TRESPASS IV - BOUNDARIES BETWEEN LAND AND WATER

by Mary MacGregor

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Establishing the exact boundary between land and the water body beside it, is far from easy.

Check Crown Grant

The first step in establishing the boundary is to look at one's Crown grant. See what is shown on any attached map, and read the grant to figure out what rights or land was excluded from the grant. (In "Trespass III", we described how to locate the Crown grant and review it for questions about access.)

At one time there was a legislative provision allowing the Crown to reserve to itself a strip of land one chain in width, measured from high-water mark, on all Crown land adjacent to the sea or an ocean inlet. Some Crown grants are likely to have a reservation of this type.

Some land owners will find that the original Crown grant is a Dominion of Canada grant rather than a provincial Crown grant. These usually cover Railway Belt lands. If the federal grant was issued before June 6, 1913, it may include land under the bed of a watercourse, although this is not certain.

Legislation

The Crown grant is not the end of the search. There are some legislative provisions which affect the situation:

The Land Act (B.C.), section 52(1):

Where Crown land is or has, prior to March 27, 1961, been disposed of by Her Majesty in right of the Province by Crown grant, and the map or plan attached to the grant shows a lake, river, stream or other body of water coloured, outlined or designated in a colour other than red, no part of the bed or shore of the body of water below its natural boundary shall pass or be deemed to have passed to the person acquiring the grant unless

(a) there is express provision in the grant to the contrary; or
(b) the minister otherwise directs by certificate under section 55.

In the Land Act, section 1, "natural boundary" is defined as "the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation as well as in the nature of the soil itself".

The effect of section 52(1) is that, if your Crown grant was issued before March 27, 1961, and shows a water body coloured in a colour other than red, the land under the water body – to its high water mark – remains with the provincial Crown UNLESS there is a specific grant of the land under the water body.

Note also that this section is retroactive. The effect of your Crown grant when granted, may be changed by this section.

Retroactive legislation is unusual and most often indicates that government sees the task, here of retrieving land under water bodies, as being of paramount importance.

The previous common law rule, which was changed by this legislation, is that the property owners beside water bodies each owned halfway across the land under the body of water. Their boundaries met half way across the body of water.

Land Title Act (B.C.) section 108(2)

Where the subdivided area shown in and included in a subdivision or reference plan deposited in the land title office before or after this section comes into force adjoins land covered by water, and the land is included in the subdivider's indefeasible title and adjoins land the title to which is vested in Her Majesty the Queen in right of the Province, the deposit shall be deemed to be a transfer in fee simple of the first mentioned land to Her Majesty the Queen in right of the Province, and the title of the registered owner to the first mentioned land covered by water shall be deemed to be extinguished.

By the way, if you find these sections difficult to read and understand, a Supreme Court judge referred to section 108(2) as "much more formidable [than Land Act s. 52(10] if not inscrutable" (Regina in right of British Columbia v. Ogopogo Investments Ltd., and Stober (1980) 23 B.C.L.R. 43).

Section 180(2) is a punishing section. Madam Justice Southin of the B.C. Court of Appeal, in Conigas Farms Ltd. v. British Columbia (1993) 77 B.C.L.R. (2D) 165, said "I have been influenced by the confiscatory nature of this provision which operates to vest the Crown, free of any obligation to pay compensation, the property of a subject if the subject's predecessor in title, decades before its enactment, had subdivided land and filed a subdivision plan to accomplish that purpose.". The section was enacted in 1965.

The section means that if, at any time after the land was originally granted from the Crown, the and along the water body has been subdivided by deposit of a subdivision plan at the Land Title Office, at that time any part of the subdivided land which is covered by water, is transferred back to the provincial Crown. "Subdivision plan" means any plan filed in the past which had or has the effect of creating a new parcel from an existing parcel.

Madam Justice Southin in Stautlo Fisheries Ltd. v. Roland W.B. Savage and R. in right of British Columbia (1991) 56 B.C.L.R. (2d) 101 said "The plain purpose of the section is to retrieve, for the use of the public, the foreshore…".

The phrase "land covered by water" in section 108(2) has also received judicial attention. In the Conigas case, Madam Justice Southin decided that, with respect to tidal river waters, the term means not only the land under the river, but also the foreshore (between low and high tide).

While in theory the question may be open as to non-tidal waters, while waiting for a case on this point one would assume that “land covered by water” means land under the water body up to and including the high water mark.

Section 108(2) means that with each change in course of a stream or river, any subdivision plan deposited at the Land Title Office will effect a transfer back to the Crown of any land newly covered by water since the Crown grant. The former stream or river channel remains owned by the Crown, so the amount of land owned by the Crown slowly increases with each channel change plus subdivision plan filing. This was the stated result in the Ogopogo Investments case referred to above.

Accretion

Accretion is the increase to land beside a river or ocean, through natural addition of soil, or permanent reduction of the waters. Accretion is a slow and gradual process, imperceptible to the naked eye, so that it can only be discerned that, after a time period, one can see that there is a fresh addition to the shoreline.

Accreted land is owned by the property owner adjacent to the water body. In Monashee Enterprises Ltd. v. Minister of Recreation and Conservation for British Columbia (1981) 28 B.C.L.R. 260, the Crown in the Crown grant had reserved a one chain strip of land back from the high water mark of the ocean. The B.C. Court of Appeal decided that the strip of land originally one chain wide, made the Crown the riparian owner. The adjacent property owner wanted the boundary moved out, so that the Crown had only a one-chain strip from the new high water mark. The Court decided that the boundary between the strip and the adjacent land did not move when the strip increased in width due to accretion. The boundary stayed fixed, one chain from the original high water mark, and the Crown benefited form the accreted land because it was the owner of the land immediately adjacent to the water body.