

IN THE MATTER OF

The Lakes and Rivers Improvement Act;

AND IN THE MATTER OF

the proposed refusal of the applications of S.A. Wilding and W.T. Wilding of 31 Resolution Crescent, Willowdale, ontario for approval of the construction of two dams on tributaries of the pine River on the East Half of Lot 15 in Concession III W.H.S. in the Township of Mulmur, in the County of Dufferin.

REPORT TO THE MINISTER OF NATURAL RESOURCES

As requested, the undersigned has held a hearing under the provisions of the Lakes and Rivers Improvement Act as to whether the proposed refusal of the application for approval of the location of two instream dams is fair, sound and reasonably necessary for the purposes of the Lakes and Rivers Improvement Act. The hearing was held in Orangeville on the 10th day of June, 1985.

At the hearing C.E. Mansfield appeared on behalf of the Ministry of Natural Resources. The applicants for approval were represented by Miss S.A. Wilding, one of the applicants. Robert Pitfield, a downstream riparian owner appeared and requested to be made a party to the hearing. No objection was raised to his being made a party and accordingly, he was made a party to the hearing.

In addition Kenneth Whitbread, a senior planner with the Niagara Escarpment Commission, appeared and requested that that Commission be made a party to the hearing. There was no objection to that request and the Commission was also made a party.

On agreement of the parties it was agreed that the Ministry would have the carriage of the hearing and accordingly, the Ministry proceeded to give its evidence and have the right of reply, both in respect of evidence and submissions.

The applicants and their father before them have been the owners of the east half of Lot 13 in Concession III, W.H.S., in the Township of Mulmur since 1959 or 1960. At the time of acquisition there were two ponds on the half lot. A house and barn were situate on the northerly part of the half lot and a pond was situate in the vicinity of the buildings. In addition a pond was

located in a wooded portion of the half lot situate in the southeasterly quadrant of the half lot.

Following the acquisition of the property the father of the applicants expended considerable sums in renovations of the buildings. The buildings were used as a recreational and hobby area. In the fall of 1974 the Township of Mulmur reconstructed the road along the north boundary of the subject lands and in the following spring there was a serious flooding problem which caused the darn in the vicinity of the buildings to break and the resultant flow of water caused a washout of part of the spillway of the southerly darn. The darn in the vicinity of the buildings has been replaced but due to the fact that the father was retired and living on his pension income, he was unable to restore the southerly darn. The applicants now wish to restore that southerly darn and construct a new darn in the southwest quadrant of the subject lands in an area that also is wooded.

Notwithstanding that the applications indicated that the purposes of the darns were related to agriculture and recreation, the expressed purpose of the darns as indicated by the evidence of Miss Wilding was the aesthetic additions to the property as a retreat area having a natural setting. Her evidence indicated that there was no agricultural purpose contemplated and that there was no contemplated use of water for irrigation or other agricultural purposes. With reference to recreational purposes her evidence indicated that there was no intention of using the headponds of the darns for the purpose of stocking fish. The expressed evidence was that the purposes were to allow indigenous species of wildlife to inhabit the area and to obtain the additional element of having ponds on the property. The use of the ponds for swimming was not involved and if animals are kept in the barns~ these animals during pasture would have some access to the southwesterly pond.

With reference to the scientific or expert implications of the proposal, the only advice that the applicants had obtained was received from a contractor from Southhampton, whose expertise appeared to be limited to the construction of darns and headponds. The estimate of the cost of construction of the darns was. \$20,000

for each pond. The applicants had caused no studies to be made to determine whether the proposed dams would interfere with the quality and quantity of the downstream flows of the water in the streams. Each of the proposed dams is on a separate tributary of the pine River. The watershed ,of the Pine River is a fairly extensive watershed and the two locations 'are at or very near the headwaters of the two tributaries. The two tributaries enter the pine River upstream of an operation previously known as the Pine River Fishing Club that was acquired approximately fifteen years ago by the Ministry and creates an interesting aspect to this application. Much of the cross-examination of Ministry employees by Miss Wilding related to the fact that the employees did not walk the portion of the two streams between the proposed locations and the Pine River. The evidence of the applicants indicated that these areas are fed by springs which add cold water to the stream which would offset any reduction in temperature resulting from the creation of the headponds. This opinion was not supported by any scientific opinion.

Turning to the evidence produced on behalf of the Ministry, it was established that the Pine River and its tributaries are classed by the Ministry as cold water streams and that it has been for some time but more particularly within the last two or three years the policy of the Ministry to refuse to grant approvals for the construction of instream dams on cold water creeks or streams. Reliance for this position was based on the classification made in the past and the facts given by some of the witnesses that they had tested the temperature by hand. There was no evidence before the tribunal of any actual temperatures having been taken on any occasion particularly in the most relevant months of the year, namely, July and August. D.J. Borchuk, the Civil Engineering Technologist responsible for the administration of applications under the Lakes and Rivers Improvement Act gave evidence that he had inspected the locations and he found that the location in the southeast quadrant of the subject lands was situate in a well-defined valley and that from an engineering point of view it was not feasible to construct a by-pass pond at this location.

The reason given for this opinion was the nature of the topography and the cost involved in breaking down the valley walls and diverting the water from the stream through the walls to an outside location. He also expressed concern regarding the flows, particularly from the dam in the southwesterly quadrant as the stream is only one foot wide and one-half of a foot deep. He was concerned that in the summer months the flow would be completely terminated.

With reference to the reconstruction of existing dams, this witness indicated that the policy of the Ministry was similar to the policy followed in respect of the original construction of dams and the applications are treated as applications for new dams. Where there are existing headponds and the dams require repair, the approvals are coupled with conditions requiring modification such as bottom-draws and an ability to empty the headponds from time to time to create better circulation of the waters of the headpond. This witness gave evidence that this policy was applied consistently and that there were no exceptions to this policy in his administration. He referred specifically to two cases of refusal and he also referred to the Pitfield application where the dam was modified to provide for a by-pass pond with inlet controls and a bottom-draw.

With reference to the Ministry's policy in administering lands of the Ministry on which dams are located, the witness indicated that during the last two or three years the policy has been to review the existing dams. Where the dams are required in the public interest two or three such dams have been converted to bottom-draws. In all other situations~ the policy has been to remove the dams entirely.

In addition to his cross-examination on the subject of failure to examine the streams downstream from the proposed sites and in respect of which the witness admitted that if there were springs feeding the stream downstream from the proposed sites the springs would temper the temperature of the heated water coming from the proposed dams, the witness was questioned regarding the Pine River Provincial Fishing Area. It was submitted to the

witness that the area of that pond was ten acres while the area of the proposed ponds were one-quarter of an acre. It was pointed out by the witness that the area of one of the ponds would appear to be in excess of one acre and the other is approximately one-third of an acre in size. It was suggested, to the witness that there was a significant difference in the size of the pond of the Ministry and the proposed ponds of the applicant and that those ponds would only be one thirty-second of the area of the Ministry's pond. with reference to that pond it was suggested to the witness that the dam was not a bottom-draw type of pond because the water was presently spilling over the top of the spillway. The witness pointed out that during the summer months when temperature is a relevant consideration there is no overtopping of the dam and the draw is from the bottom through a boxlike culvert which not only serves as the bottom-draw but also serves as a fishway for the migration of fish.

It was also suggested to the witness that of all of the tributaries of the Pine River; the tributaries flowing through the applicants' land are a very small proportion of all of the tributaries. The reply of the witness was that it was a policy of Ministry not to permit onstream dams on any cold water streams.

On re-examination the witness indicated that notwithstanding the existence of other tributaries, a reduction of the water temperature of the downstream flows would be expected.

Richard Toth~ the Fish and wildlife Management. Co-ordinator of the Huronia District and the person responsible for the administration and management of the Pine River Provincial Fishing Area as well as the other supervisory duties normally associated with that position, gave evidence. He had not personally made an inspection of the subject lands but endorsed the report that was made by Murray A. Townes. When asked his opinion as to what should be done in the situation he suggested that any available funds should be expended in creating a bottom-draw of the existing pond rather than create new ponds.

With reference to the existence of fish populations on the streams, the witness pointed out that one of the proposed dams

was on a tributary that flowed into the Ministry's property associated with the Pine River Provincial Fishing Area and that he had observed fish in that tributary on the property of the Ministry. In particular he had noted spawning at the entrance of the tributary into the pine River. The species involved were rainbow and brook trout.

The witness outlined the history of the fishing area. Over many years the area had been operated by the pine River Fishing Club and was purchased in the late sixties from that club. It was opened in 1971 for public fishing. All of the ponds have been reconstructed or improved and no greater number of ponds exist than when the site was purchased. A parking area was provided and a small building was erected. One new dam was constructed with a passageway for adult rainbow trout. The purpose of this passage is twofold, namely as a fishway and as a bottom-draw for the pond. With reference to the warming of the waters of the Pine River by this operation, the witness indicated that there was a concern primarily in the months of July and August. However, the main dam had been constructed with the fishway and in these serious months the waters flow through the fishway. It is only in the event of a heavy rainfall that water overtops the dam during these two months. Normally one hundred per cent of the outflow of the dam during the months of July and August passes through the fishway outlet and reduces the concern regarding the temperature of the Pine River as a whole.

The witness indicated that there had been a change in policy in the last ten to fifteen years. He assumed that if the property were acquired today a different approach would be followed in managing the property. However a public use of the property has been established. Over the years there has been a significant public use, as high as fifteen thousand visitors per year. Much of this popularity depended on stocking and with the decrease in the funds available for stocking of fish; the number of fishermen has decreased in recent years.

On cross-examination the witness indicated that there had been a slight increase in the size of the main pond by fifteen to

twenty per cent as contrasted with the size at the time of purchase. He confirmed that the period of concern with reference to effect on water temperatures is, the months of July and August.

Murray A. Townes, the Extension Technician of the Huronia District, gave evidence. He had inspected the sites of the proposed dams and his report was filed as Exhibit 14. The preparation of such reports falls within the normal duties of this witness. He confirmed his recommendation contained in Exhibit 14 which reads,

These are coldwater tributaries to the Pine R, a known troutstream and as such must be protected. The one stream (Pond B) already supports at least 3 ponds including one on the Applicant's property. If the Applicant wanted to deepen existing pond I would recommend approval subject to bottom drawoff etc., however I cannot in all conscience recommend approval of the ponds applied for. They would be against our policy of no onstream ponds and cause further downstream degradation of fish habitat and water quality.

The witness also expressed a concern that the quantity of water that would supply the proposed dam in the southwest part of the subject lands was insufficient to sustain a pond and maintain a downstream flow.

It was brought out on cross-examination that the witness had not made a complete examination of the entire tributaries down to the intersections with the pine River but the witness expressed his opinion that from his knowledge of the area the conditions would be similar to conditions on other cold water streams in the area. He did agree that it was likely that there were a number of springs downstream from the southwesterly site which would continue to feed the Pine River with cool water but his view was that the quality of the water would be affected by the construction of the proposed dam.

Robin Edward Craig; the District Biologist who has both a Bachelor and a Masters degree in zoology and had been employed by the Ministry for twelve years in related positions, gave evidence respecting the policy of the Ministry and the basis of the policy. He referred to the S.P.O.F.F. program resulting from federal-provincial meetings. Reference was made to pp. 9 and 10 of the fourth report of this program issued in April, 1976. At p. 9

it was stated,

Alternative uses of the environment can affect fisheries directly or indirectly.

Again at p. 10 the report states,

Indirect conflicts include dam building, gravel removal from spawning areas, pesticide use in agriculture, urban and industrial development, private shoreline development and highway construction and maintenance.

The purpose of the report was to establish management strategies for the 1980's. These strategies, in part at least, have found their way into the district land use guidelines which were filed as Exhibit 19. Reference was made to the policies respecting fisheries management in the district as it appears on pp. 21 and 22 of the guidelines as follows:

b. Important Resource Areas and Area Strategies

The emphasis for fisheries management in the district is on cold water lake and stream habitat (Map 4) its assessment, inventory, protection and rehabilitation. This does not imply that warm water fish habitat is to be ignored, but that cold water habitat and species are the most fragile and thus in most immediate need of special attention.

Ultimately the angler demand across southern ontario for lake trout and other cold water fish will exceed the capacity to produce. To mitigate this situation cold water fisheries resources have to be protected, and where necessary, rehabilitated.

The witness stated that these guidelines reflect the Ministry's interpretation of provincial policies and that the Ministry's policy is based on these guidelines. It was pointed out that the temperature in respect of cold water streams is not the sole consideration but in addition; other aspects such as a continuous all-year flow are important. Many of the cold water streams are fed by small springs and shaded banks are necessary to maintain the quality and the policy is to discourage the use of the banks for agricultural purposes.

The witness indicated that in the small streams the indigenous species of animals is the brook trout population which is highly dependent on temperature and the freedom from other changes in the environment detrimental to their continued existence.

With reference to the witness',s opinion on the effect of the proposed dams on the fishery resource, the witness indicated that although the evidence had not disclosed the existence of any

trout in the investigations conducted to date, the evidence did indicate the existence of brook stickleback. The presence of this species indicates that the stream is a cold water stream and should be treated in the same manner as other cold water streams.

Reference was made to the potential of reduction of the flow of the stream arising both from the impoundment of the waters and evaporation from the headpond. In addition, the capacity of the stream would be affected by considerable warming in the downstream areas. With reference to evaporation, the witness referred to a report prepared by Environment Canada filed as Exhibit 20 and a calculation by Donald John Borchuk which the witness confirmed and showed a loss due to evaporation of 9.2 cubic feet per hour during the months of June and July in the smaller pond and 27.7 cubic feet per hour during that period in the larger pond.

(Exhibit 21). When asked his opinion on the significance in respect of the flow the witness indicated that while it may be difficult to make a total assessment, his opinion was that there would be a serious effect because if the areas were left in a natural state the evaporation would not occur by reason of the existing cover. With reference to the larger headpond of 45,000 square feet, the witness suggested that this evaporation could use up the entire flow coming into the headpond during the months of July and August and in other months of the year there would be a ten per cent reduction. The ultimate result would be the drying up of the stream.

The witness indicated that the concerns regarding such reductions when compared with the total flow of the watershed are firstly, that the lost flows are not replaceable and secondly, in respect of the Pine River watershed; while the reductions are comparatively minor there would be an accumulative effect arising from the demands of other landowners for similar permissions. He indicated in his opinion that such reductions in the flow and temperature would affect the spawning that was shown by the previous witness to occur at the intersection of the tributaries and the Pine River. The witness indicated that there was no major concern respecting the Pine River Provincial Fishing Area but that

there was a concern regarding the minimum flows in the months of July and August.

In conclusion the witness expressed the view that the refusal of the issue of the approvals was necessary for the management of the fishery resource of the watershed.

When cross-examined by Mr. Whitbread on the accumulative effects of pond construction, the witness indicated that he had observed situations where a series of ponds had been erected on a stream with the result that in the dry periods there was no flow. In cross-examination by Miss Wilding, the witness was questioned regarding the selection of the months of June and July for the calculation of evaporation and the witness pointed that the amount of sunlight is highest in June and July and in August the days are shorter but the temperature impact is most serious in July and August and accordingly, in making the calculations an average between the June and August figures provided by Environment Canada was used in the calculations.

The witness indicated that he had not completely followed the streams to the Pine River and when cross-examined regarding the existence of spawning areas the witness indicated that an inspection had not been made in the fall but there was some evidence of spawning by previous witnesses at the intersection of the streams with the Pine River. However, the witness's opinion was that the stream, being a cold water stream, would have a potential for spawning areas but some of the capacity would be controlled by the existence of logs and other impediments that might interrupt the migration of fish to spawning areas.

On re-examination the witness indicated that the walking of the entire length of the stream was not a significant requirement in determining whether approval should be granted. In the witness's opinion the serious consideration was the impact of the dam both on the migration of fish~ the loss of flow and the increase in temperature, which concerns should be more regarded particularly in small streams such as those under consideration.

Jacob George Imhoff~ the Southern Ontario Fisheries Rehabilitation Officer of the Ministry, gave evidence on the

requirements for the continued existence of trout species in the streams of ontario, namely, water and water quality, food, temperature and space. He pointed out that where there are increased temperatures above twenty-two to twenty-four degrees Celsius, the trout populations die and that optimum temperatures are several degrees lower. He indicated the need for a wide variety of stream conditions such as riffles, pools and areas where the species could obtain protection from predators. He also expressed the opinion that quantity of water is as important as quality of water and certain amounts of water are required to sustain populations.

The witness indicated that the ideal temperatures for trout populations is from fourteen to eighteen degrees Celsius. He emphasized the need for the protection of springs in headwater areas even though downstream rehabilitation of streams is being conducted. The retention of the cold water from the headwaters and springs is essential to the recovery of stream habitat even where the lower areas of the stream are subject to rehabilitation as the loss of cold temperatures will have an additive effect on the entire stream.

The witness compared the streams with reference to the pine River system as twigs on a tree. He indicated that one or two of the twigs may be removed but if all of the twigs were removed the tree would die in which case it would be difficult to assess responsibility for the death to the removal of any particular twig. Accordingly the Province has created a policy to protect the remaining twigs in their entirety. In the witness's opinion it is essential to maintain these cold water streams in a natural condition to preserve cold water temperatures and the quantities of water in the streams. As the quantity of water is reduced the effectiveness of the decreased temperatures is further reduced. In the opinion of the witness the principle problems associated with the proposed dams are the loss of temperature and water quantity.

The witness was questioned on the issue of whether downstream springs could replace the loss of temperature created by the proposed headponds. In his opinion the cold water from the

lower streams would not reduce the increased temperature created by such headponds and the temperature could never be decreased to the same degree as it would be in a natural state.

The witness also dealt with the importance of the trout species indicating that it is the only indigenous species in the streams in Ontario with brown trout having been introduced from Europe and rainbow trout having been introduced from the Pacific Rim. The species has a significant value from the point of view of tourism and is an important species from the point of view of the interests of fishermen.

The witness outlined the time and expense involved in preparing a thorough examination of each site that might form the subject matter of an application indicating that it would require the establishment of four to six stations with thermometers and flow gauges which would have to be monitored over a three month period ranging from June through August and it was the witness's opinion that such individual assessments being time and funds consuming are unnecessary where there is adequate evidence to show the effect of the proposed dam from the existing natural conditions. With reference to bottom-draws~ the witness indicated that this device is the best of a bad situation and it is not the policy of the Ministry to require existing dams to be modified. If dams are rebuilt, bottom-draws can be installed but the policy with respect to new dams is to prohibit the construction of the dam rather than to permit the dam with a bottom-draw. With reference to by-pass ponds, the witness indicated that the construction would be difficult and perhaps impossible in respect of one of the sites but even with proper management there would still be a reduction in the essential elements. He indicated that there was a possibility of an off-channel pond on the property which could be considered by the applicants.

Miss Wilding asked the witness whether the practice of planting trees adjacent to the proposed ponds would assist the matter. The witness's position was that while evaporation is caused by three factors, namely; solar radiation; air temperature and wind, some of the effect of wind might be reduced on calm days

but there would still be an effect from the solar radiation and temperature.

Miss Wilding also put to the witness a conflict between the existence of the Pine River Provincial Fishing Area and the policy of refusing new dams on tributaries. The witness pointed out that at the time of the acquisition and establishment of the fishing area, the policy of the Ministry was to concentrate on the provision of accessible fishing areas and that policy has now changed with the emphasis being placed on the protection of the natural habitat. Notwithstanding the change in policy, the area was being continued because it provided a public fishing area.

Mr. Pitfield provided no evidence. Mr. Whitbread indicated that the subject lands fell within the jurisdiction of the Niagara Planning and Development Act and under Ontario Regulation 683, the subject lands had been made an area of development control. He pointed out that under subsection 24(1) of the Act no development could take place in a development area without a development permit and under subsection 3 of that section, no permit relating to development should be issued by any other authority unless the development permit had already been obtained. He stated that the applicants had applied in August, 1984 for such a permit, the application had been refused and the time for appeal had lapsed.

with reference to the policy under that Act, a distinction is made between natural areas and protection areas. The pond in the southwesterly part of the lot fell within the concept of a natural area and ponds were not a permitted use under the policy. The other proposed pond fell within a protection area where ponds were permitted subject to compliance with criteria. As the area was considered to be a buffer area and an area of regional significance the application was refused primarily on the basis on the report of the Ministry of Natural Resources recommending against the construction of instream dams and suggesting that the Pine River and its valley is an area of regional significance.

The submissions of the Crown relied on clause 2(c) of the Lakes and Rivers Improvement Act which states that one of the

purposes of that Act is,

- (c) the use, management and perpetuation of the fish, wildlife and other natural resources dependent on such waters.

Reference was also made to the clauses dealing with public rights in waters, protection of riparian interests and suitability of location and nature of improvements but primarily the case rested on clause 2(~). It was submitted that the scientific evidence clearly showed that the proposed dams would have an effect on the habitat of the fishery resource. with reference to the fishing area, it was submitted that this should be treated as a matter of a past mistake and that it should not have any bearing on the current knowledge or practice of the Ministry and it should not be held that past mistakes would require the making of further and future mistakes. It was submitted that the evidence clearly establishes that the two streams are cold water streams providing habitat for a trout species and that the construction of the ponds would create an adverse effect on that habitat in respect of the quantity .and flow of the streams.

With reference to fairness, it was submitted that a refusal would be fair as the policy is administered consistently and the Ministry was not singling out the particular applicant. It was also submitted that there was no evidence produced on behalf of the applicants that would outweigh the public interest illustrated by the evidence of the Ministry. The accumulative effect of the granting of such permits even if the effect were held to be insignificant was argued. It was submitted that the only fair method of dealing with applications which in themselves are not flagrant examples of deduction of the quantity and quality of the water was to refuse all such applications unless there was some serious and extenuating circumstances such as economic effects and the evidence of the applicants clearly indicates that there would be no economic loss from the refusal to issue the approval. In the absence of extenuating circumstances or economic loss, it was sUBmitted that the recommendation should be for refusal of the particular applications. Lastly, it was submitted if the evidence were considered as merely creating an adverse effect if not a severe effect that, having regard to the cumulative effects the

public interest outweighs the right of the applicants to exercise the normal rights of ownership.

Mr. Pitfield submitted that he was only concerned with the proposal in the southwest quadrant and from hearing the evidence he was not satisfied that there would be any damaging effect in permitting the construction of this dam. He also submitted that additional water supplies could be obtained from the drilling of wells, particularly if such drilling resulted in the creation of an artesian well. However, his ultimate statement was that he was not taking any position in the matter.

Mr. Whitbread supported the position of the Ministry of Natural Resources.

The applicants adopted the position taken by Mr. Pitfield that in lay opinion there would be no significant result from the construction of the proposed dams. It was pointed out that it was admitted that complete and full studies of the situation had not been performed by the Ministry and that the Ministry's position was based on other cases and general criteria rather than on a full investigation of the subject lands. Miss Wilding admitted that she had not brought technical evidence to refute the evidence of the expert witnesses of the Ministry. She suggested that the creation of the ponds might create a wildlife refuge with wild ducks and other aquatic animals being provided an additional habitat. In this regard it may be noted that no evidence was submitted to support such an alleged benefit.

In reply, it was pointed out that if the position of the applicants was that the Ministry must prove a case beyond reasonable doubt of adverse effects~ that such was an improper test to be applied. It was submitted that the test should be a civil test of balance of probabilities and reference was made to the words "reasonably necessary" in subsection 11(4) of the Lakes and Rivers Improvement Act which indicates a standard similar to the standard used in many civil matters. It was further submitted that even if a test of "beyond a reasonable doubt" were adopted that the evidence met such a test.

With reference to findings of fact; the tribunal is

satisfied that there is no significant conflict of evidence in this matter. The applicants brought no technical evidence and the only expert or technical evidence placed before the tribunal was that of the Ministry and the tribunal has no basis on which it could come to a finding other than a finding based on such expert evidence.

At the outset the major difficulty in refusing approval in this case is the appearance of unfairness arising from the operation of the pine River Provincial Fishing Area downstream from the subject lands. A continuation of the operation of this area creates an impression of a beam as contrasted with a mote in the eye or a dog in the manger situation. However, when one has regard to the history of the development of the area, the expenditure of public funds thereon and the role in the public interest served by the area, it must be concluded that the continued existence of the fishing area is not a precedent for determining future applications. With regard to fairness, consideration should be given to a comparison of existing applications and the applicants brought no evidence before this tribunal to show that applications had been granted by the Ministry in cases either analagous to or more serious than their case. Before leaving this subject it should not be overlooked that the purpose in preserving the brook trout species is to provide public fishing and the fishing area provides for such a need without the fishermen trespassing upon private lands in the pursuit of this species.

With reference to the purpose of the proposed dams, the applicants failed to establish before this tribunal any real reason for construction of the dams other than a mere desire that dams be constructed. Use for agricultural purposes, although inferrible from the application, was denied. It was denied that there was any intent to use the dams as a method of propagation of fish or for stocking purposes and the tribunal is left with the view that the proposed construction can only be categorized as purposeless. Accordingly, where a public interest is established it would seem that the public interest overrides what would have to be categorized as purposeless applications.

With reference to onus of proof, the tribunal is

satisfied that the proper test is the civil test and that it would be improper to apply a criminal test to matters dealt with at such a hearing. There was no evidence to dispute the expert evidence brought on behalf of the Ministry and the tribunal can only conclude, on a balance of probabilities, that the proposed dams would have a detrimental effect on the habitat of cold water species of fish by reducing both the quantity and the temperature of the water at the most crucial times of the year.

The tribunal is satisfied that the proposed dams would have an appreciable effect on the habitat of the brook trout species that now exist, if not on the subject lands, at least on the lands downstream from the subject lands and for this reason the applications should not be approved.

Counsel referred to clause 2(b) of the Lakes and Rivers Improvement Act which brings into consideration the protection of the interest of riparian owners. The only conclusion that can be made on the evidence, particularly the evidence regarding evaporation and the evidence of Mr. Borluk is that in the summer months the flow, particularly below the dam proposed in the southwest part of the subject lands, would be reduced or completely dried up. It would seem to the tribunal that the applicants would be exposing themselves to civil liability in such an event. It is noted that Mr. Pitfield did not express any serious objection although this stream flows through his property. However it appears from Exhibit 3 that there is another landowner between the Wilding property and the Pitfield property and consideration should be given to this area of legal liability.

For the foregoing reasons the tribunal is of the opinion that the refusal of the approvals requested is fair, sound, reasonably necessary for the achievement and purposes of the Lakes and Rivers Improvement Act.

DATED this 26th day of September, 1985.

Original signed by G.H. Ferguson

G.H. Ferguson