Indian Water Rights[1]

"Indian water rights" are defined to be water rights derived from treaty, agreement or executive act upon the establishment of a reserve and exist *in addition to* riparian rights.[2]

What water rights might an Indian band possess?

Water rights on reserve may be derived from two sources: from treaty, agreement or executive act *and* from the common law of riparian rights. Riparian rights are possessed by whoever lawfully occupies riparian land. An Indian band, within its own reserve(s), has at minimum, the same water rights as any person who holds possession of land adjacent to water. The *Indian Act* provides for possession of reserve land in the band and band members. Moreover, the *Act* declares "reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart."[3] In those cases where reserve land is adjacent to water, the recognition of this beneficial interest confirms the Indian band as riparian landowner and holder of riparian rights.[4]

To determine the exact nature of water rights which may be held by a band, the process by which each reserve was created must be examined to determine if additional rights attach to the reserve beyond the more general riparian rights attached to a piece of land.

The Constitutional Position[5]

The primary basis for federal legislative power over water management is found in the following provisions of the *British North America Act, 1867*:

Section 91 (preamble and conclusion)	- Peace Order and Good Government
Section 91(A)	- Public property
Section 91(7)	- Defence
Section 91(10)	- Navigation and shipping
Section 91(12)	- Seacoast and inland fisheries

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[1] This paper was prepared by Kathleen N. Lickers, Legal Counsel to Six Nations and member of the Blake, Cassels & Graydon LLP legal team litigating *Six Nations v. Canada and Ontario.* This paper is intended to be a brief summary of the law and will focus on the rights to water possessed by Indian bands upon the establishment of a reserve as defined by the *Indian Act* and not "Aboriginal water rights" which are those rights to water possessed by Aboriginal people and rights to water as an aspect of Aboriginal title. See R.H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (April 1988), The Canadian Institute of Resources Law, Faculty of Law, University of Calgary and Kenneth J. Tyler, *Indian Resource and Water Rights,* [1982] 4 C.N.L.R. 1.

[2] Ibid., R.H. Bartlett, p. 19.

[3] *Indian Act*, R.S.C. 1985, c. I-5, as am., s. 18(1).

[4] The question of ownership of riparian land as it applies to Indian reserves has not yet been considered by the courts. See *R. v. Lewis,* [1996] 1 S.CR. 921 and *R. v. Nikal,* [1996] 1 S.C.R. 1013 where the Supreme Court of Canada assumed ownership but did not decide the issue.

[5] For a more detailed discussion see LaForest, Gerard V., *Water Law in Canada – the Atlantic Provinces,* Ottawa, Information Canada, 1973, pp. 6-13.

Section 91(24)	**- Indians and Indian lands**
Section 91(27)	- Criminal law
Section 91(29) and Section 92(10)	- Extra-provincial works and Undertakings and Works declared to be for the general advantage of Canada
Section 95	- Agriculture
Section 132	- Empire Treaties

The bases of provincial power over water are powers under 92(13) and (16) to legislate respecting property and civil rights in the province and matters of a local or private nature.

Common Law Water Rights Generally:

Generally, at common law three types of water rights exist:

(A) Public rights;
(B) Riparian rights; and
(C) The rights attached to the ownership of the bed of a watercourse.

Each of these will be reviewed separately.

A. Public Rights

In Canada, three classes of public water rights are recognized:

(1) The right of navigation;
(2) The right of floating logs and other property; and
(3) The right of fishing.

(1) The Right of Navigation

The public has a right to navigate on all waters that are navigable, whether the water is tidal or non-tidal. What waters are navigable? Whether a body of water is or is not navigable is a question of fact, or a question of degree to be determined by an examination of all circumstances of the case (i.e. a stream or river may be navigable for only part of its course and not its whole yet is considered navigable).[6] Tidal waters are deemed *prima facie* to be navigable.

The nature of the public right of navigation has been the subject of considerable judicial comment, but as LaForest J., stated in *Friends of the Oldman River Society v. Canada*[7], "certain principles have held fast." First, the right of navigation is not a property right, but simply a public right of way.[8] It is not an absolute right, but must be exercised

[6] *A.G. Quebec v. Fraser* (1906), 37 S.C.R. 577.
[7] *Friends of the Old Man River Society v. Canada* (1992), 88 D.L.R. (4th) 1 (SCC)
[8] *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839 at 846 (H.L.)

reasonably so as not to interfere with others enjoying the same right. Finally, the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown.[9]

It includes the right to pass, to anchor and to moor, and to remain at one place for a reasonable time for loading and unloading. Any interference with the public right of navigation must be authorized by the *Navigable Waters Protection Act.*[10] By this federal legislation, the Minister of Transport is given authority to permit the erection of what would otherwise be a common law nuisance in navigable waters and as a result, has the authority to approve the erection of works that may infringe the public right. If federal legislative authority or the approval of the Minister has not been obtained, the interference is a public nuisance, and an action against the person responsible can be brought by the Attorney General of Canada.

No private person can sue for any interference with the public right of navigation, unless that person has thereby suffered special damage, i.e. damage that the public at large did not suffer.[11]

Thus, like all other members of the public, the First Nations of Canada have a right of navigation on all waters that are navigable in fact. Therefore any interference with public navigation on navigable waters which flow through or beside their reserves, without explicit authority or approval of the Minister of Transport under the *Navigable Waters Protection Act* is actionable. This point was considered in *Friends of the Oldman River Society v. Canada* [12] where the Supreme Court of Canada considered the impacts of a dam constructed on the Oldman river in Alberta and the obligation of the Minister responsible for the *Navigable Waters Protection Act* to consider all impacts of a work on other areas of federal jurisdiction, including Indians and reserve lands.[13]

(2) Rights of Floating

In Ontario, the *Lakes and Rivers Improvement Act*[14] codifies the common law that all persons shall have the right during spring, summer and fall months, to float timber down all lakes and rivers, and no person shall obstruct the floating thereof.

(3) Public Right of Fishing[15]

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[9] *Wood v. Esson* (1884), 9 S.C.R. 239.
[10] *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22.
[11] *Small v. Grand Trunk Ry.* (1857), 15 U.C.Q.B. 158.
[12] *Friends of the Old Man River Society v. Canada* (1992), 88 D.L.R. (4th) 1 (SCC)
[13] *Friends of the Old Man River Society v. Canada* (1992), 88 D.L.R. (4th) 1 at 30.
[14] R.S.O. 1990, c.L.3. Similar legislation has been enacted in the Atlantic Provinces, see La Forest, G.V., *supra*, at pp. 191-195.
[15] The public has a right to fish in tidal waters regardless of who owns the water-bed. A private right to fish however, may exist in non-tidal waters and accrue to the owner of the water-bed. The creation of an exclusive fishery was considered by the Supreme Court of Canada in *R. v. Nikal, supra.* It is also the focus of the Treaty No. 3 "headland to headland" issue highlighted in this paper.

The public has a right to fish in all tidal waters as opposed to the private right to fish that accrues to the owner of the water-bed of non-tidal waters thereby creating an exclusive fishery. Yet, the grant of land over which water flows does not carry with it the exclusive right to fish in that water.[16]

Aboriginal people possess rights to fish that arise from Aboriginal title and treaty. There is an abundance of Canadian jurisprudence, which is beyond the scope of this paper, that prescribes the interrelationship of Aboriginal and treaty rights with federal and provincial legislation that seeks to regulate these rights.

Generally, the right to fish is subject to federal regulation within the limits imposed by section 35 of the *Constitution Act, 1982*, but federal legislation must give priority, after conservation, to the Aboriginal or treaty right to fish.[17] Provincial legislation however, cannot operate to infringe the Aboriginal or treaty right to fish, as British Columbia attempted to do in *Claxton v. Saanichton Marina Ltd*[18], a case discussed in more detail below.

The Supreme Court of Canada in *R. v. Lewis*[19] wrestled with the issue of whether the fishery adjacent to the Cheakamus Reserve in British Columbia, and in *R. v. Nikal*[20] whether the fishery adjacent to the Moricetown Reserve No. 1 in British Columbia was included within the reserve(s) boundary so as to allow a defence that the bands' by-laws authorized the fishing on waters adjacent to the reserve. These cases are set out in more detail below however, underscore the fact that common law riparian rights of public fishing exist, in certain circumstances, *in addition to* the Aboriginal and treaty rights which afford "an independent source of protection of their right to carry on their fisheries."[21]

The Supreme Court of Canada has most recently in *R. v. Marshall*[22] wrestled with the interrelationship between the treaty rights of Indians and the public "rights of other inhabitants". The court was clear to distinguish the common law rights available to all of the public and the treaty rights of the Mi'kmaq:

> "There is of course a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a special legal authority, such as a treaty, to participate in the same activity...The issue here is not so much the content of the rights or liberties as the level of protection thrown around them...The point is that the treaty rights-holder not only has the *right* or liberty "enjoyed by other British

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[16] See *R. v. Nikal, supra,* where the court stated that the right of fishery, as a proprietary right, can be severed from the ownership of the water-bed. As a result, any grants of title to land adjacent to water, navigable or otherwise, must be taken as excluding the fishery.
[17] *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, as adapted by *R. v. Badger(*1996) 133 D.L.R. (4th) 324.
[18] *Claxton v. Saanichton Marina Ltd*, [1989] 3 C.N.L.R. 46 (C.A.).
[19] *R. v. Lewis*, [1996] 3 C.N.L.R. 131 (SCC)
[20] *R. v. Nikal*, [1996] 3 C.N.L.R. 178 (SCC)
[21] *Claxton v. Saanichton Marina Ltd*, [1989] 3 C.N.L.R. 46 (C.A.).
[22] *R. v. Marshall*, [1999] 4 C.N.L.R. 161

subjects" but may enjoy special treaty *protection* against interference with its exercise."[23]

B. Riparian Rights

Riparian rights are those water rights that accrue at common law to a landowner because his land is adjacent to water. The word derives from the Latin *ripa* which means "bank", and the rights are those of persons possessing property along the bank of a watercourse. Riparian rights may be classified under six headings:

(1) The right of access to the water;
(2) The right of drainage;
(3) Rights relating to the flow of water;
(4) Rights relating to the quality of water;
(5) Rights relating to the use of water; and
(6) The right of accretion.

(1) Right of Access:

The right of access to water is the most basic riparian right, entitling a landowner to the right of access from every point on the bank of the watercourse to the water. A riparian owner whose right of access has been interfered with, can maintain an action in damages or obtain an injunction against anyone who interferes with this right. These remedies are available without proof of damage.[24] Neither federal nor provincial legislation has had the effect of depriving riparian owners of this right.

Since First Nations are in lawful occupation of reserve lands, they have a complete right of access to the waters that border on their reserves or pass through them and may maintain an action against anyone interfering with this right.

(2) Right of Drainage:

The riparian owner has the right to all the advantages of drainage or irrigation reasonably used, which the river or stream may give him.[25]

(3) Rights relating to Flow of Water:

Common law rights relating to flow of water have been placed in four categories:

1. The right to have the water flow in its natural course.
2. The right to prevent the permanent extraction of water from the stream.

[23] *R. v. Marshall*, [1999] 4 C.N.L.R. 161 at 187-188.
[24] *Baldwin v. Chaplin* (1915), 34 O.L.R. 1 (C.A.)
[25] *McGillivray v. Lochiel* (1904), 8 O.L.R. 446.

3. The right to prevent the alteration of the flow of water to property downstream.
4. The right to have the water leave one's land in its accustomed manner.

An interference with these rights would give the injured landowner the right to damages. Even if he suffers no actual loss, he will be entitled to at least nominal damages. The court can also, in its discretion, order the removal of the interference.

In the western provinces, all of the above rights relating to the flow of water have been greatly altered by statute[26].

(4) Rights relating to Quality of Water:

It is a further riparian right to have water pass by his land in its natural state, unchanged in character or quality. Any pollution of the water is an interference with that right, and a downstream proprietor can maintain an action against anyone upstream who is responsible for the pollution. An owner of a fishery has a right of action against anyone who pollutes the stream.[27]

Pollution

No riparian owner has any right to pollute waters, to any degree. Various statutes have been enacted which affect the pollution of water, including the *Environmental Protection Act*,[28] *Ontario Water Resources Act*,[29] and the *Canada Shipping Act*.[30]

Consequently, First Nations possessing reserves along a waterway would at minimum, have the same rights to take action against the polluters of their waters as would any other

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[26] In 1894, the federal government enacted the *North-west Irrigation Act* (S.C. 1894, c.30) designed to abolish the common law concept of riparian rights and introduce government regulation. The *Irrigation Act* deemed all rights of water use to be vested in the Crown and any person holding water rights "for domestic, irrigation or other purposes" was required to obtain a licence; failure to do so meant the water rights were forfeited to Her Majesty.

No Canadian court however, has considered the question of whether or not Indian treaty and riparian rights to water were abrogated and treaty promises breached by application of the *Irrigation Act*. In other words, did the *Irrigation Act* demonstrate the necessary "clear and plain intention" required to extinguish Aboriginal, treaty and riparian rights?

The provisions of the *Irrigation Act* remained substantially unchanged until they ceased to apply upon the enactment of the *Natural Resources Transfer Agreements* in 1930. The *Agreements* transferred the interest of the Crown in land and resources to the administration of the Prairie Provinces (i.e. Alberta, Saskatchewan, Manitoba). The *Agreements* declared that "the interest of the Crown in the waters...under the *North West Irrigation Act, 1898*...shall...belong to the province, subject to any trusts existing in respect thereof and to any interest other than that of the Crown."

[27] *McKie v. The K.V.P. Co. Ltd.* [1949] 4 D.L.R. 497 (SCC)

[28] R.S.O. 1990, c.E.18.

[29] R.S.O. 1990, c.O.40.

[30] R.S.C. 1985, c.S.9.

citizen. Depending upon all of the circumstances, First Nations may also have additional causes of action for breach of treaty and/or fiduciary obligations.

(5) Right to Use Water:

Each landowner has a right to the advantage of the water flowing in its natural course over his land, to use it as he pleases for any purpose of his own, not inconsistent with a similar right in the landowner above or below.[31]

At common law, water can be used for ordinary and extraordinary purposes. Ordinary uses encompass such domestic uses as drinking water, watering livestock, bathing, and other domestic purposes At common law there is no restriction upon the riparian owner using the water for such purposes on his own land.

The riparian owner may also make use of water for extraordinary purposes such as irrigation however, extraordinary uses must be incident to the enjoyment of the property.

For First Nations, the riparian right to use water for ordinary or extraordinary purposes as incident to the enjoyment of the land, may exist in addition to the right to use water to sustain their aboriginal and treaty rights. Arguably, where the Crown has undertaken to protect reserve land on behalf of a First Nation by statue, agreement, unilateral undertaking or through a particular course of conduct, where the use of water rights have been interfered with so as to infringe the aboriginal and treaty rights exercised over reserve land, the Crown may be held liable for its breach of obligation to protect the First Nation's use.[32]

(6) Right of Accretion:

The owner of land bounded by water is entitled to any extension of land on the side of the water arising by accretion, unless the owner is the Crown, in which case the Crown owns the shore and any accretion belongs to the Crown.[33]

The Supreme Court of Canada has defined accretion as follows:

> The term 'accretion' denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substances, or the permanent retrial of the waters. [34]

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[31] *Acton v. Blundell* (1843), 152 E.R. 1223.

[32] For a discussion of the nature and scope of the Crown's duty to protect the treaty rights of the Athabasca Chipewyan First Nation and its exclusive use, occupation and enjoyment of IR 201 in northern Alberta, please see The Indian Claims Commission, *Athabasca Chipewyan First Nation Inquiry, W.A.C. Bennett Dam and Damage to Indian Reserve 201 Claim*, (1998) 10 ICCP 117.

[33] *A.G. v. Perry* (1865), 15 U.C.C.P. 329 (C.A.).

[34] *Clarke v. City of Edmonton and Attorney General of Canada* [1930] S.C.R. 137.

To give rise to accretion, the change must take place gradually and not result from a sudden change (i.e. erosion).

Remedies for Breach of Riparian Rights[35]
Private remedies:

What happens in the event that a riparians' rights to unaltered flow, quality and use are interfered with? Such owner is entitled to maintain an action for damages or seek an injunction. In the case of pollution for example, the riparian owner has an immediate action in nuisance and may seek damages or an injunction. Since the nuisance complained of interferes with a private right (i.e. rights relating to quality of water), it is a private nuisance for which the person may bring an action.

It is not necessary for a riparian landowner to wait for actual injury to be done. An injunction will be granted where an act is threatened, which, if done, will give a ground of action.[36]

Alternatively, damages can be awarded for loss of natural beauty or loss of amenities, even when there is no actual pecuniary loss.[37]

Public Remedies:

Where a nuisance amounts to an interference with a public right, such as fishing or navigation, the Attorney General may proceed either by way of indictment or by action.[38]

As previously explained, under the *Navigable Waters Protection Act*, the Minister of Transport may order any work that interferes with the public right of navigation and which has not been previously approved to be removed.[39]

C. Ownership of Land Under Water

At common law, the principle of *ad medium filum aquae* creates a rebuttable presumption that a riparian rights holder owns the bed of *non-tidal* waters to the centre line, where the landowner owns land on one side of a body of water or the entire bed where the landowner owns land on both sides of a body of water.

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[35] First Nations may have additional remedies, not available to the general public, as a result of the terms of a specific treaty and/or agreement giving rise to additional protection of a band's water rights. This paper will explore at least four cases where First Nations have sought to assert a breach of their water rights viz. treaty and/or agreement.

[36] *Young & Co. v. Bankier Distillery Co.*, [1893] A.C. 691 at 698 (H.L.).

[37] *Lockwood v. Brentwood Park Investments Ltd.*, (1967) 64 D.L.R. (2d) 212, varied (1970), 1 N.S.R. (2d) 669 (C.A.).

[38] Depending upon the legislative competence of the matter, the action may be commenced by either the provincial Attorney General or the Dominion.

[39] *Navigable Waters Protection Act*, R.S.C. 1985, c.N-22, s.6.

There is no such presumption with respect to *tidal* waters. A grant of land adjoining tidal waters *prima facie* extends only to the high water mark. Title to the water-bed of tidal waters remains in the Crown.[40]

In the case of *navigable* waters however, the presumption does not apply uniformly across Canada. In Atlantic Canada and Ontario, the courts recognized the presumption of ownership to the water-bed of navigable *and* non-navigable water bodies.[41] In Quebec and the Prairies, the presumption has *not* been applied to navigable waters.

The presumption may be rebutted either by the terms of the instrument or by the circumstances surrounding the conveyance.[42]

In 1908 the Ontario Court of Appeal in *Keewatin Power* held the presumption of ownership to the water-bed to be applicable to *navigable* waters. In 1911 however, the Ontario legislature enacted the *Beds of Navigable Waters Act*[43] to vary the common law. The Act declared the presumption of ownership that arose at common law to no longer apply and ownership of the water-bed was reserved to the province. More specifically, where land bordering a navigable water body had been or is granted by the Crown, it is *deemed*, in the absence of an express grant of it, that the bed of such a navigable body has not passed to the grantee.[44] Questions as to the application of this Act to reserve land however, have arisen and will be discussed in the Treaty 3 "headland" issue below.

In the case of land adjacent to *non-navigable* water, the *ad medium filum aquae* rule will apply throughout Canada, without exception. It does not matter that the grant or title declares the boundary to be the land or the edge of the water, or that the legal description refers to a map or plan on which the boundary is drawn so as not to include any of the water.

What then is the Scope of Indian Water Rights?

The scope of Indian water rights is dependent upon the intention in the particular treaty, agreement, or executive act setting aside the reserve. Consequently, the range of issues that may arise are as varied as the instruments establishing reserves however, this paper will highlight four cases where the First Nations have sought to assert water rights.

Rights to Use Water to Maintain a Traditional Fishery

The right to the use of water to maintain a traditional fishery was upheld in *Saanichton Marina Ltd* v. *Claxton*[45]. In 1983, British Columbia issued a licence to Saanichton

[40] "Constitutional Law", 8 Hals. (4th) para. 1418, 1427-28.
[41] *Keewatin Power Co v. Town of Kenora* (1908), 16 O.L.R. 184 (C.A.) reversing (1906), 13 O.L.R. 237 (H.C.).
[42] *Fares v. R.* [1932] S.C.R. 78.
[43] S.O. 1911, c.6.
[44] S.O. 1911, c.6, s.1.
[45] *Claxton v. Saanichton Marina Ltd.*, [1989] 3 C.N.L.R. 46 at p. 56.

Marina Ltd. for the purpose of constructing and operating a marina in Saanichton Bay. The Tsawat Band brought an action to stop the project on the ground that it would be harmful to its treaty right to fish guaranteed by the Saanich Treaty of 1852. The treaty reserved the whole of the Bay as part of their traditional fishing grounds.

The Crown asserted that it was the owner of the sea bed of Saanichton Bay and that all the Indians received by the terms of the treaty was a right held in common with other members of the public to fish in Saanichton Bay.

The Band, not asserting a claim of ownership to the sea bed, claimed only the right to continue their fishing activities in the Bay as provided in the treaty.

After considering the principles of treaty interpretation developed by the Supreme Court of Canada[46] and the case law examining the nature of treaty rights, the British Columbia Court of Appeal confirmed the Band's right to a traditional fishery:

> "While the right does not amount to a proprietary interest in the sea bed nor a contractual right to a fishing ground, it does protect the Indians against infringement of their right to carry on the fishery, as they have done for centuries, in the shelter of Saanichton Bay."[47]

Rights to include watercourse within a reserve boundary

The right to include a watercourse within a reserve boundary was considered in the twin Supreme Court of Canada cases, *R. v. Lewis* [48]and *R. v. Nikal*[49], each considered the application of the *ad medium filum aquae* presumption.

In *R. v. Lewis*[50], three members of the Squamish Band residing on the Cheakamus Reserve in British Columbia were "net fishing" in the Squamish River, located adjacent to the reserve. They were charged with contravening the British Columbia Fishery Regulations made pursuant to the province's *Fisheries Act*. The three accused argued their actions were authorized by the Squamish Band By-law No. 10 which authorized band members to fish on "Squamish Indian Band waters", which the by-law defined as water which is "situate upon or within the boundaries of reserves." The three men were convicted at trial and acquitted on appeal. The Crown appealed to the Supreme Court of Canada.

In disposing of the appeal, one of the issues considered by the court was whether the bed or any part thereof of the Squamish River is "on the reserve" by operation of the common law presumption *ad medium filum aquae*. Iacobucci J., for the court stated at the outset:

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[46] *Nowegijick v. R.*, [1983] 1 S.C.R. 29; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Taylor v. The Queen* (1981), 34 O.R. (2d) 360 (C.A.).
[47] *Claxton v. Saanichton Marina Ltd.*, [1989] 3 C.N.L.R. 46 (B.C.C.A.), aff'g [1987] 4 C.N.L.R. 48 (B.C.S.C.)
[48] *R. v. Lewis* [1996] 3 C.N.L.R. 131 (S.C.C.).
[49] *R. v. Nikal*, [1996] 3 C.N.L.R. 178 (S.C.C.).
[50] *R. v. Lewis, supra.*

> "since the ad medium filum aquae presumption relates to ownership of riparian land, the question remains as to whether it applies to Indian reserves."[51]

For the purposes of this appeal the court *assumed* without deciding that the presumption applied to reserves but that in British Columbia at least, the presumption does not apply to navigable waters.[52] Agreeing with the trial judge's finding that the Squamish River is navigable, the court found that the presumption does not arise and therefore the boundaries of the reserve are not to the middle thread of the river. In the result, the court maintained the convictions and concluded that the by-law cannot constitute a complete defence to the charges as it does not have any force and effect beyond the boundaries of the reserve.

In *R. v. Nikal*[53], a member of the Moricetown Band in British Columbia was charged with fishing without a licence in the waters of the Bulkley River, a watercourse running within reserve land. Arguing he had an Aboriginal right to fish, the accused also argued that the Bulkley River is part of the reserve and he was authorized by the Band by-law to fish in the river. The accused was acquitted at trial, convicted on appeal and appealed to the Supreme Court of Canada.

Citing the same reasons for the court's finding in *Lewis,* Cory J., for the majority, refused to apply the presumption *ad medium filum aquae* to navigable rivers in British Columbia; the Bulkley River having been found navigable. The majority concluded that the reserve does not include the river however, did find that the accused had an Aboriginal right to fish and such right was unjustifiably infringed. The accused's acquittal was restored.

Indian ownership of the Water-Bed[54]

Ownership of the water-bed of a stream, river or lake accordingly bestows control over projects such as bridges or dams that would seek to utilize the location. The ownership of the water-bed is determined by the boundary of the reserve and the conveying instrument (i.e. treaty or executive act) determines this.

As many reserves in Canada were set apart adjacent to or encompassing rivers, lakes or tidal waters, Indian bands, as riparian owners, are entitled to claim ownership of the bed of waters in accordance with the presumption, recognized as applicable, in the jurisdiction in which the land is located. For that reason, all bands may assert ownership of the bed of *non-navigable* waters in Canada.[55]

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[51] *R. v. Lewis , supra,* at p.
[52] *R. v. Lewis, supra,* at p.
[53] *R. v. Nikal,* [1996] 3 C.N.L.R. 178 (S.C.C.).
[54] Of greater significance to Aboriginal people are the rights of trapping and fishing that may attach to the ownership of the water-bed.
[55] R.H. Barlett, *supra,* at p. 90.

The Headland to Headland Dispute: Treaty 3 (1873)

By the terms of Treaty 3[56], which extends through much of northern Ontario and into Manitoba, the Crown promised the signatory bands to set aside reserves "where it shall be deemed most convenient and advantageous for each band". The Treaty further promised the signatory bands "right to pursue their avocation of fishing." Thus, many (if not all) of the reserves set aside were located on rivers and lakes so as to sustain traditional fishing.

By 1889 however, following the Privy Council decision in *St. Catherines Milling and Lumber Co. v. The Queen*[57], Ontario passed the *Ontario Boundaries Act*[58] confirming most of Treaty 3 to be within the borders of the province of Ontario and resulting in the federal and provincial governments jointly determining the location of reserves.[59] Recognizing that such a joint selection process needed clarification, Canada and Ontario agreed that Ontario would acquiesce in the location of reserves set aside by the federal crown "unless some good reason presents itself for a different course".[60] This agreement was codified in mutually enacted legislation and by section 4 of each Act declared, what is referred to the "headland to headland" principle, such that all waters located within or adjacent to a reserve's boundary shall be *deemed* to form part of the reserve:

> 4. That in the case of all Indian reserves so to be confirmed or hereafter selected, the waters within the lands laid or to be laid out as Indian reserves in the said territory, including the land covered with water lying between the projecting headlands of any lake or sheets of water, not wholly surrounded by an Indian reserve or reserves, shall be deemed to form part of such reserve including islands wholly within such headlands, and shall not be subject to the public common right of fishery by others than Indians of the band to which the reserve belongs.[61]

By 1911 however, as previously stated, Ontario had enacted the *Bed of Navigable Waters Act* which created a new problem: the Act was not applicable on its terms to land set apart as Indian reserves; these lands had not been, and were not, *granted* by the provincial Crown.[62]

In 1915 then, Ontario enacted *An Act to confirm the title for the Government of Canada to certain lands and Indian Lands*[63] which expressly made the *Bed of Navigable Waters*

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[56] *Treaty No. 3*, made 1873 (Ottawa: Queen's Printer, 1966).
[57] *St. Catherines Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.).
[58] *Canada (Ontario Boundary) Act*, 1889, 52-53, Vict., c.28 [U.K.].
[59] *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C.) at 82-83.
[60] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.O. 1891, c. 3, and *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.C. 1891, c.5.
[61] *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.O. 1891, c. 3, and *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.C. 1891, c.5. s. 4.
[62] R.H. Bartlett, *supra*,

Act applicable to reserves and clearly indicated its intention not to transfer the lands under water to the Indians.

The Crown's denial of the Treaty No. 3 Indians' assertion of ownership to adjacent water-beds and the recognition of the right to an exclusive fishery, included as an aspect of ownership, has resulted in litigation for breach of treaty and for breach of fiduciary duty.[64]

Six Nations Claim to the Bed of the Grand River

In 1992, the Six Nations of the Grand River Band asserted ownership to the bed of the Grand River and the Islands thereon. Referring to the express terms of the Haldimand Proclamation of 1784 which granted the Six Nations land *on both* sides of the Grand River, from its mouth to its source, the Band argued that the presumption *ad medium filum aquae* applied and resulted in their ownership of the water-bed.[65]

As R.H. Bartlett and LaForest point out, the owner of the water-bed has, in general, the same rights of property and is entitled to use it in the same manner as any other landowner, subject only to the public rights of riparian owners, navigation and floating previously recognized.[66]

By virtue of Six Nations' ownership thereof and s. 81(f) of the *Indian Act*, the Band is empowered to make by-laws respecting "the construction and maintenance of water courses." In the event that a permanent water-control project was built upon an Indian owned water-bed, it would become the property of the owner of the bed.[67]

Moreover, as R.H. Bartlett explains, the owner of the water-bed has the exclusive right to hunt, trap and fish over his land, subject to applicable game and fishing laws. Thus, the rights of Indian Bands to "regulate the fishery are of enormous contemporary significance. They are at the root of the current dispute between the federal Crown and the Indian bands" on either coast.[68]

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[64] R.H. Bartlett, *supra*, briefly outlines the matters in dispute and provides additional sources for greater detail.
[65] In the alternative, Six Nations has asserted a claim to the acreage equivalent to the bed of the Grand River.
[66] LaForest, G.V., *supra*, at 234 and R.H. Bartlett, *supra*.
[67] For a discussion of the Echo and Crooked Lake water control structures in the Qu'Appelle Valley in Saskatchewan, see the *Indian Claims Commission Report on Qu'Appelle Valley Indian Development Authority Inquiry Flooding Claim*, (1998) 9 ICCP 159.
[68] R.H. Bartlett, *supra*, p. 111-12.

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