The chainsaw heard ‘round the province’ by Douglas Hunter, Free Press, Friday July 18, 2008

Readers of this broadsheet will be so familiar with the recent excitement at Balm Beach concerning a private fence to the water’s edge, vigilante chain sawing, and various charges laid, that I’m not going to bother reviewing all the details. Suffice to say that the issues of public access to Tiny Beaches and the legal frontiers of private property are anything but settled. And what hasn’t changed is the disinterest of the attorney general of Ontario in getting involved in the matter.

I’ve written about shoreline rights for several years now. And the more I study the issue, the more I believe that the Tiny Beaches dispute is never going to be solved at a municipal level. The problems are shared in many places in Ontario, where there is a sparkling beach, a notion of historic public use and right of access, and private property owners who beg to differ.

I spoke with MPP Garfield Dunlop on the matter early Monday morning, as he phoned from a conference of midwestern legislators in Rapid City, North Dakota, which he was attending with several other members of the provincial legislature. Dunlop has been involved in the Tiny dispute for some time, responding to entreaties of constituents and local government. As a PC, he was hopeful that mediation brought in during the Harris years could settle matters (although I feel it was doomed from the get-go). He has since delivered to the attorney general’s office local requests that the AG become involved. These have been turned down, and he is dismayed. He fears that the chainsaw attack on the fence, the shoving and property defacement, might only be the start. “It’s hot out, and you can get a mob mentality going. Someone can get hurt, or even die.” He cannot see a local resolution, in no small part because “the impact is across Ontario.”

I agree that dangers for public safety are realm and that the provincial government needs to step in and do something. That “something” is to create a single, coherent policy on waterfront property that will stand up in court, with or without new or amended legislation to support it. If the attorney general doesn’t want to be involved, then I’d suggest the natural resources minister at least give the MNR people a fun summer project. They need to craft a policy statement that spells out where crown land ends and private property begins. It won’t settle the ancillary issue of public rights through historic use, but it would be enormously welcome. The federal Liberals came up with the Clarity Act when separatist forces in Quebec needed to understand what Ottawa would consider a serious referendum. The provincial Liberals need to show some leadership here and tell both the public and private property owners across the province where their realms begin and end.

This needs to involve the MNR because the indisputable public space is the “crown bed,” the bottomland, of the adjoining navigable water. That crown bed is held in trust for the public through the Public Lands Act, and is given to the MNR to administer. The big question is if the crown bed extends inland from the actual water’s edge. Our English common law heritage says it extends all the way to the high-water mark, which means that where this common law hasn’t been superseded by statute the public has the right to make some use of any exposed sand. South of the border (as I’ve previously written), progressive legislators in numerous states have used America’s own legal heritage in English common law to forge what’s called the Public Trust Doctrine, which prioritizes

the public's right to access shorelines. The results vary from state to state and their individual legal heritages, but even where case or statutory law fundamentally favours the riparian (shoreline) owner, a public right to at least walk along a beach below the high water mark is not uncommon. Some states have even resolved that the public has the right to walk across private property in order to access that public space. In New Jersey, lawmakers recently told private marina owners that the public has to be allowed access to their operations. There has also been a concerted effort to define who has ownership of, and also the right to use, the land between the high and low water marks.

Ontario extends to shoreline property owners the right to occupy the crown bed, without actually granting them title. Within certain limits, they're can build a dock or fix a mooring on bottom of the adjoining navigable water, for example. But when it comes to granting the public definitive rights to a shore area, Ontario is conspicuously silent. There is no Public Trust Doctrine in Canada. In Ontario at least, that seems to be because key elements in English common law were abrogated by The Bed of Navigable Waters Act of 1911.

Ontario nevertheless attempted to carve out something like a Public Trust Doctrine under the Hepburn Liberals. In the 1930s, as Hepburn's government moved to create provincial parks, it also found itself fighting lawsuits by cottage owners who wanted to assert ownership right down to the water at major beaches. The government decided to put an end to the legal wrangling (and expenses) by amending The Bed of Navigable Waters Act, by specifying the high-water mark as the upper limit of crown bed, as per English common law.

In 1951, the Drew government struck down the amendment, viewing it as an intrusion on private property rights. Since then, we seem to have been in a bit of a legal limbo over the extent of crown bed. The MNR's policy for surveying crown lands being sold off where there is not regulated flooding is to measure down to the "water's edge," which would presumably serve as the upper limit of crown bed. Finer legal minds than mine can argue over exactly what that means, when the water's edge is constantly moving. But several civil cases before the 1940 amendment indicated that private property could extend to the low water mark, and there is some opinion today that this may still be the case.

Beyond deciding if unsightly fences meet the local building code and zoning regulations, there's doesn't seem much for Tiny township to do in resolving what is becoming a legitimate crisis. The province has to stop insisting it's a local matter and make some hard decisions. Can the public at least walk along the shore from an access point to an acknowledged public beach, even if that means traipsing across the front of properties? When a lake's level drops and the water's edge recedes, does it automatically become part of the adjoining property, or does the property owner instead have exclusive right to its use? Or does the public right to that previously submerged bottom continue, now that it is dry beach? And if the water rises, does the crown bed rise with it, subtracting from private lands? At the moment, I have no idea. Maybe the province already has the answers.

"It's like the smoking by-laws," Dunlop proposes. What began as a series of local bylaw initiatives ended up coming under the umbrella of provincial law. Beach access—and property rights—demand their own umbrella.