriginal title to aquaculture in Nova Scotia:

> Aboriginal land claims are of particular interest to the aquaculturist as they claim a usufructory interest, i.e. a right to use the land and resources as they had historically. These uses and the area where they are carried on are pertinent to aquaculture, as they include taking shellfish and marine plants along the marine foreshore and salmon along the rivers of the province.[53]

Thus far, the potential significance of aboriginal title for aquaculture policy does not appear to have been explored in the academic literature. However, the potential interplay between aboriginal title and aquaculture has become even more significant than would have been the case in 1982. As noted above, in *Delgamuukw* the Supreme Court of Canada confirmed that aboriginal title is more than simply a right to use the land in traditional ways; it is title to the land itself and carries with it a right to use the land for a broad range of activities and the right to exclude others. Furthermore, there are now constitutional restraints on the government's ability to infringe aboriginal title, either directly through its own actions or by permitting others to engage in activities that would interfere with a First Nation's title to land.

If aboriginal title were recognized in a riverbed or a portion of the seabed, could the First Nation holding aboriginal title decide to use the area for aquaculture? If so, would the First Nation be required to obtain a license under, or otherwise adhere to, the aquaculture legislation in that jurisdiction? Could a First Nation prohibit others from carrying on aquaculture in the aboriginal title area, or decide to permit but regulate such activities? These questions raise two issues: first, absent any government regulation, what rights would flow from the recognition of aboriginal title? And second, to what extent could government restrict those rights?

Rights associated with aboriginal title

Would aboriginal title give a First Nation the right to engage in aquaculture or to control whether or how others could engage in aquaculture? As noted, the only limit that the Supreme Court of Canada has put on the use of aboriginal title land is that the uses must not be irreconcilable with the community's attachment with the land. There is already disagreement in the academic literature as to exactly how this limitation should be interpreted, but it seems unlikely that this would preclude all First Nations from using aboriginal title land for aquaculture. If such activity were challenged, a court would have to decide, on a case-by-case basis, whether the particular

form of aquaculture being practiced was irreconcilable with the attachment of the particular First Nation to its land.

Assuming that aquaculture could take place on aboriginal title land, could the First Nation regulate how its own community members practiced aquaculture, prohibit outsiders from coming into the area for aquaculture purposes, or decide to allow outside involvement, but regulate it? Subject to what is said below regarding justified infringements of aboriginal rights, authority to do each of these things would seem to flow from the fact of holding title. With regard to regulating its own aquaculture activities, where land is held by a community (as is the case for aboriginal title land), presumably the government structure of that community has the authority to regulate members' use of the land.[54] With regard to outsiders engaging in aquaculture, the Supreme Court of Canada has made it clear that aboriginal title, like other title to land, includes a right to exclude others, so (again subject to what is said below) presumably it would be up to the First Nation to decide whether an individual or corporation outside the community should be allowed to engage in aquaculture in the aboriginal title area. The corollary of the power to exclude is the power to invite others in, and to regulate the conduct of those so invited. Therefore, absent valid legislation limiting the rights flowing from aboriginal title, it seems that First Nations holding land by way of aboriginal title might well, depending on the nature of their historic connection to the land, have the right to engage in aquaculture. They would also have the authority to prohibit or permit such activities by those outside the community and to regulate any aquaculture that was permitted.

Justified infringement of aboriginal rights

It is possible, however, that governments might be able to restrict the rights referred to above, whether by prohibiting the First Nation from carrying on aquaculture, by allowing it to do so but requiring adherence to a federal or provincial regulatory scheme, or by controlling any aquaculture activities by those outside the First Nation.

Although aboriginal rights, including aboriginal title, are recognized and affirmed by the Constitution, courts have held that these rights are not absolute. They can be infringed by both the federal and provincial governments,[55] provided that the infringement can be justified. The Supreme Court of Canada has set out a two-part analysis on the issue of justification.[56] First, an aboriginal nation wishing to challenge legislation as infringing its aboriginal rights bears the onus of proving prima facie infringement; not every application of legislation will be seen as an infringement of aboriginal rights. To determine whether there is a prima facie infringement, the courts must consider various factors, including whether the legislation limits the exercise of the right, whether the limitation is unreasonable, and whether it imposes undue hardship.

If the First Nation is able to show infringement using these tests, the second step of the analysis comes into play. It is up to the Crown to show that applying the legislation in this context could be justified. The Crown would have to prove that the legislation in question was "enacted according to a valid objective,"[57] and that the infringement of the aboriginal right can be justified in terms of the "honour of the Crown."[58] According to the Supreme Court of Canada in *Delgamuukw*, this might mean that the government would have to show that it accommodated the participation of Aboriginal peoples in resource development or that Aboriginal peoples had been involved in decision-making in respect of their lands.[59] *Delgamuukw* also stated that there would always be a duty to consult where the government is seeking to justify the infringement of aboriginal rights; however, the nature and extent of the consultation required could differ significantly from case to case.[60] The Supreme Court of Canada also held that since aboriginal title "has an inescapably economic aspect . . . fair compensation would ordinarily be required when aboriginal title is infringed."[61] Therefore, rights flowing from aboriginal title could be limited by aquaculture legislation if the Crown could show that the relevant provisions of the Act met the test for justification.

Common law riparian rights

Introduction

This section considers whether a First Nation might be able to claim proprietary rights in a riverbed by virtue of the fact that it holds aboriginal title to the adjacent land; that is, whether rights could be claimed through the application of common law principles regarding riparian rights[62] without the need to prove aboriginal title to the riverbed itself. As was noted in the previous section, the English common law drew a distinction between tidal and non-tidal waters in determining the ownership of the waterbed. Ownership to the beds of tidal waters lay prima facie with the Crown, and since the time of Magna Carta, there has been a public right to fish in such waters, which could only be restricted by an Act of Parliament. When non-tidal water runs in a definite stream or channel, there is at common law a presumption that the owner of land bounded by the river or stream owns the submerged land to the centre of the riverbed (*usque ad medium filum aqua*).[63] This presumption could be rebutted by a contrary expression in the grant or conveyance, or by evidence that the grantor of the abutting lands had not intended to convey the stream bed as well.[64]

At common law, fishing rights in non-tidal waters, unless at some time separated and conveyed as a *profit a prendre*, go with ownership of the riverbed.[65] Thus, there existed in England an exclusive common law right to fish in non-tidal waters, which right was an incident of ownership of the submerged land beneath. Finally, at English common law the soil beneath a

lake or pool as well as the water[66] in it belonged to the person whose land surrounded it.[67] Where one's property abuts rather than surrounds a lake, the law was for a time less clear,[68] but according to Cheshire and Burns it is likely that the same rules would apply as to non-tidal waters.[69]

Application in Canada

In Canada, the *ad medium filum* presumption has been applied more narrowly in some jurisdictions than was the case in England, and most provinces and territories have passed legislation placing the ownership of watercourses and waterbeds in the Crown. While English common law distinguished between tidal and non-tidal waters, with the *ad medium filum* presumption applying to non-tidal waters, in the western provinces courts have drawn the distinction between navigable and non-navigable waters such that the presumption applies only to waters that are both non-tidal and non-navigable. Similarly, in Ontario the *Beds of Navigable Waters Act*[70] ousts the presumption with regard to navigable waters. In these provinces, then, riparian rights to the waterbed could at most apply to those parts of rivers or streams that are non-tidal and too small for navigation.

In Atlantic Canada, however, the English approach has been followed, so that the key issue is whether water is tidal, not whether it is in fact navigable.[71] The Canadian situation was summarized by the Supreme Court of Canada in a 1992 decision, *Friends of the Oldman River*:

> Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago. Instead the rule is that waters are navigable in fact whether or not the waters are tidal or non-tidal.[72]

Even more significant is that fact that most provinces have, by legislation, appropriated ownership of all river and stream beds to the provincial Crown.[73] Similar legislation has been passed by the federal government in relation to the Yukon, the Northwest Territories and Nunavut.[74] Thus, of the common law provinces and territories, common law riparian rights would seem only to exist in Ontario, New Brunswick, Prince Edward Island, and Newfoundland and Labrador, and even in several of these provinces the common law rights have been significantly limited.[75]

Potential application of common law riparian rights to aboriginal title lands

A consideration of whether the common law presumption that the owner of riparian lands also owns a portion of the riverbed could be applied to riparian lands held by way of aboriginal title is, at best, highly speculative, given the lack on jurisprudence on this issue. The Supreme Court of Canada has

been willing to assume without deciding that the presumption might apply to reserve lands,[76] and a 1985 decision of the British Columbia Supreme Court, *Pasco* v. *C.N.R.*,[77] held that that there was "a serious question to be tried" with regard to an Indian band's claim of riparian rights attached to a reserve.[78] Given comments by the Supreme Court in both *Guerin*[79] and *Delgamuuk*[80] regarding the similarity of the interest held by aboriginal communities in reserve lands and aboriginal title lands, these cases at least leave open the possibility of arguing that the presumption is relevant. However, there is very little else to guide the discussion or to suggest how courts might respond to the series of questions that would have to answered if the riparian rights presumption were held to be applicable. All that this section attempts to do, therefore, is to outline the questions and subquestions that would arise, depending on how a court reasoned at each stage of the inquiry, and to sketch in some of the factors that might be taken into account.

In considering the question "do common law riparian rights attach to aboriginal title land?" a key issue may well be whether the application of the *ad medium filum* presumption is limited to the interpretation of a grant – in other words, whether the existence of title created by grant is a necessary precondition for the application of the presumption. From the perspective of aboriginal title, it matters greatly whether the rule is seen to mean "if you are granted or conveyed property fronting on a non-tidal portion of a river, it is assumed, absent evidence to the contrary, that you were also granted or conveyed half the riverbed" or whether it means "if you hold title to property fronting on a non-tidal portion of a river, it is assumed, absent evidence to the contrary, that you also hold title to the half the riverbed." Only the latter would permit the argument that riparian rights could attach to aboriginal title land, given that aboriginal title is founded on historic use, rather than on a Crown grant. *Halsbury's* simply states that "By a presumption of law, and in the absence of any evidence to the contrary, the ownership of a bed of a non-tidal river or stream belongs in equal halves to the owners of the riparian land."[81] Thus, the focus in *Halsbury's* seems to be on the fact of ownership rather than on the source of that ownership. However, *Anger and Honsberger Law of Real Property* refers specifically to a Crown grant: "[T]he rule respecting non-tidal waters applies only if there is a Crown grant extending to the centre of the water. If the bed is not included in the grant, the land extends only to the water's edge."[82]

As was noted above, the Supreme Court of Canada has left for another day the issue of how or whether the presumption might operate in the context of reserve lands. In both *R.* v. *Nikal*[83] and *R.* v. *Lewis*,[84] it was argued that a fishing by-law passed by the band applied as far as the midpoint of a river adjacent to the reserve, by virtue of the *ad medium filum* presumption. In *Nikal*, the court held that the river in question was navigable and therefore the presumption did not apply. In *Lewis*, the court decided against the claimants both because of the navigability of the river and because of

historical evidence regarding the government's intention in creating the particular reserve. However, in *Nikal* the British Columbia Court of Appeal saw the absence of a grant or conveyance as fatal to a claim that riparian rights attached to reserve land:

> The creation of the Moricetown reserve did not involve a grant or conveyance of title or ownership to the Gitksan Wet'suwet'en people. It affirmed their right to use and occupation of the land. The English property rule in question applies to the interpretation of grants and conveyances of land. It has no application to circumstances which do not involve a grant but which recognize or affirm existing rights.[85]

In *Lewis*, despite the statement from the Supreme Court of Canada that for the purposes of the appeal it would assume without deciding that the presumption could apply to reserve lands, Iaccobucci J, speaking for the court, raised the question of whether title in reserve land would be seen as ownership for the purposes of the presumption: "At the outset, it should be noted that since the *ad medium filum aquae* presumption related to ownership of land, the question remains as to whether it applies to Indian reserves."[86] If a court held that riparian rights could attach to aboriginal title land, the court would then have to consider the nature of the estate acquired by way of the presumption: would the First Nation hold the riverbed by way of fee simple, as would be the case in a wholly common law context, or by way of aboriginal title? While it seems logical that the presumption, if applicable, would replicate the title to which it attached (meaning that the First Nation would hold the riverbed by way of aboriginal title), there is no case law on this point.

If riparian rights could attach to aboriginal title land and if the title in the riverbed so acquired were characterized as aboriginal title, rather than fee simple, the question then arises as to whether the title to the riverbed would have the same protection as other aboriginal title. On the one hand, it might be argued that since title to the riverbed is not based on historic occupation and use of the riverbed itself,[87] it is not deserving of the constitutional protection provided to aboriginal title in other contexts. The opposing argument would be that s. 35(1) of the *Constitution Act 1982* simply refers to aboriginal title and so there is no basis for creating different categories of aboriginal title, with different levels of protection. Again, there is no case law to guide this discussion. However, one author has suggested that "since riparian rights are not Aboriginal rights, they do not need to meet the requirements of infringement or extinguishment set out in the doctrine of Aboriginal rights."[88]

If this were the case, then aboriginal title in a riverbed acquired by way of the *ad medium filum* presumption could be restricted without governments having to meet the test for justification, and could be unilaterally extinguished by the federal government. The argument might be made that such

a different species of aboriginal title, arising solely from the application of the common law and therefore having little inherently "aboriginal" about it, could even be extinguished by provincial governments. If the court adopted this approach, and if a claim arose in a province or territory where title to waterbeds is, by legislation, vested in the Crown, then the court would have to consider whether such legislation should be seen as expressing sufficiently clear and plain intent to extinguish the aboriginal title.

In some jurisdictions, this question might be answered by the wording of the legislation itself. If the Act was to the effect that after a certain date any grant or conveyance of riparian lands could not extend past the high-water mark, this would not seem to affect any aboriginal title based on the *ad medium filum* presumption, since aboriginal title does not depend on any grant or conveyance for its existence. Where legislation simply states that the title to the beds of all watercourses lies with the Crown, a court would have to decide whether this meant that the Crown intended to acquire the unencumbered fee simple and whether it had made that intention sufficiently plain to extinguish aboriginal title. An alternative argument might be that since aboriginal title coexists with Crown title, the fact that the riverbed is held by the Crown would be no impediment to a claim based on riparian rights.

If a court held both that the riparian presumption could attach to aboriginal title lands, creating aboriginal title in the riverbed, and that all aboriginal title, however acquired, has the same constitutional protection, then the title in the riverbed could only be infringed by legislation meeting the tests for justification. Furthermore, it could only be extinguished by the federal Crown, and could not be unilaterally extinguished after 1982. In this scenario, legislation placing the ownership of waterbeds in the provincial Crown would certainly not extinguish such rights, as provincial governments cannot extinguish aboriginal title.[89] With regard to the impact of legislation vesting waterbeds in the federal Crown, then the earlier discussion on the wording of such legislation and the possible coexistence of the Crown title with aboriginal rights would be relevant here as well. Interestingly, in *Lewis* and *Nikal* the Supreme Court of Canada rejected claims based on riparian ownership on the grounds that the river was navigable, and therefore the *ad medium filum* presumption would not apply. The court did not state that all such rights have been ousted in British Columbia by the *Water Act*.

Conclusion

The first section of this chapter considered whether the doctrine of aboriginal title, as developed thus far by Canadian courts, could apply to rivers, lakes and the seabed. While there is no Canadian jurisprudence directly on point, it is at least arguable that the doctrine of aboriginal title might apply in these areas. Aboriginal title carries with it the right to use the land for a

variety of purposes, the right to exclude others and the right to regulate use of the land. In areas where aboriginal title claims might be made out, careful thought will therefore have to be given to accommodating aboriginal title rights within aquaculture policy, and considering the extent to which attempts to limit such rights would be upheld as justifiable.

The second part of this chapter asked whether the common law *ad medium filum* presumption could be used by an aboriginal community holding riverbank land by way of aboriginal title in order to claim title to the riverbed. Given the lack of relevant case law and the number of questions that would have to be worked through by any court tackling this question, it is difficult to draw even tentative conclusions on this question. However, the possibility of riparian rights claims cannot be rejected out of hand, and so any developments in this area of the law should be watched closely by those responsible for developing and implementing aquaculture policy.

Notes

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1 While there are other categories of rights that might be relevant to the issue of First Nations and aquaculture – for instance, treaty rights or aboriginal fishing or gathering rights – these are not discussed here. My focus is solely on aboriginal or common law rights to the land itself.
2 Each of the provinces and territories of Canada (with the exception of Québec) incorporated English law as of a certain date (ranging from the mid-eighteenth to the early nineteenth century, depending on the jurisdiction) into its law. Thus, English common law is relevant to the issue of property rights in Canada. It must be remembered, however, that the common law can evolve over time. In some instances, Canadian courts have specifically altered the English common law to take account of different circumstances pertaining to Canada. Further, the common law can be changed or abrogated by statute.
3 *Constitution Act 1982*, s. 35(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, ch. 11.
4 The range of rights encompassed by "aboriginal rights" was discussed by the Supreme Court of Canada in *R.* v. *Adams* [1996] 3 S.C.R. 101 (an aboriginal fishing rights case). The Supreme Court of Canada stated that "claims to title to the land are simply one manifestation of a broader-based concept of rights" (para. 25), and that "fishing and other aboriginal rights can exist independently of a claim to aboriginal title" (para. 3). This was again discussed in *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010 [*Delgamuukw*]:

> The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal community of the aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land." . . . Nevertheless, those activities receive constitutional protection. In

> the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. . . . At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. . . . What aboriginal title confers is the right to the land itself (para. 138).

5 *Delgamuukw*, *supra* note 4 at para. 111

6 The 1973 case of *Calder* v. *British Columbia (Attorney General)* [1973] S.C.R. 313 [*Calder*], which forms the foundation for the modern law on aboriginal title, recognized that such title is inherent. Judson J stated, "[w]hen the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries" (328). In *Delgamuukw*, *supra* note 6, the Supreme Court of Canada described "the prior occupation of Canada by Aboriginal peoples" (para. 114) as one of the sources of aboriginal title. In *Delgamuukw*, the court also set out the following requirements for the establishment of aboriginal title:

> i the land must have been occupied prior to sovereignty,
> ii if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and
> iii at sovereignty that occupation must have been exclusive (para. 143).

7 *Delgamuukw*, *supra* note 4 at para. 114.

8 *Ibid.* at para. 111.

9 *Ibid.* at paras. 112–114, and *Canada* v. *Guerin* [1984] 2 S.C.R. 335 at 336 [*Guerin*]. See John Borrows, "Listening for a Change: The Courts and Oral Tradition," (2001) 39 *Osgoode Hall Law Journal* 1, for commentary on this.

10 *Delgamuukw*, *supra* note 4 at para. 115.

11 *Ibid.* at paras. 116, 117.

12 *Ibid.* at para. 111. For commentary on this restriction, see Nigel Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Use," (1998) 32 *University of British Columbia Law Review* 317 [Bankes, "*Delgamuukw*"]; Richard H. Bartlett, "The Content of Aboriginal Title and Equality before the Law," (1998) 61 *Saskatchewan Law Review* 377 [Bartlett, "Content"]; Brian Burke, "Left Out in the Cold: The Problem with Aboriginal Title under s. 35(1) for Historically Nomadic Aboriginal Peoples," (2000) 38 *Osgoode Hall Law Journal* 1; William Flanagan, "Piercing the Veil of Real Property Law: *Delgamuukw v. B.C.*," (1998) 24 *Queen's Law Journal* 279; and Kent McNeil, *Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, York University, 1998) at 117–118 [McNeil, *Defining*].

13 *Calder*, *supra* note 6 at 353, and *Delgamuukw*, *supra* note 4 at para. 145.

14 *Delgamuukw*, *supra* note 4 at para. 113.

15 *R.* v. *Van der Peet* [1996] 2 S.C.R. 507 at para. 28, and *Delgamuukw*, *supra* note 4 at para. 35.

16 *Constitution Act 1867* (UK), 30 & 31 Victoria, c. 3, s. 91(24).

17 *Delgamuukw*, *supra* note 4 at para. 180.

18 *Ibid.* at para. 112.

19 There are, however, several authors who argue that the doctrine is applicable. Terence P. Douglas has suggested that, given the wording in *Calder*, *supra* note 6, "[a]lthough there is an absence of jurisprudence specifically relating to a

claim of Aboriginal title to specific bodies of water of water, the available case law permits the inference that such a claim is compatible within the context of Aboriginal title." See Terence P. Douglas, "Sources of Aboriginal Water Rights in Canada," at para. 17 [Douglas, "Sources"]. Online. Available http://www.firstpeoples.org/land_rights/canada/summary_of_land_rights/water_rughts.htm (accessed 14 April 2004). Even more emphatically, Bartlett, "Content," *supra* note 12, has stated, "A right to water is . . . an integral part of aboriginal title."

20 Action No. L020662, filed in the Supreme Court of British Columbia, 6 March 2002.

21 These cases include the following:

In *Kainaiwa/Blood Tribe* v. *Canada* [2001] F.C.J. No. 1502 (F.C.T.D.), aboriginal groups claimed use and ownership of rivers and riverbeds adjoining their reserve, by way of "existing aboriginal rights, treaty rights, or as riparian owner" (para. 6). However, the interim decision of the Federal Court focused solely on the jurisdiction of the court to hear a claim against the province of Alberta.

In 1999, the Association of Mi'kmaq Chiefs of Nova Scotia opposed the grant of a license allowing Maritime and Northeast Pipeline to build a natural gas pipeline over Crown lands on the grounds that "[t]he Mi'kmaq did not surrender Aboriginal title to the provincial Crown lands, including watercourse lands, along the pipeline corridor" (application reproduced in *Union of Nova Scotia Indians* v. *Nova Scotia (Attorney General)* [1999] N.S.J. No. 270 (N.S. S.C.) at para. 30). There has not been any decision on this issue.

In *Oregon Jack Creek Band* v. *CNR* [1989] B.C.J. No. 211, the Band claimed aboriginal title in a "river system." However, a 1989 decision of the British Columbia Court of Appeal dealt solely with the issue of whether the trial judge had been correct in refusing to allow the plaintiffs to amend their statement of claim so as to make a claim not only on behalf of three bands, but on behalf of the members of three First Nations.

22 *Re Marlborough Sounds*, unreported, Maori Land Court, 22A Nelson Minute Book I, 22 December 1997.

23 *Ngati Apa* v. *Attorney-General*, [2002] 2 N.Z.L.R. 661 [*Marlborough Sounds*]. The matter came before the High Court as stated case on questions of law.

24 *Ibid*. With regard to the foreshore, the High Court held, in keeping with the decision of *In Re Ninety-Mile Beach* [1963] N.Z.L.R. 461, that "the foreshore cannot be customary land unless the adjoining land is also customary land, as the rights to the foreshore go with the dry land" (para. 36).

25 *Territorial Sea and Exclusive Economic Zone Act 1977* (N.Z), 1977/28.

26 *Marlborough Sounds*, *supra* note 23 at para. 16. The focus of the Maori Land Court in New Zealand is to investigate claims to title, and, where such claims are substantiated, to convert the customary title to fee simple. This is very different from the situation in Canada, where the Supreme Court of Canada has made it clear that aboriginal title is not a form of fee simple. The High Court did state that its holding regarding title would "not preclude Maori from establishing customary rights over the foreshore, the seabed and the waters over them short of a right of exclusive possession" (para. 52).

27 *Ngati Apa* v. *Ki Te Tan Ihu Trust* [2003] N.Z.C.A. 117.

28 *Ibid*. at para. 8.

29 *Ibid*. at para. 12.

30 *Ibid*. at para. 51.

31 *Ibid*. at para. 63.

32 *The Commonwealth* v. *Yarmirr* [2001] H.C.A. 56 at para. 1 [*Yarmirr*].

33 *Ibid*. at para. 2.

34 *Seas and Submerged Lands Act 1973* (Cth.).

35 *Yarmirr*, *supra* note 32 at para. 54.
36 *Ibid.* at para. 57.
37 *Ibid.* at para. 61.
38 On appeal, the claimants had responded to the primary judge's refusal to recognize exclusive native title by "acknowledging the existence of the public rights to navigate and to fish and the right of innocent passage and contending that a determination of native title should be made subject to a qualification recognizing those rights" (*ibid.* at para. 94). However, the majority of the High Court responded to this by stating (*ibid.* at para. 98):

> [T]here is a fundamental inconsistency between the asserted native title rights and interests and the common law public rights of navigation and fishing, as well as the right of innocent passage. The two sets of rights cannot stand together and it is not sufficient to attempt to reconcile them by providing that the exercise of native title rights and interests is to be subject to the other public and international rights.

39 Lord Hailsham of St. Marylebone, ed., *Halsbury's Laws of England*, 4th ed., Vol. 49(2) (London: Butterworths, 1973) at para. 86 [*Halsbury's*].
40 *Delgamuukw*, *supra* note 4 at para. 112.
41 S.C. 1996, c. 31. The issue of Crown and aboriginal title in the seabed is discussed in greater detail in Diana Ginn, "Aboriginal Title and Oceans Policy in Canada," in D. Rothwell and D. VanderZwaag, eds., *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (London: Routledge, 2006).
42 Where it is argued that submerged land belongs to a private, non-aboriginal owner rather than the Crown, presumably the first question would be whether any aboriginal title to the area had been lawfully extinguished, as this would seem to be a precondition to the Crown having the authority to grant the land to others. If aboriginal title did exist in the area and there had been no valid extinguishment, then it would seem the underlying radical title would still lie with the Crown and would be burdened by the aboriginal title. If aboriginal title existed, and was extinguished without consent, then compensation to the First Nation might well be in order, since Lamer CJC stated in *Delgamuukw*, *supra* note 4 at para. 168, that, given the inescapably economic aspect of land, loss of title would ordinarily require compensation.
43 Whether the underlying fee is federal or provincial should not affect the possibility of aboriginal title existing. Litigation might be necessary to determine which Crown holds the unencumbered fee simple once aboriginal title has been surrendered or extinguished, but that presumably is irrelevant to the question of whether aboriginal title exists.
44 It is worth noting that the language used in the Nunavut Land Claims Agreement (Ottawa: published under the joint authority of the Tungavik and the Honourable Tom Siddon, PC, MP, Minister of Indian Affairs and Northern Development, 1993) seems to recognize the possibility that the Inuit held aboriginal title to water areas:

> 2.7.1 In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby:
>
> (a) cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands *and waters anywhere within Canada and adjacent offshore areas within the sovereignty* or jurisdiction of Canada. [emphasis added]

45 *Alford* v. *Canada (Attorney General)* [1997] B.C.J. No. 251 (S.C.) at para. 17.

46 *Canada* v. *Robertson* (1882) 6 S.C.R. 52 at 88.
47 Gerard V. LaForest, *Water Resources Study of the Atlantic Provinces* (Ottawa: Department of Regional Economic Expansion, 1968) at 27–28 [LaForest].
48 See Bankes, "*Delgamuukw*," *supra* note 12 at para. 2; Peggy Blair, "Solemn Promises and Solemn Rights: The Saugeen Ojibeway Fishing Grounds and *R.* v. *Jones and Nadjiwon*," (1996–1997) 28 *Ottawa Law Review* 125; and Mark Walters, "Aboriginal Rights, Magna Carta and Exclusive Rights to Fisheries in the Waters of Upper Canada," (1998) 23 *Queen's Law Journal* 301.
49 *R.* v. *Gladstone* [1996] 2 S.C.R. 723.
50 *Ibid*. at para. 67.
51 *Supra* note 27 at para. 50.
52 This is discussed further in Ginn, *supra* note 41.
53 B. Wildsmith, *Aquaculture: The Legal Framework* (Toronto: Emond-Montgomery Ltd., 1982) at 165.
54 In *Delgamuukw*, *supra* note 4 at para. 115, Lamer CJC noted that:

> [a] further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

55 For commentary on provincial power to infringe, see J. Lambert, "*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues," (1998) 32 *University of British Columbia Law Review* 249 at 226; and McNeil, *Defining*, *supra* note 12 at 25.
56 This test was first developed in *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 [*Sparrow*], an aboriginal fishing rights case. In *Delgamuukw*, *supra* note 4, Lamer CJC applied the *Sparrow* test in the context of aboriginal title.
57 *Sparrow*, *supra* note 56 at para. 64.
58 *Ibid.*
59 *Delgamuukw*, *supra* note 4 at para. 168.
60 *Ibid.*
61 *Ibid.* at para. 169.
62 The term "riparian rights" is sometimes used to encompass both rights of water usage, which were not dependent on ownership of the underlying waterbed, and ownership of the riverbed. At common law, the owner of land abutting a river or stream or the sea has certain rights to use the water, including:

- the right of access to the water;
- the right of drainage;
- rights relating to the flow of water;
- rights relating to the quality of water (pollution);
- rights relating to the use of water;
- the right of accretion (LaForest, *supra* note 47 at 32–33).

The focus of this chapter, however, is rights of ownership; that is, title to the land acquired by way of riparian rights, rather than on rights of usage.
63 *Halsbury's*, *supra* note 39 at para. 101.
64 *Ibid.* at para. 106. La Forest, *supra* note 47 at 82, expresses the English rule as follows:

> That the owner of the land through which a non-tidal stream flows owns the bed of the stream unless it has been expressly or impliedly reserved, and if the stream forms the boundary of lands owned by different persons, each proprietor owns the bed of the river *ad medium filum aquae* – to the centre thread of the river.

65 Sir Robert E. Megarry and Sir William Wade, *The Law of Real Property*, 4th ed. (London: Stevens, 1975) at 30–56.
66 Standing water was the exception to the general common law rule that water could not be owned.
67 *Halsbury's*, *supra* note 39 at para. 107.
68 *Ibid.*
69 Cheshire and Burns, *Modern Law of Real Property*, 15th ed. (London: Butterworths, 1994) at 165, and LaForest, *supra* note 47 at 86.
70 *Beds of Navigable Waters Act*, R.S.O. 1990, c. B-4, s. 1:

> Where land that borders on a navigable body of water or a stream or on which the whole or part of a navigable body of water or stream is situate, or thru which a navigable body of water or stream flows has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

71 Thus La Forest, *supra* note 47 at 94, states, "There is no instance in any of the Atlantic provinces where rivers have been considered navigable unless they were tidal and the courts have throughout acted on the basis that the English law prevails."
72 *Friends of the Oldman River* v. *Canada* (Minister of Transport) [1992] 1 S.C.R. 3 at 54.
73 For instance, in what are now the three prairie provinces, the common law presumption was initially ousted by federal legislation, the *Northwest Irrigation Act 1894*, 57 & 58 Vict., c. 30., which vested "property in and the right to use" of all watercourses in the Crown. In 1930, this was transferred to the provincial Crowns, as part of the transfer of ownership of natural resources.
74 The *Northwest Territories Waters Act*, S.C. 1992, c. 39, s. 4, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10, s. 8(1) and the *Yukon Waters Act*, R.C. 1992, c. 40, s. 4, all state:

> Subject to any rights, powers or privileges granted pursuant to the *Dominion Water Power Act* or preserved under that Act, the property in and the right to the use and flow of all waters are vested in Her Majesty in right of Canada.

75 For instance, LaForest, *supra* note 47 at 122, states with regard to New Brunswick:

> [W]ith limited exceptions, private interests in land abutting on the above named rivers, deriving from Crown grants after 1884, and private interests in lands abutting on any river or lake deriving from a Crown grant after 1927, are subject to riparian ownership reserved to the Crown.

76 *R.* v. *Lewis* [1996] 1 S.C.R. 921 [*Lewis*]; *R.* v. *Nikal* [1996] 1 S.C.R. 1013 [*Nikal*].
77 *Pasco* v. *C.N.R.* [1985] B.C.J. No. 2818 (B.C. S.C.) [*Pasco*]. In this case, the Indian band had sought an interim injunction to prevent the Canadian National Railway from building tracks along a river that ran beside the reserve, construction of which would involve adding some fill to the river. The band argued that this would interfere with their fishery, and also claimed ownership in the riverbed, based on the *ad medium filum* presumption.
78 *Ibid*. at para. 29.
79 *Guerin*, *supra* note 9.
80 *Delgamuukw*, *supra* note 4.
81 *Halsbury's*, *supra* note 39 at para. 101.
82 A. H. Oosterhoff and W. B. Rayner, *Anger and Honsberger Law of Real Property*, 2nd ed., Vol. 2 (Aurora, ON: Canada Law Book, 1985) at 987.

83 *Nikal*, *supra* note 76.
84 *Ibid*.
85 *R.* v. *Nikal* [1993] B.C.J. No. 1399 at para. 58 (C.A.).
86 *Lewis*, *supra* note 76 at para. 57.
87 If the test for aboriginal title would be met, it would seem more straightforward to attempt to claim the submerged land directly by way of an aboriginal title claim, rather than through the riparian rights route.
88 Douglas, "Sources," *supra* note 19 at para. 7.
89 *Pasco*, *supra* note 77, raised the question of whether provincial legislation vesting the title to waterbeds in the provincial Crown is of any effect when the adjacent land is held as an Indian reserve. In *Pasco*, the Court posed the following question with regard to the British Columbia *Water Act*, R.S.B.C. 1986, c. 483: "Does the province have the legislative competence to deny riparian rights to the federal Crown in connection with an Indian reserve? . . . could such a provincial power infringe on federal rights in respect of Indians and fisheries?" (paras. 28–29).