Water Boundaries in Southern Ontario

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This article first appeared in the July 2, 1999 edition of "The Lawyers Weekly"

With the advent of Summer, residents of Ontario and visiting vacationers are drawn to the extensive sand beaches along the Great Lakes. But not very many beaches in Southern Ontario are actually available for public use.

Some people presume that all beaches are inherently publicly owned, and that adjoining private properties are limited by the "high water mark". However, the term "high water mark" has no legal meaning except in tidal waters.

In fact, most Southern Ontario properties fronting on large lakes extend to the water's edge by operation of the original Crown grants. In the early decades of this Province, transportation over land was difficult. Roads were few and, indeed, impassable for much of the year. For transportation and communication reasons, water frontage was of fundamental importance to settlers when lands were originally patented by the Crown Lands Department.

High Water Mark: A Misused Term

For many decades the Ontario Department of Lands and Forests (and the successor Ministry of Natural Resources), contrary to well-established common law, vigorously promoted the use of "high water mark" (meaning the landward side of the beach) as the boundary separating patented uplands from lands forming the bed of the adjoining water body.

On the basis of that notion, the beaches were considered by Crown officers to be part of the bed of the adjoining water body and, therefore, unalienated Crown lands, except where a water lot had been granted. The concept was raised to the status of legislation as part of an omnibus bill in 1940 (Statute Law Amendment Act, S.O. 1940, c.28) but was found to be unworkable and was repealed in 1951 by the *Beds of Navigable Waters Amendment Act*, S.O. 1951, c.5.

The Courts have been consistent in applying the common law rule placing the boundaries of inland non-tidal riparian properties at the water's lowest mark. The principle was confirmed by the Supreme Court of Canada in *Attorney-General for Ontario v. Walker et al.* (1974), 42 D.L.R. (3d) 629. There are only two exceptions to the rule:
(1) if the words of the grant clearly reserve a space between the water and the granted uplands; or
(2) if the boundaries of the granted uplands are clearly defined by reference to an original plan of survey which is unequivocal in demonstrating an intention on the part of the Crown to retain a space between the water and the granted lands. Two fairly recent decisions have dealt with these two exceptions.

Exception 1: Reservation of Space

The High Court of Justice decision in *Gibbs v. Grand Bend* (1989), 71 O.R. (2d) 70 (which was appealed) provided an extensive analysis of the historical and legal aspects of the subject lands, which were included as part of one massive grant to the Canada Company in 1836. That grant was subject to the following reservation:

"... saving reserving and excepting to [the Crown] to and for the use, as well of us, our heirs and successors, as for all our loving subjects, all navigable streams, waters and watercourses, with the beds and banks thereof, running, flowing or passing in, over, upon, by, through, or along any of [the granted lands]."

The Crown advocated that this was a reservation of space between the water and the granted lands on the premise that the "banks" were composed of dry land above the water-covered bed of the lake. On the trial, Chilcott J. decided that the reservation did not apply to the beach area, and that the wording of the reservation was not sufficiently clear and unambiguous to effect the exclusion contended by the Crown. On the separate issue of user, Chilcott J. decided that the current owners, as successors to the Canada Company, had not lost ownership of the beach area by implied dedication and acceptance.

The decision was reversed on appeal ((1995), 26 O.R. (3d) 644 (C.A.)). The three Court of Appeal judges were in agreement that, based on the *user* issue, Gibbs had could not restrict public access to the beach area. With respect to the *reservation* issue, Finlayson J.A. and Carthy J.A presented conflicting opinions. (In respect of the extent of public user, Finlayson's judgment gives an answer without a solution for defining the limit at the "top of the bank".) Brooke J.A. did not deal with interpretation of the reservation clause at all. Consequently, the Court of Appeal decision did not affect the lower Court decision with respect to interpretation of the reservation clause, or the location of boundaries of Crown grants. The common law remains consistent.

Although much debated with much evidence adduced, "high water mark" was not an issue in the *Gibbs* case. All parties agreed that the boundary of the subject lands was the water's edge at low water; the matter being contested was ownership of the beach area based on either the reser-

vation clause or the user issue.

Exception 2: Reference to an Original Plan of Survey

The decision in *Ontario (Attorney-General) v. Rowntree Beach Association* (1994), 17 O.R. (3d) 174 (Gen. Div.) addressed the significance of a feature shown on the original survey plan of the Township of Tiny and known as the "line of the wood". The Crown's position was that land patents were intended to be limited by that line.

Similar to the *Gibbs* case, all parties to the *Rowntree* case agreed that if the lands were granted to the lake, then the boundary of the patented lands was the water's edge at low water. The fact of the grants confirmed that the beaches were not subject to any public right in the absence of either dedication to public use by a later private subdivision, or a decision of the Court on user based on unrestricted public use for many years.

Flynn J. decided that the "line of the wood" was not a feature that was clearly intended to limit the lots shown on the township plan. Other township plans, for example, clearly show such intention, such as where road allowances were specifically laid out along the shores of water bodies. The *Rowntree* decision was not appealed.

The prudent owner of waterfront property will acquire professional advice with respect to the extent of their private lands. Users of publicly owned beaches should take necessary measures to satisfy themselves that the beach they intend to visit is indeed open to public use.