

ELEMENTS OF THE LAW ON MOVABLE WATER BOUNDARIES >>>

B E HAYES

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Through all my run to seashore head –

At last the ocean true!

The fisherman who walks my bed

May tread on title *inconnu*.¹

Anon

¹Inconnu – unknown, a stranger – *New Shorter Oxford Dictionary* page 1340



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»» Preface

The law relating to water boundaries in New Zealand has not been cohesively developed. Errors, conflicts, and misconceptions abound.¹ Broadly speaking, when the legislature has dealt with water boundaries and the ownership of riverbeds, it has tried to apply reason to finding solutions. Since 1900, when the courts have had a say (expressed in decided cases), they have generally shown a preference for authority with origins in English common law. Regrettably, the marriage of New Zealand statute law and English case law has been neither wholly happy nor entirely productive. However, that is not to deny that where its application is appropriate, New Zealand has benefited greatly from common law.²

Erosion (the alteration of water boundaries by the action of nature) and trespass (the legal prohibition of access) are strongly linked in the practices of waterside passage and recreation. In fact, the first significant Supreme Court case in New Zealand concerning erosion³ was brought as an action in trespass in 1888.

Modern case-law authority stems from two fountainhead decisions by the courts. The first of these decisions, on erosion of a riverside road, was dealt with by the New Zealand Supreme Court (now the High Court) in 1906.⁴ Although the second case brought together for argument elements of the law on accretion and ownership of riverbeds, the New Zealand Court of Appeal in its decision in 1955⁵

¹ These notes are not intended to cover all the complexities of water boundary law – of which there are so many. Rather, this is an attempt to plainly show that the law is complex and, worse, is still uncertain; and why with good reason:

- certain deficiencies in trespass law may not be corrected without legislation;
- legislation need not be extensive;
- ownership rights maybe left unaffected.

² In an unreported decision, *MacDougalls Transport Ltd v Southland Catchment Board*, Somers J said:

Undoubtedly the common law rules about watercourses form part of our law. But they are rules which developed in a different physical climate, which were formulated centuries ago and whose object was to regulate the lives of men settled along the banks of rivers and streams. And such rules cannot automatically be applied to some of the circumstances of New Zealand which are wholly different. Rivers such as the great South Island watersheds had no part in the formulation of the common law rules. The Courts have recognised that in cases such as *Piripi te Maari v Matthews* (1893) 12 NZLR 13, 22 and *Kingdon v Hutt River Board* (1905) 25 NZLR 145, 157-158.

³ *Pipi Te Ngahura v The Mercer Road Board* (1888) 6 NZLR 19

⁴ *Attorney-General and Southland County Council v Miller* (1906), 26 NZLR 348

⁵ *Attorney-General and Hutt River Board v Leighton* (1955) NZLR 750

failed to satisfactorily resolve longstanding issues which continue to be of uncertain application.

The Supreme Court decision of 1906 which relied on English common law was doubtfully, if not wrongly, decided because it failed to take into account relevant statutory provisions then in force. Nevertheless this case (which, curiously, seems never to have been the subject of rigorous analysis) has governed the law relating to riparian roadside erosion for the last 100 years. By implication it has played a significant part in the doctrine of fixed boundaries along the inner limit of waterside reservations (i.e. the dry land boundary) when a margin was reserved at the time of the Crown grant.

The Court of Appeal decision discussed New Zealand statute law dealing with questions of (a) navigability as a test of ownership and (b) Crown ownership of riverbeds, without making any actual decision. The Appeal Court applied by a majority a common law principle of ownership to the centre line of non-navigable boundary rivers, ruling however, that these riverbeds were not to be included in the owners' certificate of title.

On the same facts both the Supreme Court of Canada in 1961⁶ and the High Court of Australia in 1966⁷ took the contrary view that the owner's certificate of title extended to the centre line. It may well be that, should the opportunity arise for a reconsideration, our own Court of Appeal and the new Supreme Court might now reach different conclusions from those expressed by the Court of Appeal in 1955.⁸

The most recent High Court case in New Zealand dealing with riverbed boundaries was decided in 1984.⁹ This decision followed the dissenting view in the 1955 Appeal Court case and interpreted the statute law in such a way that the statute law dealing with Crown ownership of riverbeds became largely inoperative.

The New Zealand cases will be discussed later; a brief reference is made here to indicate that all is not as well as it might be with the law as it has been applied. Any solution attempting to deal with

⁶ *Rotter v Can Exploration Ltd* (1961) SCR 15

⁷ *Lanyon Pty v Canberra Washed Sand* (1966) 115 CLR 342

⁸ Professor F M Brookfield in *The New Zealand Torrens System Centennial Essays*, Butterworths, 1971 at p197 provides a compelling argument for inclusion of these riverbeds in the adjoining certificate of title.

⁹ *Tait-Jamieson v GC Smith Metal Contractors Ltd 2* (1984) NZLR 513

recreational issues concerning erosion and trespass will have to be flexible enough to cover some very uncertain underlying law.

What is clear from research is that after 1900 the courts appear to have preferred solutions having an origin in English common law to New Zealand statute law. On occasion the judges, although invariably scholarly, may have been clearly wrong but not wrong clearly,¹⁰ and as a result the law has become uncertain.

The primary purpose of this commentary is to highlight unsatisfactory elements in our waterside law which detract from a stable legal environment where the landowner and recreational user may have a mutual understanding. A secondary purpose is to show that we need legislation to protect the landowner and the recreational user from inadequacies in such law as we now have. This legislation need not be complex or extensive; ownership rights need not be affected. We must acknowledge, however, that we need much more than legally impeccable statutes to assure the future. For the foreseeable time access to recreational water will in part be based on reserved public land dating from early settlement¹¹ and in part on activities which are permitted by land owners the Crown and territorial authorities. Private landowners including Māori, the Crown, and territorial and regional authorities, together with recreational users, must provide the essential non-legal elements of an outdoors values system which in large part is neither workable nor worth working without co-operation and consensus.

The Department of Lands and Survey (the old department) and its successor departments¹² as agents of the Crown have made a generous contribution to our recreational heritage. The freedom the old department allowed the public in respect of vast areas of Crown land contrasts with the formidable statutory charter on trespass on Crown land – s176 of the Land Act 1948. Subsections (1), (2) and (3) of this section are set out pages 3–4 (below). Subsection (6) of s176 says:

(6) In any such proceedings the averment that any lands in question are lands of the Crown shall be sufficient without proof of that fact, unless the defendant proves to the contrary, and all plans, maps, leases, licences, certificates, and copies certified as true under the hand of the Commissioner or Chief Surveyor shall be sufficient evidence of their contents without production of original records, and without the personal attendance of those officers or proof of their signatures.

¹⁰ The extraordinary range of judicial opinion on the same law as indicated at p26 (below) is such that much of it must be wrong. However scholarly and sophisticated, if wrong but not wrong clearly, such opinions merely serve to confuse the issue.

¹¹ Key statutory authorities are listed (p3 below).

¹² (a) Land Information New Zealand – deals with residual Crown land.
(b) Department of Conservation – deals with the conservation estate.

In matters of trespass, the Crown neatly reverses the burden of proof so that the defendant has to prove that they were not on Crown land, if that is the case. The Crown does not have to prove that its officers have a right to eject based on a right of ownership.

The private landowner or occupier is not protected in the same way in cases of doubt, and so for the owner as well as for the sake of the recreational user, the law on trespass along water boundaries should be clarified. The protected position that s176(6) provides for the Crown when it brings an action in trespass corroborates the inadequacy of the Trespass Act 1980 as it affects natural boundaries adjoining private land. Current law places the landowner at risk of an action by an aggrieved recreational user in proof of a right to be along or on a riverbed, and at the same time provides an unacceptable degree of uncertainty for the recreational user who may have no ready way of knowing that there is a gap in legal access along water, or whether a riverbed is publicly or privately owned.

In compiling *The Law on Public Access along Water Margins*¹³ and in preparing this commentary, the author has formed the opinion that the roading pattern set out by the early surveyors along water and over land to be Crown granted was the foundation of free, public and permanent access in New Zealand. The intention was that most of these roads would remain in a state of nature. Next to the rivers, mountains, lakes, and the sea, the unformed roading network originally held in trust by the Crown for the people¹⁴ and now administered by local councils, is one of the greatest recreational assets of the nation, for it is the one mechanism that provides an unqualified guarantee of access for everyone.

Brian Hayes

February 2007

¹³ *The Law on Public Access along Water Margins*, Hayes, 2003, Ministry of Agriculture and Forestry, PO Box 2526, Wellington. Available on www.walkingaccess.org.nz

¹⁴ In delivering the judgement of the Court of Appeal in *Man O'War Station v Auckland City Council* (2000) 2 NZLR 267 at 272 Blanchard J said:

Until 1 January 1973 all land becoming road was vested in the Crown (s111 of the Public Works Act 1928). From that date, with certain exceptions of no present relevance, roads were vested in fee simple in the local authority under s191A of the Counties Act 1956 and, from 1 April 1979, under s316 of the Local Government Act 1974. Despite the vesting in the local authority the right of passage over a road is one possessed by the public, not the local authority, which holds its title and exercises its powers in relation to a road as upon a trust for a public purpose (*Fuller v MacLeod* [1981] 1 NZLR 390 at p414).

»» Executive summary

Waterside law and practice designed to free New Zealand from the rules of English law and provide public access to water was optimistically put in place in the 19th century by the colony's administrators, legislators and judges. They employed the most durable means then known: roads along water. Roads which the legislators declared could never be legally stopped if along rivers; roads which when placed on either side of a river preserved a right of passage and public access to the bed and recreational waters.

The Supreme Court (now the High Court) in 1888 declared that when a road which runs along the bank of a river is washed away, the public are automatically entitled to a road over the corresponding part of the adjoining land.¹ Roding policies were not uniformly applied, largely because of inconsistent practices in the period of provincial government, but in 1892 McKenzie's Land Act² introduced national water margin standards. The Act protected public access when land alongside waterways was sold by the Crown, so that in the latter part of the 19th century the future of waterside access seemed assured.

In 1903 the Coal-mines Amendment Act vested the beds of navigable rivers in the Crown, so that riverbeds not previously retained by the Crown should return to public ownership. Now, more than 100 years later, there is still judicial contention over the scope of that legislation. However, this legislation may be demonstrated as indicated hereafter, to be of more plain and extensive effect than judicial opinion in the past may have indicated.

Inconsistent judicial practices and a failure to maintain cohesive policy development in the 20th century have resulted in uncertain law and practice. The intention is to explain how:

- roads became the basis of water margin access;
- in the 19th century the legislature and judiciary protected the roading pattern along water;
- from early in the 20th century, the English common law supplanted the early New Zealand law;
- the fixed boundary concept supported by English common law made New Zealand law more rigid – the flexibility achieved in the 19th century was lost in the 20th;

¹ This case was not followed in later litigation. See p7 below.

² John McKenzie, Minister of Lands 1891–1900; s110 Land Act 1892.

- the New Zealand legislature in 1952 removed statutory protection for roads along water;
- erosion may narrow or obliterate public access which previously may have existed as of right.

In addition, crucial issues of riverine ownership are addressed to show how:

- ownership of riverbeds where there is no road or reserve alongside may be uncertain;
- ownership of riverbeds when roads are alongside requires clarification;
- owners of adjoining land may consider that they own to the centre line of the river, while the riverbed may in fact be owned by the Crown under the Coal Mines Act;
- the fact that the Coal Mines Act should contain provisions relating to Crown ownership of riverbeds may be explained;
- links with Canadian law and practice show that our early law was not developed in isolation;
- a minor amendment to the Trespass Act 1980 may alleviate public access problems created by erosion and uncertain ownership of riverbeds in New Zealand.

The issues outlined above are discussed in relation to general land rather than Māori land. Although access to and ownership of Māori riverbeds and lakes is not directly addressed, a general commentary on access to Māori land is included as Appendix B (noting in footnote 2 in that appendix a recent view on ownership of rivers as expressed in the Court of Appeal). Water boundaries excluded from analysis are listed in Appendix C.

»» Introduction

Public rights of access along water in New Zealand have accrued under statute law authorising public ownership of waterside margins in many different forms of title. Access over publicly owned water margins is popularly believed to be a right, but given the varied legal status of its components, true unfettered rights of public access apply only to waterside roads. Access over other publicly owned land or Crown land is authorised only by the appropriate statute or permitted on sufferance.

Marginal public land along watercourses, along the coast and around lakes, in addition to roads, includes:

- Crown land;
- land reserved from sale under s58 of the Land Act 1948 and earlier Land Acts;
- all reserves under the Reserves Act 1977 and earlier Reserve Acts;
- all land subject to part IVA of the Conservation Act 1987;
- all local purpose reserves for esplanade purposes vested under the Resource Management Act 1991 and earlier Acts relating to the subdivision of land;
- all esplanade strips or access strips under the Resource Management Act 1991;
- all reservations over Māori land whether under the authority of the Māori Affairs Act 1953, the Resource Management Act 1991 or earlier Acts relating to the subdivision of land, or Te Ture Whenua Māori Land Act 1993.

The Commissioner of Crown Lands has traditionally been generous in respect of unoccupied Crown land, so that the public generally perceives there is a “right” of access over Crown land, whereas s176 of the Land Act 1948 gives nothing away:

176. Trespass on or damage to Crown land

- (1) In this section the expression “lands of the Crown” means:
 - (a) Crown land and any other lands administered by the Board under the Act which respectively are not for the time being subject to any lease, licence, or demise serving to vest the exclusive occupation thereof in any person other than the Crown;
 - (b) Any public reserve not granted to or vested in any local body, trustees, or other persons, – but shall not include any lands which are subject to [the Forests Act 1949].
- (2) Every person commits an offence against this Act who, without right, title, or licence, –
 - (a) Trespasses on, or uses, or occupies lands of the Crown:

- (b) Causes or allows any cattle, sheep, horses, or other animals to trespass on lands of the Crown:
 - (c) Fells, removes, damages, destroys, or otherwise interferes with any forest, wood, or timber growing or being on lands of the Crown:
 - (d) Takes or removes from lands of the Crown any bark, flax, mineral, gravel, guano, or other substance whatever:
 - (e) Repealed by s62(1) of the Forest and Rural Fires Act 1955.
 - (f) Uses, sells or otherwise disposes of any wood, timber, bark, flax, mineral, gravel, guano, or other substance whatever knowing the same to have been removed unlawfully from lands of the Crown.
- (3) No person shall be convicted under this section except on the information of the Commissioner or of some person appointed in writing by him ...

The Crown (through land-administering departments, principally Land Information New Zealand and the Department of Conservation) and the territorial and regional local authorities (the owners of various forms of waterside title including roads) generally allow the public to enjoy access over most of the publicly owned margins without hindrance, giving rise to the popular misconception that this is in all respects a legal right.

The right or facility to be alongside the water is based in a strict legal sense on title: title to public land touching the water, banks or foreshore, separated by a surveyed line from title to the adjoining land. The concept of a fixed landward boundary was carried into effect on survey plans prepared for sale by the Crown and on subsequent titles, even though the riverine or coastal boundary of the publicly owned margins generally has been a moveable boundary. (The waterside exception is where, say, there is a surveyed allotment with fixed boundaries or perhaps a Crown grant originally to a superintendent of one of the provinces¹ – these may, subject to individual assessment, bear a fixed boundary.

The statutory authorities for waterside reservations are documented in Hayes (2003)² and need no further review, except to note that whereas that report dealt objectively with unambiguous law and is the basis of much of this paper, this discussion will deal (among other things) with conflicts and errors in the application of the law. An explanation of the general terms used in relation to boundaries along water is set out in Appendix A.

¹ These grants after abolition of the provinces were restored to territorial local authorities or the Crown for the public purpose originally stated.

² *The Law on Public Access along Water Margins* (pviii above).

However, at the outset, the general term “riparian” relates to all water boundaries and may include the coast. The term “riparian” derives from the Latin “ripa”. In the narrow and original sense, “ripa” means the “bank” of a river: “littoral” and “lacustrine” are the specific terms for lands bordering respectively the sea and lakes. However, general and legal usage down the centuries make “riparian” the comprehensive term for all proprietorships bordering on any class of waterway. It is the land upwards of the water which is riparian, not the bed. In the leading case of *Lyon v Fishmongers Co* (1876) 1 App. Cas. 662 (HL) Lord Selbourne stated:

With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights property so called, because the word “riparian” is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law.

Whenever the commentary relates exclusively to rivers or riverbeds the term “riverine” is applied.

»» Waterside margins

Roads

Up until the enactment of the Land Act 1892, general waterside reservations were shown as roads on the plans prepared for the sale of Crown land. From 11 October 1892 the Land Act¹ provided for a strip of Crown land to be reserved along water on the sale of land by the Crown. Public reserves of various kinds were also established along rivers and the coast in the early days, but roads form by far the bulk of early public land.

The practice of showing reservations as road continued inconsistently until 1913 (in some provinces the depiction of a road was thought to be a compliance with the Land Act 1892). Then the practice of setting aside a margin of Crown land, rather than a road, along water was introduced on a national basis.² Much of the public land along major rivers and the coast is legal road.³

¹s110 Land Act 1892

²From 1888 to 1906 roads along rivers were considered to be ambulatory under a decision of the then Supreme Court and this may have influenced the Chief Surveyors of the land districts (the former provinces) to continue to use roads rather than fixed strips of Crown land along water. Also, roads along rivers could not be stopped after 1882. See below p7.

³The author has read all of the relevant instructions from the Colonial Office to the New Zealand Governors, all of the land-related ordinances and statutes of the central government and the 10 provincial governments prior to the abolition of provincial government in 1875, and all relevant statutes of central government up until the enactment of the Land Act 1892 (see Hayes 2003, pp43–46), and cannot find any specific or general references to “roads as a requirement along water”. Legislation in Canada most closely approximates to waterside legislation in New Zealand extending to colonial times, and commentators there have faced the same problem. Professor David W Lambden, Emeritus Professor of Surveying, University of Toronto and Izaak de Rijcke of the Canadian Bar in *Legal Aspects of Surveying Water Boundaries* (Carswell, 1996) say at p45 of their text:

Documentation has not been found in the authors’ research giving the official reason for placing a road allowance along the shores of navigable lakes and the banks of navigable rivers in the surveys, after 1851, of the 1000-acre sectional system in the forest lands of the Shield area of Southern Ontario. It is suggested that for the Crown to keep a reserve and dedicate it as a road was a logical practice to adopt, not that it would become a physically passable road but that it gave freedom of enterprise for the logging operations that were the prime industry of Ontario at that time. In driving the logs down the rivers, the lumber men would not be trespassing on private lands if a space was maintained along the shore. Since navigable waters are a highway, a road (a very valid term of somewhat older times for the clear main channels leading to harbours), a shore reserve for the same purpose, would appropriately be called a “road allowance”.

The use of roads as waterside reservations in New Zealand may well owe something to earlier settlement in Canada.

The first case on erosion of a riverine road decided in the Supreme Court,⁴ *Pipi Te Ngahuru v The Mercer Road Board* (1888) 6 NZLR 19, decided that when a road along the bank of a river is washed away, the public are automatically entitled to a road over a corresponding part of the adjoining land. The judgment of Ward J is short and to the point, but does not discuss in detail the English authorities on roads along water, although some are mentioned by counsel. Ward J does not refer to the statutory prohibition on stopping riverside roads introduced by s93 of the Public Works Act 1882 but his judgment is consistent with s93.

Section 93 is a unique legislative provision providing roads along rivers with quasi-constitutional protection; that is to say, an Act of parliament or the authority of an Act would be necessary before a riverside road could be stopped. Its history is outlined below.

After the abolition of provincial government, the legislative structures which have influenced public administration to the present time began to emerge as consolidated statutes. The first Public Works Act of 1876 consolidated and repealed some 109 Acts and ordinances. Section 92 dealt with the stopping of roads, and reads:

92. No road shall be stopped unless and until a way to the lands adjacent as convenient as that theretofore afforded by the said road is left or provided, unless the owners of such lands give consent in writing to such stoppage.

The Act of 1876 was repealed by the Public Works Act 1882, in which s92 was re-enacted as a new s93 to say:

93. No road shall be stopped unless and until a way to the lands adjacent as convenient as that theretofore afforded by the said road is left or provided, unless the owners of such lands give consent in writing to such stoppage, **and no road along the bank of a river shall be stopped either with or without consent.** [*Emphasis added.*]

Section 93 of the Public Works Act 1882 was re-enacted (in each case without amendment) as s121 of the Public Works Act 1894, then successively as s129 of the Public Works Act 1905, s130 of the Public Works Act 1908, and s147 of the Public Works Act 1928.

The death knell for this unique provision concerning roads came in the Public Works Amendment Act 1952 where s12 states:

12. (1) Section one hundred and forty-seven of the principal Act is hereby amended by omitting the words “and no road along the bank of a river shall be stopped either with or without consent”.

Whether s93 was a truly effective legislative means of providing a perpetual road along the bank of a river when at the time of the Crown grant a road was reserved may be debated. The section does not

⁴The former Supreme Court, now the High Court.

specifically deal with ambulatory boundaries, or gaps in the physical roadway caused by erosion. However, in placing the interpretation that he did on waterside roads, Ward J included the concept of perpetual public access in the spirit of s93 within the scope of his decision. Given the comparatively small volume of New Zealand statute law in force in 1888 it seems inconceivable that he would not be aware of s93. He had the vision to see what was required in New Zealand, and provides an early example of a judge reasoning a solution rather than rigidly applying common law when common law does not fit. His judgement is surely in keeping with the spirit of the early surveyors who laid out the first publicly owned water margins using roads as the best of the mapping tools available to them.

This interpretation of the law stood until 1906 when in *Attorney-General and Southland County Council v Miller* (1906) 26 NZLR 348 on similar facts the Supreme Court⁵ held that where a public road runs along the edge of a river, the owner of land abutting on such road is under no obligation, if the land on which the road is constructed is destroyed or washed away, to give up to public use any part of his or her land to take the place of that road. If there is a public need for a replacement road and it cannot be obtained without encroaching on private property, then the new line of road must be taken under the Public Works Acts, and the owner of the land compensated.

This decision was based on an extensive discussion of the common law of England (rather than any consideration of conditions in New Zealand). It establishes in general the concept of a fixed position for roads, negating any right of road along the altered course of the river. However, the decision makes no attempt to reconcile the common law with s129 of the Public Works Act 1905 then in force, which is designed to preserve in perpetuity the law-based existence of roads along the banks of rivers.

Whether this case was rightly decided obviously may be argued. However, even though the decision grievously damaged the concept of continuous water margin access, the principle that it established has stuck. Erosion of a water margin road may create a physical gap in the road. The case also established by implication a second principle that the inner limit of the road or marginal reservation is not ambulatory. When there is a road alongside, no matter where the river may change its course the boundaries of the Crown-granted land will always remain the same.

⁵The former Supreme Court, now the High Court

This sounds simple enough and reflects the very human desire exemplified in the profession of survey draughting to “fix” things including parcel boundaries in a land title system. However, in many cases where pegging is incomplete the location of the inner limit i.e. the landward side of the road, is dependent on the natural boundary at a particular moment in time – the time of the Crown grant. Often the task for the surveyor is a very difficult one: to locate that original natural boundary, where the grant may have been given over 100 years ago. The natural boundary may have been subject to flooding or erosion, or other effects of the ravages of time. These surveys may be extremely expensive. Along water, where a public land is reserved, it may sometimes be difficult for even the expert professional to readily know if they are standing on publicly owned land, or on the land of the adjoining owner, or in the former riverbed, or possibly on the foreshore.

Pipi te Ngahuru v The Mercer Road Board showed how the common law when read with relevant innovative statute law can, in case of need, keep pace with the nature of the society it controls, particularly in a new country. Equally, *Attorney-General and Southland County v Miller* shows how the common law can arrest the advance, or (to vary the metaphor) put back the clock. There is very little written commentary on either of the cases. When comparing the two cases in *The Land Transfer Act 2nd Edition* (1971), E C Adams says at page 608 that *Pipi te Ngahuru* “according to general professional opinion was wrongly decided”, but he provides no reasons, nor does he discuss or mention s129 of the Public Works Act.

The only other text to address these cases, *Short’s Roads and Bridges* (1907) at p31, says with unaccustomed reticence:⁶

It has until recently been held, under the authority of *Pipi Te Ngaharu v The Mercer Road Board*, 6, NZLR 19, that if a river washes away the bank and destroys the road thereon, the public are entitled to a road over a corresponding portion of the adjoining land, and the local body having control over the road has a right to remove any fences that obstruct such road; but by the recent case of *Attorney-General and Southland County Council v Miller* (9 GLR, 145), it appears that the public has no such right.

⁶Short was a qualified lawyer, a Commissioner under the Commissioners Act 1903, The Public Works Act 1905, The Municipal Corporations Act 1900 and other Acts. At the time of publication he was Chief Clerk of the Department of Roads and had specialised in the law relating to roads in New Zealand for 23 years. His text is perhaps the most comprehensive on roads ever written in New Zealand and his style is crisp and authoritative. Regrettably, he does not deal extensively with historic law for his emphasis is on the law then in force at the time of writing. One suspects some unease with the decision in *Attorney-General and Southland County Council v Miller*. There is no mention by him of the inherent conflict with s129 of the Public Works Act.

It is possible to distinguish the *Mercer Road Board* decision and *Miller's* case, for *Miller* was decided on authorities relating to roads which were formed and in use; *Mercer* was broadly decided to encompass roads which were in a state of nature. Although roads were extensively laid out along water from the time of the early surveys (i.e. shown as roads on the Crown grant survey plans), the least logical place to build a country road is usually immediately beside a river, a lake or the foreshore, as such sites are inherently hazardous being subject to erosion and flooding. *Mercer* recognised that much of New Zealand in 1888 was still in a state of nature including its roading, and that a considerable proportion of the roads along water would remain so.

However, since 1906, *Attorney-General and Southland County Council v Miller* has been applied both to roads which are formed and used, and to roads which remain in (or have reverted to) a state of nature, or perhaps, are in a state of pasture or even in noxious weeds. Formed roads and roads in a state of nature largely have a common legal background. In fact, however, there are some distinctions. A territorial local authority is not bound to keep in repair roads which have never been formed and is not liable for injuries caused by defects in such roads to people who may use them: *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618. Whilst The Public Works Act 1981 may be the appropriate instrument to make good a gap in a formed and maintained road which is used by the public, statutory action to fill an eroded gap in a riverine road which is in a state of nature does not appear to be authorised or in any event likely to be undertaken. Riverine access has become vulnerable to erosion, administrative inadequacy, and neglect.

The desire to fix the boundary in survey records, even when as a result of natural change the boundary no longer reflected the physical attributes of the land, must be seen in the light of the mood and temper of the time. In 1906 the Torrens system providing state-guaranteed land title in New Zealand was barely 35 years old. The new government guarantee of title extended in the minds of many people

to guaranteed boundaries (although in fact it never has at any time⁷) Edwards J in *The King v Joyce* 25 NZLR (1905) 78 at 102 provides what is probably the most succinct description ever made of the New Zealand survey system:

It must be borne in mind that in New Zealand a survey of land is not a mere measurement of land within certain boundaries, known by name or otherwise. It is a complete ascertainment of the geographical position of each allotment, starting from a fixed point, and defining each allotment by bearings, as well as by measurements and by area, so as to render the exact position of the land a matter of mathematical certainty. In addition to this, the exact boundaries are defined upon the land by pegs, so that every one who purchases land from the Crown may see with his own eyes what he is purchasing, and so he knows that he is purchasing neither more nor less than the survey indicates upon the record map and the pegs indicate upon the ground.

As good as it is, this statement is not complete. The principle that parcels are defined by fixed boundaries (“mathematical certainty”) does not fully mean what it implies. Under the Torrens system, parcels by fixed boundaries mean that the geometric land boundaries have been actually surveyed and demarcated (generally pegged) on the ground. If pegs or other monuments of title are disturbed or lost, the position lost may be reinstated in accordance with the Survey Regulations. Natural boundaries are not demarcated but are identified on the plan.

However appealing as the notion of guaranteed boundaries for guaranteed parcels of guaranteed title may have been to the early administrators, the truth is that the facts and description in the land

⁷S Rowton Simpson in *Land Law and Registration*, Cambridge University Press, 1976 – an international study – notes, at page 137:

The so-called “guaranteed boundary”

Owing to the way in which boundaries are set out on the ground and surveyed under the Torrens system, they can be regarded as being of the fixed boundary category. None of the Torrens statutes, however, expressly guarantees boundaries, though the belief is widespread that the “guaranteed boundary” is an outstanding merit of the Torrens system in contrast to the loose “general boundary” of the English system. Ruoff (sometime Chief Land Registrar, London) writes: “Incidentally when, as a younger man, I was in New Zealand, I was constantly reminded, both by lawyers and by surveyors in that country, that in England HM Land Registry did not guarantee a man’s boundaries. These statements started me for the plain truth is, that of all the numerous Torrens statutes, covering many countries, which I have ever read, I have yet to find one which makes any express provision for the guaranteeing of boundaries. In particular, none of the New Zealand Acts does so, or has ever done so.

titles register and the plan which supports the title do not control the parcel on the ground where the rules of evidence of the things there observed (i.e. the position of the water boundary) control the actual extent of the parcel. This principle applies to Crown-owned riverbeds where private title abuts the bed, and to privately owned riverbeds to the centre line. The principle applies to accretion to waterside roads and other waterside public reservations but does not apply to erosion of the water boundary of a road.⁸ Perhaps it is not surprising that since *Miller* the doctrine of moveable boundaries has applied inconsistently to roads. A practice established by the Department of Lands and Survey in 1926 – that an accretion to a road was Crown land, not road – was overturned in 1965.

It is sufficient, however, to state the application was effective from 1965.⁹ Should there be an accretion to a road, the road having a natural boundary will widen to the extent of the accretion, the accretion taking the same status as the road to which it attaches. On the other hand, should the road be eroded by water, the status of the land lost to the water will remain road: the road stays in a fixed position in accordance with the Crown grant survey of the adjoining land.

Since 1978 accretion and erosion of roads has been covered by statute, with the Local Government Amendment Act 1978 inserting a new s315 in the principal Act.

⁸ “Once a road, always a road” is the maxim. A road may expand in width by accretion but if eroded, the part covered by water remains road.

⁹ *The Surveyor and the Law*, 1981, The New Zealand Institute of Surveyors, at para 5.11.5A:

The position has now been resolved in reference to the differing treatments of (1) terminal and (2) lateral accretion to a road. Previously, a lateral accretion to the soil of a highway (road or street) vested in the Crown or the appropriate municipal corporation, but did not become a public highway. But if a road or street ended at the sea shore or riverbank, any accretion to it formed part of the highway as to the normal width of that highway. For many years (since a Crown Law opinion of 1926) the Department of Lands and Survey had followed the policy of treating lateral accretions to a public road as having the status of Crown land, due to a precedent having been established. The opinion of 25.8.1926 from the Solicitor-General stated that the question seemed barren of authority, but the unreported judgment of Salmond J in *Mayor, etc of Eastbourne v. O'Sullivan* (Supreme Court, Wellington, 10 June 1924, No. 1923/85) was apparently not considered. A further Crown Law opinion obtained in May 1965 took the contrary view that such accretion had the status of public road. The question has now been resolved by statute.

Subsections (4) and (5) of s315 say:

- (4) Every accretion to any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake caused by the action of the river or stream or of the sea or lake shall form part of the road.
- (5) Where any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake is eroded by the action of the river or stream or of the sea or lake, the portion of road so eroded shall continue to be a road.

The new subsections may have been intended to serve administrative record-keeping in preference to a true reform of the law.¹⁰ Historically, since *Miller* there are many inconsistencies, two long periods of different practice,¹¹ and the amendment to the law in 1978 does not apply retrospectively to accretions because of decisions previously made in error, as indicated in footnote 10 below. Nor is the amendment worded to include erosion which took place before 1978. The words "...is eroded by the action of the river etc..." are not qualified to include previous erosion. For comparison, note s172(1) of the Land Act 1948 which concludes in a clear expression: "whether such use commenced before or after the coming into force of this Act".

Roads constructed on river banks which have been wholly or partly eroded away have, in effect, been stopped by nature. Yet the law in force (s129 Public Works Act 1905) at the time of the decision in *Miller* (1906) says that no road along the banks of a river may be stopped. The legal process of stopping that this refers to is not to be confused with stopping by nature. The truth is that before *Miller*, nature and the law were in harmony. However, it is not the purpose of this paper to suggest that settled principles of survey definition and riparian road practice as have been observed after *Miller* should be altered, even if the premises upon which they are founded may be questioned. Rather, this summary of the history of the law means to show why there are problems in relation to eroded roads along water.

¹⁰ S315 (4) and (5) merely re-state in an imperfect way indicated in the text above the principle that is set out in *Miller's* case in respect of erosion. Although, as indicated, subsection (4) would not appear to apply to prior accretions this is not of much account because the common law which applied previously is to the same effect as the new subsection.

¹¹ For many years accretion to road was treated administratively as Crown land (curiously access along water would not then be as of right) and latterly, post 1965, accretion was treated as road thus preserving public rights.

It is a pity that Cooper J sought to find solace in the common law of England, for had he looked for consistency with s129 of the Public Works Act and further developed an indigenous solution, legislation to deal comprehensively with identified difficulties would surely have followed. Our law could have developed from a settled base. Six years earlier the Court of Appeal in *Mueller v Tapurii Coal Mines* (p21 below) developed an indigenous solution for Crown ownership of a specially identified navigable riverbed, and legislation to deal generally with navigable riverbeds was enacted (below p22). An opportunity for future riverside certainty was lost in the decision of *Miller*.

An interesting ancillary aspect of access dealt with by Cooper J in *Miller* but not actually decided by him is discussed by Short (p9 above) at page 45 of his text:

It used to be the law in England that where the road was out of repair the traveller could deviate on to the adjoining land, doing as little damage and returning as soon as possible to the road, but this is not the law now where the land is fenced off from the road; consequently any one who deviates from the road in such a case is a trespasser, and is liable to the owner of the land for damages. It is doubtful if any person has the legal right in New Zealand to go even temporarily upon private land adjoining a highway in order to pass a temporary obstruction (see *Attorney-General and Southland County Council v Miller*, 9 GLR p145).

On this explanation of the law, a trespass at common law or within the scope of the Trespass Act 1980 takes place whenever an eroded gap in a waterside road is traversed without permission.

There is in fact an historic four-way tension between (a) the legislature which in 1882 fledglingly provided in s93 of the Public Works Act for perpetual roads along rivers; (b) the court, which in 1906 ignored that legislation and clearly did not take into account the special attributes of roads which are in a state of nature when eroded; (c) the administrators of the survey and title systems following that case who strove for certainty in title boundaries in matters which of their very nature are uncertain; and (d) the territorial local authorities in which title to these roads is now somewhat unhappily vested.¹² Erosion is the most subtle of all boundary adjustments, for the law gradually and imperceptibly takes title away. Neither the landowner nor the recreational user should be exposed to civil or criminal liability as a result of erosion. Trespass as a result of erosion may readily be addressed, but it is part of a wider issue.

¹² Until 1972 the Crown was the proprietor of all waterside roads outside municipalities; multiple territorial local authority ownership now makes the development of cohesive policies more difficult. See page 40 for a brief commentary on the transfer of roads from the Crown to the then County Councils in 1972.

Publicly owned margins other than roads

The origin and status, attributes, and public rights over the various margins along rivers, streams, lakes, and the sea is set out in Hayes (2003) at pages 34–42.¹³ Waterside reservations may be subject to the Reserves Act 1977 when land has been set aside for a public purpose, or as strip-like parcels when taken as esplanade reserves on subdivision. Road-like strips may have been reserved from sale under s58 of the Land Act 1948 and earlier Land Acts.

Despite there being a variety of legal waterside margins, a general rule on boundaries may be formulated. The inland boundary of waterside reserved land is pegged to stay in a fixed position in relation to the land which it adjoins. The water boundary of the reserved land is a moveable boundary, so that the rights which attach to the parent parcel or strip, including land reserved from sale, attach also to accreted lands.¹⁴ In respect of the inland boundary there is a strong analogy with the modern survey definition of roads, for the same survey techniques in demarcating inland and water boundaries are in practice applied to roads, land reserved from sale, waterside reserves for public purposes, and esplanade reserves. While New Zealand law and practice is founded on one hundred or more years of case law and practice, supported by survey regulations, a Canadian commentary provides a fresh common law perspective. *Survey Law in Canada* (1989) Carswell at p189 states:

When a grant is subject to a reserve, the Crown remains the riparian owner and benefits from accretion. *Monashee Enterprises Ltd v Min. of Recreation and Conservation (BC)* [footnote 14 below] for example, concerned a Crown reserve along tidal waters, one chain in width, measured from the high water mark. At issue was the location of the landward boundary of the reserve after accretion had occurred along the shore. Reversing an arbitration award, the trial decision held that the reserve was ambulatory with constant width. Thus the private property adjacent to the reserve would have benefited from the accretion as an indirect result of allowing the one-chain reserve to shift seaward. On appeal the decision was reversed again and title to the accretion was awarded to the Crown. In this judgment the court reasoned that:

¹³ (pviii above).

¹⁴ *Mercer v Denne* (1904) 2 Ch 534 affirmed (1905) 2 Ch 538, CA

Monashee Enterprise v British Columbia, Minister of Recreation and Conservation (1981) 28 BCLR 260; 23 LCR19 (CA)

White v Rosseau (1995) 24 OR (3d) 826, the Ontario Divisional Court held that land accreted to a municipal road allowance took on the character of a road allowance, and did not become municipal land. The court cited *Monashee Enterprises Ltd v British Columbia (Minister of Recreation & Conservation)*, above with approval. Section 315(4) and (5) Local Government Act 1974 (p12 above)

It is well settled that land gained by accretion accrues to the benefit of the riparian owner ... It is equally well settled that to be a riparian owner, and thus to benefit from accretion, one's property must run to the shoreline ... In this case, the riparian owner is the Crown as the owner of the one-chain strip. The land gained by accretion is added to and becomes part of the strip.

The reserve therefore varied in width and the landward boundary of the reserve between private and Crown lands was held fixed.

An accretion to a publicly owned margin along a river or stream, around a lake, or along the coast will take the same character as the land to which the new land attaches so that the access rights of the public remain as before.

While the law relating to accretion may equally apply to privately owned waterside land and public lands, public land along water held as a road or as some other class of public reservation may not yield to a loss of title as a result of erosion, if the general rule of the common law¹⁵ has been modified by statute as indicated in the examples below.

Lands reserved from sale on the alienation of Crown land after 1892 are now marginal strips for the purposes of the Conservation Act 1987.¹⁶ Loss to the water through erosion may not inhibit many of the purposes for which marginal strips are held by the Crown as set out in s24C of the Conservation Act:

[24c. Purposes of marginal strips – Subject to this Act and any other Act, all marginal strips shall be held under this Act -

- (1) For conservation purposes, in particular –
 - (i.) The maintenance of adjacent watercourses or bodies of water; and
 - (ii.) The maintenance of water quality; and
 - (iii.) The maintenance of aquatic life and the control of harmful species of aquatic life; and
 - (iv.) The protection of the marginal strips and their natural values; and
- (2) To enable public access to any adjacent watercourses or bodies of water; and
- (3) For public recreational use of the marginal strips and adjacent watercourses or bodies of water.

¹⁵The general rule of common law is that a riparian boundary is subject to a loss of title through gradual and imperceptible erosion by natural action of the water. See Appendix A at p56.

¹⁶Section 24 (3) Conservation Act 1987.

Esplanade reserves under the Reserves Act 1977 vested in either the territorial local authority or a regional council or the Crown (s2 Resource Management Act 1991), by virtue of s229 of the Resource Management Act may have any or all of the following purposes:

- (a) To contribute to the protection of conservation values by, in particular, –
 - (i.) Maintaining or enhancing the natural functioning of the adjacent sea, river, or lake; or
 - (ii.) Maintaining or enhancing water quality; or
 - (iii.) Maintaining or enhancing aquatic habitats; or
 - (iv.) Protecting the natural values associated with the esplanade reserve or esplanade strip; or
 - (v.) Mitigating natural hazards; or
- (b) To enable public access to or along any sea, river, or lake; or
- (c) To enable public recreational use of the esplanade reserve or esplanade strip and adjacent sea, river, or lake, where the use is compatible with conservation values.¹⁷

Erosion by the natural action of the water would not necessarily negate many of the purposes for which esplanade reserves are held.

Marginal strips under the Conservation Act are somewhat different from Esplanade reserves under the Reserves Act in that the former were originally “land reserved from sale” on the sale of Crown land and as a result have never been the subject of a Crown grant. The underlying title of a marginal strip is the radical title of the Crown. Given the breadth of s24C of the Conservation Act (above) the Department of Conservation would appear to retain control over eroded marginal strips. Esplanade reserves have been taken on the subdivision of privately owned land fronting water, have previously been a part of land included in a Crown grant, and are vested in the council or the Crown for a freehold estate in fee simple. Although the water boundary of an esplanade reserve is riparian, and at common law subject to loss by erosion, an eroded esplanade reserve may nevertheless continue in the title of the council or the Crown by virtue of the breadth of the provisions of s229 of the Resource Management Act 1991.

Apart from any question of title which may determine control by the council or the Crown, erosion may create a physical gap in a marginal strip or a reserve. In this respect, erosion of a marginal strip

¹⁷The dominant purpose of access on foot over esplanade reserves is provided for in s23(2) of the Reserves Act 1977.

or esplanade reserve may be similar to erosion of a road, i.e. the legal status of the strip or reserve may be preserved but continuous access may be lost.

Specific statutes dealing with ownership of riverbeds are relatively rare. For example, the Waimakariri River Improvement Act 1922 and the Ashley River Improvement Act 1925 respectively vest the riverbeds in separate river trusts as endowments but do not deal with ownership of margins alongside the riverbank boundaries. Such statutes deal with flood protection and are not concerned with public access. Any road, marginal strip, or esplanade or other public reserve alongside such a riverbed would provide access in the standard way subject to the ordinary rules of accretion and erosion.

There is power under s131 of the Soil Conservation and Rivers Control Act 1941 for (now) Regional Councils to initiate a taking of land under the Public Works Act 1981 for the purposes of the former Act. Under the general rules of taking land by compulsory process a taking by proclamation or equivalent, as a confiscatory action, should be strictly construed so that surveyed boundaries are fixed. Any alteration to the boundaries should be by formal action under the Public Works Act.

The general principles to attach to all publicly owned waterside reservations are that:

- the landward boundary of the parcel is fixed;
- accretion may attach to any of class of reservation along water taking the same status as the parent land;
- erosion may not necessarily affect legal title to reserved land which may retain its reserved status although under water, but may create a physical gap in public access.

»» Crown ownership of riverbeds

Navigable rivers: a commentary on statute and case law

Introduction

This commentary on riverbed ownership is a summary of statute law and decided case law, which is indicative of a past too often shaped by judicial and administrative interpretations based on the circumstances of the day, rather than the cohesive approach intended by the statute law. This summary reflects on the law as it is today and to shows how public access to riverbeds is compromised by law made uncertain by inconsistent interpretation.

The inconsistencies of the past are easily illustrated and show how the law is, at present, open to a more certain explanation of the statutory provisions first enacted in 1903. The time may have arrived, with the benefit of a broadly based reflection on the origin of the statute law and the vagaries of inconsistent interpretation, to consider again the literal meaning of s14 of the Coal-mines Amendment Act 1903, noting the words of Hay J in *The King v Morrison* (below at p29) “The language ... is to my mind, plain and unambiguous ...”. Hay J in these words represents one end of the interpretative continuum. Most of the other case law¹ provides various levels of complexity in interpretation. At the other end of the continuum some of the judges prefer a meaning so restricted as to make the section virtually meaningless.

Section 14 and succeeding sections in the various Coal Mines Acts form the basis of the following discussion. It will become clear that the legislators had in mind a powerful expression of Crown ownership of navigable rivers, based on an extended definition of “navigable”, to encompass all navigable rivers great and small regardless of width, to ensure that the beds of all such rivers were nationalised for the benefit of the nation.

As will be illustrated, the nationalisation of water for the generation of electricity took place at the same time; the Coal-mines Amendment Act 1903 and The Water-power Act 1903 were to come into force on the same day. The vesting of navigable riverbeds in the Crown although achieved in general terms rather than for any specific purpose, when viewed in the context in which the legislation was enacted, clearly was not intended to be an inchoate vesting. The Water-power Act specifically identified its subject matter; on the other hand

¹ Noted at p26–31 below.

section 14 of the Coal-mines Amendment Act provided the certainty of Crown ownership of riverbeds for a broad range of purposes. However, a dominant objective of s14, ascertained by a reading of the Water-power Act and an understanding of the context in which that Act was enacted, is for sites for hydro-electric power stations. While it is relatively easy to point to the interpretative difficulties which have afflicted s14 for much of its statutory life,² on a literal view, the scope of the section may now be seen to be quite plain. Section 14 was enacted to confirm Crown ownership of navigable riverbeds when title to the bed had never been alienated by the Crown. Also, it was intended to achieve an unambiguous return to the Crown of navigable riverbed alongside alienated lands, when that riverbed had not previously been included by area and measurement in a Crown grant (i.e. had not been purchased by the adjoining grantee by a payment to the Crown).

In effect s14 may have:

- (a) confirmed by declaration the ownership by the Crown of riverbeds:
 - i) when riverbed formed part of the demesne lands of the Crown;³ and
 - ii) when ownership had previously been preserved for the Crown by the laying out of road or marginal strips reserved from sale along river boundaries;
- (b) had the effect of returning navigable riverbed to the Crown in circumstances where at common law prior to 23 November 1903⁴ the adjoining owner may previously have claimed ownership to the centre line;⁵ and
- (c) confirmed Crown ownership in special circumstances, where as in respect of the Waikato River, the river is a highway retained by the Crown.

The bed of a navigable river, except where it has been granted by the Crown, remains, and is deemed to have always been, vested in the Crown by statutory declaration under various Coal Mines Acts (p22 below). Whilst the theory may be easily stated, applying the concept to waterways is another and vastly more difficult matter. The adjoining landowner may consider that they own to the centre line whereas

²Noted at p21–31 below.

³Land which had never been alienated by the Crown.

⁴The coming into force of s14 of the Coal-mines Amendment Act 1903.

⁵Note the reference immediately above to an absence of payment for adjoining riverbed. Edwards J in the *King v Joyce* (1905) 25 NZLR 78 CA at p95 points out the practice of there being no payment by the grantee for adjoining riverbed.

under the statute law, dating from 1903, the bed may have vested in the Crown; the recreational user may not be sure if they are on privately owned land or Crown land.⁶ A short journey through the legal jungle will prove the point.

Decisions by the Courts

A decision by the New Zealand Court of Appeal in 1900⁷ indicated an indigenous approach to major waterways in New Zealand. The court held that the bed of the Waikato River remained in the public ownership of the Crown, being a public though non-tidal river subject to a right of passage. The Crown retained ownership of all minerals under the bed. The headnote to *Mueller v The Taupiri Coal Mines Limited* summarises the decision:

The presumption that a grant of land described as bounded by a river passes the bed of the river *ad medium filum aquae* is rebutted in the case of a grant from the Crown by the fact that the river is a public navigable (though non-tidal) river, subject to a public right of passage, the Crown, as trustee for the public having an interest in the bed remaining public property, and the presumed intention to pass the bed being therefore negated. The fact that the grant is a military grant, made under an Act passed for the purpose of confiscating Native land and making military settlements thereon, and that the river is the only practicable highway for military and other purposes, indicates that the Legislature, and therefore the Crown, in making the grant, had no intention that the bed of the river should be granted. So held by *Williams, Edwards, Conolly, and Martin, JJ.* (Stout, CJ, *dissentiente*).

Hay J in *The King v Morison* (1950) NZLR 247, 258-260 in discussing the effect of *Mueller* on navigable rivers pointed out that although the Waikato River was a public highway it does not follow that all navigable rivers are public highways.

The legislature decided by enacting s14 of the Coal-mines Amendment Act 1903 to codify and extend the effect of *Mueller* to apply generally to all navigable rivers. Section 14 stated:⁸

14 (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.

⁶ JAB O’Keefe, in the only modern text on Crown land in New Zealand, *The Law and Practice Relating to Crown Land in New Zealand*, 1967, Butterworths, Wellington, says pointedly at p266, “The law in New Zealand as to ownership of riverbeds is indeterminate”.

⁷ *Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89.

⁸ The Parliamentary passage of s14 is described at p35.

(2) For the purpose of this section –

“Bed” means the space of land which the waters of the river cover at its fullest flow without overflowing its banks.

“Navigable river” means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts, or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

The later enactments were the Coal-mines Act 1905, s3; the Coal-mines Act 1908 s3; the Coal-mines Act 1925, s206; and the Coal Mines Act 1979, s261, which was repealed by the Crown Minerals Act 1991 (s120(1) and First Schedule). But the repeal does not affect the Crown’s title to land (that is, to the beds of navigable rivers affected) under s261, which continues by s354(1) of the Resource Management Act 1991. Under s261(1) of the Coal Mines Act 1979 “bed” means the space of land which the waters of the river cover at its fullest flow without overflowing its banks, and to be “navigable” the river must be of sufficient width and depth (whether at all times or not) to be used for the purposes of navigation by boats, barges, punts or rafts. (The definition of “navigable” differed somewhat from that in the Acts of 1903, 1905, and 1908; but the difference has been said to be immaterial: *Attorney-General ex rel Hutt River Board v Leighton* [1955] NZLR 750 (SC and CA) at 788 per FB Adams J).

Adams J said:

This enactment first appeared as s14 of the Coal-mines Act Amendment Act 1903, re-enacted unchanged in s3 of the Coal-mines Act 1905, and in s3 of the Coal-mines Act 1908. In those three statutes the wording was as above, except for the definition of “navigable river,” which appeared therein in the following form:

“Navigable river” means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts or rafts.

It will be seen that “continuously or periodically” has now become “whether at all times so or not” and the reference to use by “residents ... on its banks,” as well as by “the public,” has disappeared. But, in regard to user, the words that remain are perfectly general, and on their face, would apply to residents on the banks and to all other persons whomsoever. It is difficult to see any practical difference between the two formulae, and it is unlikely that, in a section of this kind, a change of meaning was intended. I suspect that the draftsman of the Coal-mines Act 1925, was merely saving words and aiming at simplification without change of meaning, and intended neither to narrow nor to enlarge the scope of the section. To narrow it might be abandonment pro tanto of lands theretofore vested in the Crown, while to enlarge it might be an encroachment upon titles previously vested in subjects. An alteration

of wording does not necessarily imply a change of meaning: Maxwell on Interpretation of Statutes, 9th Ed, 326, and Craies on Statute Law, 5th Ed, 135.”

Section 261 of the Coal Mines Act 1979, the latest re-enactment of s14 reads:

261. Right of Crown to bed of navigable river – (1) For the purpose of this section –

“Bed” means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:

“Navigable river” means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

(2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

(3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

In 1901 a case on navigability on non-tidal rivers was reported in England (*Attorney-General v Simpson* (1901) 2Ch 671) and there seems no doubt that the draftsman of s14 (as first enacted) drew on the English case as well as *Mueller’s* case. The relevant issues decided by the English case are:

- proof of a public right of navigation in a non-tidal river depends on proof of historical use;
- it is not enough to show that it is a large river which could have been used for navigation.

Both of these elements of the common law are overturned by s14. In New Zealand after the enactment of s14 a non-tidal river to be navigable merely had to be susceptible; that is:

- of sufficient width and depth to be of actual or future use; and
- not necessarily always available for the use of craft when flow is diminished.

Also, a further departure was made from common law to widen the class of traffic. The specified craft (boats, barges, punts or rafts) cover all craft available in 1903 – in other words, any craft which then floated – and arguably may cover any craft which is capable of navigation today.

The three principles set out above may be directly extracted from the statute and clearly stand when considered in the light of *Attorney-General v Simpson*. However, with the exception of FB Adams J who

gives extensive but not complete support (noted at page 28), and Hay J (noted at page 29), the judges have not accepted the simplicity of the tripartite proposition. Instead they have preferred to be guided by the complexity of English common law, omitting, however, reference to *Attorney-General v Simpson* which is demonstrably the key to s14.⁹

Section 14 is an amalgam and extension of the principles enunciated in *Mueller's* case and a robust overturning of the common law as set out in *Attorney-General v Simpson*. Whilst in matters of judicial interpretation the section has been treated as not being free from doubt, when viewed from the perspective here suggested, s14 may in fact be clearer in intent and greatly wider in scope, affecting many more rivers than judicial opinion so far may have indicated. *Mueller's* case created New Zealand common law – judge-made law. *Mueller's* case recognises in New Zealand that the presumption that a Crown grant of land bounded by a river passes the bed of the river “ad medium filum aquae” (to the centre line of the water) may be rebutted (in the circumstances of the case) by the fact that a river is a public navigable (though non-tidal) river.

That is not the case in England, where the common law admits that any non-tidal river owned to the centre line may through historic use bear a right of navigation for the public. Since *Mueller* the New Zealand courts have acknowledged that at any time after the Crown grant the court may consider evidence of whether the presumption may be rebutted. After the decision in *Mueller*, every Crown grant incorporating a riparian boundary is conditional to the extent that the presumption may be rebutted by legal process. An express grant of the bed of a river by the Crown is, however, an unconditional grant. Section 14 is the expression of the legislature entrenching, extending and clarifying the decision in *Mueller's* case. Section 14 clearly intended to remove the narrowness of English common law which was so dependent on historical practice, an element unsuited to a new country. It is not, however, a panacea. Unless a decision of the High Court clarifies its operation in respect of an individual waterway its application is uncertain.

Whilst the relative isolation of New Zealand around 1900 may superficially indicate a certain uniqueness in developing Crown ownership of riverbeds, Canadian experience about the same time shows that is not so. A brief reference first to the western provinces (a radical solution) and then to Ontario (a solution similar to ours) will

⁹Note, however, the exception made by Hutchison J referred to at p27 below.

demonstrate the manner in which the problem was addressed in four of the Canadian provinces at about the same time as in New Zealand. *Survey Law in Canada* (Canadian Council of Land Surveyors) 1989, Carswell states at page 230:

In Alberta the question of ownership of the bed is effectually resolved by the *Public Lands Act 1980*, navigability of the waters is not a criterion.

3. (1) Subject to subsection (2), the title to the beds and shores of all rivers, streams, watercourses, lakes and other bodies of water is hereby declared to be vested in the Crown in right of Alberta and no grant or certificate of title made or issued before or after the commencement of this Act shall be construed to convey title to those beds or shores. [Subsection 2 provides for certain exceptions.]

These statutory provisions, with the date of June 18, 1931 for Alberta and July 15, 1930 and April 1, 1931, for the similar provisions for Manitoba and Saskatchewan respectively, provide continuity with the earlier federal enactment, the *North-west Irrigation Act*, originally passed in 1894; where the Act applied the bed of the waters would not pass with the grant.

The prairie provinces laws are statutory and generally exclude the continued operation of the common law principle of entitlement to the land under any water, except where a judicial interpretation of a grant might rule otherwise. In Ontario the law on this matter remains the common law except for the statutory provision that waterways that are navigable, in fact, are excluded from the title.

Litigation is not required in the western provinces to establish Crown ownership – simplicity is achieved by radical expropriation despite Canadian property law being very similar to that of New Zealand, at least in essential elements. Ontario in 1911 enacted legislation weighted towards a navigability test. To make the statute workable, six substantive amendments and a number of re-enactments were required over the next 50 years. The Ontario legislation is set out as Appendix D.

The Canadian solutions are given to illustrate how difficult it is technically and politically to achieve a title-based solution. Either the legislature has to follow the Shakespearian prescript and be “bold, brave and resolute” as in the western provinces, or if a softer solution is preferred, be prepared to grapple with the matter in ongoing legislation. In New Zealand, our solution did not exclude the judiciary like the western provinces, or rely upon an active legislature like Ontario. Although s14 as re-enacted in subsequent legislation (indicated at p22 above) is in some immaterial respects rephrased, there are no substantive amendments to it since 1903.

In New Zealand the judges have held varying interpretations of s14 and succeeding sections so that uncertainty of the effect of the section proceeds from two perspectives:

- rivers may not be authoritatively identified as having Crown-owned riverbeds except by action in the High or superior courts (this inherent in s14);
- the outcome of court action is uncertain.

One judge has said that the meaning of the section is plain and unambiguous.¹⁰

Two judges have said that the relevant navigability should be based on commercial activity, thereby limiting the scope of Crown ownership to very large rivers.¹¹

One judge has said that navigability and use as a highway go together.¹²

Two judges have said that the emphasis ought not to be on “navigation” but on the craft which the section mentions so that if those craft may negotiate a river then that is navigation by these craft.¹³

One judge has said that the grant of a riverbed must be express or by necessary implication to avoid the statutory declaration of Crown ownership;¹⁴ two judges have disagreed.¹⁵

One judge has said that a confiscation is effected by the section.¹⁶

Two judges have said that s261 is not a statutory rebuttal of the common law rule of a presumption of ownership to the middle line making the section of nugatory effect.¹⁷

Other judges disagree; and so on. A closer consideration of judicial opinion is instructive.

¹⁰ Hay J in the *King v Morison* (SC) (p29 below).

¹¹ Hutchison J in *Leighton's Case* (SC) (p27 below)

Fair J in *Leighton's Case* (p28 below)

¹² Hay J in the *King v Morison* (SC) (p29 below)

¹³ F B Adams J in *Leighton's Case* (CA) (p28 below)

Stanton J in *Leighton's Case* (CA) (p28 below)

¹⁴ Fair J in *Leighton's Case* (CA) (p29 below)

¹⁵ F B Adams J in *Leighton's Case* (CA) (p30 below)

Savage J in *Tait-Jamieson's Case* (HC) (p30 below)

¹⁶ Fair J in *Leighton's Case* (p29 below)

¹⁷ F B Adams J in *Leighton's Case* (CA) (p30 below)

Savage J in *Tait-Jamieson's Case* (HC) (p30 below)

Given the steady reference in New Zealand to the common law as a fountainhead of riverine authority, it is curious that there is only one reference to *Attorney-General v Simpson* in the New Zealand cases on navigability and Crown ownership of riverbeds. This is by Hutchison J in the court of first instance in *Attorney-General ex relatione Hutt River Board v Leighton* (1955) NZLR 750 at page 754:

The English authorities dealing with navigation or navigable rivers do not, in general, assist in interpreting the phrase “for the purpose of navigation” in the section, because of the common-law definition of navigable rivers, which restricts those to tidal rivers. A right of navigation in a non-tidal river may, however, be obtained by user. In *Attorney-General v Simpson* ([1901] 2 Ch 671), where it was sought to establish a public right of navigation on a non-tidal river, *Farwell, J*, at first instance, said: “The first issue which I have to determine is, whether the river is and has been from the earliest times, or, at any rate, a time anterior to the grant of the patent rights, a public navigable river. Now, the question whether a non-tidal river is navigable or not depends, not on the question of possibility of navigation, but on the proof of the fact of navigation. If the fact be proved, then the channel of river is the King’s highway, and as such is open to the free passage of all the subjects of the Crown:”. While the judgement of *Farwell, J*, was varied on appeal, it was, so far as this issue was concerned, upheld.

Hutchison J does not however draw attention to greatly extended definition of navigability introduced by s14 in contrast to *Simpson* and rather prefers a narrow meaning. After an examination of English and American authorities Hutchison J stated at page 755:

My opinion is that the words “for the purpose of navigation” in the definition in s206 of the Coal-mines Act 1925, mean for economic purposes, such as the transport of goods for the purposes of commerce, agriculture, and the like. As a matter of interest, this meaning is, I think, consistent with the use of the phrase in the original section (s14 (2)) of the Coal-mines Act Amendment Act 1903: “Susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public.”

If the right of navigation contemplated by the definition in s206 is a public one, it is, in my view, for such purposes as a public highway is normally used for on land, which would include the transport of goods for the purposes mentioned. If, on the other hand, the right so contemplated is confined to the riparian residents and is, consequently, a right of way (*Orr Ewing v Colquhoun*, (1877) 2 App Cas 839), it is still, in my view, a right of way for the like purposes. I think that this view receives some support from the choice that the definition makes of craft by which navigability is to be tested. Boats are of various kinds, and for various purposes, but barges and punts are primarily goods-carrying vessels, while rafts, if not rafts of logs being floated to a mill, seem to me also to be goods-carriers.

When *Leighton's* case moved to the Court of Appeal further differences in interpretation were to feature.

F B Adams J did not agree with Hutchison J, the trial Judge's interpretation of s206. At page 788, Adams J said:

To my mind, the emphasis rests not so much on the word "navigation" as on the words "by boats, barges, punts or rafts." The envisaged purpose is "navigation by boats, barges punts or rafts" and, wherever such craft are used for their proper purposes, there is I think, "navigation" by boats, barges, punts or rafts. There may be a problem in determining what are "boats", "barges", "punts" and "rafts" respectively; but when that problem is solved all that remains in this particular connection, is the question whether such means of passage or conveyance can be used with normal and reasonable facility. In regard to the meaning of "boats", I prefer to reserve my opinion, but, as at present advised, would not be disposed to limit the word to boats used commercially, or to depart in any other way from whatever may be the natural and ordinary meaning of the word.

Fair J said at page 768: "The evidence as to the use of the river when s14 of the Coal-mines Act Amendment Act 1903, was passed is very scanty and I agree that the Court should not decide whether this river falls within the scope of the section unless it is essential to do so". Later on in his judgement, however, at page 770 Fair J expresses a firm view which appears to be substantially in accord with that of the judge of first instance:

The principle of construction, which requires the limitation of general words to a scope which is amply sufficient to effect the object and the purpose of the provision, requires, in my view, a restriction of the section to rivers likely to be of real use for commercial, or economic or general purposes of transport. As I have said, it is, clearly, highly improbable that it was intended to include a shallow stream not likely in the year 1903, to be of substantial use for these purposes.

Stanton J dealt very briefly with this point, but it is reasonable to infer that he would give the section a wider construction. At page 778, he said:

For myself, I would only say that I find the test suggested by the learned trial Judge – namely, that "for the purpose of navigation" [*below* page 766, 1. 4] means for economic purposes such as the transport of goods – does not afford much assistance in determining whether any particular stream has the requisite width and depth, to bring it within the section. What would seem to be envisaged is such a width and depth as would be sufficient to allow the boats or other craft mentioned to pass over a sufficiently continuous length of water as to justify one in saying that the stream, or a substantial and continuous portion of it, was available for the passage of any of the craft mentioned.

A further dimension had previously been added in 1950. Hay J in *The King v Morison* (1950) NZLR 247 at 267 said:

The language of s206 is, to my mind, plain and unambiguous as expressing an intention on the part of the Legislature that the beds of all navigable rivers are to be deemed always to have been vested beneficially in the Crown, excepting in cases where such beds have been expressly granted by the Crown. Unless that interpretation is adopted, it is difficult to see what purpose as to be served by passing the legislation at all.

However, at p259 Hay J made it clear that in his view the meaning of the phrase “for the purposes of navigation” is that the cases indicate that navigability of a river and its use as a highway are matters that go closely together. He decided that:

The bed of the Wanganui River for such of its length as is capable of being used for navigation is vested in the Crown by virtue of s206 of Coal-mines Act 1925; excepting in those cases where such bed has been expressly granted by the Crown.

In another aspect of the interpretation of s206 of the Coal Mines Act 1925 there is a marked divergence of opinion between Fair J and F B Adams J (*Leighton's case*). The wording of subs (1) would suggest a retrospective effect of the section; in particular the words “and shall be deemed to have always been vested in the Crown”. At page 792 F B Adams J, however, said: “This is the sort of thing one expects in a declaratory enactment; and in my opinion, the wording tells strongly against the theory that any divesting of private rights already acquired was intended.”

Fair J expresses an opinion in sharp conflict to this. He was certain that the effect of the section was confiscatory (at p768, 769). At page 770, he said:

But F B Adams J, in his judgment, gives the widest possible meaning to the exception in the opening words of subs (1) of s206 of the Coal-mines Act 1925. The effect of this is so to limit the operation of the enacting words of subs (1) as to render it (as indeed the learned Judge frankly recognises) practically nugatory.

And at page 772 Fair J continued:

In my view, the only way in which the attainment of the object of the section according to “its true intent, meaning and spirit” (Acts Interpretation Act 1924, s5(j)) can be achieved is by construing the word “granted” in the opening words as meaning “expressly or by necessary implication granted”, and by construing the general words of the section as including within its terms, the ownership of beds of navigable rivers which are vested in the owner by implication as the result of a general rule of law applicable to the grants of land shown as bordering on a river.

Stanton J does not express an opinion on this point but Hay J in *The King v Morison* [1950] NZLR 247, 267, expresses an opinion similar to that of Fair J.

In the most recent case, *Tait-Jamieson v G C Smith Metal Contractors Ltd* (1984) 2 NZLR 513, Savage J preferred to follow the dissenting view of FB Adams J in *Leighton's* case and the headnote for *Tait-Jamieson* summarises his decision concerning the Manawatu River:

When land bounded by a non-tidal river is granted by the Crown the presumption that the boundary of the land extends to the middle line of the river applies unless rebutted either by the terms of the grant or by the circumstances of the particular case. Section 261 is not a statutory rebuttal of the presumption *ad medium filum*. In this case the presumption had not been rebutted. Further, it has not been shown that the river was navigable. Consequently, the presumption applied and the plaintiffs were the owners of the bed of the river *ad medium filum*.

Savage J referred to the conflicting views expressed in *Attorney-General ex rel Hutt River Board v Leighton*. In the Court of Appeal, Fair J had interpreted “granted” as meaning “expressly or by necessary implication granted”. The consequence of this was to bring within Crown ownership the beds of all navigable rivers that would otherwise have passed to grantees under the presumption of ownership to the centre line. F B Adams J disagreed and concluded that:

wherever there is a Crown grant to which the presumption applies, the portion of the bed *ad medium filum* has, in the words of [the section], been “granted by the Crown”; and it has been so granted as fully and truly as the other lands comprised in the grant; any alternative construction would ... produce an unjust and almost cynically arbitrary result.

Uncertainty concerning the ownership of riverbeds continues to be formally expressed in legal commentaries. In *The Laws of New Zealand* Vol 30, Butterworths, 1997 at p74¹⁸ the effect of s261 is considered:

For a grant of the bed to come within the exception to the statutory vesting, it is uncertain whether the grant must be made expressly or by necessary implication, or whether in a grant of riparian land the middle line presumption applies so that half of the bed is included. The former interpretation is thought to be correct.

An express grant of a riverbed or part riverbed would describe the bed in some way by reference to a plan of survey so that title could be issued for it. A grant by “necessary implication” poses some descriptive

¹⁸ *The Laws of New Zealand* is a commentary (30 plus volumes) which when completed should cover all branches of New Zealand law. It is being compiled under the supervision of distinguished judges and former judges of the Court of Appeal, and High Court, and distinguished academic lawyers. The quote above is from Professor F M Brookfield.

difficulty¹⁹ but could perhaps extend to a Crown grant of land bounded by a river where the grant included by description the portion of riverbed alongside. At best, the phrase is not particularly helpful.

On the view of F B Adams J (*Leighton*) and Savage J (*Tait-Jamieson*), despite s261 of the Coal Mines Act 1979 which is said to vest the bed of navigable rivers in the Crown, a Crown grant of land adjoining a navigable river will carry with it a common law title to half of the adjoining bed, or the whole of the bed if the river intersects the land.

On the alternative view expounded by Fair J in particular, s261 modifies the common law so that in the absence of an express grant of the bed (or a grant by necessary implication) as outlined above, the bed of any such navigable river is vested in the Crown. The Laws of New Zealand (above) suggests that the alternative view is correct. If the alternative is not accepted s261 becomes virtually meaningless.

The layman must surely be puzzled as to why laws dealing with the ownership of riverbeds should be so complex. A decision of the High Court is required to authoritatively determine whether a riverbed is Crown-owned or privately owned. The Canadian experience at the turn of the 19th century is better documented than that of New Zealand. *The Legal Aspects of Surveying Water Boundaries* (footnote 2 at p6 above) at p174 puts the issues which underpin legislation in Ontario and New Zealand in sharp focus:

It might have been better if “navigable” had never been used for the [Ontario Act]; the capability for navigation is merely a test for what the Crown really wanted, which was control of many waterways for clear title needed for the siting and construction of hydro-electric power dams.

Public access except for navigation on large rivers apparently was not a critical issue when legislation to vest riverbeds in Crown was enacted in Ontario. Nor was public access the prime factor when the Coal-mines Amendment Act 1903 was enacted in New Zealand. Navigation, in the context of s14 primarily is a test for Crown ownership of the bed. The capacity for navigation takes greater prominence than the fact of navigation.²⁰ The legislation gave the Crown the capacity to establish ownership of a riverbed by an action in the court on grounds which would not be available at common law.

¹⁹This is a “judicial” phase which does not fit particularly well with our system of land titles in which title cannot issue for an undefined interest: s65(2) Land Transfer Act 1952.

²⁰This is a reversal of English common law; refer p24 above.

The Canadian precedent

In the latter years of the 19th century a series of actions was fought in the courts of Canada over matters similar to those which came before the New Zealand Court of Appeal in *Mueller's* case in 1900. In Canada, however, unlike New Zealand, there was an more open disclosure of new social and economic goals. A brief summary of the turmoil in Canada, followed by a description of the legislative response in securing the position in New Zealand, may surprise the layman and lawyer alike.²¹

Not only does the Canadian experience mirror some of the reasoning which was applied by the Court of Appeal in *Mueller's* case, but it also places Crown ownership of riverbeds in perspective in the early part of the 20th century. At the time that legislation confirming Crown ownership of riverbeds was enacted, the driving force was the energy that rivers were soon to provide. The age of hydro-electric power had arrived.

In 1878 the Province of Ontario had enacted An Act Respecting Water Powers. The following account by Jamie Benidickson is informative.²²

The application of the Water Powers Act to certain Ontario rivers depended upon the nature of the presumption regarding ownership of the beds of navigable rivers where shoreline property had been granted by the Crown. Control of a number of major hydro-electric power sites in the north depended upon determining whether the Crown was presumed to have granted or retained ownership of the stream beds when granting shoreline properties. In *Keewatin Power Company and Hudson's Bay Company v Town of Kenora* (1906), the issue was tested in a dispute involving the Winnipeg River.

²¹ Although no documentation of the Canadian–New Zealand connection at the end of the 19th century has been discovered, there are very strong indications of a cross fertilisation of ideas. For example s110 of the Land Act 1892 (NZ) providing for Crown-owned strips along rivers was preceded by legislation in Canada.

In New Brunswick, *An Act to provide for the Survey, Reservation and Protection of Lumber Lands 1884* was made applicable to grants of lands adjacent to lakes as well as non-tidal rivers. Section 4 stated:

In all Grants hereafter to be made of Crown Lands adjacent to the following Rivers and Streams [here followed a list of many of the rivers of the Province] and all such other rivers, lakes and streams as the Governor in Council may hereafter declare by Proclamation published in the Royal Gazette, – there shall be reserved to the Crown a strip or portion of land, four rods in width from the banks of the streams, or lakes on each side thereof, and the riparian ownership of the said stream shall remain wholly vested in the Crown provided always, that the owner or occupier of any lot abutting upon said strip of land shall have a right of way across the same to and from the said river or stream.

²² J Benidickson “Private Rights and Public Purposes in the Lakes, Rivers, and Streams of Ontario 1870-1930” in D H Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: Osgoode Society, 1983) at 390-393.

From the time of the decision in *Dixson v Snetsinger* in 1872, to 1908, a number of decisions were made in Ontario about title to land under water, navigability, and ownership of riverbeds. These were considered by Justice Anglin in the court of first instance in *Keewatin Power Company v Kenora (Town); Hudson's Bay Co. v Kenora (Town)* (1906).²³ Justice Anglin referred to the opinion of Sir Henry Strong, Chief Justice of Canada, in *Provincial Fisheries, Re* (1895).²⁴

Assuming that the Upper Canada cases ... of *Parker v Elliott*, 1 CP 470; *The Queen v Meyers*, CP 305; *The Queen v Sharp*, 5 PR 140, and *Dixson v Snetsinger*, 23 CP 235, were well decided, as I hold they were, the soil of all non-tidal navigable rivers, so far as it has not been expressly granted by the Crown, was, at the date of confederation, vested in the provinces.

Anglin J, in *Kenora*, elaborated with the following points:

Finally, in *Re Provincial Fisheries* ... at page 528, Strong CJ, says: "It is said that the common law of England applies to new settled colonies only so far as it is adapted to the circumstances and requirements of the colonists. I cannot bring myself to think, this being the condition on which the law of England applies in settled colonies, that we are required, in the case of ceded colonies which have adopted the law as the rule of decision, to apply it in a manner which would be entirely unsuitable to the circumstances and conditions of the people."

Assuming that doctrines of the English common law wholly unsuited to our conditions should be altogether rejected and other doctrines of the same law applied only so far as they appear to be reasonably adapted to those conditions, in determining to what non-tidal navigable waters in Ontario the English *ad medium* rule is not reasonably applicable, our courts would encounter many difficult problems for the solution of which it would seem scarcely possible to prescribe an immutable standard.

Earlier, Anglin J stated:

The weight of judicial opinion of authority in this Province distinctly supports the view that the soil of our rivers navigable in fact is presumed to remain in the Crown unless expressly granted.

The opinion of Anglin J would equate with the opinion of the majority (4/1) of our Court of Appeal in *Mueller's* case.

However, Anglin J's decision was appealed in 1908 and the judges of the Court of Appeal held that the 1792 enactment of the legislature of Upper Canada adopted the laws of England and that the common law of England must control the decision. Chief Justice Moss said:

In my opinion, the rule of the common law as to the presumption of title in the beds of the streams, whether navigable or non-navigable, still prevails in

²³ (1906) 13 OLR 237 (HC) varied (1908) 16 OLR 184 (CA)

²⁴ (1895) 26 SCR 444

this Province, and is to be applied in the first instance. Whether there exist circumstances or conditions sufficient to repel the presumption is a question to be dealt with in the particular case.²⁵

Meredith JA expressed his view on the real issue that was being tested:

But it is said that the natural conditions of this country are such as to render the rule quite inapplicable to navigable non-tidal waters here. That I quite deny.

This contest is not in the interests of navigation, but is really wholly for private purposes and in private interests; that is to say, it is, in truth, but to ascertain who is entitled to the price of the bed of the river which the defendants are acquiring for the purposes of a private dam, a dam which will most effectually stop any such navigation as there might in a state of nature have been where it is to be, and would be a public nuisance if the place were naturally navigable.

There were no further appeals, but three years later in 1911, with important power developments on the St Lawrence River in contemplation, the legislature reversed the result of the *Kenora* case (see Bed of Navigable Waters Act SO 1911, Appendix D) enacting provisions comparable to s14 of the Coal-mines Amendment Act.

The real issue was whether the beds of larger rivers should be publicly owned to protect navigation if that were appropriate for large rivers, or publicly owned for the purposes of hydro-electric schemes to generate publicly owned electricity. The essential issue was energy.

The New Zealand solution

In New Zealand, the first river harnessed for the generation of electricity for municipal supply to a major city (Dunedin) was the Waipori River. Work on the power scheme began in 1900.²⁶ The issue of Crown versus private ownership of riverbeds had reason to be alive in New Zealand as it was in Canada. The Coal-mines Amendment Act as described below embodies the principle decided in *Mueller*, indicating an intention on the part of the legislature to put in place a broadly-based statute dealing with the ownership of river beds. Ownership of the beds of rivers was one part of the equation – the use of water for the generation of electricity was addressed by parliament in a Water-power Bill which was before the House at the same time.

²⁵ This is substantially the view taken by Stout CJ in *Mueller's* case, his being the dissenting opinion.

²⁶ A water right was granted to the Waipori Falls Electric Power Company Limited on 7 May 1900 to divert water out of the Waipori River. Eight further licences were granted for additional water and the erection of a power house between 22 July 1901 and 27 April 1903. In 1904 The Waipori Falls Electrical Power Act provided for the reticulation of electricity in the City of Dunedin and surrounding boroughs and counties. The Act also directed that the entire undertaking of the company should forthwith be assigned to the Dunedin City Council.

When the Coal-mines Amendment Act received its second reading on 12 November 1903, Mr McGowan moved that a new clause be inserted:

It is hereby declared that all coal and lignite under any river exceeding 33 feet in width is vested in the Crown.

Mr Massey moved to insert the words “subject to existing rights” after “that”. At that point a very conservative approach to *Mueller’s* case appeared intended. Crown ownership of coal under river beds was not provided for in the Bill as originally introduced.

On 17 November, some five days later, the Premier, Mr Seddon, moved a new clause 14 to replace Mr McGowan’s clause. Mr Seddon’s new clause 14 was accepted without discussion. The Bill received its third reading and clause 14 became s14 of the Act to read:

14 (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.

(2) For the purpose of this section –

“Bed” means the space of land which the waters of the river cover at its fullest flow without overflowing its banks.

“Navigable river” means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or to the public for the purpose of navigation by boats, barges, punts, or rafts; but nothing herein shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

In the view of this commentator s14, despite judicial reluctance to give it full effect, is in many respects astutely drafted if considered in the light of the common law it was designed to alter and overcome. It is almost unthinkable that so complex a piece of law so carefully drawn would have been drafted in less than five days after the first proposed amendment. The Department of Mines dealing with coal mining at that time would have been the general agency for energy. Placing a provision which (among other matters) would preserve for the Crown, the sites of power stations and incidental ownership rights for the future generation of hydro-electric power, a new national energy resource, in the prime statute dealing with coal, then the main form of energy in New Zealand, has a certain, if strained, logic about it.

The link between Crown ownership of riverbeds and the generation of hydro-electric power is made more explicit by the enactment at the same time of the Water-power Act 1903. This Act reserved to the Crown exclusive rights to generate electricity by water power. The Water-power Act is set out as Appendix E. The Water-power Act and

the Coal-mines Amendment Act came into force on 23 November 1903 to apply simultaneously to water and to riverbeds. The Water-power Bill was controversial and generated a great deal of discussion in the House. Clause 14 of the Coal-mines Amendment Bill, which was more far-reaching, slipped through virtually unnoticed.

Earlier experience in Canada supplies an explanation of the connection between the Water-power Act and s14 of the Coal-mines amendment Act. Benidickson's account of the legislation in Ontario (p32 above) is reiterated:

The application of the Water-powers Act to certain Ontario rivers depended upon the nature of the presumption regarding ownership of the beds of navigable rivers where shoreline property had been granted by the Crown. Control of a number of major hydro-electric power sites in the north depended upon determining whether the Crown was presumed to have granted or retained ownership of the stream beds when granting shoreline properties.

On that analysis (which undoubtedly is correct) each of the New Zealand Acts is ineffective for the purposes of providing for state-controlled hydro-electric power generation without the existence of the other statute. While s14 may stand alone, because it vests riverbeds in the Crown and a broad meaning may be attributed, the Water-power Act for practical purposes would be a nullity without s14 as a companion. In fact, the purpose of the twin enactments in nationalising resources may not be achieved if the vesting of the water and the vesting intended by s14 is not in each case, an absolute vesting in the Crown, extinguishing every interest in the bed, and, for the purposes of hydro-electric generation, every interest in the water.²⁷

The riverbeds to which the original s14 was primarily intended to apply would have been the subject of Crown grants of land alongside made prior to the enactment of s110 of the Land Act 1892. Also affected would be rivers intersecting land granted by the Crown prior to the enactment of s110 if not included in the grant. In either case for s14 to be operative in 1903, there would have been no roads or marginal strips reserved alongside. Roads or marginal strips along the banks would have preserved ownership of the bed for the Crown.

²⁷ The intention to vest the means of generating electricity absolutely in the State had earlier been the subject of legislation. The Electrical Motive-power Act 1896 prohibited any right to generate or use electricity without the previous consent of the Governor by gazetted Order in Council. In a letter dated 26 February 1906 to S Saunders, Editor, Lyttelton Times, Premier Seddon confirmed that he had promoted the 1896 measure to provide exclusive rights for the state in all streams, rivers and lakes.

After s110 came into effect, on the sale or alienation of Crown land, marginal strips alongside would have preserved Crown ownership of the beds of all rivers having a width of 33 feet or more, i.e. 10 metres. In this respect the choice of navigability as a test in s14 rather than specified width is noteworthy. In the first attempt to amend the Coal-mines Amendment Act (indicated above), to provide for Crown ownership of coal under rivers, width was the criterion selected. The same width as employed in s110 of the Land Act 1892 was proposed, i.e. 33 feet. On the other hand, there is a clear implication in s14 that riverbeds of less than 33 feet (10 metres), if navigable, and not the subject of a Crown grant, should return to the Crown. In 1948, 66 years after s110 was enacted, the width of rivers and streams alongside of which marginal strips were reserved on the sale of Crown land was reduced to 10 feet (3 metres).²⁸ Many rivers between 3 and 10 metres are navigable by boats and rafts, providing s14 and the sections which succeeded it with a wide potential application. In this respect, the provisions of s 2(1) of the Water-Power Act 1903 are noteworthy:

Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty.

The section includes streams as well as rivers indicating, as suggested above, that s14 of the Coal-mines Amendment Act should apply to small navigable watercourses.

Riverbed status by Crown declaration

In the past, the Department of Lands and Survey and its successor department, the Department of Survey and Land Information, have made status declarations establishing land to be the land of the Crown.²⁹ In 1986 when the Department of Survey and Land Information was established, the Survey Act 1986 provided in s11 for the functions of the Surveyor-General to include by subsection:

- (l) To investigate the status of the title to lands of the Crown as required to enable disposal, reservation, reversion, or allocation for government purposes.

And by subsection:

- (o) To receive requests, investigate status of land, and co-ordinate proposals for relevant legislation.

These status declarations were applied in establishing the identity of the demesne lands of the Crown (i.e. land which had never been

²⁸ Section 58 Land Act 1948.

alienated by the Crown) and were extensively used by catchment authorities in respect of riverbeds.

The Cadastral Survey Act 2002 replaced the Survey Act 1986. Section 7, which prescribes the functions and duties of the Surveyor-General, no longer includes equivalent provisions to subsections (l) and (o) of the former s11. The Surveyor-General now does not certify status.

After 10 April 1990, s24F of the Conservation Act 1987 as inserted by s15 of the Conservation Law Reform Act 1990, provides that when the Crown disposes of land adjoining a non-navigable river or stream the relevant part of the bed of that river or stream shall remain owned by the Crown. Section 24 of the Conservation Act reserves marginal strips when Crown land is sold alongside any river or stream over three metres in width and so preserves Crown ownership of the bed for all larger streams or rivers whether navigable or not.

Statutory navigability

Statutorily defined navigability is at the heart of Crown ownership of riverbeds. Section 261 of the Coal Mines Act 1979 is the latest re-enactment of s14.

261. Right of Crown to bed of navigable river – (1) For the purpose of this section – “Bed” means the space of land which the waters of the river cover at its fullest flow without overflowing its banks:

“Navigable river” means a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts, or rafts.

(2) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown; and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

(3) Nothing in this section shall prejudice or affect the rights of riparian owners in respect of the bed of non-navigable rivers.

²⁹In respect of notations on the status of riverbeds made by the Department or Lands and Survey prior to the enactment of Survey Act 1986 JAB O’Keefe (above at p21) sounds a warning.

Although this might appear to be a question of fact, it may well be open to some conjecture whether a given river may be characterised “navigable” within the meaning of s206 of the Coal Mines Act 1924. As a matter of practice, the Crown (i.e. the Survey Office) plans may or may not contain notations such as “navigable river” or “Crown land” similar to the “road to be closed” kind of notation. This cannot be anything more than a surveyor’s opinion, and thus descriptive or explanatory matter, and not substantive of the legal status of the land concerned.

Section 120 of the Crown Minerals Act 1991 repealed s261, but s354 of the Resource Management Act 1991 preserved Crown title to riverbed previously vested.

354. Crown's existing rights to resources to continue –

(1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2), it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular –

(a) ...

(b) ...

(c) Section 261 of the Coal Mines Act 1979,

– shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

While any vesting is protected by s354, the right of the Crown to the bed is not made plain until the High Court has declared the bed to be the property of the Crown. To evidence the vesting in the Crown of the bed notwithstanding the repeal of s261, the court must have regard to the definition of “bed” and “navigable river” in s261(1). At the time of vesting, which may date to 1903 when the section was first enacted, Crown ownership of the bed is wholly dependent on “navigation” as defined in s261(1) in terms of a “navigable river”. Without navigation or the capacity for navigation there is no Crown ownership in terms of s261. If there is an existing right of navigation the repeal of s261 may not affect the continued existence of that right for in terms of s354(1)(c) the right of navigation is a right established by the Crown as the factor to determine whether the Crown has an interest of title in the bed of a river. Section 20(e) of the Acts Interpretation Act 1924 in force at the time of the repeal says:

(e) The repeal of an Act ... at any time shall not affect –

(i) ...

(ii) ...

(iii) Any right, interest or title already acquired, accrued or established.

Section 17(1)(b) of the Interpretation Act 1999 (now in force) says:

17(1) The repeal of an enactment does not affect –

(a) ...

(b) An existing right, interest, title, immunity or duty; ...

The vesting of the bed and navigation over it are inextricably bound together and whilst the issue has not been decided by the courts, given

the relevance of the interpretation acts, the better opinion would appear to be that existing rights of navigation over a vested bed would continue notwithstanding the repeal of s261.

Riverbeds bounded on both sides by road

Before Part I of the Counties Amendment Act 1972 came into force on 1 January 1973, the ownership of roads (as opposed to the control of operations on them) within counties was vested in the Crown under the Public Works Act 1928. The effect of the relevant provisions of Part I (which became ss191 and 191 A-H of the Counties Act 1956) is expressed in s191A(1) in this way:

All roads (whether created before or after the commencement of this section) and the soil thereof and all material of which they are composed, shall by force of this section vest in fee simple in the Corporation. There shall also vest in the Corporation all materials placed or laid in any road in order to be used for the purposes there of.

The vesting included all roads whether formed and in use or in a state of nature, and all roads along rivers and streams, around lakes, or along the foreshore.

The purpose of the Amendment Act was part of a continuing process of expanding the powers of county councils to bring their powers largely into line with those long since exercised by borough and city councils under the various Municipal Corporations Acts. The Act was concerned with roads and their ownership and control, and has nothing whatever to say about waterways. A similar comment may be made in relation to Part XXI of the Local Government Act 1974 which now deals with roads under local government control.

Before 1972 there were never any doubts concerning Crown ownership of riverbeds bounded by roads. The Crown owned the riverbed because (among other reasons) it owned the roads alongside. Transferring the bounding roads to the territorial local authorities raised the question of whether the Crown had transferred ownership of the bed.

Neither the Counties Act 1956 nor Part XXI of the Local Government Act 1974 is expressed to bind the Crown, though plainly some portions of it do affect, and were intended to affect, the rights and interests of the Crown.

Nevertheless, the general provision contained in s5(k) of the Acts Interpretation Act 1924 (in force when the Counties Amendment Act 1972 was enacted) applies to this situation. It states:

No provision or enactment in any Act shall in any manner affect the rights of Her Majesty, her heirs or successors unless it is expressly stated therein that Her Majesty should be bound thereby ...

This provision runs counter to the vesting by implication of portions of Crown land (i.e. Crown-owned riverbed) in territorial local authorities by virtue of statutory ownership of adjoining roads. A sensible construction is to leave s191A(1) to the topic which it deals with expressly – that is, the vesting of roads, not riverbed. While it is a pity the legislature did not expressly deal with the ownership of these riverbeds the Crown appears to have authority as is expressed above to claim ownership and in practice does so.

»» Fencing of watercourses

Up until the enactment of the Fencing Act 1978 there was specific provision for fencing when a river or other waterway provided a natural boundary. Under s22 of the Fencing Act 1908 where the boundary is a river, creek, ditch, or a natural or artificial watercourse, the parties may agree upon a line of fence on either side of the boundary. In the event of their failure to agree, the question may be determined in the District Court.

The Fencing Act 1978 did not make specific provision for the fencing of watercourse boundaries, and such fences are now covered under a general provision for give and take fences: s21. In the context of public access, the occupier of the land as fenced and occupied along a water boundary as agreed by the adjoining owners would have the rights of an occupier under the Trespass Act 1980.

»» Prescription

All prescriptive rights begin life as a trespass, i.e. one person unlawfully enters on the land of another and continues to occupy or use that land.

Prescription over private land

Prescription is a right or title by authority of law deriving its force from use and time. In New Zealand, public access rights over private land may not be established by historical use. Although the Prescription Act 1832 (UK) is in force in New Zealand (Section 3 (1) and First Schedule to the Imperial Laws Application Act 1988 NZ), prescriptive rights may be acquired only over land the title to which is not under the Land Transfer Act. In practice as for practical purposes all private land is now subject to the Land Transfer Act this limitation alone rules out the possibility of prescriptive rights arising.

Prescription over public lands

Rights of way

Section 172(1) of the Land Act 1948 provides that no dedication or grant of a right of way, shall by reason only of user, be presumed or allowed to be asserted or established as against the Crown, or as against any person or body holding lands for any public work or in trust for any public purpose, or as against any state enterprise referred to in the Second Schedule to the State-Owned Enterprises Act 1986 whether such user commenced before or after the coming into force of that Act.

The breadth of this section should be noted. First, it is retrospective in its operation. Secondly, it not only applies to lands owned by the Crown but also operates in favour of lands held for any public work or in trust for any public purpose. Thirdly, it applies to land owned by any state enterprise under the State-Owned Enterprises Act 1986. Fourthly, it is immaterial whether the land is in the name of Her Majesty the Queen, a person or persons, or a body corporate.

The terms “public work” and “public purpose” are not defined in the Land Act 1948 and so it is difficult to precisely state the full ambit of the section. The courts would probably apply the definition of “public work” in s2 of the Public Works Act 1981 by analogy, and that of “public purpose” would equate with “Reserve” or “Public Reserve” as defined in s2 of the Reserves Act 1977.

Roads, streets, public works, reserves, waterside margins

Section 172(2) of the Land Act 1948 provides that:

Notwithstanding any statute of limitation, no title to any land that is a road or street, or is held for any public work, or that has in any manner been reserved for any purpose, or that is deemed to be reserved from sale or other disposition in accordance with section 58 of this Act, or the corresponding provisions of any former Land Act, and no right, privilege, or easement in, upon, or over any such land shall be acquired, or be deemed at anytime heretofore to have been acquired by possession or user adversely to or in derogation of the title of Her Majesty or of any local authority, public body, State enterprise referred to in the Second Schedule to the State-Owned Enterprises Act 1986 or person in whom the land has been at any time vested in trust for the purposes for which it has been reserved as aforesaid.

First, this section is also retrospective in its operation. Secondly, it protects from adverse occupation roads or streets, land held for public works, public reserves, and land reserved from sale along water margins under the Land Acts dating back to 1892.¹ Again it is immaterial whether the land is in the name of a State-owned enterprise, Her Majesty the Queen, a person or persons, or a body corporate.

Crown land which may be adversely occupied

The right of the Crown to resume land of the Crown which is not of the categories listed above in s172(2) of the Land Act 1948 may be barred by the operation of s7 of the Limitation Act 1950 after more than 60 years possession adverse to that of the Crown: *Robinson v Attorney-General* (1955) NZLR 1230. This case is significant in that a prescriptive title was acquired in the bed of a river. How extensively Crown ownership of riverbeds vested in the Crown may have been affected by occupation by the adjoining landowner is of course unknown.

¹ Section 58 Land Act 1948 reservations referred to in s172(2) above.

»» Trespass to land

Trespass at common law

A direct entry on land in the possession of another person may be a trespass and create a right of action at common law without proof of actual damage. The right of action in the High Court which the occupier may bring in his or her name is therefore not wholly based on actual harm for the law is intended to ensure that the possession of land should be free from interference by other persons. The law provides a private way of punishing wrongful entry on land and acts as a deterrent.

The common law action for trespass is a separate civil remedy to be distinguished from Criminal Trespass under the Trespass Act 1980. Common law actions are now rarely undertaken.

Under the Trespass Act 1980

A criminal offence may be committed by entering without permission on any place and, after being told to leave by the occupier, by failing or refusing to leave the property. If an occupier warns any person to stay off, that person commits a criminal offence if they wilfully return to that place within two years of the warning. The occupier can call the police to arrest, remove, and prosecute the trespasser.

A warning under the Trespass Act 1980 may be given orally or by written notice delivered to the person named or sent by post to that person's usual address. A warning to leave (under s3) need not specify the consequences of non-compliance. However, a warning to stay off (under s4) must specify the consequences of not staying off the property.

A person who enters with permission, as a licensee, may become a trespasser if they breach the terms of the licence (i.e. any conditions that the occupier might impose, for example, not to enter with dogs). An offence is committed should there be a failure to comply then with a request to leave. The alternative is to revoke the licence (i.e. advise the person of the defect in behaviour, and terminate the right to be on the land) so that the person becomes a trespasser, and then provide a warning to leave in terms of s3 of the Trespass Act.

The Act provides a limited defence of necessity.

In relation to public access, trespass under the Trespass Act 1980 is by far a more significant issue than trespass at common law.¹

¹ Professor John Smillie makes a detailed analysis on the law of trespass on land at p360 *The Law of Torts in New Zealand*, 4th Ed, 2005, Brooker's.

»» Trespass clarified

If nothing else, it is often hard to know who owns the gravel in the old riverbed. The sources of potential uncertainty on private land may be summarised as follows:

- the effect of erosion and accretion– gaps and alterations created by nature – on reserved land along water boundaries;
- the difficulty of applying either the presumption of title to the centre line of the water, or Crown ownership of the bed;
- the administrative uncertainty of the effects of erosion, which maps and official records may not show;
- the intense statutory protection from trespass given the Crown contrasting with uncertain rights applying to natural boundaries on private land.

Trespass along water boundaries may take place where there is no reserved land along the water boundary; where there is a gap in a reservation; when the bed of a river or stream is privately owned to the legal centre line of the water; or where a person indiscriminately accesses private land in the vicinity of or away from water. Trespass may either be at common law where the fact of trespass in the dominant aspect of the offence or within the scope of the Trespass Act 1980.

Trespass over Crown land may take place in terms of s176 of the Land Act 1948 (p3 above). Although trespass extends to any lands of the Crown¹ and so includes Crown-owned riverbeds, the Commissioners of Crown Lands have always been generous in allowing access over Crown land.

In one sense natural boundaries along water are the most certain of all boundaries, for they are always observed on the ground in the position seen on the day of the observation. Uncertainty exists where there is erosion of public land along water; and also in the ever-present conflict between the presumption of ownership to the centre of the water, and Crown ownership of the bed under the Coal Mines Act.

Amendments to the Trespass Act 1980 may serve to clarify aspects of the law on trespass in relation to these two areas of uncertainty. Extending the limited defences offered by sections 3 and 4 of the Trespass Act provides one suggested solution.

¹“Lands of the Crown” as specified in s176 2(a) of the Land Act 1948 is a more comprehensive term than “Crown land” as defined in s2 of the Land Act.

Section 3: Trespass after warning to leave

In general terms the defences may be extended for access on foot only (a) to cover erosion and (b) to reconcile with Crown ownership of riverbeds through the use of navigation as a criteria, for this is the essential element of Crown proprietorship of the bed.

Additional subsections suggested:

(3) It shall therefore be a defence to a charge under subsection (1) if the defendant proves that a publicly owned water margin reservation exists in the records of the Surveyor-General or Registrar-General of Land along a continuous length of water boundary where the offence is alleged to have taken place. If for any reason the defendant is unable to be on the publicly owned water margin reservation as laid out in the above records, whether laid out on the ground or not, this defence is available only if the defendant has kept as close as is reasonably practicable to the dry margin.

(4) It shall be a defence to a charge under subsection (1) if the defendant proves at the time when the offence is alleged to have taken place on a river or stream bed that the bed of the river or stream on which the offence is alleged held water to be of sufficient width and depth to permit the passage of any boat or raft.

Section 4: Trespass after warning to stay off

Additional subsections suggested:

(6) It shall therefore be a defence to a charge under subsection (1) if the defendant proves that a publicly owned water margin reservation exists in the records of the Surveyor-General or Registrar-General of Land along a continuous length of water boundary where the offence is alleged to have taken place. If for any reason the defendant is unable to be on the publicly owned water margin reservation as laid out in the above records, whether laid out on the ground or not, this defence is available only if the defendant has kept as close as is reasonably practicable to the dry margin.

(7) It shall be a defence to a charge under subsection (1) if the defendant proves at the time when the offence is alleged to have taken place on a river or stream bed that the bed of the river or stream on which the offence is alleged held water to be of sufficient width and depth to permit the passage of any boat or raft.

The suggestions made above are definition-dependent:

“Bed” means (a) in relation to any watercourse – the space which exists between dry margins on either side, and (b) in relation to any water body the shore which exists immediately below the dry margin.

“The dry margin” means and commences where the mark made by the action of water under natural conditions on the bank of a watercourse or the shore of a water body which action has been so common and usual and so long continued that it has created a difference between the character of the vegetation or soil on one side of the mark and the character of the vegetation or soil on the other side of the mark.

“Publicly owned water margin reservation” means

- roads;
- crown land;
- land reserved from sale under s58 of the Land Act 1948 and earlier Land Acts;
- all reserves under the Reserves Act 1977 and earlier Reserve Acts;
- all land subject to part IVA of the Conservation Act 1987;
- all local purpose reserves for esplanade purposes vested under the Resource Management Act 1991 and earlier Acts relating to the subdivision of land;

If this suggestion were adopted, administrative uncertainty in respect of erosion would be limited because mapping would be of lesser importance in identifying where erosion is an issue.

No suggestion is made to alter the common law on trespass.

»» Some reflections on muddy waters

The route taken to our present position on access to water has hardly been a straight one. Despite the idealism of the 19th century and the first few years of the 20th, when the legislators, administrators, and judiciary sought to endorse new values in a new land, the foundation then laid has not fully been applied in a beneficial way. That is not to say progress has not been made in many respects. Reservations from sale of land along water have been applied when Crown land was sold after the enactment of the Land Act 1892, and since 1946 reserves have been taken when private rural land is subdivided. However, the law on riparian access and Crown ownership of riverbeds has not been clearly explained nor clearly applied by the courts.

A driving force at the beginning of colonial settlement – that the old English law protecting landed privileges should not apply in New Zealand – was extensively but far from completely applied. Inconsistent administrative practices in provincial (1854–1876) and post-provincial times¹ put paid to the ideal of universal public access to waterways, lakes, and the coast. Reservations for public access were sometimes inexplicably omitted when Crown land was sold. However, waterside reserve allowances in the form of roads were nevertheless extensively applied as settlement proceeded. In the post-provincial era these roads were to receive special statutory protection. From 1882 until 1952 roads along rivers could not legally be closed. The courts initially developed indigenous common law to ensure that riverside roads could not be lost to erosion. Ward J in *Mercer* (1888) (p7 above) allowed the one chain width of a riverside road to shift with the erosion of the bank so that the road alongside was perpetually ambulatory and of constant width. His statement of the law suited the then rather uncontrolled state of many of the rivers in New Zealand. His ruling was not, however, based on the common law of England.

The robust development of indigenous riverine common law in New Zealand is best exemplified in *Mueller's* case in 1900 when the Court of Appeal held that the Waikato river was a public though non-tidal navigable highway, the bed of which was owned by the Crown. The Court did not follow English common law which would have provided for private ownership to the centre-line of such a river. In Canada, in the leading province of Ontario, over a period of 35 years

¹ National practice was not settled until s110 of the Land Act 1892 was enacted.

from 1872, the superior courts in at least six decisions held that the soil of non-tidal navigable rivers was vested in the Crown rather than the adjoining owners.² By the end of the 19th century a new jurisprudence along similar lines relating to rivers had emerged in Canada and New Zealand. However, this fresh approach was not to last in either country.

In 1906 the then Supreme Court in New Zealand in *Miller's* case preferred English common law to the indigenous precedent set in *Mercer* in 1888. Without reference to s129 of the Public Works Act 1905 (then in force) which declared that roads along rivers may not be stopped, implying permanent status, the Court ruled in accordance with English common law that roads along rivers were fixed in position rather than ambulatory, and subject therefore to gaps created by erosion. Under the ruling a taking or purchase under the Public Works Act was necessary to re-establish a continuous roadway.

The renewed emphasis on English common law is well illustrated in the *King v Joyce* (1905) 25 NZLR 78 CA, where the Crown tested the application of the English common law doctrine of ownership to the centre line with reference to a large non-navigable river. The land, which vested in the Crown grantee as from 31 March 1870, was described as bounded by a river which was non-navigable. The measurement of the land in the grant was satisfied without including half the bed of the river. The river opposite the land was from ten to twelve chains in width and in other reaches the bed was as wide as 40 to 50 chains with banks as high as six metres in places.

Despite the valiant effort made by Edwards J who in his strongly dissenting judgment argued that New Zealand legislation, in particular, the Highways and Watercourses Act 1858, indicated an intention on the part of the Crown to retain ownership of such riverbeds and thus rebutted the centre line presumption, the majority of the Court ruled that this was not so. In the opinion of the majority there being nothing in the terms of the grant or in the facts of the case itself to rebut the presumption, the grant therefore passed the bed of the river in accordance with English common law. The Waipaoa was a non-navigable river with a very large bed. Joyce was claiming 4800 pounds in compensation for twelve acres of riverbed shingle, for which, as Edwards J wryly pointed out, neither the grantee of the adjoining land nor his successors which included Joyce had paid one single farthing.

² p33 above.

The preference of the majority of the court for the common law of England clearly originated in the decision of the Privy Council in *Lord v The Commissioners* of Sydney 12 MOO PCC 473 which in 1859 applied the centre line ownership rule of England to the colonial territories. Despite the reference made by Edwards J to the opinion of their Lordships which held the application of the rule to be “always a question of intention, to be collected from the language used with reference to the surrounding circumstances” he could not persuade his brother judges to a view more suited to New Zealand conditions. Chapman J (although in the majority) even went so far as to say: “It may be taken to be a correct general statement of the law as urged by Dr Findlay (counsel for the Crown) that the presumption may be rebutted by physical circumstances”. But to no avail. The judicial forces now at work were very conservative.

In Canada, in 1908, the Court of Appeal for Ontario held that a line of decisions over the previous 35 years holding that the soil of non-tidal navigable rivers was vested in the Crown were decided in error, and that the English common law of private ownership to the centre line was to be preferred. (The legislature reversed this decision in 1911 so that by statute the beds of navigable non-tidal rivers were again vested in the Crown).

The conservatism illustrated above, may possibly be explained by reference to a New Zealand case referred to the Privy Council in 1903: *Wallis v Solicitor-General* (1840–1932) NZPCC. After the advice of the Privy Council was received, a protest of the Bench and Bar was held in the New Zealand Court of Appeal on 25 April 1903, (1840–1932) NZPCC appendix at 730. The judges felt compelled to defend the integrity of the New Zealand courts. An extract from the protest of Mr Justice Edwards at p757 tells the story:

Never before has it happened that the ultimate appellate tribunal of the Empire has charged the Judges of any colonial Court, as their Lordships have now charged the Judges of this Court, with want of dignity and with denying or delaying justice at the bidding of the Executive ...

Yet such charges have been made by the Judicial Committee against the Judges of the Appellate Court of this Colony; and they have been made without the slightest foundation in fact, and based only upon assumptions of law which to every trained lawyer in the Colony must appear, at the least, astonishing and absurd.

Although the judges robustly defended the independence of the New Zealand courts it does seem that from then on, as *Attorney-General and Southland County Council v Miller* (1906) (p8 above) and the *King v Joyce* (1905) (p50 above) exemplify, that greater reference was made to English common law in preference to developing New Zealand law. Clearly, in the law relating to riverine ownership at least, the same thing was to happen in Canada, adding strength to the perception that the colonial judges in each jurisdiction after the rebuke from the Privy Council, on an unrelated matter, now appeared to be more constrained in their approach to riparian matters, riverbed ownership and access.

From the cohesion of the 19th century when administrators, legislators and judges worked in harmony to provide clear legal principles on access, riparian, and riverine ownership, we stumbled in the 20th century. From 1905, when the Court of Appeal delivered its judgment in *The King v Joyce* case, and again in 1906 when *Miller's* case was decided, English common law took precedence. The courts, possibly in the shadow of the *Wallis* case, have preferred to apply English common law in many respects rather than boldly interpret our own statute law.³ There is a pattern of inconsistency and uncertainty, and, sadly, a blight on solutions that if implemented would have provided perpetual riparian access (where access was reserved at the time of the Crown grant) and public ownership of most riverbeds.

³ Note especially the commentary on navigable rivers (p19–32 above).

»» Conclusion

In 1990, 102 years after Ward J in *Mercer* (1888) ruled in favour of ambulatory roads along water boundaries, only to have his opinion on the law overturned in 1906 by a contrary decision, the Conservation Reform Act 1990 amending the Conservation Act 1987 enacted that marginal strips along water reserved from sale when Crown land is sold (after 10 April 1990) should move with the movement of water, so eliminating any gaps created by erosion, and preserving reservations in perpetuity. In 1888, roads were the current form of land reserved from sale. The analogy between early roads and modern marginal strips is appropriate, for if the wisdom of Ward J had been accepted as the law in 1906 rather than the common law of England, it is likely that the general law of riparian access would have developed on the principles stated above, now included in the Conservation Act 1987. In that event our historic access law on riparian boundaries where public land alongside is reserved would have been clear and unambiguous. That is, if public access were shown on public maps, continuous public access would have been available on the ground. That is not always the case.

In 1993, an amendment to the Resource Management Act 1991 extended the “moveable” rule to marginal strips along water when the adjoining land is privately owned and new access is provided under that Act.

In current law there has been a return to the principles first stated in *Mercer* in 1888.

From early settlement, the *ad medium filum* rule – ownership to the centre line – was excluded in its application to rivers, lakes and the coast, when roads were reserved alongside the water, ensuring Crown ownership of the bed and shore. However, the rule applied extensively when roads were not reserved. The extent to which s261 of the Coal Mines Act 1979 supercedes the operation of the rule is not clear. On a true construction it is unlikely that the conservative approach seen in *Leighton’s* case (1955) and *Tait-Jamieson* (1984) is a correct application of the law. Section 261 in fact may establish Crown ownership of the beds of most watercourses large enough to be rivers.

However, given the unsettled state of the law we too often do not know in practice which of our rivers flow on Crown-owned riverbeds. This gives rise to a conflict between adjoining land owners who may think their title extends to the centre of the water, and those who assert that the Crown owns the riverbed. Even when a riverbed dispute is placed before the court, there may be surprises. The 1984 High Court ruling

that the Manawatu, a large river, was owned to the centre line illustrates the surprise aspect.¹ Uncertainty multiplies, for expert opinion does not generally provide support for the Manawatu decision, which is in conflict with an earlier decision on the Wanganui River.²

The laying out of roads and reserves along water boundaries in a fixed position on the landward side and providing for a moveable boundary on the water side makes public land vulnerable to alterations effected by nature. It may even, when erosion is severe, have the effect of obliterating public access along a stretch which previously carried a publicly owned margin.

It is not the purpose of this paper to suggest any change to the law which establishes title to riverbeds and reserve allowances along water boundaries. Rather, this is an attempt to identify, in the context of public access in particular, the threads of experience which have shaped riparian and riverbed law in New Zealand. The reform suggested here is to the law of trespass. This is to ensure that uncertainty in the law is removed when (a) natural boundaries, which are inherently subject to change, and (b) doubts over the ownership of riverbeds, create uncertainties that ought to have no part in proceedings under a statute applying criminal sanctions – the Trespass Act 1980.

As a final observation, the language used in s14 of the Coal-mines Amendment Act was clearly intended to vest the bed of navigable rivers and streams in the Crown for a broad range of purposes. The old Department of Lands and Survey under the superintendence of the Minister of Lands on behalf of the Crown administered “title” to Crown riverbeds in a neutral setting. Given the competition that now exists for riverbed use, whether for recreation, conservation, flood protection, and uses authorised under the Resource Management Act 1991, the Crown agency which supervises the title of the Crown should have a neutral role. The Crown and the public will not be well served if riverbeds should be “captured” by sectional management.

Land Information New Zealand, the successor to the Department of Lands and Survey, is the neutral agency, under the Minister of Lands, which should undertake this role.

¹ *Tait-Jamieson* (p30 above).

² *The King v Morison* (p29 above).

»» Appendix A

Explanation of terms used

Some explanation is required of the terms used in relation to boundaries along water. These terms describe the way in which the law recognises the impact of the forces of nature and acknowledges the movement of boundaries.

Accretion

This is the gradual and imperceptible increase to land bordering water through the deposit of firm land on the banks of a river or stream, seashore¹ or lakeshore, or through withdrawal of the water. Accretion may occur by (a) the washing up of sand or soil to form firm ground; or (b) the recession or withdrawal of water from the adjoining land as the result of seasonal changes in water level, or of longer term climatic changes such as drought conditions (a dereliction). When an accretion increases the width of a road, a reserve, or Crown land adjoining water, the increase in the parcel takes on the same legal character as the land to which it attaches. The “new” land is road if the land to which it attaches is road. Where there is no reservation of public land along water and there is a moveable natural boundary – that is, the water boundary is not defined by the lines of a survey to exclude accretion (which is rare) – there is an addition to the adjoining title. The moveable natural boundary may be tidal (the sea), an inland water line along a Crown-owned river, or a river or stream to which the presumption of ownership to the middle line applies.

The *ad medium filum aquae* rule

By the common law, ownership of land adjoining a watercourse which is not owned by the Crown gives rise to the presumption that title extends to the middle line. It is a rebuttable presumption – that is, evidence to rebut (disprove) the presumption is always admissible.

Avulsion

When the change of the position of the middle line of a river or stream has been sudden, violent and visible, as from the exceptional runoff from heavy rain or melting snow, the original middle line of the stream continues as the line of division of the two estates on the opposite banks of the stream. No question of accretion on the one side and erosion on the other arises.

¹ For s20 of the Foreshore and Seabed Act 2004 see Appendix F.

Fixed boundaries

This term does not mean what it implies – boundaries that are guaranteed. What it does mean is boundaries that have been surveyed and geometrically defined and demarcated on the ground, and that the monuments (generally pegs) placed there may, if lost, be reproduced in accordance with the Survey Regulations. In relation to public access, the landward boundary of any road or other component of publicly owned margins (set out on page 3 above) under current interpretation is a fixed boundary. In contrast, the riparian (river) or littoral (sea) boundary of the publicly owned margins is almost always a moveable boundary. An express Crown grant of land surveyed by lines on all sides of the land including the water side may form an exception.

Dereliction

Dereliction is an accretion of dry land gained by the gradual receding of waters.

Diluvion

Diluvion is the slow advance of the waters over the land.

Erosion

Erosion is the loss of land adjoining water by the gradual and imperceptible action of the water. All riparian (riverside), littoral (seaside) and lakeside land may be subject to erosion. If privately owned to the water or the centre line, the land lost by the action of the water is lost to the registered proprietor; if a road or other public reservation lies between the land Crown granted and the water, the road or public land may be physically eroded away but (subject to individual assessment) will generally retain its legal status even if covered by water. If the advance of the water crosses the road or other reservation, the title of the registered proprietor will stay fixed at the Crown grant boundary, that is, the landward side of the road, reserved or other public land.

Natural boundaries

Natural boundaries are not demarcated (that is, not marked with pegs or such) but are identified and delineated as to the tidal line or inland water line or middle thread that applies. This means that the land title register and plans which support it do not control the extent of the parcel on the ground where the rules of evidence of things there observed – the moving boundary – control the extent of the parcel at any given point in time.

Queen's chain

A commonly used expression for a strip of land (usually 20 metres wide) reserved for public use alongside a water margin, including the sea shore, lakes and rivers.

»» Appendix B

Māori land – a category of its own¹

The greater part of the reserved water margin pattern which exists today was established over general land in the period 1853 to 1892 by the laying off of roads along significant water boundaries. This was the period when, after Māori title had been extinguished, settlers took Crown grants to the best and most accessible land. Concurrently (or nearly so) in the period 1862 to 1909 almost all Māori customary land was converted to Māori freehold land. But Māori customary land did not admit of the attributes which would permit a coastal or riverside reservation to the Crown. The reservation of boundary margins over general (non-Māori) land was based on plans of survey, and Crown grants which excluded the land reserved. There was underlying Crown title to both the land granted and the land reserved. Māori ownership according to ancient custom was obviously not based upon survey plans and Crown grants. Although the conversion of Māori customary land to Māori freehold (i.e. a written title) was perfected by a formal grant of the land from the Crown the basis of the paper title was an investigation of ownership rights by the Māori Land Court. The Court provided the Governor with a certificate of ownership that authorised the Governor to make the grant. There has never been power to grant customary title as freehold to anyone other than the customary owners. If there were to be a strip it would have to be taken not reserved. In a nutshell this is the reason why the Queen's Chain was not established over Māori land.

The classic description of customary ownership along rivers was provided by Judge Browne of the Māori Land Court in the original proceedings for investigation of title to the bed of the Wanganui River in a judgment on 29 September 1939:²

¹ Hayes, 2003 at pviii

² No consideration of Māori ownership of riverbeds and banks may be placed in current perspective in the absence of reference to *In re the Bed of the Wanganui River* (1962) NZLR 600 and the 25 years of litigation which preceded that decision. In that time the Māori Land Court, The Māori Appellate Court, the then Supreme Court, a Royal Commission in 1950 and the Court of Appeal (on two occasions) considered the principles of law distilled from Māori custom and usage and the application of appropriate English freehold law. The above passage by Judge Browne was approved by the then Supreme Court in *The King v Morrison* (1950) NZLR 247 at 255, and in the second and final hearing in the Court of Appeal (1962) 600 at 608 per Gresson P, at 612 per Cleary J and 621 per Turner J.

The headnote (at p600) for the second hearing in the Court of Appeal (supra) provides a precise statement of the decision of the Court:

Where a block of land fronting on a non-tidal river has been held by Māoris under their customs and usages and later the title has been investigated and

This Court in all its experience of native land and the investigation of the title thereto, never once heard it asserted by any Māori claimant that the ownership of the bed of a stream or river running through or along the boundaries of the land the subject of investigation, whether that stream or river was navigable or not, was in any way different from the ownership of the land on its banks. Nor has it ever heard it denied that the tribes or hapus that owned the land on the banks of a stream or river had not the exclusive right to construct eel weirs or fish traps in its bed or exercise rights of ownership over it. The river bed being a source of food in ancient times would be looked upon as a highly important asset to any tribe and the right to it would be very jealously guarded by the members of that tribe.

Marginal land along river and stream boundaries is part of the customary title of Māori and part of their freehold title when customary land becomes freehold land. Marginal land around lakes and along the coast on the upland of the water, i.e. above mean high water mark or the upland margin of fluctuating inland lake beds would similarly originally have formed a part of the adjoining customary land and later the freehold of that same land.

The physical dimension of ownership of Māori land along water margins can be described with reference to the customary rights obtained by usage in the past. Has statute law made any impact?

separate titles issued, the bed of the land adjoining the river becomes *ad medium filum* as part of that block and the property of the respective owners of that block.

The fact that a whole tribe may have exercised a right of passage over the river and that eel weirs and fishing devices placed by individuals or *hapus* were not rigidly limited to the portion of the river immediately adjacent to the bank occupied by such individuals or hapus does not negative the application of the *ad medium filum* rule.

So held, by the Court of Appeal (Gresson p., Cleary and Turner JJ.).

Further held (per Turner J.). Whatever was originally the nature of the customary title to lands which have come before the Māori Land Court for investigation, the incidents of the titles which the same Court has issued and certified are, and always have been, the incidents of English freehold titles.”

More recent judicial opinion has queried (in some respects) the correctness of the Court of Appeal decision in *re the Bed of the Wanganui River* – notably Cooke P in *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* (1994) 2 NZLR 20 at 26 where he said “... the Waitangi Tribunal have adopted the concept of a river as being a taonga. One expression of the concept is “a whole and indivisible entity, not separated into bed, banks and waters”. However, at this point in time the Wanganui case continues to state the law i.e. the second decision of the Court of Appeal. The adjoining owners of Māori land own the bank and the bed to the centre line if there are separate owners on either side and the whole of the bed if the river intersects the title.

The first of the Court of Appeal cases on the Wanganui River (reported at (1955) NZLR 419) was initiated under the authority of s36 of the Māori Purposes Act 1951 which conferred jurisdiction to determine questions relating to the bed of the Wanganui River. The Court required further information to deal with the matter comprehensively; the second case stated arose out of that requirement. However, the court in the first case did rule that “... the bed of the Wanganui River within the limits stated, was at the time of the Treaty of Waitangi and upon the acquisition of

Although the instructions from the Colonial Office in 1846 made provision for a court to deal with Māori land, nothing was done until the Native Land Act 1862 was enacted. The court did not begin operations until 1865 when in that year a further Native Land Act repealed the Act of 1862. The Act of 1865 had far-reaching effects for the court was empowered to issue a certificate converting land from customary to freehold tenure which could be sold. After receipt of the certificate of the court the Governor could issue a Crown grant for the land in the certificate. Section LXXVI of the Act of 1865 provides for roads through land granted under the Act. “From and out of any land which may be granted under the provisions of this Act it shall be lawful for the Governor at any time thereafter to take and lay off for public purposes one or more lines of road ...”. Significantly at the point of taking the land would be freehold in status and no longer customary land. The Māori title had been converted to a general title, and the Māori owners could sell the land free of tribal constraints. Large areas were sold to the settlers.³

The laying out of roads along water boundaries was the device employed by the Governor and early land administrators in respect of general land to secure a public margin. This was achieved under the statutes and ordinances relating to the sale of Crown land all of which where appropriate contained powers to lay off roads (pages 15–18). In fact under sLXXVI the Governor could have laid out roads along Māori freeholds with frontage to water in the same way as in land sold directly by the Crown to the settlers. Clearly the Crown did not compromise the title of Māori but respected cultural and customary rights in relation to the land for which Māori retained title. Article 2 of the Treaty of Waitangi may be taken to have had a bearing on the matter.

The key period in relation to Māori land and water margins is 1862–1909. If legislation were to deal with any form of marginal strip along water it is the legislation enacted in that period which would provide

British Sovereignty, land held by Māoris – namely the Wanganui tribe – under their customs and usage.” From that judgement FB Adams J dissented and provided an opinion which said the river was held *ad medium filum aquae* by individual Māori owners. Adams J in a very detailed judgement disagreed with the vagueness of the tribal case and his opinion is valuable for providing some balance between the rights of individual Māori owners and tribal claims. His decision was encapsulated in the second case when the three judges of the second Court of Appeal agreed with him. In the context of the rights which do not arise along the riverbanks of Māori land when compared with reservations along rivers in general land, whether the land is tribally owned or individually owned may not matter – the land is of customary origin and is exempt from riverside margins.

³ Many riparian titles (no riverside or coastal reservation) came into the hands of settlers through direct sales from Māori.

authority. From time to time between the first Native Land Act of 1862 and the year 1909 when for practical purposes the conversion from customary to freehold land was completed, there were changes made in the legislation relating to the manner of giving effect to and the steps to be taken after an investigation of title by the Māori Land Court. The law and practice are authoritatively summarised by Sir John Salmond then Solicitor-General in his *Notes on the History of Native Title 1909* (Vol 6 The Public Acts of New Zealand 1908–1931 at p87) reproduced as Appendix 15 (p105).

All of the statutes to which Sir John refers have been perused; there is no statutory provision which would require or authorise a marginal strip along water boundaries. That is not to say that on occasion reserves may not have been made for public access. Rather, the statutes simply do not provide for margins along water. Cooke J in his judgement in *In re the Bed of the Wanganui River* (1955) NZLR 419 at 437 in commenting on the effect of the legislation summarised by Sir John Salmond (*supra*) says:

At every stage of the legislation, there was, however, provision for the issue of some instrument that either itself was, or that had the effect of, a Crown grant; and it is clear, I think, that, whatever be the precise form of the instrument of grant that represented the culmination of the proceedings for investigation of title to any of the riparian lands between 1862 and 1903, the grantor, and the only grantor, in the transactions was the Crown. The instrument was always, in effect or in terms, a grant by the Crown: and it is to such a grant and to the circumstances surrounding it that resort must be had ...

In the event of there being a doubt, in the final analysis it is the grant and the supporting survey plan which will determine the issue.

Many years were to pass before the Crown would attempt to establish public ownership of water margins on lands for which it had granted title but had not made appropriate provision at the time of the Crown grant. The Land Subdivision in Counties Act 1946 was the first of a line of statutes which provided for a compulsory reserve for public purposes along water boundaries when land was subdivided by the owner. Section 11 – Reserves along seashore and banks of lakes and rivers etc – included a proviso to subsection (1):

Provided also that nothing in this subsection shall apply with respect to the subdivision of any land which is [Māori] land within the meaning of [the Māori Affairs Act 1953].

Traditional values were preserved in the legislation.

This approach was to change. Section 432 of the Māori Affairs Act 1953 required partitions (subdivisions) of Māori Land in cities and boroughs to comply with the provisions of the Municipal Corporations

Act as to subdivision. Under s432 the vesting of a reserve was effected by an order of the Māori Land Court. Section 23 of the Māori Affairs Amendment Act 1967 inserted a new s432A in the Principal Act to place land in counties in the same situation as land in cities and boroughs. Esplanade reserves could be required by councils and confirmed by order of the Māori Land Court.

When the Local Government Act 1974 replaced the Municipal Corporation Act and the Counties Amendment Act (in 1979) the same procedure were followed. When Te Ture Whenua Māori Māori Land Act was enacted in 1993 there was a substantial upgrade of procedures. The main provisions relating to Māori partitions are set out in *Environmental Law and Resource Management* 2n Ed 1997 DAR Williams at p139.⁴ Section 303(2) of Te Ture Whenua as originally enacted was specific in relation to the vesting of esplanade reserves. Subparagraph (b) says:

Make such orders as may be necessary to

- (i) Vest in the territorial authority an esplanade reserve required to be set aside under section 230 of the Resource Management Act 1991; and

⁴The main differences between an ordinary subdivision and a partition to which the RMA applies are:

1. any condition requiring a contribution of land for reserves or in lieu of reserves can only be set aside out of part of the land to be alienated;¹
2. a reserve contribution cannot be made in respect of any part of the land which the Māori Land Court has certified to be of special historical significance or emotional association to the Māori people;²
3. no survey plan relating to the partition need to be deposited with the District and Registrar, but a plan must still be approved by the Māori Land Court;³
4. any outstanding subdivision consent conditions may still have to be complied with at the time of making the partition order;⁴
5. the Māori Land Court has special powers to deal with subsequent alienation of land outside the hapu where there has previously been an exempt partition of the land;⁵
6. any requirement for reserves or roading may be waived if the territorial authority is satisfied that the partition is not for the purposes of sale and no person other than the present owner will acquire an interest in the land.⁶

¹Section 302(1), Te Ture Whenua Māori Act 1993, Māori Land Act 1993

²Section 302(2). Te Ture Whenua Māori Act 1993, Māori Land Act 1993

³Section 300, Te Ture Whenua Māori Act 1993, Māori Land Act 1993

⁴Section 303(2) and (3), Te Ture Whenua Māori Act 1993, Māori Land Act 1993

⁵Section 304, Te Ture Whenua Māori Act 1993, Māori Land Act 1993

⁶Section 305, Te Ture Whenua Māori Act 1993, Māori Land Act 1993; the Court may impose a condition that, in the event of sale, the territorial authority's reserves and roading requirements be met in full.

- (ii) Vest in the Crown any land to which section 235 of the Resource Management Act 1991 applies, - and sections 229 to 237 of the Resource Management Act 1991 shall apply with all necessary modifications.

However, by s47 of Te Ture Whenua Māori Amendment Act 2002⁵ this provision was repealed and new procedures substituted. Land no longer vests in the territorial authority as esplanade reserve along water but is set apart as a Māori reservation for the common use and benefit of the people of New Zealand. This new concept is both encouraging and sensitive.

⁵ S47 Te Ture Whenua Māori Māori Land Act 2003 states in subsections (2) (3) (4) and (5):

- (2) The Court must –
 - (a) make such orders as it considers necessary, having regard to Part X of the Resource Management Act 1991, to ensure that, in respect of any conditions of the subdivision consent that have not been complied with, adequate provision is made for such compliance; and
 - (b) have regard to sections 229 to 237H of the Resource Management Act 1991 in respect of every partition of land to which section 301 applies.
- (3) Any land that would be required to be set apart, reserved, or vested in another person, because of subsection (2), must be set apart as a Māori reservation for the common use and benefit of the people of New Zealand, despite anything in the Resource Management Act 1991.
- (4) Land to which subsection (3) applies must be treated –
 - (a) as if it were land set apart under section 338(1) and section 340(1); and
 - (b) as if the procedural requirements of those subsections has been satisfied.
- (5) The Court may declare that any land set apart under subsection (3) be dedicated for the construction of roads, if the Court considers that to be necessary to satisfy a condition or requirement of a subdivision consent.

»» Appendix C

Boundaries excluded from analysis

The following boundaries are excluded from analysis:

- moveable esplanade strips or access strips under ss232–237 H Resource Management Act 1991;¹
- moveable marginal strips under Part IVA of the Conservation Act 1987;²
- coastal boundaries, except in an incidental way when the same principles of law apply to riverbeds and the coast.³

¹These are an alternative to fixed position esplanade reserves and as the strips move with the movement of the water questions of erosion and accretion do not arise. These strips are therefore outside the scope of this analysis.

²These strips move with the movement of the water and questions of erosion and accretion do not arise. These strips are therefore outside the scope of this analysis.

³The general law is now extensively set out in The Foreshore and Seabed Act 2004.

»» Appendix D

The Bed of Navigable Waters Act 1911 (Ontario)

A consideration of the law of Ontario which is based on navigability (a term which is there left to the discretion of the court) indicates a refined approach based on experience. Since first enacted in 1911 with the objective of vesting all navigable riverbeds in the Crown with the exception of beds which had been expressly granted, the Bed of Navigable Waters Act has been amended six times and re-enacted a number of times.

Section 2 of the Act of 1911 reads:

2. Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law.

In 1940 the Act was amended by inserting definitions of “bed” and “high water mark” and providing for the physical boundary of navigable water. The Act was consolidated in 1950 but substantially amended in 1951 by the deletion of the statutory definitions of “bed” and “high water mark” making a return to the common law definitions. A new section 2 was inserted:

2. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate or through which a navigable body of water or stream flows, has been heretofore or is hereafter 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.

Note that the operative section now includes water bodies intersecting land titles.

The Act was consolidated again in 1960 when s2 was re-enacted. For completeness of the illustration, the four key statutes are included in this appendix.

Previous legislation

S.O. 1911, c. 6

The Act as here follows continued unchanged through R.S.O. 1914, c. 31, R.S.O. 1927, c. 42 and R.S.O. 1937, c. 44, until February 24, 1940.

An Act for the Protection of the Public Interests in the Bed of Navigable Waters

Assented to 24th March, 1911.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title

1. This Act may be cited as “The Bed of Navigable Waters Act.”

Grant to be presumed to be to water’s edge

2. Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law.

Saving as to certain cases

3. Section 2 shall not affect the rights, if any, of a grantee from the Crown or of any person claiming under him, where such rights have heretofore been determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or any person claiming under him who establishes to the satisfaction of the Lieutenant-Governor that he or any person under whom he claims has previous to the passing of this Act developed a water power or powers under the bona fide belief that he had the legal right to do so, provided that he may be required by the Lieutenant-Governor in Council to develop the said power or powers to the fullest possible extent, and provided that the price charged for power derived from such water power or powers may from time to time be fixed by the Lieutenant-Governor in Council. And the Lieutenant-Governor in Council may direct that letters patent granting such right be issued to such grantee or person claiming under him, under and subject to such

conditions and provisions as may be deemed proper for insuring the full development of such water power or powers, and the regulation of the price to be charged for power derived from them.

Act not to apply to a certain locality

4. This Act shall not apply to the bed of the river where it runs through Lot 8 in the 6th Concession of the Township of Merritt, in the District of Sudbury.

Lieutenant-Governor may deal with special cases

5. Notwithstanding anything herein contained the case of any person setting up on special grounds a claim to receive from the Crown a grant or lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant-Governor in Council as he may deem fair and just.

Proclamation of Act

6. This Act shall not come into force until a day to be named by the Lieutenant-Governor by his proclamation.

S.O. 1940, c28

The Statute Law Amendment Act, 1940.

Section 3 amended the 1911 enactment as given in
R.S.O. 1937, c. 44*Assented to February 24th. 1940.**Session Prorogued February 24th. 1940.*

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Rev. Stat., c. 44 amended

3. - (1) *The Bed of Navigable Waters Act* is amended by renumbering the present section 1 as section 1a and by adding thereto the following section:

Interpretation

1. In this Act, –

“bed”

- (a) “bed” used in relation to a navigable body of water shall include all land and land under water lying below the high water mark; and

“high water mark”

- (b) “high water mark” shall mean the level at which the water in a navigable body of water has been held for a period sufficient to leave a watermark along the bank of such navigable body of water.

Rev. Stat., c. 44, s. 1a, amended

(2) Section 1a of *The Bed of Navigable Waters Act*, as renumbered by subsection 1 of this section, is amended by adding thereto the following subsections:

Where boundary body of navigable water

- (2) Where in any patent, conveyance or deed from the Crown made either heretofore or hereafter, the boundary of any land is described as a navigable body of water or the edge, bank, beach, shore, shoreline or high water mark thereof or in any other manner with relation thereto, such boundary shall be deemed always to have been the high water mark of such navigable body of water.

Minister may fix high water mark

- (3) The Minister of Lands and Forests may, upon the recommendation of the Surveyor-General for Ontario, fix the high water mark of any navigable body of water or any part thereof, and his decision shall be final and conclusive.

Rev. Stat., C. 44, s. 2, amended.

- (3) Section 2 of The Bed of Navigable Waters Act is amended by striking out the word and figure "Section 1" in the first line and inserting in lieu thereof the word, figure and letter "Section 1a."

R.S.O. 1950, c.34**The Bed of Navigable Waters Act****The Act as here follows continued unchanged until April 5, 1951***Interpretation*

1. In this Act,
 - (a) “bed” used in relation to a navigable body of water includes all land and land under water lying below the high water mark;
 - (b) “high water mark” means the level at which the water in a navigable body of water has been held for a period sufficient to leave a watermark along the bank of such navigable body of water. 1940, c. 28, s. 3(1).

Grant to be presumed to be to water’s edge

2. (1) Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly and not in accordance with the rules of the English Common Law. R.S.O. 1937, c. 44, s. 1.

Where boundary body of navigable water

- (2) Where in any patent, conveyance or deed from the Crown made either heretofore or hereafter, the boundary of any land is described as a navigable body of water or the edge, bank, beach, shore, shoreline or high water mark thereof or in any other manner with relation thereto, such boundary shall be deemed always to have been the high water mark of such navigable body of water.

Minister may fix high water mark

- (3) The Minister of Lands and Forests may, upon the recommendation of the Surveyor-General for Ontario, fix the high water mark of any navigable body of water or any part thereof, and his decision shall be final and conclusive. 1940, c. 28, 2. 3(2).

Saving as to certain cases

3. Section 2 shall not affect the rights, if any, of a grantee from the Crown or of any person claiming under him, where such rights have heretofore been determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or any person claiming under him who establishes to the satisfaction of the Lieutenant-Governor that he or any person under whom he claims has previous to the 24th day of March, 1911, developed a water power or powers under the bona fide belief that he had the legal right to do so, provided that he may be required by the Lieutenant-Governor in Council to develop the said power or powers to the fullest possible extent and provided that the price charged for power derived from such water power or powers may from time to time be fixed by the Lieutenant-Governor in Council, and the Lieutenant-Governor in Council may direct that letters patent granting such right be issued to such grantee or person claiming under him, under and subject to such conditions and provisions as may be deemed proper for insuring the full development of such water power or powers, and the regulation of the price to be charged for power derived from them. R.S.O. 1937, c. 44,s.2.

Act not to apply to a certain locality

4. This Act shall not apply to the bed of the river where it runs through Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury. R.S.O. 1937, c. 44, s. 3.

Lieutenant-Governor may deal with special cases

5. Notwithstanding anything herein contained the case of any person setting up on special grounds a claim to receive from the Crown a grant or lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant-Governor in Council as he may deem fair and just. R.S.O 1937, c. 44, s. 4.

S.O. 1951, c. 5

(The Bed of Navigable Waters Amendment Act, 1951)

Section 1 repealed the definitions and boundary determination section 1 of R.S.O. 1950, c. 34, enacted first by S.O. 1940, c. 28, s. 3; and extended the effect of the Act by repeal and re-enactment of section 2 to include the beds of navigable waters flowing through lands previously granted by the Crown and removed the presumption of the original statute.

An Act to Amend The Bed of Navigable Waters Act

Assented to April 5th, 1951.

Session Prorogued April 5th, 1951.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Rev. Stat., c. 34, s. 1, repealed

1. Section 1 of The Bed of Navigable Waters Act is repealed.

Rev. Stat., c. 34, s. 2, re-enacted

2. Section 2 of The Bed of Navigable Waters Act is repealed and therefor:

Grant to be deemed to exclude the bed

2. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate or through which a navigable body of water or stream flows, has been heretofore or is hereafter 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.

Short title

3. This Act may be cited as *The Bed of Navigable Waters Amendment Act, 1951.*

R.S.O. 1960, c 32

The Bed of Navigable Waters Act

The Act as here follows continued unchanged through

R.S.O. 1970, c. 41, R.S.O. 1980, c. 40, and R.S.O. 1990, c. B.4

Grant to be deemed to exclude the bed

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been heretofore or is hereafter 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. 1951, c. 5, s. 2.

Saving as to certain cases

2. Section 1 does not affect the rights, if any, of a grantee from the Crown or of a person claiming under him, where such rights were, previous to the 24th day of March, 1911, determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or a person claiming under him who establishes to the satisfaction of the Lieutenant Governor that he or any person under whom he claims has previous to the 24th day of March, 1911, developed a water power or powers under the *bona fide* belief that he had the legal right to do so, provide that he may be required by the Lieutenant Governor in Council to develop such power or powers to the fullest possible extent and provided that the price charged for power derived from such water power or powers may from time to time be fixed by Lieutenant Governor in Council, and the Lieutenant Governor in Council may direct that letters patent granting such rights to be issued to such grantee or person claiming under him under and subject to such conditions and provisions as are deemed proper for insuring the full development of such water power or powers and the regulation of the price to be charge for power derived from them. R.S.O. 1950, c. 34, s. 3, amended.

Act not to apply to a certain locality

3. This Act does not apply to the bed of the river in Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury. R.S.O. 1950, c. 34, s. 4.

Lieutenant Governor may deal with special cases

4. Notwithstanding any other provision of this Act, the case of any person setting up on special grounds a claim to receive from the a grant or lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant Governor in Council as he deems fair and just. R.S.O. 1950, c. 34, s. 5.

Current legislation

(R.S.O. 1990, c. B.4)

Bed of Navigable Waters Act

Grant to be deemed to exclude the bed

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through 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. R.S.O. 1980, c. 40, s. 1. Saving as to certain cases
2. Section 1 does not affect the rights, if any, of a grantee from the Crown or of a person claiming under the grantee, where such rights were, before the 24th day of March, 1911, determined by a court of competent jurisdiction in accordance with the rules of the English Common Law, or of a grantee from the Crown, or a person claiming under the grantee who establishes to the satisfaction of the Lieutenant Governor that he, she or it or any person under whom the person claims has, before the 24th day of March, 1911, developed a water power or powers under the reasonable belief that he, she or it had the legal right to do so, provided that the person may be required by the Lieutenant Governor in Council to develop such power or powers to the fullest possible extent and provided that the price charged for power derived from such water power or powers may from time to time be fixed by the Lieutenant Governor in Council, and the Lieutenant Governor in Council may direct that letters patent granting such rights be issued to the grantee or person claiming under the grantee under and subject to such conditions and provisions as are considered proper for insuring the full development of such water power or powers and the regulation of the price to be charged for power derived from them. R.S.O. 1980, c. 40, s. 2, revised.

Act not to apply to a certain locality

3. This Act does not apply to the bed of the river in Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury. R.S.O. 1980, c. 40, s. 3.

Lieutenant Governor in Council may deal with special cases

4. Despite any other provision of this Act, the case of any person setting up on special grounds a claim to receive from the Crown a grant of lease of any part of the bed of a navigable body of water or stream shall be dealt with by the Lieutenant Governor in Council as the Lieutenant Governor in Council considers fair and just. R.S.O. 1980, c. 40, s. 4.

»» Appendix E

New Zealand

The Water-power Act 1903

Analysis

Title

1. Short Title.
2. Use of waterfalls, &c., for electrical purposes to vest in the Crown. Acquisition of waterfalls for electrical purposes.
3. Delegation of power to local authority.
4. Power to grant rights for certain purposes.
5. Use of water for mining purposes.
6. Rights under any existing Act reserved.

1903, No. 26.

An Act to provide for the Vesting in the Crown of Waters for Electrical Purposes and for the Utilising of such Waters for those Purposes.

[23rd November, 1903.]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:–

1. The Short Title of this Act is “The Water-power Act, 1903”; and it shall form part of and be read together with “The Public Works Act, 1894.”
2. (1) Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty.

(2) The Governor may from time to time acquire as for a public work any existing rights or any lands necessary for utilising water for generation or storage of electrical power.

3. The Governor may from time to time, by Order in Council gazetted, delegate to any local authority, on such conditions as he thinks fit, the right to use water from any lake, fall, river, or stream for the purpose of generating electricity for lighting or motive power.
4. Notwithstanding anything in this Act, the Minister for Public Works, outside a mining district, may, subject to such conditions as he thinks fit, grant to any person or company the right to use water from any fall, river, or stream for the purpose of:-
 - (a.) Generating electricity for lighting, to be used only for the purpose of and in connection with the business of such person or company, and not for the purpose of sale to or use by any other person, company, or corporation; and
 - (b.) Driving any machinery used for any agricultural, industrial, or manufacturing purpose other than the generation or storage of electricity.
5. Nothing herein shall affect the right to the use of water for the irrigation of agricultural or pastoral lands, for the supply of water stock, or under "The Mining Act, 1898," except the granting of water-rights for the generation of electric power for any other purpose save the applicant's own use:

Provide that no application to a Warden for the use of more than forty heads of water shall be granted except with the consent in writing of the Minister of Mines.
6. Nothing in this Act contained shall be deemed to invalidate or restrict any rights or privileges conferred by any existing Act of the General Assembly.

»» Appendix F

Section 20 of the Foreshore and Seabed Act 2004

- 20** Additions to public foreshore and sea bed resulting from activities –
- (1) This section applies if, -
 - (a) under an authority granted by or under an enactment, activities are undertaken on, under, or over the public foreshore and seabed; and
 - (b) as a result of those activities, an area of the public foreshore and seabed that is immediately adjacent to the area in which those activities are carried on becomes raised in height (whether gradually or imperceptibly or otherwise) so as to be above instead of below the line of mean high water springs.
 - (2) Despite an enactment or rule of law to the contrary, if the raising of the area described in subsection (1)(b) was not authorised by the authority referred to in subsection (1)(a), the raised area –
 - (a) continues to be vested in the Crown as part of the public foreshore and seabed; and
 - (b) remains subject to this Act.
 - (3) Sections 355, 355AA, and 355AB of the Resource Management Act 1991 apply with any necessary modifications to any area of the kind described in subsection (1)(b), and the Minister of Conservation may, under and in accordance with those sections, vest a right, title, or interest in an area of that kind.
 - (4) In this section, “activities” include the reclamation of any land from the public foreshore and seabed.