

**CASE STUDY**

# The Decline of the Mermaid Creek Salt Marsh and the Promise of the BC Coastal Marine Strategy

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**DATE**

July 10 2025



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**WEST COAST**  
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# 1. Introduction

**This case study examines the plight of the Mermaid Creek Salt Marsh, in Sidney, BC, to highlight issues with British Columbia's management of coastal habitat and to recommend solutions.**

Coastal habitats, such as spawning beaches and salt marshes, play important roles in coastal British Columbia. They provide spawning areas for fish such as sand lance and surf smelt that are critical to the marine food web<sup>1</sup> and provide habitat and food sources for migratory birds and numerous other species.<sup>2</sup> These areas also provide many benefits for coastal human communities:

- sequestering carbon emissions;
- protecting communities from flooding and buffering the impacts of storms;
- helping to maintain local food security; and
- acting as natural filtration systems for the runoff from agriculture and pollution from other inland operations.<sup>3</sup>

However, coastal habitats, and salt marshes in particular, have been disappearing at alarming rates in British Columbia. It has been estimated that 70-83% of salt marshes in British Columbia have been either lost or degraded.<sup>4</sup>

Salt marshes are typically found in the foreshore, the area between the high and low tides.<sup>5</sup> Subject to the rights and title of Indigenous nations, in coastal British Columbia, the Province generally holds the Crown title to foreshore areas and has important responsibilities in issuing and managing tenures in these areas.

The Mermaid Creek Salt Marsh in Roberts Bay is one BC marsh that has been receding at a rapid rate. Studies have identified several factors responsible for this recession, including anti-erosion hard armoring structures erected on the shoreline of the Bay, as well as climate change (e.g., increased frequency of larger storm events). In recent years, Peninsula Streams and Shorelines (PSS) and SeaChange Marine Conservation Society (SeaChange) collaborated with the Tseycum

1 Guidance Document: *Forage Fish Beach Spawning Surveys in British Columbia*, prepared by WWF-Canada and Archipelago Marine Research Ltd., 2020, available online at: <https://wwwf.ca/wp-content/uploads/2020/07/Guidance-Document-Forage-Fish-Beach-Spawning-Surveys-in-British-Columbia-1.pdf>

2 Marianne Fish, "Why Salt Marshes and Seagrass Meadows Matter," July 25, 2024, available online at: <https://wwwf.ca/stories/why-salt-marshes-and-seagrass-meadows-matter/>

3 Statistics Canada, "Salt Marshes: A Crucial Ecosystem Component," June 8, 2023, available online at: <https://www.statcan.gc.ca/o1/en/plus/3793-salt-marshes-crucial-ecosystem-component> ["Salt Marshes: A Crucial Ecosystem Component"]; Marianne Fish, "Why Salt Marshes and Seagrass Meadows Matter," July 25, 2024, available online at: <https://wwwf.ca/stories/why-salt-marshes-and-seagrass-meadows-matter/>

4 Maryann Watson, *British Columbia Coastal Habitat Review: Protecting Sensitive Coastal Ecosystems*, prepared for the West Coast Environmental Law Research Foundation, 2020, at p. 12, available online at: [https://wcel.org/sites/default/files/publications/bc-coastal-habitat-review\\_final\\_2020.pdf](https://wcel.org/sites/default/files/publications/bc-coastal-habitat-review_final_2020.pdf)

5 See note 3, "Salt Marshes: A Crucial Ecosystem Component."

Stewardship Society to develop a project to help restore the marsh. The project garnered support and funding from the federal government, national environmental organizations, and the Town of Sidney (where Roberts Bay is located). They began by installing fencing on the bank of the upper marsh in the first phase of the project.

However, the second phase of the project, focused on the lower marsh, was cancelled as a result of difficulties in obtaining a provincial licence of occupation. Without restoration efforts like these, Mermaid Creek continues its recession.

The Mermaid Creek example illustrates how BC's current framework of laws, rights and policies does not adequately protect and preserve coastal ecosystems. Not only does its legal framework permit shoreline development that harms coastal ecosystems, but it also is hindering restorative work that could repair the harm incurred.

As part of its recently developed BC Coastal Marine Strategy, the British Columbia government has set goals to support healthy and biodiverse coastal ecosystems and has committed to taking action to protect and restore nearshore ecosystems such as salt marshes and wetlands, as well as to incorporate nature-based solutions, like restoring wetlands. The Province also commits to streamlining "authorization processes for activities that promote ecosystem health (such as First Nations sea gardens and ecological restoration)."<sup>6</sup> In order to achieve this, British Columbia should make changes to its coastal legal framework to encourage projects like the Mermaid Creek restoration.

In this report, we use the Mermaid Creek Salt Marsh as a case study to reveal problems with provincial coastal management and to suggest solutions. We will begin by discussing the Mermaid Creek Salt Marsh restoration project and the issues it encountered with riparian rights. We will then make recommendations for legal reform the Province can carry out under its Coastal Marine Strategy to create a system that better balances riparian rights with habitat conservation and supports projects like the Mermaid Creek Salt Marsh Restoration project.

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<sup>6</sup> BC Coastal Marine Strategy, Minister of Land, Water and Resource Stewardship, 2024, at p. 25, available online at: [https://www2.gov.bc.ca/assets/gov/environment/air-land-water/water/coastal-marine-strategy/coastal\\_marine\\_strategy.pdf](https://www2.gov.bc.ca/assets/gov/environment/air-land-water/water/coastal-marine-strategy/coastal_marine_strategy.pdf) ["Coastal Marine Strategy"].



## 2. Mermaid Creek Salt Marsh

Mermaid Creek Salt Marsh sits off the Saanich Peninsula, in the traditional territories of the WSÁNEĆ people. The marsh provides crucial ecosystem services, such as carbon sequestration and water filtration, and hosts a large number of birds, fish and other wildlife. The marsh is located within the Shoal Harbour Migratory Bird Sanctuary and the Sidney Channel Important Bird Area and contains *Sarcocornia pacifica* (or American glasswort), a species red-listed as an imperilled species according to the BC Conservation Data Centre.<sup>7</sup> The Town of Sidney has also designated Roberts Bay, including the Mermaid Creek Salt Marsh, as an Environmentally Sensitive Area in its Official Community Plan.<sup>8</sup> However, the Marsh has experienced a decline of over 70% in the last sixty years.<sup>9</sup>

To better understand what was happening to the Marsh, local conservation organizations, including PSS and SeaChange commissioned two studies of the causes of the decline and how it might be reversed.<sup>10</sup> The studies found that key factors in the decline of the marsh were human-caused,

7 Jessica Wilson, "Coastal Engineering Analysis and Marsh Restoration Preliminary Design, Roberts Bay," DHI Water and Environment Inc, November 2022, p. 1, available online at: <https://peninsulastreams.ca/wp-content/uploads/2023/03/42803806-RobertsBayReport-FINAL-20221129.pdf>; BC Conservation Data Centre: Ecological Community Summary - *Sarcocornia pacifica* - *Lysimachia maritima*, available online at: <https://a100.gov.bc.ca/pub/eswp/speciesSummary.do;jsessionid=6E6B0DF7FAF2002DD37220080520B87E?id=21114>

8 Bailey Seymour, "Peninsula Streams cancels marsh restoration project," Peninsula News Review, March 13, 2024, available online at: <https://www.peninsulanewsreview.com/local-news/peninsula-streams-cancels-marsh-restoration-project-7329404>; Sidney Coles, "The Mermaid Creek Salt Marsh: Is Mother Nature in charge, or are we?" Capital Daily, October 8, 2024, available online at: <https://www.capitaldaily.ca/news/the-mermaid-creek-salt-marsh-is-mother-nature-in-charge-or-are-we>

9 Sarah Cook and Laurie McCormick, "Analysis of Current and Historic Conditions in Roberts Bay, BC," Coastal and Ocean Resources, November 2021, at p. 50, available online at: [https://peninsulastreams.ca/wp-content/uploads/2023/03/RobertsBay\\_SummaryReport\\_Nov2021\\_Final.pdf](https://peninsulastreams.ca/wp-content/uploads/2023/03/RobertsBay_SummaryReport_Nov2021_Final.pdf)

10 Sarah Cook and Laurie McCormick, "Analysis of Current and Historic Conditions in Roberts Bay, BC," Coastal and Ocean Resources, November 2021, available online at: [https://peninsulastreams.ca/wp-content/uploads/2023/03/RobertsBay\\_SummaryReport\\_Nov2021\\_Final.pdf](https://peninsulastreams.ca/wp-content/uploads/2023/03/RobertsBay_SummaryReport_Nov2021_Final.pdf); Jessica Wilson, "Coastal Engineering Analysis and Marsh Restoration Preliminary Design, Roberts Bay," DHI Water and Environment Inc, November 2022, available online at: <https://peninsulastreams.ca/wp-content/uploads/2023/03/42803806-RobertsBayReport-FINAL-20221129.pdf>

such as hard armoring of shoreline properties, the burial of Mermaid Creek, and effects of climate change – all of which disrupted sedimentation in the area.

Hard armoring structures, such as seawalls, are generally installed to prevent erosion of shoreline properties. However, the effect of the structures is often to increase the erosion of finer sediments off the beaches and erosion of marsh platforms seaward from these structures,<sup>11</sup> and to prevent these beaches and wetlands from migrating landward from sea level rise.<sup>12</sup> Hard armoring structures are an issue throughout coastal British Columbia, leading to the loss of many beaches and wetlands.<sup>13</sup>

In Roberts Bay, the above-mentioned studies found that the shoreline has been extensively modified by seawalls, as well as other structures that extend into the intertidal zone, altering the natural movement of sediments on the beach. Compounding this is the fact that the Town of Sidney buried and incorporated Mermaid Creek into its stormwater system, resulting in the usual delivery of sediment from the Creek being disrupted. Finally, climate change is bringing larger waves and storms to the area, causing damage to the Marsh.

#### **a. MERMAID CREEK SALT MARSH RESTORATION PROJECT**

One of the two studies commissioned by the local conservation organizations, found that the pace of loss of the Mermaid Creek Salt Marsh was increasing, with approximately 30% lost on an annual basis, and that without intervention, the Marsh would be completely lost in a few years. PSS and SeaChange collaborated with the Tseycum First Nation's Marine Stewardship organization to secure funding for a restoration project that had been conceived of by the authors of one of the studies they had commissioned. The organizations secured funding from several sources, including the Town of Sidney, Environment and Climate Change Canada, as well as several non-governmental organizations.<sup>14</sup>

In the first phase of the project, native vegetation was planted along the shoreline and ecocultural fencing was installed on the bank of Mermaid Creek to stabilize the banks of the Mermaid Creek Estuary. A second phase of the project was planned for the lower marsh (with funding secured) that would involve:

1. Creating approximately 1-metre high rock crescent clustered headlands approximately 20 metres seaward of the existing marsh edge to attenuate wave energy from intensifying storm surges and to protect the marsh from recessional forces;

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11 Surfrider, "Seawalls Are Stealing Our Sandy Beaches," August 9, 2021, available online at: <https://www.surfrider.org/news/seawalls-are-stealing-our-sandy-beaches>

12 "Coastal Armoring," Explore Beaches, University of California, Santa Barbara, available online at: <https://explorebeaches.msi.ucsb.edu/beach-health/coastal-armoring>

13 Hope Lombe, "BC coastal strategy not enough to curtail waterfront development," August 28, 2024, National Observer, available online at: <https://www.nationalobserver.com/2024/08/28/news/bc-coastal-strategy-fails-curtail-waterfront-development>

14 Peninsula Streams & Shorelines – Mermaid Creek Salt Marsh Restoration website, available online at: <https://peninsulastrems.ca/our-work/restoration-projects/mermaid-creek-salt-marsh-restoration/>

2. Applying nourishment of the area between the existing marsh edge and the newly formed headlands with approximately 4000 tons of sediments;
3. Planting and stabilising the restored marsh area with its native pickleweed and salt grass to expand the area of native marsh; and
4. Employing adaptive Management and monitoring of elevations, materials, and plantings.<sup>15</sup>

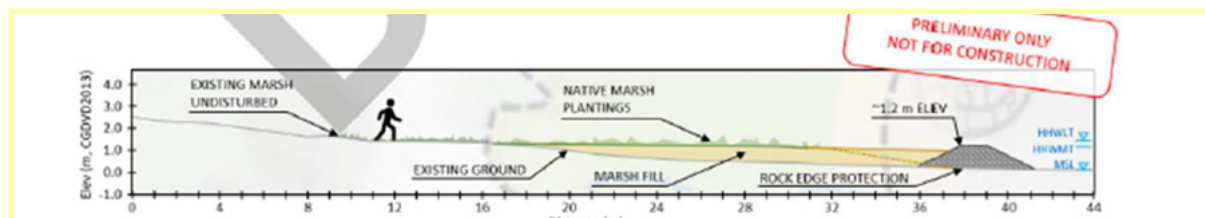
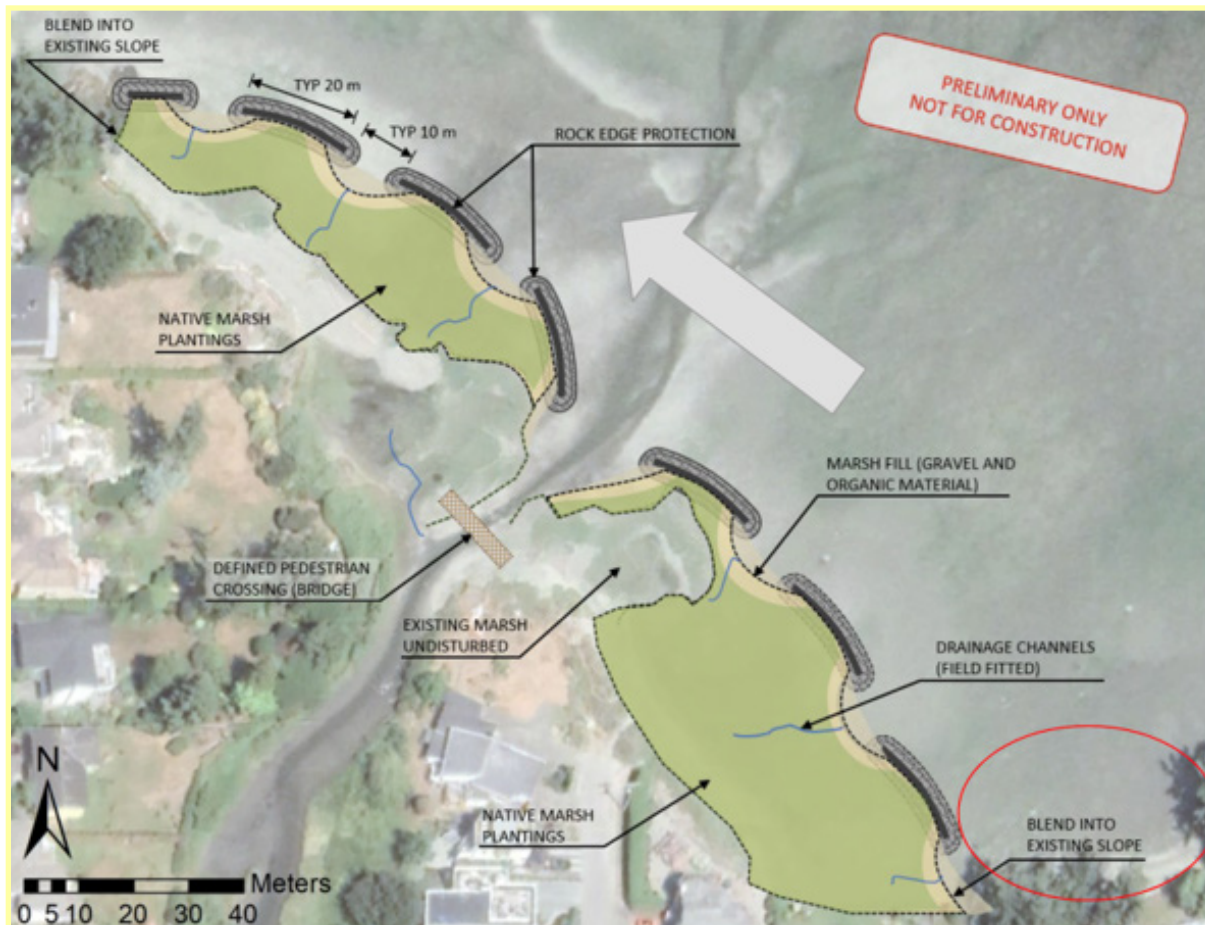


Illustration of proposed second phase of the project

<sup>15</sup> Peninsula Streams & Shorelines – Mermaid Creek Salt Marsh Restoration website, last accessed June 10, 2025, online at: <https://peninsulastreams.ca/our-work/restoration-projects/mermaid-creek-salt-marsh-restoration/>



The aim of the restoration project was to bring the marsh back to its 1960 extent.

The second phase of the project required two major approvals from the federal and provincial government.

First, the project needed an approval from the federal Minister of Transport under section 7(6) the *Canadian Navigable Waters Act*,<sup>16</sup> because it may have interfered with public navigation.

Second, the project required a licence of occupation from British Columbia under the *Land Act*<sup>17</sup> for the area it would be taking up. This is because the Province holds the Crown title to the foreshore and seabed in this area, subject to the rights and title of Indigenous nations.<sup>18</sup>

The Province held a public consultation period during which some citizens voiced concerns with the Mermaid Creek Salt Marsh Restoration project. One concern expressed by shoreline property owners on the Bay was the impact the project would have on their riparian right to access the waters of the Bay, by kayak and in other ways.<sup>19</sup> While shoreline property owners would have previously been able to access deeper waters in a straight line from anywhere on their shoreline, if this project had been built, they would have had to navigate between the constructed rock crescent headlands that were planned in order to access deeper waters at low tide.

The Province identified properties where the project had a high likelihood of infringing their owners' riparian rights. The Province required that the proponents obtain written consent from each of the property owners as a condition of obtaining the licence of occupation. The proponents determined that obtaining the required consent from each of the property owners was likely unattainable in the timeframe required and cancelled the second phase of the project.<sup>20</sup>

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16 *Canadian Navigable Waters Act*, RSC 1985, c N-22.

17 *Land Act*, RSBC 1996, c 245.

18 The Province has the Crown title to "inland waters" on the BC coast, including the area between headlands such as bays, sounds, harbours, and coves. A 1984 Supreme Court of Canada decision found that the Province also has the Crown title to the seabed between Vancouver Island and the Mainland, including in the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait, and Queen Charlotte Strait: *Reference re: Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 SCR 388, [1984] 4 WWR 289, at 2.

19 "Questions Re: Roberts Bay Salt Marsh Restoration," last accessed June 10, 2025, available online at: <https://peninsulas-treams.ca/wp-content/uploads/2023/05/RB-Neighbours-Questions-and-Concerns-and-Responses.docx.pdf>

20 Bailey Seymour, "Peninsula Streams cancels marsh restoration project," Peninsula News Review, March 13, 2024, available online at: <https://www.peninsulanewsreview.com/local-news/peninsula-streams-cancels-marsh-restoration-project-7329404>





### 3. Riparian Rights

The exercise of riparian rights is an important cause of the decline of Mermaid Creek Salt Marsh (as well as of other coastal habitats in British Columbia). The hardening of the shoreline (through structures such as seawalls) in the Bay by property owners, an exercise of riparian rights, has disrupted the natural movement of sediments in the Bay and increased the erosion of the Marsh. Moreover, in the context of PSS and SeaChange's efforts to restore the shoreline, the riparian right of access to deep water likely gave impacted shoreline property owners the power to stop the project if their consent was not obtained.

Under the common law, these riparian rights are quite broad and may permit the destruction of habitat on foreshore and nearshore areas adjacent to an owners' property. In this section, we will discuss the nature of riparian rights. We will begin by discussing who has riparian rights and then we will discuss the different types of riparian rights.

#### a. WHO HAS RIPARIAN RIGHTS?

Riparian rights are rights that are incidental to the ownership of properties that border a body of water. The word "riparian" comes from the Latin word for bank, and riparian rights arise from the ownership of the bank of a body of water.<sup>21</sup> This includes the banks of both freshwater bodies – such as rivers and lakes, as well as the ocean. Historically, in the context of lakes and the ocean, the law often referred to these as "littoral rights"; however, Canadian courts now tend to use the term "riparian" for all waterfront lands.<sup>22</sup>

21 G. La Forest. *Water Law in Canada -The Atlantic Provinces*. (Ottawa: Information Canada, 1973), at 200 ["Water Law in Canada"].

22 See Public Works and Government Services Canada, *Valuation Guidelines*, March 2007, at 1C6 p.4, available online at: [https://publications.gc.ca/collections/collection\\_2009/tpsgc-pwgsc/P26-6-2007E.pdf](https://publications.gc.ca/collections/collection_2009/tpsgc-pwgsc/P26-6-2007E.pdf)

In order for a property owner to possess riparian rights, it is sufficient that the boundary of the property come into contact with a body of water for a substantial part of every day in the ordinary course of nature.<sup>23</sup> In the coastal British Columbia context, many properties have a shoreline boundary of the “natural boundary” of the water, which is the visible high tide mark of the ocean. Such a boundary entitles the owner to riparian rights even if, for much of the day, the property does not come into contact with water.<sup>24</sup>

When the legal boundary of a property is defined as the boundary of the body of water, under the common law, the boundary of the property will follow any long-term gradual and imperceptible change in the edge of the body of the water. So, for example, if the high tide mark of the ocean retreated gradually out to sea over time creating more dry land (referred to as accretion), coastal properties bounded by the “natural boundary” would also extend further out to sea to encompass this new dry land. This right to accreted land is one of the riparian rights possessed by shoreline property owners.<sup>25</sup> This accreted land can be reflected in the title for the property pursuant to sections 94-95 of the *Land Title Act* in British Columbia.<sup>26</sup> Likewise, if the water level rises and erodes the shoreline, the property boundary will shift landwards and the owner could lose the now submerged land.

It is also important to note that riparian rights arise from the legal boundary of the property coming into contact with water. There may be physical boundaries on the property (such as fences) that prevent contact with water; however, such boundaries have no bearing on whether a property owner is entitled to riparian rights.

## **b. TYPES OF RIPARIAN RIGHTS**

Several different types of riparian rights exist under the common law, including rights relating to access to the water, the right of accretion, and the right to protect one’s property from erosion.<sup>27</sup> We will discuss two of these types of riparian rights in more detail as they are particularly relevant to this case study: the right to protect one’s property from erosion and the right of access to the water.

It is important to note that the riparian rights of property owners arise from the common law and can be regulated or extinguished by statutes enacted by the legislature – and many have been in British Columbia.

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23 See note 21, *Water Law in Canada* at 200.

24 See note 21, *Water Law in Canada* at 200.

25 *Bryan’s Transfer Ltd. v. Trail (City)*, 2010 BCCA 531 [“Bryan’s Transfer”]. See note 21, *Water Law in Canada* at 225-226. It should be noted that if the boundary of the water body were to shift suddenly (and as the result of a man-made structure) a shoreline owner may not be entitled to the newly accreted land and may lose their riparian rights.

26 See note 25, *Bryan’s Transfer*.

27 See note 21, *Water Law in Canada* at 201; *Fonseca v. Gabriola Island Local Trust Committee*, 2021 BCCA 27, at para 57; see note 25, *Bryan’s Transfer*; *Nicholson v. Moran*, 1949 CanLII 255 (BC SC), [1949] 4 DLR 571 [“Nicholson”]

### **i. Riparian Right to Protect one's Property from Erosion**

The owner of a property that borders a body of water has a riparian right to protect their property from erosion caused by inroads of the body of water. The owner is permitted to build works such as embankment walls on the edge of the owner's property that prevent the land from eroding into the body of water.<sup>28</sup>

However, riparian owner may potentially be liable if they build a structure in such a way as to cause damage to the property of another riparian owner on the water body. Thus, for example, in a Nova Scotia case, a riparian owner who built a dam that had the effect of directing water to another property and causing damage was found liable for the damage.<sup>29</sup>

Earlier we noted that the effect of building hard armoring structures that prevent erosion of shoreline property is often to increase the erosion of foreshore and nearshore areas in front of these structures, destroying wetlands and beaches. Whether this type of damage could lead, under the common law in British Columbia, to a claim against a riparian owner who has hard armored their property remains to be seen.

### **ii. Riparian Right of Access to the Water**

The riparian right to pass unimpeded to and from the upland property to the body of water is considered the most basic of riparian rights.<sup>30</sup> This is because without the right of access, a property could not enjoy many of the riparian rights related to the property. The right of access has been construed to include the right to pass to and from the shoreline to "deeper waters where navigation practically begins."<sup>31</sup> The right prevents others from erecting structures or otherwise preventing the owner of riparian rights from accessing deep water.<sup>32</sup>

The riparian right of access exists "in a direct line from every point along the whole frontage of his land on the water. It is, therefore, no answer to an action for damages for obstruction of the right that the owner can get to and from the water from another part of the land."<sup>33</sup>

In Ontario, the Superior Court of Justice of Ontario found that a boathouse 50 feet in front of the shoreline of a riparian property on the St. Lawrence River interfered with the riparian right to access the river.<sup>34</sup> The court cited with approval that: "[n]o one, not even the Crown, can erect any structure on the shore or otherwise permanently obstruct a riparian owner's right of access." The court stated that the right of access is an important aspect of ownership of a shoreline property and should not be minimized and that:

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28 *Fonseca v Gabriola Island Trust Committee*, 2018 BCSC 1684 (CanLII), para 55.

29 *Lorraine v Norrie* (1912), 42 N.S.R. 177; see note 21, *Water Law in Canada* at 232.

30 See note 21, *Water Law in Canada* at 201; *Attorney General of the Straits Settlement v. Weymiss* (1888), 13 A.C. 192 (P.C.); *Graham v. Andrusyk*, 2006 BCSC 1614 (CanLII), para. 11 ["Graham"].

31 *Day v Valade*, 2017 NSSC 175 (CanLII), para 23 ["Day v Valade"].

32 See note 31, *Day v Valade*.

33 See note 34 *Browne et al. v Meunier et al.*, 2022 ONSC 3118 (CanLII) ["*Browne v. Meunier*"], at para 14, citing, *Water Law in Canada*, see note 21; see note 30, *Graham*, para 12.

34 See note 33, *Browne et al. v Meunier*, although the lawsuit was unsuccessful for other reasons; upheld on appeal by the Ontario Court of Appeal in 2023 ONCA 223 ["*Browne v. Meunier*"].



*“...the case law does not require a complete obstruction of the upland owner’s access to the water...significant obstruction of these rights will establish a cause of action.”<sup>35</sup>*

Canadian courts have stated that what constitutes adequate (or reasonable) access to navigable waters and whether it is significantly obstructed is a case-by-case determination that is made based on the circumstances of the area, including the nature of the body of water and the water uses associated with the lands.<sup>36</sup> When determining what reasonable access meant for a lake in Nova Scotia, the Nova Scotia Supreme Court noted that land owners on the lake used the lake for a “variety of recreational purposes including swimming, fishing, and boating using small private watercraft such as kayaks, canoes, paddle boats, and sailboats.” The Court stated that sailboats would require greater depth of water for navigating because the centreboard drew approximately three feet of water when down.<sup>37</sup>

In *Nicholson v Moran*, a 1949 court decision, BC Supreme Court considered the riparian access to a property between Roberts Bay and All Bay. Two things are important to note about this decision. First, in considering whether there was interference with the plaintiff’s riparian right of access and what constituted reasonable access to navigable waters, the BC Supreme Court noted that:

*“a 30 to 40-ft. boat with a draught of 3’ ½ to 5 ft. is a boat of reasonable size to use in safety in the adjacent waters, being the waters of the Gulf Islands, on practically all occasions, but smaller boats are used perhaps by a majority of the people using these waters from time to time.”<sup>38</sup>*

Given this case was decided in 1949 and that scope of the right of access is a fact-based assessment, it is possible that reasonable access to waters would be construed differently in 2025 based on the current water uses associated with properties in the area.

The second important thing to note from this case is that the court drew a distinction between the riparian right of access and the right of navigation. Once a riparian owner is in navigable waters, they are exercising a public right of navigation not a private riparian right. If there is an interference with the right of navigation, they cannot personally seek damages based on this public right unless they can show they have suffered special damages.<sup>39</sup>

Ultimately, the BC Court found that the defendant’s marine railway and float did not interfere with the plaintiff’s riparian right of access as the court determined that a boat could back out safely out of the plaintiff’s boathouse and navigate a 50-foot channel to the open ocean.<sup>40</sup>

35 See note 33, *Browne v Meunier*, at para 18.

36 See note 31, *Day v Valade*, at para 30.

37 See note 31, *Day v Valade*, at para 30.

38 See note 27, *Nicholson*, at 573-574.

39 See note 27, *Nicholson*, at 576.

40 See Note 27, *Nicholson*, at 574.

In summary, courts have stated that the right of access includes the right of access from every point along shoreline in a straight line to navigable water and that, rather than a complete obstruction, a significant obstruction is all that is required for someone to be found liable for breaching this riparian right. What constitutes reasonable access and what constitutes a significant obstruction is a factual case-by-case determination. A 1949 court decision considered that in the Roberts Bay area, the right included the right for a 30-40 foot sailboat to access navigable water from the shoreline – though this might be interpreted differently today.

### **c. THE REGULATION OF RIPARIAN RIGHTS**

Riparian rights originate from the common law and were meant to manage conflicts among different property owners. However, they were not developed with the protection of coastal and aquatic ecosystems in mind. As Public Works and Government Services Canada once stated:

*“It may be said that the common law of riparian rights is geared to simpler times where perhaps only an adjoining owner was affected by waters. Today water affects more than the rights of adjoining owners of land, it affects the interests of the public.”<sup>41</sup>*

Governments can restrict and regulate riparian rights by statute and have done so in many instances to protect the public interest. However, as the Mermaid Creek Salt Marsh case illustrates, the statutory regimes do have gaps and limitations.

In the next section, we will discuss how statutory law regulates the riparian right to protect one’s property from erosion and the riparian right of access to water, and highlight the gaps in this regime.

#### **i. The Regulation of the Riparian Right to Protect Property from Erosion**

The exercise of the riparian right to build hard armoring structures to protect from erosion has had negative consequences for British Columbia’s coastal ecosystems. There are natural approaches (or nature-based solutions) that can protect properties from erosion without damaging seaward beaches and marshlands or causing erosion on adjacent properties, and the BC government has taken steps to support these approaches.<sup>42</sup>

A number of legal tools exist under provincial statutes that can limit the right to build hard armoring structures. Local governments have jurisdiction over shoreline areas down to the foreshore in much of the province, and in many cases some distance out into the ocean,<sup>43</sup> subject to the rights and title of Indigenous nations. Local governments have been granted legal powers under provincial

41 Public Works and Government Services Canada, Valuation Guidelines, March 2007, at 1C6 p.13 available online at: [https://publications.gc.ca/collections/collection\\_2009/tpsgc-pwgsc/P26-6-2007E.pdf](https://publications.gc.ca/collections/collection_2009/tpsgc-pwgsc/P26-6-2007E.pdf)

42 *Saving Orcas by Protecting Fish Spawning Beaches*, University of Victoria Environmental Law Centre, October 2019, p. 6-7, available online at: <https://elc.uvic.ca/wordpress/wp-content/uploads/2019/11/2019-01-11-Saving-Orcas-by-Protecting-Fish-Spawning-Beaches.pdf> [“*Saving Orcas by Protecting Fish Spawning Beaches*”].

43 Stephanie Hewson et al., *Protecting the Coast and Ocean: A Guide to Marine Conservation Law in British Columbia*, UBC Press, Vancouver, 2023, pp. 22-23 [“*Protecting the Coast and Ocean*”].

statutes to limit the erection of hard armoring structures on shorelines. Under section 479 of the *Local Government Act*<sup>44</sup> (and under the *Islands Trust Act*<sup>45</sup>) local governments can enact zoning bylaws that prohibit the erection of hard armoring structures. In *Fonseca v Gabriola Island Local Trust Committee*,<sup>46</sup> a riparian owner challenged the application of the Gabriola Land Use Bylaw to limit the owner from building, among other works, a concrete seawall to protect their property from erosion in keeping with their riparian rights. The BC Court of Appeal found that the Land Use Bylaw could validly regulate the exercise of the riparian right to protect one's property from erosion, pursuant to the Local Trust Committee's powers under the *Islands Trust Act* and the *Local Government Act*.

Local governments can also designate areas within their jurisdiction, as part of their Official Community Plan, where a development permit is required before a structure is constructed or altered.<sup>47</sup> In the case of the Town of Sidney, it has designated Roberts Bay as an Environmentally Sensitive Area Development Permit Area under its Official Community Plan.

Lastly, local governments (or other provincial government bodies) can place a covenant on a property that could legally prevent the development of shoreline areas of the property, pursuant to section 219 of the *Land Title Act*, RSBC 1996, c 250. Landowners who agree to environmentally protective covenants on the property may obtain federal tax benefits and municipal tax exemptions for doing so in certain circumstances.<sup>48</sup>

### **Weaknesses with current regulation of riparian right to protect property from erosion**

There are three significant weaknesses to the Province's current regulatory approach to limiting hard armoring structures. First, the powers under the *Local Government Act* to zone and to create development permit areas do not apply to armoring structures that were constructed prior to the enactment of the zoning or the development permit area (these have been "grandfathered in").<sup>49</sup> In Roberts Bay, many of the hard armoring structures were constructed before Sidney's bylaws came into effect and are thus not subject to the bylaws.

Second, the current system mostly leaves shoreline regulation above the high water mark up to municipalities and does not adequately include First Nations in planning and decision making on this issue. In light of the Province's adoption of the *Declaration on the Rights of Indigenous Peoples Act*,<sup>50</sup> this legal framework needs to be updated to reflect a proper decision-making role for First Nations.

Third, the current system largely leaves it up to the discretion of each individual local government whether and how to regulate hard armoring structures, without overriding requirements from the

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44 R.S.B.C. 2015, c. 1 ["Local Government Act"].

45 *Islands Trust Act*, RSBC 1996, c 239, s. 29.

46 *Fonseca v Gabriola Island Local Trust Committee*, 2021 BCCA 27 ("Fonseca").

47 See note 44, *Local Government Act*, ss.488-489.

48 See note 43, *Protecting the Coast and Ocean*, pp. 201-204; *Islands Trust Natural Area Protection Tax Exemption Regulation*, BC Reg 41/2002.

49 See note 44, *Local Government Act*, sections 528-529.

50 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.



Province. This results in a patchwork of different restrictions throughout coastal British Columbia from local governments that have decided (or have the capacity) to restrict hard armoring, and it is up to these governments to enforce these restrictions. It also leaves gaps in the restrictions in areas where local governments have not developed restrictions.

The Crown title to the foreshore in British Columbia is generally held by the provincial government, subject to the rights and title of Indigenous nations. The Province has a responsibility to steward these areas and the important ecosystems they contain. Leaving it up to the discretion of local government bylaws to permit or not permit shoreline hardening that can harm these habitats, some of which are threatened with extinction, is not in keeping with these stewardship responsibilities.

Understanding the importance of freshwater riparian areas, the Province has created specific legal requirements that apply to many local governments in the freshwater context through the *Riparian Areas Protection Regulation*. Under the *Riparian Areas Protection Regulation*, local governments are required to enact zoning or land use bylaws that require that an assessment be carried out by a qualified environmental professional before developments are permitted in a riparian area.<sup>51</sup> But the Province has not created a similar regime for the ocean context.

Neighbouring Washington State has enacted the statewide *Shoreline Management Act* that requires local governments to create shoreline programs and regulations to achieve no net loss of ecological function.<sup>52</sup> Washington State has considered whether to move beyond just conserving existing shoreline ecological functions (via a “no net loss” standard) to actually restoring wetlands and other environmental features by adopting a “net ecological gain” standard for its shoreline planning.<sup>53</sup>

In 2019, the UVic Environmental Law Centre released a report calling on the BC government to follow the Washington State example and enact a province-wide *Shoreline Protection Act* that, among other things, requires local governments to:

- Adopt “standardized shoreline protection measures into their local planning, land use and other bylaws” to achieve no net loss of shoreline ecological function;
- Adopt zoning bylaws that “create a zone 30 m from the natural boundary which can only be used for ecological purposes”;
- Incentivize natural shorelines through tax exemption policies.<sup>54</sup>

## ii. Regulation of the Riparian Right of Access

As discussed above, the riparian right of access to the water from the shoreline of a property has been interpreted quite broadly by Canadian courts and can potentially prevent the placing of any kind of structure or impediment between the shoreline of a property and navigable water. Accord-

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51 *Riparian Areas Protection Regulation*, BC Reg 178/2019, s. 4(2).

52 *Shoreline Management Act of 1971*, Chapter 90.58 RCW.

53 Department of Fish and Wildlife, State of Washington, “Net Ecological Gain Standard Proviso Summary Report 2022,” December 2022, online: <https://wdfw.wa.gov/sites/default/files/publications/02375/wdfw02375.pdf>

54 See note 42, *Saving Orcas by Protecting Fish Spawning Beaches*, p. 37.

ingly, this right can provide a significant obstacle to undertaking remediation projects, like the Mermaid Creek example, on the foreshore or seabed.

The provincial *Land Act* regime, under which British Columbia grants interests (such as licences of occupation) to the foreshore and the seabed, does not restrict a riparian right of access in order to allow foreshore restoration projects. This means that the Crown cannot grant a licence of occupation to the foreshore or seabed that permits interference with the riparian right of access.<sup>55</sup> If a proponent is granted a licence of occupation and constructed structures that significantly interfered with riparian access, the proponent could be sued and forced to remove the structures.

Before the BC government issues a licence of occupation for an area of the foreshore or seabed, it considers whether the occupation of the area will impact the right of access of adjacent riparian owners as well as rights of navigation. The Province has created policy guidance to assist in determining whether to permit a licence of occupation in the foreshore or seabed. Under this policy, the province will not issue foreshore tenures in front of privately owned waterfront property if the tenures permit the building of improvements without the consent of the shoreline owner. For a licence of occupation for areas further offshore that do not abut the low water mark, the policy guidance follows the 1949 decision *Nicholson v Moran* to “err on the side of caution.” The policy guidance states that:

*“The ministry recognizes that interference with access and navigation has to be assessed differently in every situation because of variables such as the shape of the coastline, depth of water, tides, and so forth. However, ministry staff will generally attempt to locate near-shore and offshore tenures so that at lowest tide a 40-foot boat could still have comfortable access to every point along the foreshore adjacent to the waterfront property, and to and from deep water with enough room to manoeuvre and turn around.*

*Providing that these guidelines are followed and that the tenure does not create an interference with the public right of navigation or specially damage the waterfront property owner, consent of the owner should not be required.”<sup>56</sup>*

As a result, projects like the Mermaid Creek Salt Marsh Restoration project will often require the approval of all potentially impacted riparian owners before a licence of occupation can be obtained. This adds considerable risk and time to developing these projects. This legal uncertainty makes obtaining funding for these projects difficult and limits the amount of these projects that can proceed. This is counter to the goals of the BC Coastal Marine Strategy and the general public interest. It is also not in keeping with the Province’s responsibilities to steward these Crown lands and to protect these endangered ecosystems.

55 *Redwood Park Motel Limited v. British Columbia Forest Products Limited*, 1953 CanLII 502 (BC SC).

56 BC Ministry of Agriculture and Lands - Crown Land Administration Division, Riparian Rights and Public Foreshore Use in the Administration of Aquatic Crown Land - Occasional Paper No. 5, August 2008; note that the policy guidance at the time of writing is currently under review.

British Columbia has created processes to support nature-based projects, like its Expedited Permit Process for Nature-Based Shoreline Projects pilot project for the West Coast region, a pilot project developed with the Stewardship Centre for BC, to make it easier to get authorizations for nature-based shoreline projects, which are projects that are designed to enhance ecological systems and their functions.<sup>57</sup> But that process does not enable project proponents to interfere with a shoreline owner's right of access, because the Province does not currently have a legal framework to do so.

British Columbia has created legal frameworks to limit property interests when it is in the public interest to do so, including riparian rights, and to legislatively specify if and when compensation is required. For example, British Columbia has abrogated the riparian right to use freshwater and regulates the use of freshwater under the *Water Sustainability Act*.<sup>58</sup> The *Mineral Tenure Act* permits the Minister of Mining and Critical Minerals to restrict the right to or interest in minerals without compensation, if the minister considers that it contains a cultural heritage resource or that the area should be used for purposes other than mining.<sup>59</sup>

The Province could create a legal framework whereby the riparian right of access is limited to the extent that it comes into conflict with public interest foreshore and nearshore restoration projects. This would remove the need to obtain the approval of each riparian owner before the Province issues a licence of occupation for such projects. Such a legal regime should still require obtaining the consent of First Nations with rights and title in the area, and could include a process for consulting with the local community to ensure community concerns are being considered in carrying out the project.

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57 Stewardship Centre for BC, Nature-based Shoreline Project Checklist, November 2021, available online at: [https://stewardshipcentrebc.ca/PDF\\_docs/greenshores/Resources/NBSPchecklist2021.pdf](https://stewardshipcentrebc.ca/PDF_docs/greenshores/Resources/NBSPchecklist2021.pdf); *Green Shores Guide to Expedited Permit Process for Nature-based Shoreline Projects in BC – West Coast Pilot*, Stewardship Centre for BC, 2022, available online at: [https://stewardshipcentrebc.ca/PDF\\_docs/greenshores/Resources/ExpeditedPermitGuide2021.pdf](https://stewardshipcentrebc.ca/PDF_docs/greenshores/Resources/ExpeditedPermitGuide2021.pdf)

58 See note 25, *Bryan's Transfer*, para 26.

59 *Mineral Tenure Act*, RSBC 1996, c 292, s 17.





## 4. Conclusion & Recommendations

As climate change intensifies, the biodiversity crisis worsens, and the population of coastal British Columbia increases, preserving and restoring threatened coastal wetlands and ecosystems is of critical importance. These areas protect communities from climate change impacts, like storms and flooding, and are vital to the coastal ecosystems that underpin BC's blue economy.

Many of these ecosystems have been designated by governments as ecologically important areas. The Mermaid Creek Salt Marsh was designated as a Bird Sanctuary, an Important Bird Area, and an Environmentally Sensitive Area. The *Sarcocornia pacifica* that it contains was red-listed by the British Columbia Conservation Data Centre.

British Columbia has entered into a Canada-British Columbia Agreement On Species At Risk in which they "agree that, to the extent possible, stewardship activities will be encouraged in order to provide for the protection of species at risk, residences and critical habitat." British Columbia has also entered into the Accord for the Protection of Species At Risk, in which it agrees to "establish complementary legislation and programs that will provide for effective protection of species at risk."

If these commitments and responsibilities are to be respected, it is incumbent on British Columbia to remove legal obstacles to the protection and survival of these salt marshes.

The plight of the Mermaid Creek Salt Marsh highlights how under BC's current laws and policies, riparian rights can present significant obstacles to the protection and restoration of nearshore habitats.

First, the exercise of riparian rights to protect a shoreline property from erosion has led to significant hardening of shorelines, which is a key cause of the decline of the Mermaid Creek Salt Marsh in Roberts Bay and elsewhere. This decline will intensify under climate change as it will in other areas of the coast. The Province should better support local governments in helping to address

shoreline hardening. There should be province-wide standards on shoreline development and better means to address pre-existing hardened shorelines.

Second, the proposal to remediate the Marsh was frustrated because it would potentially impact the riparian rights of property owners to access navigable waters. These property owners would still be able to access the water but, in some areas, they would have to pass by headlands 20 meters seaward from the Marsh. Despite support from Tseycum Stewardship Society and the Town of Sidney, the BC tenure regime did not permit British Columbia to grant the needed licence of occupation for the project without the approval of every shoreline owner impacted.

Riparian rights are an important aspect of owning property in coastal areas and should be respected by government. However, there is a public interest in ensuring these rights are not exercised in a manner that leads to the loss of coastal ecosystems. In certain circumstances, it is necessary that government limit these rights. It has done so in other contexts.

British Columbia has identified as an action in the BC Coastal Marine Strategy to protect and restore nearshore ecosystems and to incorporate nature-based solutions. The Coastal Marine Strategy also lists several activities the Province intends to undertake to incorporate nature-based solutions, including to:

- Investigate and consider incentives to homeowners and developers to maintain or restore natural shorelines (such as through grants and rebates, tax relief and permitting efficiencies); and
- Expand the implementation of BC's expedited permit process for nature-based shoreline projects.
- Streamline authorization processes for activities that promote ecosystem health (such as First Nations sea gardens and ecological restoration).

In furtherance of those actions, British Columbia should revise its legal framework to better protect endangered wetlands like the Mermaid Creek Salt Marsh and to facilitate restoration projects like the Mermaid Creek Salt Marsh Restoration project:

- Create regulations similar to the *Riparian Areas Protection Regulation* for saltwater bodies or enact a *Shoreline Protection Act* that requires local governments to:
  - Adopt standardized shoreline protection measures into their local planning, land use and other bylaws to achieve net ecological gain
  - Adopt zoning bylaws that include a buffer zone from the natural boundary, development within which can only be for ecological purposes;
  - Incentivize natural shorelines through enlarged tax exemption policies; and
  - Co-create shoreline plans, policies and bylaws in partnership with First Nations who have rights and title in the area.
- Create a legal framework that limits the riparian right of access to the extent that it conflicts with public interest wetland restoration projects, such that British Columbia can grant tenures in the foreshore and seabed for such projects without the consent of riparian property owners.