Ontario Court Ruling on the definition of Navigability

Summary:

Action for a declaration that a creek was not a navigable waterway. At issue was the interpretation of section 1 of the Beds of Navigable Waters Act, and in particular what was meant by "an express grant of it" and "navigable". The latter issue included a dispute as to whether navigability related to commercial or recreational navigation.

Held, Action dismissed. Express meant particular rather than general. There were no express grants exempting the creek bed from Crown ownership. It was navigable, in that it was an aqueous highway, especially for canoes, for five to eight weeks during the spring run-off and for hunting for a number of weeks in the fall.

Statutes, Regulations and Rules Cited:
** Unedited **

Indexed as:
Casselman v. Ontario (Ministry of Natural Resources)

Between
Ramon H. Casselman, Plaintiff, and
Her Majesty The Queen, in the Right of Ontario as represented by the Ministry of Natural Resources, Defendant

[1994] O.J. No. 2180
DRS 94-14785
Action No. 1807/92

Ontario Court of Justice - General Division
Brockville, Ontario
Cosgrove J.

September 12, 1994.
(20 pp.)

Beds of Navigable Waters Act, R.S.O. 1990, c. B.4, ss. 1, 3. Ontario Rules of Civil Procedure, Rule 611.

Barry D. Laushway, on behalf of the Plaintiff. Leslie McIntosh and Elizabeth Christie, on behalf of the Defendant.

COSGROVE J.:

BACKGROUND:

I The plaintiff claims a declaration that the Hoasic Creek, insofar as it passes through the lands of the plaintiff herein at Lots 16 through 20, Concession 3 and Township of Williamsburg, County of Dundas, is not a navigable waterway.

II The key issue between the parties is the interpretation of S. 1 of the Beds of Navigable Waters Act, Chpt. 04, R.S.O. 1990, which provides:

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

III The question has been 200 years in gestation! The court is asked to interpret the original Crown grants of the affected property dated as early as July 16, 1797. Expert zooarchaeological opinion dating from the year 1100 A.D. was introduced during the trial.

IV Hoasic Creek, which begins (or ends) at the St. Lawrence River very close to the eastern limits of the Village of Morrisburg, has a mainstream length of 11.3 kilometres (crossing under eight public roads, including Highway 401) and has a watershed of approximately 81 hectares of drainage area. A diagram is attached to these Reasons illustrating its general location (Exhibit No. 1). The creek is sometimes identified as Nash Creek or Hoasic/Nash Creek or Hoasic Creek in the evidence. The most recent district map [See paper copy for illustration of map] published by the Ministry of Natural Resources (1988) identifies the watercourse by both names (Nash Creek and Hoasic Creek) and the sign for the creek at the Highway 401 intersection is posted as Hoasic Creek. The width of the spans in between the abutments of the various

bridges crossing the creek vary from approximately six to 13 metres.

V A Memorandum to File (A. Bosman, Lands Technician, 1981) introduced in evidence provided as follows: (Exhibit A--Tab 15--pp. 105-107)

Subject:
Navigability of Hoasic Creek (Nash Creek), Williamsburg Township, Dundas County

In response to a letter received from the Township of Williamsburg, Hoasic Creek between Concession 3 and 5 was inspected by A. Bosman, Lands Technician and R. Sprigings, Conservation Officer on January the 10th, 1981, to determine the waterways' navigability.

The following guideline was used in making a decision respecting Hoasic Creek's navigability. A body of water may be administratively decided to be navigable if it is capable, in its natural state during regular flow conditions, of accommodating watercraft commonly used for recreational boating or other
significant aquatic transportation purposes."

The following information was collected during the inspection.

1. Present use of the waterway by watercraft.
2. Capability of use by commercial watercraft.
3. Depth of water at natural and high water levels, width of natural channel type of bottom, shoreline and beach, physical structures or improvements influencing or impeding water traffic.

Note: (also that) Since a navigable waterway, although frozen over, is still technically navigable and the public can travel thereon, winter travel (over the Hoasic Creek) i.e. snowmobiling, snowshoeing, etc. over Hoasic Creek was also investigated during the inspection.

Although the inspection was undertaken during freeze up, information concerning summer conditions was readily available from (informed sources.) (our C.O.'s) District Conservation Officers and (other) local residents.

The inspection together with our other sources of information, revealed the following (information) facts about Hoasic Creek.

1. Hoasic Creek is frequently used by small watercraft e.g. canoes, punts, etc. for fishing and hunting purposes.
2. The creek is not capable of being used nor is it used by commercial watercraft.
3. The creek ranges from 1-3 metres in depth, 6-20 metres in width. The shoreline consists of cattails, alder and scrub bush. Approximately 4 beaver dams, all in a state of disrepair, obstruct the waterway, impeding water traffic.
4. Snowmobile trails and tracks possibly made by a trapper were seen during the inspection.

In view of the above information and the guideline mentioned earlier, Hoasic Creek (can be) is considered (for administrative purposes in connection with Ministry Programs) to be a navigable waterway. It must be pointed out that this decision is based upon opinion and as such could be challenged in the Courts.

(Areas in parentheses were originally written by the author, then crossed and amended.)

VI The friction generating this action seeking a declaration respecting the navigability of Hoasic Creek is clearly illustrated in the following letter (February 20, 1981) to the Clerk Treasurer of the Township of Williamsburg from the District Manager, Cornwall District, of the Ministry of Natural Resources: (Exhibit A--Tab 16--pp. 108-109)

Dear Sir,
This memo will confirm your telephone conversation (Schell - Sprigings) of Feb. 18/81. With reference to your question on the legality of a land owner prohibiting hunters and fishermen from travelling over the natural bed of the Hoasic (Nash) Creek. I trust the following will clear up your concerns. In early January an inspection of the Hoasic Creek was undertaken by two of our lands and wildlife staff to determine administratively the navigability of the watercourse. The following guidelines were used in making a decision respecting the waterway's navigability; "A body of water may be administratively decided to be navigable if it is capable in its natural state, during regular flow conditions, of accommodating watercraft commonly used for recreational boating or other significant aquatic transportation purposes". A navigable waterway although frozen over is still technically navigable and the public can travel thereon, i.e.: snowmobiling, snowshoeing etc. Information concerning open water conditions was readily available from district Conservation Officers and local residents. In view of the above criteria the Hoasic Creek is considered to be a navigable watercourse by the Ministry of Natural Resources.
A title search of the third, fourth and fifth concessions of Williamsburg along the Hoasic creek revealed that the Crown owned bed of the creek was never granted to landowners adjacent to the creek. With the determination that the Hoasic is navigable and the bed of such belonging to the crown, private landowners along the creek cannot prohibit entry or passage on or over the actual bed, but do control trespass upon flooded portions adjacent to the watercourse.
It must be pointed out that this decision is open to interpretation and as such could be challenged in the court.
Yours truly,
J.R. Morin
District Manager

VII A letter was sent to the plaintiff on October 4,1990, from the Fish and Wildlife Supervisor in the Cornwall District office of the defendant as follows: (Exhibit A--Tab 20--pp. 115-116)

Dear Mr. Casselman:
Since your discussion on Saturday, 29 September 1990 with Conservation Officer David Critchlow, it has come to Mr. Critchlow's attention that the bed of Hoasic Creek has been determined to be Crown land. A title search of the third, fourth and fifth concessions of Williamsburg Township along Hoasic Creek revealed that the bed of the creek was never granted to adjacent landowners. As a result, the bed is considered to be Crown land.
Hoasic Creek has been determined under Ministry policy to be a navigable waterbody. Recent case law in Ontario (Canoe Ontario v. Julian Reed) has also determined that a waterbody is considered navigable if, in its natural state, it is capable of being traversed by a large or small craft. In the case of Hoasic Creek, it is certainly navigable by canoe. Case law continues to say that navigability does not give persons the right to trespass on private land to portage around obstacles. However obstacles may be traversed. Navigability is not restricted by the presence of obstructions - e.g. hydro electric dams.
Further, the creek is considered to be navigable whether by boat on open water, or by snow machine or snowshoe in winter. Finally, Section 18(2) of the Game and Fish Act prohibits unauthorized persons from giving notice prohibiting an activity on Crown land.
Yours truly,
Ed McGregor
Fish and Wildlife Supervisor

VIII A further memorandum from the Stormont-East Dundas Area Biologist M.N.R., July 28, 1992, sets the stage for this action: (Exhibit A--Tab 25--p. 134)

NAME OF AREA
STORMONT-EAST DUNDAS
NAME OF RIDING
GLENGARRY
NAME OF MEMBER
Mr. Noble Villeneuve

NAME OF ISSUE
NAVIGABILITY AND OWNERSHIP OF HOASIC CREEK

BACKGROUND AND ISSUE DESCRIPTION
Sporadically, over the past several years, individual landowners along Hoasic Creek has asserted that they have the right to deny access to the creek on the basis that they own the bed of the creek. It has been the position of the Ministry of Natural Resources that the creek is navigable under the Beds of Navigable Waters Act. This position is an administrative interpretation of the Act and the associated case law. The final determination of navigability of a stream can only be established by the Courts on a case-by-case basis. Based on our position that the creek is navigable, and given that the original patents did not expressly grant ownership of the creek bed to the original landowner, it is our position that the creek bed is Crown Land and that consequently, the adjacent landowners cannot prevent the public from using the creek itself for various recreational pursuits such as canoeing or hunting.
Mr. Tolley's assertion regarding the beaver being transplanted into Hoasic Creek is not verifiable. We have no information that this occurred and no way of finding out. It is not particularly relevant in any event because beaver were certainly present when the original patent was issued and the fact that beaver were not present (as alleged) in the 1940's and that the creek was drier in the summertime, does not alter our contention that the stream is presently navigable and hence, Crown land. The creek is used extensively by hunters, snowmobilers and canoeists (at various times of the year). In terms of beaver control (although this does not seem to be Mr. Tolley's main concern), MNR is already working with the Township (to facilitate closed season nuisance beaver control) and we are assigning trappers to the creek during the open season as well. Given that the area is an extremely large Class 1 wetland which we do not want to see compromised by extensive drainage, we are of the opinion that the present level of beaver control (attained by our present efforts) is sufficient. PROPOSED RESOLUTION, IF ANY
It is not in MNR's interests nor is it appropriate to alter the administrative opinion that the creek is navigable and therefore Crown land. The final determination of navigability would have to be made by the courts in an action launched by one or more of the landowners.
Beaver control should continue to be undertaken as it is now with MNR cooperating with the Township (during the closed season) and assigning trappers to the area during the open season.

IX Obviously the plaintiff, having been advised by the defendant that the final determination of navigability of a stream could only be established by the courts, opted to seek such a determination.

LAW:

X Counsel were in agreement that the key issue between the parties is the interpretation of Section 1 of the Beds of

navigable Waters Act, Chpt. B4, R.S.O. 1990. I will repeat this section for ease of reference:

1. Where land that borders on a navigable body of water or stream, or on which the whole or a part of a navigable body of water or stream is situate, or through which a navigable body of water or stream flows, has been or is granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.

XI Counsel agreed as well that there were two aspects of Section 1 above germane to the determination of the issues between the parties, as follows:

(i) what is meant by the words, "an express grant of it"?
(ii) what is meant by the word, "navigable"?

XII It is only when these words are interpreted in law that the facts in the case can be examined as to their pertinence (which will be done under the heading FINDINGS).

(i) "an express grant of it"...

XIII I accept the argument of counsel for the Ministry of Natural Resources that use of the word "express" in Section 1 connotes "particular" as opposed to "general". This distinction is apparent from earlier cases which examined Section 1 of the Beds of Navigable Waters Act so that plain, clear and particular identification of the bed of a specific body of water needs to be located in the Crown grants similar to the exception and the words of the exception in Section 3 of the Act itself which provides:

3.
This Act does not apply to the bed of the river in Lot 8 in the 6th Concession of the Township of Merritt in the District of Sudbury.

(ii) "navigable"...

XIV It is obvious that the interpretation or meaning attributed to the word "navigable" is not simply hypothetical or of academic concern to the Ministry of Natural Resources which has a mandate to administer the use of these lands (and waters above them!). The memoranda and letters which have been quoted herein illustrate that the administrative interpretations governing the Ministry's procedures have been closely dependent upon the case law treating of the issue of navigability. Similarly, the owners of affected property and the general public have been guided in their use of disputed waterways by the rulings of the courts.

XV A number of circulars distributed within the Ministry of Natural Resources on the subject of "Navigability of Waterways" were introduced in evidence for the years of 1976, 1983 and 1992. The 1976 circular described a water course as navigable if it was capable of use by the public "for purposes of aquatic transportation and commerce". The May 24, 1983 Bulletin contains the following introductory paragraphs:

The Reasons for Judgment, released March 1, 1983, by Mr. Justice Henry of the Supreme Court of Ontario in Coleman and the Attorney General for Ontario et al. provides this Ministry with some long-awaited modern case law on the subject of navigability of waterways in Ontario. The Judgment clearly establishes that navigability is both a question of law and of fact. Navigability, in fact, is demonstrated if a waterway is used or capable of use by the public as an aqueous highway for activities such as boating, canoeing, the use of paddle-boats, inflatable rafts, kayaks, white-water canoeing and rafting, as well as, in winter, cross-country skiing, snowshoeing and snowmobiling. A waterway which is navigable, in fact, for purposes of transportation or public travel is navigable in law.

XVI The Bulletin went on to detail specific criteria to be considered by local ministry officials in determining "navigability" and contained in the following instructions:

In cases where data from previous study of a waterway is already on hand, it may be used if it adequately addresses the new criteria. However, the decision reached must be in accord with the new case law, regardless of whether or not such decision is contrary to a previous one.

XVII The most recent Directive (February 13, 1992) from the Ministry placed in evidence is a more comprehensive document on the issue of "navigability" which makes reference to the more recent case of "navigability", Canoe Ontario et al. v. Reed et al. (1983) 69 O.R. (2d) 494 (which, in turn, relied heavily upon Coleman and the Attorney-General for Ontario et al.). The instructions to regions in making navigability decisions contained the following:

In order to make a determination of navigability at the date of letters patent, particularly in older grants, in addition to researching the historical use and physical characteristics of the waterbody, field staff must research the original patents, original surveys, and field notes before making an administrative decision on the navigability of a waterbody. Interpretation of survey plans and field notes should be done in consultation with Crown Land Surveys Section. If, after having

considered the issue of navigability both under the current situation and at the date of patent, different conclusions of navigability prevail (e.g. because of artificial improvements or impediments to navigation; or a drying up of a river bed), Legal Services Branch Staff should be consulted before developing a Ministry position...
Navigability is both a question of law and of fact. To be navigable in law, the water course must be navigable in fact. Navigability in fact is demonstrated if a waterway is used, or is capable of being used, by the public as an aqueous highway. For a waterway to be navigable in law, it must have real or potential practical value to the public as a means of travel or transport, generally from one point of public access to another point of public access.

XVIII Plaintiff's counsel argued that the so-called "new" or "modern" approach to navigability in the Coleman and Canoe decisions is not binding because these decisions where they enlarged or extended the meaning of "navigability" beyond that contained in earlier jurisprudence (navigability in Leamy et al. v. The King, 1916, 33 D.L.R., 237, meant that a stream must be capable of navigation in furtherance of trade and commerce), such extension was unnecessary or restricted to the facts of those particular decisions with the result that the comments therein respecting recreational uses are obiter.

XIX It was also argued by Plaintiff's counsel that the Coleman and Canoe decisions are not determinative of the issue of navigability because of the manner in which the issues were placed before the court for adjudication. For example, in the Coleman case the court was asked for an opinion by way of originating motion based on affidavits under Rule 611 and no viva voce evidence was called from parties other than the applicant or Ministry staff (a kinder, gentler process than the trial herein wherein a number of independent witnesses testified and were subject to cross-examination). It was urged that the real issue in dispute in the Canoe case was the right of portage by canoeists across the defendant's property where a dam used for private hydro-electric generation blocked the Credit River.

XX I am unable to agree, with respect, that the Coleman or Canoe decisions should be so narrowly interpreted or restricted. In the Coleman et al. and Attorney-General for Ontario et al., 143 D.L.R. (3d) 608 decision, Mr. Justice Henry in his extensive review and analysis of the development of case law on the subject of navigability in Ontario distinguishes the common law English basis from that of the law originating in France which was adopted by the Supreme Court of Canada, but only insofar as it applied in the Province of Quebec. He says at Page 618:

Under the common law as I see it, navigability for commercial purposes was simply evidence that the watercourse was navigable in fact; it was not an essential condition of navigability in law.

XXI His summary at Page 622 is as follows:

I conclude therefore that if the stream is navigable in fact for the purposes of transportation or travel, or is floatable, whether for large or small craft of shallow draft, it is navigable in law without the necessary of applying the test of its usefulness for trade and commerce, a test which may well have been apt when the country was developing in the course of settlement, but is now no longer realistic in the light of modern conditions. I do not believe this does violence to the principles of the common law. I believe I am not precluded from taking this approach by judicial decisions in Ontario applicable to Ontario law, and it is consonant with what I regard as the persuasive authority of the decisions in Ne-Bo-Shone Ass'n Inc. v. Hogarth (1934), 7 F. Suppl. 885, affirmed 81 F. (2d) 70, and Collins v. Gerhardt, supra. On this view of the matter I find that Bronte Creek is now and at the time of the Crown grant in 1827 to be regarded as navigable in law irrespective of its usefulness as a highway for commercial purposes. (Emphasis Added)

XXII As regards the process of adjudication in the Coleman decision, Mr. Justice Henry was himself concerned that the trial of an issue ought to have been directed. After argument, he reserved judgment and on review requested and received considerable additional evidence from the parties on the history of Bronte Creek. Much of the evidence considered by him is the same type of evidence placed before me in this trial (i.e. historical and current on-site surveys of the stream, maps, photographs and affidavits of personal experience and observations). He found as well that there was no issue of credibility, although he said he preferred some areas of evidence by one party over that of another.

XXIII Similarly, I do not believe that credibility is a significant issue on the evidence before me; in other words, although there are areas of evidence which conflict between the plaintiff and witnesses called by him with witnesses called by the Ministry of Natural Resources, I do not believe these areas are determinative of the issues for decision.

XXIV As regards the decision of Mr. Justice Doherty in Canoe Ontario et al. v. Reed et al., 69 O.R. (2d) 494, I am satisfied that he was required to direct his mind directly to the issue of navigability (in addition to the issue of portage) with the result that his comments thereon, in my view, are legitimate ratio decidendi in the decision. Moreover, Mr. Justice Doherty buttresses the analysis by Mr. Justice Henry at Page 502 where, after a review of Quebec and American authorities, he states:

I agree with Henry J. in Re Coleman and A.-G. Ont., supra. at p. 622, that commercial utility is not a sine qua non to navigability, although evidence of commercial use will be determinative of the question. If the purpose underlying the recognition of a public interest in certain waterways is analogous to that which recognizes the public interest in certain highways, then that purpose is not served by limiting navigability to cases involving commercial usage. A public highway may serve many public purposes other than a purely commercial one.

XXV I agree and adopt his words at Page 503:

A distinction between public commercial use and public non-commercial use is also unrealistic. Many non-commercial uses can readily be turned into commercial endeavours. This case provides an example. If several individuals, for recreational purposes, canoe down the river, then their purpose is entirely non-commercial; however, if one individual, perhaps more experienced than the others, purports to operate a tour down the river and to charge individuals for canoeing the river with him, then the exact same trip becomes a commercial endeavour. Navigability should not depend on such personal considerations. Navigability should depend on public utility. If the waterway serves, or is capable of serving, a legitimate public interest in that it is, or can be, regularly and profitably used by the public for some socially beneficial activity, then, assuming the waterway runs from one point of public access to another point of public access, it must be regarded as navigable and as within the public domain.

XXVI In his comments, Mr. Justice Doherty cites an example of how a recreation canoeing outing can be clothed as a commercial endeavour. This analysis implicitly excludes recreation uses from commercial designation. On the other hand, most recreation activities inherently have some commercial component (some more than others) so the distinction between these uses today is tenuous. In other words, "commerce" in 1795 in Ontario is not the "commerce" of the Ontario of the 1990's. (I think of the employment in the manufacture, distribution and sale of such things as canoes, fishing, hunting and sporting equipment and apparel).

FINDINGS:

(i) Express grant of river bed to Hoasic Creek.

XXVII I have reviewed the various copies of Letters Patent from the Crown of the lands of the plaintiff through which Hoasic Creek runs in Concession 2, 3 and 4 of the Township of Williamsburg. These Patents bear dates July 16, 1797, September 1, 1797, March 3, 1808, January 22, 1836, and March 18, 1871. I have had the opportunity of comparing the wording of these Patents with those which were studied respecting the Credit River.

XXVIII I agree with Ministry counsel that none of these Patents have wording sufficiently express to exempt the bed of the Hoasic River from Crown ownership by virtue of Section 1 of the Beds of Navigable Waters Act.

(ii)
Navigability of the Hoasic River ...

(a)
... at the time of Crown Patent beginning July 16, 1797.

XXIX A written report, May 26, 1994, from Staff Archaeologist C. Andersen of the Ministry of Culture, Tourism and Recreation was introduced into evidence. The author has spent twenty years of archaeological study in research on the St. Lawrence Iroquoians and other Ontario Iroquoian peoples. His primary area of research is zooarchaeology, the study of animal bones from archaeological sites. Rather than attempt to paraphrase the report's findings, I will excerpt some pertinent sections of his opinion: (Exhibit A--Tab 34--Page 1)

The Steward (BfFt-2) site is located on the west side of the town of Morrisburg, near the mouth of Stata's Creek, on Lot 31, Concession 1, Williamsburg Township, Ontario. Stata's Creek is the first creek west, by about 2 km, of Nash/Hoasic Creek. The artifactual and radiocarbon evidence from the Steward site shows that it was occupied by St. Lawrence Iroquoian peoples for a period of about 500 years, ending at circa A.D. 1600. The faunal evidence shows that the site was only occupied on a seasonal basis, in the spring and fall, and that it served primarily as a fishing station. The primary fish species exploited were American Eel, Sucker/Redhorse, and Smallmouth Bass. The most important mammal species utilized by the site's inhabitants were deer and beaver, both of which were obtained locally and in significant numbers. (Page 2)
... The St. Lawrence Iroquoian peoples had two main types of settlement:
(1) large inland villages which were occupied on a year-round basis, and
(2) small seasonally-occupied sites which were established for the purposes of exploiting specific farmal resources, especially fish. Examples of the latter type include the Steward site at Morrisburg and the Driver's (FeFu-2), east of Johnstown. The main village sites, such as are represented by the Beckstead (BfFt-1) site, were typically located in less exposed situations at some distance inland, most commonly on the South National River or its tributaries.
Travel between the inland villages and the small fishing stations on the St. Lawrence was accomplished either by foot, via woodland trails, or, most commonly, by canoe, which was the principal mode of transportation for all Iroquoian peoples. The many rivers, streams and creeks in the region were the main travel corridors for both the Native Peoples and the European settlers until well into historic times.
The waterways were the highways on which were carried people, food, and the beaver and other pelts which were the principal objects of trade between the Native Peoples and the Europeans.
... The largest and hence most easily navigable northward-flowing creek in the vicinity of the Steward site is Nash (Hoasic) Creek. Unfortunately, there has never been an archaeological survey conducted along the banks of that stream and its mouth has been inundated to a distance of about 500 metres north from its original location. Any archaeological sites which

may be located there are now under as much as 25 feet of water. As a result, there is currently no information available concerning Native settlement anywhere along Nash/Hoasic Creek. Nevertheless, on the basis of the presence of sites at the mouths of Stata's, Flagg, and Driver's creeks, all smaller streams, it is my considered opinion that similar St. Lawrence Iroquoian sites were present on Nash/Hoasic Creek and that substantial archaeological sites may yet be found on its banks. It is my opinion that Nash/Hoasic Creek would have served as a major thoroughfare by means of which the local St. Lawrence Iroquoian peoples would have travelled to and from the hinterlands to the north. Certainly there is zooarchaeological evidence to suggest that the inhabitants of the Steward site were aware of and made good use of Nash/Hoasic and its resources. (Emphasis Added)
Zooarchaeological analyses of the animal bones recovered from Steward and Beckstead show that beaver were very well represented at both sites, as they are at all other St. Lawrence Iroquoian sites for which such analyses have been completed. Among the other species represented in the Steward site were relatively large quantities of Smallmouth Bass. Nash/Hoasic Creek is the only stream on this" part of the St. Lawrence into which Smallmouth Bass enter in large numbers during the spring spawning season. In order to have caught this species in the significant numbers present in the Steward site fannal assemblage, the inhabitants of the Steward site must have been exploiting the Nash/Hoasic spawning run.

XXX Exhibits No. 14 and No. 15 in the trial which were copies of a Survey Plan and assessment map for the Williamsburg Township dated January 15, 1795, recorded the Hoasic Creek for the first time. A Report and Field Notes, 1938, by N.B. MacRostie, O.L.S., records the early chronology of official surveys of the District of Williamsburg from 1785. Narrative and plan sketches therein identify the Hoasic Creek from these earliest records. The chronology of record of the Creek was continued through the evidence of a plan of survey showing the land division of the lands in Concessions I to V through which the Hoasic Creek ran taken from the Illustrated Historical Atlas of the Counties of Stormont, Dundas and Glengarry dated 1879. Hoasic Creek is said to have been named by united Empire Loyalists who initially settled its environs. There is nothing in the evidence to refute the continuous use of the river at least for canoes or small craft from the time of its earliest recording in 1795 to modern times.

(b) ... navigability of the Hoasic Creek today.

XXXI A Navigability Report of the Hoasic Creek, Williamsburg Township, St. Lawrence River to Concession V, prepared by Jim Cameron, June, 1993, was very helpful to me in determining the nature of the Hoasic Creek today. This Report follows a format prepared by Ministry officials on the issue of navigability of the Credit River. The use of this common format is useful not only as a diagnostic or analytical tool in assessing the Hoasic Creek, but also as a quick comparison, for example, to the study of the Credit River.

XXXII The Report organizes information on the Creek under the following headings: Introduction; Physical Description; Creek Data Chart; Existing uses; Past Uses; Summary. The Report also contains a List of Illustrations including Photographs (30), Resource Mineral Survey Map, Topographic Map showing Stream Measurements and Wetland Boundaries and various additional topographic maps together with the earlier Survey Report and field Notes of 1938.

XXXIII The author of the Report, Mr. Cameron, testified at the trial that he prepared the initial draft of the report which was subsequently edited by legal counsel for the defendant. He was cross-examined extensively on the Report, but I am satisfied that the Report substantially presents an accurate assessment of the characteristics of the Hoasic Creek today. The Report contains the following comments under the heading, "Existing Uses": (Exhibit 12--Tab 1--Page 5)

The Wetlands
The Creek provides an important recreational activity for waterfowl hunters and naturalists seeking access to the Wetland upstream. The Wetland was designated as a provincially significant wetland on or about 1986, when the Ministry determined that it was large in size (4,088 hectares), contained a great variety of fish and wildlife habitats, as well as vegetation communities. The Wetland is important for waterfowl production and migration, supports provincially significant wildlife species, and is a wintering area for wildlife. Moreover, the Wetland the Creek act as a spawning area for numerous fish species, and contributes substantial social and economic benefits to its users. Waterfowl hunters and naturalists use the Creek to access the Wetland throughout the spring, summer and autumn.
The St. Lawrence River The Creek empties into the St. Lawrence River, which is another significant point of public access. Canoes and other small water craft use the Creek for recreation and access to the St. Lawrence River.
In the last several years, a small local group of canoeists have navigated the Creek from Road 18 to the St. Lawrence River. This sport is limited by the depth of the water during the summer months.
In addition, Ministry staff have regularly observed waterfowl hunters using canoes during the fall in Concessions 3, 4, and 5. Ministry staff have also traversed the length of the Creek by canoe over the last ten years.

XXXIV The photographs included in the Report are impressive pictorial support for the text above. In addition, I was similarly assisted with a video presentation taken on a canoe trip from County Road 18 (the northern limit of Hoasic Creek) to the St. Lawrence River, where the Hoasic empties its waters.

XXXV The use of the Hoasic Creek by canoeists, whether for boating pleasure, hunting or fishing was confirmed by all the witnesses who testified during the trial. Evidence by some witnesses was to the effect that canoes had been used on the Hoasic Creek for generations, especially during the spring high water run-off.

XXXVI Evidence of aerial maps of the Hoasic Creek were introduced at the trial (photographed during the summers of 1951, 1971 and 1992) which illustrated the consistency of the creek bed location over those decades. In addition, the court was shown two aerial videos taken of the entire length of Hoasic Creek, one filmed in July, 1992, and the other in May, 1994.

XXXVII I alerted counsel at the beginning of the trial that there was the potential for me to conduct a view of the Hoasic Creek where it crossed the plaintiff's property. The evidence of the various witnesses during the trial (for both parties), including the maps, photographs and videos, made a view unnecessary. Obviously, the Hoasic Creek by comparison to the material provided describing the Credit River is a smaller, slower and shallower water course. Nonetheless, the evidence plainly illustrates that it is an aqueous highway, especially for canoes, for five to eight weeks during the spring run-off and for hunting for a number of weeks in the fall.

CONCLUSION:

XXXVIII Some weeks after I had reserved my judgment herein, defendant's counsel sent me a copy of the judgment in Dobson v. Tulloch, 17 O.R. (3d) 533, a recent decision of this court dated March 15, 1994. The trial judge at Page 543 therein appears to return to the earlier notions of "commercial" use in defining the meaning of navigability. Unfortunately, counsel in the Dobson v. Tulloch decision did not bring the Canoe or Coleman decisions to the court's attention (this is acknowledged by the judge at Page 543). Absent this reference to the Canoe or Coleman decisions, I do not believe the decision on the issue of "navigability" is binding or detracts from my interpretation of the law herein.

XXXIX As a result of my findings and interpretation of "navigability" in Section 1 of the Beds of Navigable Waters Act, the part of the Hoasic Creek which runs through the plaintiff's property was a public or navigable waterway in 1759 and continues as a public or navigable waterway today, with the result that the plaintiff's request for a declaration to the contrary is dismissed.

XL May I have submissions on costs in writing within 30 days.

XLI ORDER ACCORDINGLY.

COSGROVE J.