# Ontario High Court Ruling on the definition of Navigability

*Summary:*

*The plaintiffs owned a parcel of land which was bisected by a creek. Their title derived from the original Crown patent which reserved all navigable waters therein. The creek was a shallow, fast-moving stream with a bottom predominantly of cobble-stones, but it had some natural obstacles in the form of rapids, falls and boulders. These occurred also at the site of the plaintiffs' land. The width of the creek varied from 26 to 60 ft.; its depth varied seasonally from one to five feet. In the past the stream had been used for navigation by canoes and other shallow craft and for floating logs on a seasonal basis. The latter was a commercial use, the others probably were not, since the area was served by a good road system when it was settled. More recently, the creek at the site of the plaintiffs' land and elsewhere was used for recreational purposes by shallow craft and, in the winter, [page609] by snowmobiles, skiers and others. The plaintiffs, being concerned about their ability to sever the lands on either side of the creek, brought an application to determine whether they owned the bed of the creek.*

*Held, the creek was navigable; hence the bed was vested in the Crown.*

*The issue whether a stream is navigable in law must be determined as of the date of the Crown patent. However, modern uses of the stream may be taken into consideration. Navigability is determined by the following criteria: (1) A stream is navigable in law if it is navigable in fact; (2) a stream is navigable in fact if it is capable in its natural state of being traversed at least by small craft, or even, in the Canadian context, if it is floatable in the sense that it is used to float logs, log rafts and booms; (3) the stream does not in fact have to be used for navigation so long as it is realistically capable of being so used; (4) the stream may be navigable over part of its course and not navigable over other parts and hence its navigability may be determined independently at different locations; (5) as distinct from the law of Quebec, the test of navigability does not, in Ontario, require that the stream be capable of navigation in furtherance of trade and commerce. Rather, the test identifies a lake or stream as a public water over which the public have an inherent right to pass, whether for commercial or non-commercial purposes. Moreover, the test remains open to definition in light of modern needs of the public; (6) the essence of the test of navigability in law is that a stream be a public aqueous highway used or capable of use by the public.*

*A stream is not navigable if it is used only for the private purposes of the owner; (7) navigation need not be continuous, but may fluctuate seasonally; (8) interruptions to navigation of a natural kind, such as rapids, which may, by improvements, be readily circumvented, do not render the stream non-navigable. Moreover, a stream not navigable by reason of natural obstructions may become so as a result of artificial improvements.*

*On the facts, the creek was navigable in fact and in law at the site of the plaintiffs' land at the date of the Crown patent, either on the basis of the traditional test of navigability, or the test as modified by modern conditions and considerations. Hence, title to the bed did not pass the grantee. This conclusion was confirmed by s. 1 of the Beds of Navigable Waters Act, R.S.O. 1980, c. 40, which declares, with retrospective effect, that the beds of navigable waters do not pass to grantees of the lands through which they pass in the absence of an express grant.*

RE COLEMAN et al. AND ATTORNEY-GENERAL FOR ONTARIO et al.

143 D.L.R. (3d) 608

Ontario High Court of Justice
Henry J.

March 1, 1983

Collins v. Gerhardt (1926), 237 Mich. 38; Ne-Bo-Shone Ass'n, Inc. v. Hogarth et al. (1934), 7 F. Supp. 885; affd 81 F. (2d) 70, apld

Gordon v. Hall et al. (1958), 16 D.L.R. (2d) 379; Bell v. Corp. of Quebec (1879), 5 App. Cas. 84, distd

Keewatin Power Co. v. Town of Kenora (1906), 13 O.L.R. 237; vard 16 O.L.R. 184; A.-G. Que. v. Fraser (1906), 37 S.C.R. 577; affd sub nom. Wyatt et al. v. A.-G. Que., [1911] A.C. 489; A.-G. Que. v. Scott et al.; City of Hull v. Scott et al. (1904), 34 S.C.R. 603; Leamy et al. v. The King (1916), 54 S.C.R. 143, 33 D.L.R. 237; Tadenac Club Ltd. v. Hebner et al., [1957] O.R. 272, 9 D.L.R. (2d) 282, consd

Other cases referred to:

Stephens et al. v. MacMillan et al., [1954] O.R. 133; Rice Lake Fur Co. Ltd. v. McAllister (1925), 56 O.L.R. 440, [1925] 2 D.L.R. 506; "The Montello" (1974), 20 Wallace 430; Harrison et al. v. Fite et al. (1906), 148 F. 781; Moore v. Sanborne et al. (1853), 2 Mich. 520 [page610]

Statutes referred to:

Beds of Navigable Waters Act, 1911 (Ont.), c. 6

Beds of Navigable Waters Act, R.S.O. 1980, c. 40, s. 1

Navigable Waters Protection Act, R.S.C. 1970, c. N-19

Planning Act, R.S.O. 1980, c. 379, s. 29 (am. 1981, c. 15, s. 1)

Rules and regulations referred to:

Rules of Practice (Ont.), Rule 611

APPLICATION to determine whether the applicants owned the bed of a stream which passed through their land.

H. W. Sterling, for applicants.

P. W. Lockett, for respondent, Attorney-General for Ontario.

HENRY J.:

The applicants, Mr. and Mrs. Coleman, own a parcel of land in the Regional Municipality of Halton through which passes a watercourse known as Twelve Mile Creek or Bronte Creek. They ask the court to determine what interest they have in the bed of this stream which bisects their lands.

The critical issue is whether the stream is navigable in law; if it is, the bed was reserved in the original grant from the Crown in May, 1827, and did not pass to the grantee. This result is confirmed by the declaratory provision in s. 1 of the Beds of Navigable Waters Act, R.S.O. 1980, c. 40, 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 heretofore or is hereafter 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.

In my opinion this originating motion may properly be brought under Rule 611 of the Rules of Practice as it involves the construction of the instrument of Crown grant, assisted by the terms of s. 1 of the Act that I have cited.

The applicants gave notice to the Attorney-General of Ontario who was represented by counsel on return of the motion. Counsel for the Attorney-General took no firm position but gave considerable assistance to the court. No notice was given to other persons except the respondents Schieck (adjacent owners) who did not appear, and no issue was raised as to this point. By way of evidence I was offered an affidavit by Mr. Coleman as to present facts and background history which were accepted as common ground. After hearing argument by both counsel I reserved judgment. In the course of reviewing the jurisprudence, it became apparent that in the decided cases the issues of fact relating to navigability of waters and watercourses have usually been deter- [page611] mined after a trial on viva voce evidence. I therefore felt obliged to consider whether I should order the trial of an issue. I accordingly consulted counsel informally as to the availability of further evidence bearing on the issue of navigability of Bronte Creek, not only at the Coleman site but throughout its length, and historically as well as currently.

Through the co-operation of counsel and the owners I have now been furnished with an affidavit of Richard Laverne Tapley, District Lands Administrator of the Cambridge District of the Ministry of Natural Resources for the Province of Ontario, sworn December 3, 1982, who has made an historical and current on-site survey of the stream; he has provided a very helpful report accompanied by maps and photographs. Counsel for Mr. and Mrs. Coleman also submitted further information of an historical nature, together with current photographs. I have also received the Colemans' comments with respect to Mr. Tapley's report; they do not agree with all of his measurements, principally with respect to average depth of the stream, and with respect to current use by small craft of the stream at the site. There is no issue of credibility here and neither counsel indicates a desire to cross-examine on the material filed. I prefer the information provided by the Colemans where it is based on their personal observation on a year-round basis over that of Mr. Tapley who has not had the opportunity of such comprehensive observations, his survey being made in October of 1982.

I have therefor before me an affidavit of Mr. Coleman sworn November 24, 1981, and further information supplied by him

on December 3, 1982; the affidavit of Richard Tapley with the report of his recent survey sworn December 3, 1982, and the applicants' statement of facts which is not disputed. Among the material filed are some modest historical writings, some statements based on folklore, old maps of the area, current photographs of the stream at various seasons at the site, and current aerial photographs and maps of the stream over its length.

I am informed that the present objective of the applicants in bringing this motion is to ascertain whether they have a proprietary interest in the bed of the stream so that, in the event they should sever their lands in future on either side of the stream, they would be required to obtain consent pursuant to s. 29 of the Planning Act, R.S.O. 1980, c. 379. There is no indication that there is here raised any question that might require the intervention of the Attorney-General of Canada for purposes of the Navigable Waters Protection Act, R.S.C. 1970, c. N-19, nor is the [page612] ownership of the bed of the stream by any other owners than the Colemans before me. I have therefore decided in the interest of minimizing costs to the applicants to dispose of the matter under Rule 611 without the trial of an issue.

The lands at present owned by Mr. and Mrs. Coleman were originally granted by the Crown by deed executed in the name of King George IV under the great seal of the Province of Upper Canada by the hand of Sir Peregrine Maitland, then Governor of the province, on May 14, 1827, to William Fitz ... [illegible], schoolmaster and late private in the Canadian Fencibles. Reserved from the grant of the lands were "all navigable waters within the same, with free access to the beach by all vessels, boats and persons". What is now known as Bronte Creek (or Twelve Mile Creek to local inhabitants) flowed through the lands granted. In due course a portion of the lands was conveyed by the successor in title to the Colemans by deed dated September 13, 1977. Approximately 1,200 ft. of Bronte Creek passes through the Colemans' lands. That deed is given in the usual form, "subject to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown". The deed was registered in the Land Registry Office for the Registry Division of the Regional Municipality of Halton as instrument No. 465985.

It is my opinion that the reservation in the Crown grant respecting navigable waters when read with the declaratory provisions of s. 1 of the Beds of Navigable Waters Act which has retrospective effect, excludes from the Crown grant and the deed to the Colemans the bed of Bronte Creek, if it is a "navigable" water or stream; clearly, the bed of the stream was not expressly granted.

It is my opinion that the issue whether the stream is navigable in law must be determined as of the date of the Crown grant; it is at that time that title to the bed of the stream passed to the grantee or was reserved to the Crown as the case may be. If title did not then pass to the original grantee, it has not subsequently been conveyed by deed or operation of law to any subsequent owner.

The law relating to navigability of waters and watercourses is not free from difficulty. Whether or not a lake, river or stream is navigable is a question of law and also of fact. The issue arises in several ways in the jurisprudence, principally:

(a) to determine proprietary rights in the bed or solum;
(b) to determine the right of the public to use the waters for hunting and fishing; [page613]
(c) to determine the right of the public to use the waters as a "highway" for commerce or recreation;
(d) to determine the lawfulness of obstructions to navigation, as an tort or under the Navigable Waters Protection Act.

The common law in England distinguishes between tidal waters, which are navigable and accessible to the public for passage over the surface, the ownership of the bed being vested in the Crown, and inland waters (i.e., non-tidal) in which case a grant by the Crown to a riparian owner automatically conveys to him the bed of the inland water adjacent to the lands conveyed while the public right of navigation is preserved.

Those principles have been applied in Ontario, particularly by the decision in Keewatin Power Co. v. Town of Kenora (1906), 13 O.L.R. 237 (H.C.J.); varied 16 O.L.R. 184 (C.A.), which held the Great Lakes and the Winnipeg River to be inland waters as to which a riparian owner was prima facie presumed to have title to the solum. This rule of law has now been modified by the Beds of Navigable Waters Act originally enacted by 1911 (Ont.), c. 6. It is an essential attribute of a waterway that is navigable in law that the public may use it as of right for purposes of passage as a public waterway or highway, even if the title to the bed is in the riparian owner or owners.

It is noteworthy that the English common law rules have been adapted to particular requirements of the North American geography and economics, both in Canada and the United States, and that Ontario courts have not hesitated to cite U.S. decisions with approval: see Keewatin Power v. Kenora, supra, and Gordon v. Hall et al. (1958), 16 D.L.R. (2d) 379 (Ont. H.C.).

In Canada the leading jurisprudence has evolved in decisions of the Supreme Court of Canada in the early part of the century with respect to waters in the Province of Quebec. The principles emerging from the cases may, for our purposes, be briefly stated without much elaboration.

(1) A stream, to be navigable in law, must be navigable in fact. That is, it must be capable in its natural state of being traversed by large or small craft of some sort -- as large as steam vessels and as small as canoes, skiffs and rafts drawing less than one foot of water: A.-G. Que. v. Fraser (1906), 37 S.C.R. 577; affirmed sub nom. Wyatt et al. v. A.-G. Que.,

[1911] A.C. 489 (P.C.); A.-G. Que. v. Scott et al.; City of Hull v. Scott et al. (1904), 34 S.C.R. 603, and Keewatin v. Town of Kenora, supra. [page614]
(2) In the context of the Canadian economy where the timber trade has developed, "navigable" also means "floatable" in the sense that the river or stream is used or is capable of use to float logs, log-rafts and booms: Leamy et al. v. The King (1916), 54 S.C.R. 143, 33 D.L.R. 237, and the Fraser case, supra. (I note here that this development follows the corresponding development of the law in the United States.)
(3) A river or stream may be navigable over part of its course and not navigable over other parts; its capacity for navigation may therefore be determined by the courts independently at different locations: the Fraser case, supra, and the Leamy case, supra.
(4) To be navigable in law a river or stream need not in fact be used for navigation so long as realistically it is capable of being so used: the Keewatin case, supra, and Tadenac Club Ltd. v. Hebner et al., [1957] O.R. 272, 9 D.L.R. (2d) 282 (Gale J., obiter).
(5) To be navigable in law, according to the Quebec decisions, the river or stream must be capable of navigation in furtherance of trade and commerce; the test according to the law of Quebec is thus navigability for commercial purposes: Leamy v. The King, supra; A.-G. Que. v. Fraser, supra. This was also the test in some of the earlier United States cases. So far as the law of Ontario is concerned, the commercial test was alluded to in Gordon v. Hall, supra, per McRuer C.J.H.C., obiter, but as I shall indicate, I do not consider the "commercial" test an element of the law of Ontario.
(6) The underlying concept of navigability in law is that the river or stream is a public aqueous highway used or capable of use by the public. This concept does not embrace uses such as irrigation, power, fishing, or other commercial or non-commercial uses that do not depend upon its character as a public aqueous highway for passage. In law a river or stream is not navigable if it is used only for the private purposes, commercial or otherwise, of the owner: see Gordon v. Hall, supra, citing U.S. authorities at pp. 382-3.
(7) Navigation need not be continuous but may fluctuate seasonally: see Gordon v. Hall, supra.
(8) Interruptions to navigation such as rapids on an otherwise navigable stream which may, by improvements such as canals be readily circumvented, do not render the river or stream non-navigable in law at those points: see Keewatin, supra, and Stephens et al. v. MacMillan et al., [1954] O.R. 133 (H.C.). [page615]
(9) It would seem that a stream not navigable in its natural state may become so as a result of artificial improvements: see per Mulock C.J.O. in Rice Lake Fur Co. Ltd. v. McAllister (1925), 56 O.L.R. 440 at pp. 449-50, [1925] 2 D.L.R. 506 at p. 513, cited obiter by Gale J. in the Tadenac case, supra, at p. 275 O.R., p. 285 D.L.R.; see also, Stephens v. MacMillan, supra.

I consider now the physical features of Bronte Creek. This stream, which is fed by a number of tributaries, has its principal source in Puslinch Township, near the intersection of present Highways 6 and 401 whence it meanders generally south-easterly to its mouth in Lake Ontario at the Town of Bronte, a distance of approximately 35 miles. It passes through the historic communities of Cedar Springs and Lowville, before reaching the Colemans' property. It borders part and bisects part of the Coleman property for a distance of approximately 1,200 ft. Thence it continues southerly to and through Bronte Creek Provincial Park whence it enters Lake Ontario.

Bronte Creek is a shallow, fast-moving stream with a bottom predominantly of cobble-stones. It has some natural obstacles in the form of rapids and boulders. There are at present some man-made obstructions which are located upstream from the Coleman's lands. The stream is generally known for trout fishing.

At the site of the plaintiffs' land (where the only precise data are presented) the stream is fast-moving, contains several rapids and natural falls and some boulders, but the bottom is predominantly cobble-stones. Its width varies from 26 to 60 ft. The depth varies seasonally from one to five feet. There are several rapids throughout this stretch; at three of these points the depth was measured at less than one foot in October, 1982. The man-made obstructions mentioned are not found on the Coleman stretch or downstream from it; they are located upstream from Lowville.

Bronte Creek has been in the past, and is now capable of navigation by canoes and other shallow craft on a seasonal basis, at least from Lowville to its mouth in Lake Ontario (including the Colemans' lands) when water levels are high enough to clear the natural obstacles such as rapids. There is no evidence that boats or other craft were used to transport freight or produce by the early settlers; the early development of a good network of roads made this unnecessary. However, in the early 1800s sawmills and grist mills, powered by the stream, were established. One of these, the Dakota mill, was located six miles upstream from Lowville; the second was established at Lowville, and a third was [page616] established on the lands now owned by the Colemans. Bronte Creek was used to float logs from upstream farms and timberland to these mills.

I conclude that at the time of the Crown grant of the Colemans' lands Bronte Creek, at that site, was commercially floatable; it is probable that it was also capable of seasonally moving farm produce and articles of commerce in shallow boats, scows or rafts, had the developing road system not provided a better alternative. The stream was therefore navigable in law and the title to its bed did not pass to the grantee from the Crown.

The conclusion I have reached satisfies the legal test of navigability adopted by Canadian courts (including the law of Quebec), that is, navigability in fact, by any mode of craft, and capability of use as a highway for trade and commerce. I have also applied the test of floatability hitherto applied by the Supreme Court of Canada in relation to the law of Quebec. I

have no hesitation in applying the latter to situations in Ontario where the same considerations of the timber trade apply. All these tests are consistent with the earlier U.S. cases, such as "The Montello" (1974), 20 Wallace 430; Harrison et al. v. Fite et al. (1906) 148 F. 781 at pp. 783-4; Moore v. Sanborne et al. (1853), 2 Mich. 520; Collins v. Gerhardt (1926), 237 Mich. 38.

I am persuaded, however, that in Ontario, navigability in law ought to be determined according to a less restrictive test in the light of modern conditions which, in recent years, have seen extensive use of lakes, rivers and streams for non-commercial purposes. It is common knowledge that in recent decades the myriad lakes and streams of this province are increasingly used for recreational purposes in the form of swimming, boating, canoeing, the use of paddle-boats and inflatable rafts, kayaks, windsurfers, white-water canoeing and rafting, as well as, in winter, cross-country skiing, snowshoeing and snowmobiling. It is even possible that some of these activities were practised by early settlers. (I do not include here such purposes as fishing, and use of the waters by riparian owners for irrigation and power for the mills which is a different subject-matter from the use of waterways for passage.) In particular I am asked by Mr. Lockett to consider applying the test of navigability in fact as identifying a lake, river or stream as public water over which the public have an inherent right to pass, whether for commercial or non-commercial purposes. In the State of Michigan this developing concept was the subject of the decision in Ne-Bo-Shone Ass'n, Inc. v. Hogarth et al. (1934), 7 F. Supp. 885, affirmed 81 F. (2d) 70, a [page617] case involving fishing rights where Raymond D.J. after reviewing the development of the jurisprudence said, at pp. 888-9:

> Much of the difficulty in analysis of the various cases and in application of the principles announced arises from the failure in some instances to distinguish between the so-called "test" and the object of the test. The human mind is prone to confuse definitions with the thing defined, symptoms with the disease, theology with religion, and descriptions with the thing described. By too close attention to the bait the game escapes. This tendency has been noted by the Supreme Court in the class of cases here being considered. In the case of The Genesee Chief v. Fitzhugh, 12 How. (53 U.S.) 443, 455, 13 L. Ed. 1058, Chief Justice Taney said: "And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters." (Italics by the court.)
>
> The distinction sought by the variously stated tests is that between public and private waters. In England, the test was whether or not the tide ebbed and flowed. In America, navigability was at one time generally regarded as the criterion, and later, in the states where logging and lumbering became an important commercial enterprise, floatability of logs was made the test. It is to be noted that, while navigability was made the guide as to what constituted public waters, it was not made the test of the scope of the public use of such waters. While floatability was often stated to be the test of navigability, it seems apparent that, in fact, it was not so. The very purpose for the change of test was to classify as public waters streams which were not commercially navigable but which were within the test of floatability. If these streams had been navigable, no need for a more inclusive test would have arisen. The real purpose of a change of test was to apply a broader definition to bring within the scope of public waters, streams and lakes which under former definitions would have been regarded as private. There is as much reason for saying that, when the test of public waters was limited to navigability, the only purposes for which such streams could be used were those of navigation and commerce, as to say that, when the test is floatability, the only purpose for which the stream to which the test is applicable may be used is the floating of logs. While the courts have frequently said that floatability is a test of navigability, it is clear that what was intended was that floatability is a test of whether the waters to which the test is applied are public or private.
>
> Because some waters are public, certain rights attach thereto. These rights are not limited by the test by which the nature of the waters is determined but to the rights incident to the characterization as public of the stream or body of water.

The court held that a stream of average depth of two-and-a-half feet and average width of 50 ft., these measurements varying considerably in different parts of the stream and in different seasons, was a public water because it had been used for the [page618] public purpose of floating logs and, accordingly, it could be used for other public purposes, inter alia, fishing. The decision was upheld in the Circuit Court of Appeals, Sixth Circuit, in Ne-Boo Shone Ass'n, Inc. v. Hogarth et al. (1936), 81 Fed. Rep. (2d) 70. I quote from this judgment at p. 72:

> We come finally to the inland lakes cases cited by the appellee. Giddings v. Rogalewski, 192 Mich. 319, 158 N.W. 951, 953; Winans v. Willetts, 197 Mich. 512, 163 N.W. 993; Pleasant Lake Hills Corporation v. Eppinger, 235 Mich. 174, 209 N.W. 152. Though these cases deal with private lakes and not with rivers, they expressly or inferentially reaffirm the test of navigability applied in Moore v. Sanborne. If it be said that they discard that test in view of the fact that the lakes may have sufficient water capacity for the floating of logs or even of small boats, it is to be noted that the test was not so limited. The original doctrine applied the criterion of floatability to rivers as a test of their navigability only where they might be used as highways of commerce. An inland lake wholly surrounded by private property, and having no navigable outlet to other waters of the state, cannot be said to constitute a highway of commerce except in the most limited and restricted sense. This was clearly pointed out by the court in Giddings v. Rogalewski, where it was said, "The true test is whether the waters under consideration are capable of being used by the public as thoroughfares or highways for purposes of commerce,

trade, and travel -- of affording a common passage for transportation and travel by the usual and ordinary modes of navigation," citing Moore v. Sanborne, supra.

In Bell v. Corp. of Quebec (1879), 5 App. Cas. 84, a case originating in the courts of Quebec, the Privy Council appeared to consider the test of commercial utility as peculiar to the law of France. The Board said, at p. 93:

These general definitions of Daviel [Trait? des Cours d'Eaux] and Dalloz [R?p. tit. "Voirie par eau"] shew that the question to be decided is, as from its nature it must be, one of fact in the particular case, namely, whether and how far the river can be practically employed for purposes of traffic. The French authorities evidently point to the possibility at least of the use of the river for transport in some practical and profitable way, as being the test of navigability.

This approach in my opinion places in proper perspective the common law of England which was concerned to distinguish between public and private waters. I have not been referred to any decision that imported the concept of commercial use of inland waters as a test of the public character of those waters; that test appears to have been adopted by the Supreme Court of Canada as applicable to waterways in the Province of Quebec as a derivative of the law of France (see A.-G. Que. v. Fraser (1906), 37 S.C.R. 577, and Leamy et al. v. The King (1916), 54 S.C.R. 143, 33 D. L.R. 237), but it does not necessarily follow that those decisions are part of the law of Ontario. In Keewatin Power Co. v. Town of Kenora (1906), 13 O.L.R. 237, the decision was that the common [page619] law of England was adopted in Ontario so as to declare the Great Lakes and the Winnipeg River to be inland waters, and so in the public domain for navigation, and not limited, so far as I can see, by the trade and commerce test, although the waters in question were found to be navigable for commercial purposes. The judgment cites "The Montello", supra, where use of the waters for commerce was an integral element of the test. It does not appear to me that the commercial aspect of navigation was an issue to be decided in the Keewatin case; commercial viability was simply an acknowledged fact. 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: see Angell, A Treatise on the Law of Watercourses, 7th ed. (1877), p. 706; and 39 Hals., 3rd ed., p. 534.

In Tadenac Club Ltd. v. Hebner et al., [1957] O.R. 272, 9 D.L.R. (2d) 282, which concerned the right to fish, Gale J. did not find it necessary to decide whether the stream in question was navigable in law. He referred obiter to the passage in "The Montello", supra, and while not adopting it expressed the view that if the waters had in fact been used for commerce he would be inclined to agree that they were navigable in the legal sense.

In Gordon v. Hall et al. (1958), 16 D.L.R. (2d) 379, McRuer C.J.H.C. dealt with the right of a member of the public to use a private lake for fishing, swimming and boating. He held that the lake was not navigable in law. At pp. 382-3 he said:

Without entering upon the task of defining "navigable waters" I think it is clear that the small lake here in question is not a navigable water. In the first place, to be regarded as a navigable water, it must have something of the characteristics of a highway, that is, it must afford a means of transportation between terminal points to which the members of the public have a right to go as distinct from a means of transportation between one private terminus and another. In A.-G. Que. v. Fraser (1906), 37 S.C.R. 577 at p. 597, Girouard J. said: "The test of navigability is its utility for commercial purposes." This is a concise statement of the test applied in the American Courts.

In Harrison et al. v. Fite (1906), 148 F. 781, Hook J., in delivering the opinion of the Circuit Court of Appeals, stated the American law in this way at pp. 783-4: "To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the [page620] fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation." This would appear to be the accepted statement of American law. See Best v. State (1929), 279 P. 388, and U.S. v. Ladley (1930), 42 F. (2d) 474.

Without presuming to decide what a navigable water is for all purposes I have no difficulty in coming to a conclusion that there is no authority for holding that this small lake in question comes within the tests laid down.

This is the only decision of an Ontario court to which I have been referred that could be said to apply the test of commercial use in determining navigability in law. That case I believe may be distinguished from the case at bar. The water in question was a land-locked lake about 300 yds. in width and about 15 acres in area. It had not historically been used for navigation, it was a "private" lake entirely surrounded by the lands of the owner; it was in no sense a public highway, being capable of passage only between points on the owner's lands. The decision can stand without application of the commerce test. Moreover, the applicability of the Supreme Court of Canada decision in the Fraser case to Ontario, in view of its derivation from the law of France, does not appear to me to have been raised. It may also be questioned whether the United States decisions cited clearly reflect the state of the U.S. law in 1958. The decision in Collins v. Gerhardt in 1926 (reversing the judge of first instance on a writ of error) puts the law of Michigan differently (at pp. 42-4):

In view of modern social and economic conditions, and the flexibility of the common law in adapting itself to the changing needs of the people, we shall not consider the term navigability in a too technical commercial sense, or seek out some ancient test in determining if Pine river belongs in the class legally regarded as public waters. It has been said that:

"The right of the public use in American rivers and streams depends, not upon their navigability, in the technical sense of the term, as defined by the common law." Carter v. Thurston, 58 N.H. 104 (42 Am. Rep. 584).

And:

"If under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred." Lamprey v. State, 52 Minn. 181, 199 (53 N.W. 1139, 18 L.R.A. 670, 38 Am. St. Rep. 541).

The common law relative to the navigability of waters has never been wholly adopted by the courts of this State. As has been said, it is not adaptable to our conditions and circumstances. If it had been adopted neither our Great Lakes nor our largest rivers could be classed as navigable. At [page621] common law only the sea and those rivers in which the tide ebbed and flowed were navigable. But above the ebb and flow of the tide some rivers were capable of floating vessels and were valuable in carrying the trade and commerce of the country. These rivers were not legally navigable but were characterized as navigable in fact. In Michigan we have no waters in which the tide ebbs and flows, but we have lakes and rivers which would meet the test applied by the common law to waters navigable in fact. The test which the common law applied to determine whether rivers were navigable in fact was originally used in this country to determine if they were navigable in law. Here, every stream that is navigable in fact is navigable in law. So our first understanding of what constituted navigability in a river was whether it had the capacity for carrying boats and accommodating commerce and travel. But, in the settlement and development of this State, it soon became apparent that the people had other uses for the rivers and streams. There came the lumber industry and a demand for the use of the rivers for the floatage of logs and rafts. The demand was resisted by the riparian proprietors, who claimed that the only use the public could make of the rivers and streams was in navigation by boats. This court met the situation by declaring all rivers navigable and public which in their natural state were capable of floating logs, boats and rafts. Moore v. Sanborne, 2 Mich. 519 (59 Am. Dec. 209).

In that case the court said:

"It was contended in argument, in behalf of the plaintiff in error, that the capacity of a stream to float logs and rafts, was no criterion of the public right of servitude; but that to render a river a public highway, it must be susceptible of navigation by boats. But this, we apprehend, is too narrow a rule upon which, in this country, to establish the rights of the public, and as already intimated, such is not the rule in any of the States. The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use."

Thus, it appears that early in the history of the State the common-law rule relative to the navigability of rivers was enlarged to embrace all streams having a capacity to float logs and rafts; and this was done to meet the needs and necessities of the people. Moore v. Sanborne, supra, was decided in 1853.

During the long period that has followed it is not surprising to find in the judicial opinions of the court expressions of dicta from eminent common-law jurists, questioning the soundness of the principles enunciated in that case. But the Sanborne Case has never been overruled. There is no reason why it should be. It is in harmony with the judicial decisions of other States where similar conditions exist. It lays down a sensible rule based on the necessities of the people and saves for them all of the valuable public uses of which their rivers are capable.

Justice COOLEY recognized this rule in his great work on Constitutional Limitations, and states it as follows:

"If a stream is of sufficient capacity for the floatage of rafts and logs in the condition in which it generally appears by nature, it will be regarded as public, notwithstanding there may be times when it becomes too dry and shallow for that purpose." Cooley's Constitutional Limitations (7th Ed.) p. 861.

I conclude therefore that the test of navigability, or as I consider it better expressed, the public character of watercourses [page622] in Ontario, remains open to definition in the light of the modern needs of the public.

According to the material before me, Bronte Creek at and in the vicinity of the Coleman site has in recent memory and currently been used for canoeing, and rubber-boating, such craft being launched at Lowville and travelling down the stream through the Colemans' property and beyond to its mouth in Lake Ontario, at least on a seasonal basis. In winter the stream is frequently used for snowmobiling and cross-country skiing. The stream is, and always has been, floatable in fact, and in my opinion should in the public interest be regarded as a public highway in summer and winter. The majority of lakes and streams in Ontario are now seldom required for commercial use and it is, I suggest, quite illogical that the right of the public to use them for passage should, in the light of current requirements of the public for passage over the surface for non-commercial purposes, depend upon a finding of capability for commercial use at present or in the past.

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 necessity 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. Supp. 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.

It follows from what I have said that Bronte Creek, at the site of the Colemans' property, is navigable in law and the bed of the stream is not vested in the Colemans as riparian owners. The title is vested in the Crown in the right of the province. I wish to emphasize that, notwithstanding that I have made comments that may be taken to apply to portions of the stream above and below the Coleman site, this decision is confined to that portion of the stream that abuts and bisects the Coleman lands, and is based only upon the evidence and materials before me. [page623]

An order will therefore go declaring that the applicants have no interest in the bed of,the stream, Bronte Creek. In the circumstances this is not a case for costs and there will be no order for costs.

Judgment accordingly.