

**611428 Ontario Ltd v Metropolitan Toronto and
Region
Conservation Authority**

Between
611428 Ontario Limited, appellant, and
Metropolitan Toronto and Region Conservation Authority,
respondent

[\[1996\] O.J. No. 1392](#)

File No. 123/94

**Ontario Court of Justice (General Division)
Divisional Court - Toronto, Ontario
White, Feldman and MacPherson JJ.**

Heard: March 6-7, 1996.
Judgment: April 22, 1996.
(31 pp.)

Pollution control — Landfill sites — Deposit of garbage — Refusal of permission.

This was an appeal from an order refusing permission to place fill on land near a creek. The appellant company had been refused permission to dump fill by the Mining and Lands Commissioner because of the impact it would have on the land and the surrounding area. The company argued that the Commissioner erred in basing her decision on an incorrect interpretation of the purpose of section 28(1)(f) of the Conservation Authorities Act. The Commissioner held that this section provided for the conservation of an ecosystem. The company submitted that the Act did not require the land to be preserved in a state of complete nature. The company also argued that the Commissioner erred by imposing an onus on it to prove that an area downstream would not be significantly altered by the fill. It argued that there was no basis in law for requiring a burden of proof greater than on a balance of probabilities.

HELD: The appeal was dismissed. The Commissioner did not err in her interpretation of the Act. Section 28(1)(f) provided for the conservation of land. This included the conservation of an ecosystem. Furthermore, the Commissioner did not impose an excessive burden of proof on the company. The Commissioner reasonably inferred that the fill would alter the area downstream. It was then up to the company to show that this would not occur. The burden of proof had simply shifted to the company and it was then faced with adducing evidence to undermine the inference.

Statutes, Regulations and Rules Cited:

Conservation Authorities Act, R.S.O. 1990, c. C.27, ss. 20, 21, 28(1)(f), 28(5).

Ministry of Natural Resources Act, R.S.O. 1990, c. M.31, s. 6(6)(b), 6(7).

Mining Act, R.S.O. 1990, c. M.14.

Counsel:

S.M. Makuch for the appellant.

J.H. Wigley for the respondent.

The judgment of the Court was delivered by

¶ 1 **WHITE J.**— This is an appeal to the Divisional Court from the order of the Mining and Lands Commissioner dated February 11, 1994. The appellant had sought permission from the Metropolitan Toronto and Region Conservation Authority ("MTRCA") on December 4, 1990 for permission to place fill on certain lands of the appellant located in the City of Vaughan. The Board of the MTRCA held a hearing on March 13, 1992, and consequently it refused to issue permission to the appellant to place fill on the relevant lands. The appellant appealed the refusal of such permission to the Minister of Natural Resources pursuant to s. 28(5) of the Conservation Authorities Act, R.S.O. 1990, c. C.27. The powers and duties of the Minister under s. 28(5) have been assigned by Revised Regulations of Ontario 795/90 to the Mining and Lands Commissioner pursuant to clause 6(6)(b) of the Ministry of Natural Resources Act, R.S.O. 1990, c. M.31. Proceedings before the Commissioner are governed by part VI of the Mining Act, R.S.O. 1990, c. M.14 subject to the modifications required by s. 6(7) of the Ministry of Natural Resources Act.

¶ 2 The Commissioner treated the appeal before her as a new hearing and received evidence from the appellant and the respondent MTRCA and on February 11, 1994, rendered her reasons which concluded with the statement:

The appeal ... is dismissed due to the impact of the proposed placing of fill on the conservation of land.

The Appellant's Lands

¶ 3 The appellant owned 6.1 hectares of land on the west side of Rainbow Creek. The application for the placing of fill involved placing 67,000 cubic metres of fill in an area of 3.5 hectares, being wholly within the jurisdiction of the MTRCA pursuant to Ontario Regulation 293/86, Schedule 3, which applies to the Humber River watershed. The 3.5 hectares are located on part of Lot 9, Concession IX, in the City of Vaughan and may be

referred to as the subject lands in respect of which the appeal to the Commissioner was made, and in respect also of which the appeal to this court is made.

¶ 4 The subject lands are located between the flood line and the fill line delineated in map M.T.R. 3-30 (Ex. 9), pursuant to Schedule 3 of O.R. 293/86. The subject lands contain a depression known alternatively as a valley feature, a minor tributary valley, a first order stream valley and a misfit stream. The appearance of that valley feature is that of a ravine which makes contact with Rainbow Creek. To the west of the subject lands is the area in which the proposed extension of Highway 427 is to be constructed.

The Issues Propounded on This Appeal

¶ 5 The appellant presents seven issues in this appeal:

1. The Commissioner erred in law in basing her decision on an incorrect interpretation of the purpose of s. 28(1)(f) of the Conservation Authorities Act, in that she held that the section provided for the conservation of an ecosystem.
2. The Commissioner erred in law in imposing an onus on the appellants that they prove "irrevocably" that the "downstream" (of the West Rainbow Creek) would not be "significantly altered" by the placing of the fill.
3. The Commissioner erred in law in basing her decision on the consideration of the "cumulative effects" of potential future development applications when no such applications were before her and there was no evidence that any such applications existed and no evidence of the effects such applications would have if they did exist.
4. The Commissioner erred in fact and law in dismissing the appeal when there was no evidence that the placing of fill would affect the conservation of land through sedimentation, erosion, and flooding.
5. The Commissioner erred in fact and law in making her decision when evidence showed there was no watercourse in the Proposed Fill Area which would affect or be affected by sedimentation, erosion or flooding.
6. In the alternative, if the Commissioner correctly interpreted the purpose of s. 28(1)(f) of the Act, then she erred in fact in that there was no evidence to show the Proposed Fill Area served a significant ecological or environmental function.
7. There was sufficient evidence presented to justify the granting of the permit.

The Relevant Statutory Provisions

¶ 6 The Conservation Authorities Act sets out the objects of the authority in s. 20:

The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals.

¶ 7 Section 28(1)(f) of the Conservation Authorities Act provides:

28(1) Subject to the approval of the Lieutenant Governor in Council, an authority may make regulations applicable in the area under its jurisdiction,

...

- (f) prohibiting or regulating or requiring the permission of the authority for the placing or dumping of fill of any kind in any defined part of the area over which the authority has jurisdiction in which in the opinion of the authority the control of flooding or pollution or the conservation of land may be affected by the placing or dumping of the fill.

¶ 8 Under the authority of s. 28(1)(f) of the Conservation Authorities Act the MTRCA in 1986 enacted O.R. 293/86, the predecessor to O.R. 158, which prohibited the placing of fill within a line in the Humber River watershed which included the subject property. Section 4 of O.R. 158 repeats s. 28(1)(f) of the statute and states that the MTRCA may permit the placing of fill if in the opinion of the MTRCA the placing of that fill will not affect the control of flooding, pollution or conservation of land.

¶ 9 The issue before the MTRCA, and the issue also before the Commissioner was whether the placing of the fill would not affect the control of flooding, pollution or conservation of land. It appears that the MTRCA was of the opinion that the placing of fill would affect the conservation of land. It also appears that the conclusion reached by the Commissioner was that the placing of the fill would adversely affect the conservation of land in the watershed controlled by the MTRCA.

The Milani Valley at Present

¶ 10 Heard by the Commissioner was factual and opinion evidence of certain witnesses to the following effect:

1. The depression feature on the subject lands is a minor tributary of the West Rainbow Creek. The drainage area of that depression feature is about 10 Hectares. (The depression feature may be called the Milani Valley).
2. Water does flow down the Milani Valley and it would have been sufficient to create a permanent channel, but for agricultural activity that had taken place in the area of its lower end.
3. The processes that take place in the Milani Valley contribute nutrients to the main watercourse Rainbow Creek.
4. The Milani Valley provides an element of flood storage.
5. River valleys and their tributaries are important natural resources.
6. The Milani Valley provides ecological diversity.
7. The Milani Valley provides corridors for the movement of plant and animal life and habitat.
8. The Milani valley acts as a natural filter eliminating pollutants from adjacent fields.
9. Water seepage apparent near the mouth of the Milani Valley contributes to the base flow of the West Rainbow Creek, and the maintenance of the temperature of the system.

The Proposed Filling of the Milani Valley

¶ 11 1. The filling that was proposed involved 4,000 to 5,000 truck loads of fill material that would be 8 metres (1 1/2 storeys) thick. The effect of the filling would be to destroy the Milani Valley; the effect would also be to create four industrial lots, for commercial exploitation.

¶ 12 2. Retention and detention ponds would be needed so as not to lose the natural capability of the Milani Valley to retard the flow of water under storm conditions, and replicate the ground water recharge functions that existed naturally. Even then, there would be problems with such ponds including the maintenance situation, temperature, and loss storage during multiple storm events. Porous pipes also have a sedimentation problem with a tendency to plug up over time.

¶ 13 3. Water flowing into the West Rainbow Creek, if the Milani Valley were filled, would access the West Rainbow Creek via a drainage pipe. Water emerging from the drainage pipe into the West Rainbow Creek would be warmer than water emerging from the Milani Valley untouched. The higher temperature of the water would adversely affect natural organisms in that Creek.

- ¶ 14 4. Run off from the farmer's field at the rear of the Milani Valley with its attendant chemicals would be piped directly into the West Rainbow Creek.
- ¶ 15 5. If the Milani Valley were left untouched, in time, it would become through the process of natural regeneration similar, albeit on a smaller scale, to the West Rainbow Creek Valley in its plant life.
- ¶ 16 6. The practice of filling in ravines (one can designate the Milani Valley as a ravine) for the creation of development lands leads to the loss of headwater, habitats, nutrient sources and landscape diversity, affecting the watershed adversely.
- ¶ 17 7. The incremental loss of tributaries has not been well researched. Only the end product of species-deficient rivers has been observed in watersheds with few or no primary tributaries. The cumulative effect of removing all of the tributaries leads to the elimination of most of the downstream species. The elimination of tributaries and ravines also reduces headwater habitats and natural nutrient sources that will ultimately lead to a biologically depressed river and estuary ecosystem.
- ¶ 18 8. Piping the drainage and filling the valley feature could be done easily at the adjacent Roybridge Valley and any of the other smaller tributaries that feed into the West Rainbow Creek or, for that matter, on any tributary.
- ¶ 19 9. Any placing of fill will have some pollution effect.
- ¶ 20 10. A river system is like a tree. The mainstream of the river is the trunk; from the trunk emerge branches and from them smaller branches, and from the smaller branches twigs. The West Rainbow Creek is a smaller branch of the Humber River tree and it has twenty-nine twigs or first order streams. If you fill the twig or first order stream i.e. a tributary valley of the system, the results are;
- (i) higher flood peaks,
 - (ii) loss of storage capacity,
 - (iii) diminished intake of nutrients,
 - (iv) sedimentation,
 - (v) increase of water temperature, and,
 - (vi) deterioration of the quality of the water downstream.

This degradation of the tree of the Humber River system by the placing of the impugned fill in the Milani Valley cannot be measured; nonetheless, it will occur if the fill is placed.

- ¶ 21 11. The appellant was not the only land owner who sought permission of the MTRCA to fill a twig of the Humber River system. The owner of land contiguous to the

subject land whose land also contained a depression feature (called the Roybridge Valley) had made application to the MTRCA to fill that depression feature. That land owner awaited the result of the appellants application for permission to fill the Milani Valley.

Indeed, before any development of the appellant's land could ensue - the Roybridge Valley would have to be filled. Access to the subject lands for the purpose of filling the Milani Valley would only be possible if the Roybridge Valley were previously filled.

The Findings of the Commissioner

¶ 22 The reasons of the Commissioner comprise some seventy-four pages. They are comprehensive. All evidence was duly considered by her. She found as follows:

1. First order streams play an integral role in the health of the downstream water course.
2. The proposed piping would serve to increase water temperatures flowing from the drainage area. Similarly, pipe water does not have the same sedimentation retarding capacity as does land left in its natural state.
3. Headwater first order streams play a unique role. The functions performed by first order streams will have an effect on downstream characteristics by impacting on water temperature, removing sedimentation and providing nutrients while filtering out chemicals.
4. The role a first order stream, within the headwaters, plays within the watercourse, is precariously fragile.
5. No model was presented at the hearing to indicate a threshold for intrusion into the watershed beyond which development should not be allowed. In the absence of such a model, the Commissioner found that it was appropriate to apply a precautionary principle to development.
6. Headwaters must be regarded as fragile.
7. Permitted intrusions into any drainage area will impact on water temperatures and nutrient loading, notwithstanding engineered solutions.
8. Changes to the stream characteristics within the headland reaches will be compounded throughout the watershed.
9. The long term effects of the sediment entering the main channel of the West Rainbow Creek is of sufficient concern that it has not been irrevocably proved that the downstream will not be significantly altered.

10. There is sufficient evidence that the proposed development will cause impacts elsewhere in the watershed which have not been provided for.

¶ 23 Certain paragraphs in the reasons of the Commissioner are worth repeating. At page 69 and 70 she stated:

The tribunal is much persuaded by the evidence of Dr. Eagles and Dr. Newbury concerning the importance of the functions performed by first order streams to the overall health of the watershed, particularly water quality downstream. Currently, the water draining from and over the subject lands is undetectable for portions of the year. However, the water entering the main channel of the creek is unquestionably cold water if left in its natural condition. The proposed piping would serve to increase water temperatures flowing from the drainage area, due to the increased speed with which drainage would occur. Similarly, piped water does not have the same sedimentation retarding capacity as does land left in its natural state, and while Dr. Brown and Mr. Brodie suggested that the mitigation of an engineered solution would be sufficient to minimize impacts, they were unable to agree that there would be no impact. While the proposed measures to provide a retention and discharge function and control sedimentation are recognized as being somewhat effective, the impacts of engineered intrusions on a water-course are not 100 percent effective.

¶ 24 At pages 70 and 71 her reasons contain the following significant paragraphs:

Headwater first order streams play a unique role. Of all areas within the watershed, intermittent streams which drain a relatively small area, are the least differentiated and evolved.

Although it is recognized that a first order stream is not a living organism, the adjective "embryonic" best describes its relationship to the watershed. Therefore, the tribunal finds that Intermittent or first order streams located in headwaters are best characterized as embryonic streams. While not having the distinctive and year round permanence of features associated with third, fourth and fifth order streams, the functions performed by first order streams will have an effect on downstream characteristics, by impacting on water temperature, removing sedimentation and providing nutrients while filtering out chemicals. Development of any one first order stream, even through the use of engineered solutions, will have some impact on the water temperature on the main channel, which was admitted by witnesses for the applicant, as well as the amount and quality of nutrients available to the biotic community. Dr. Brown did not admit this latter impact, but the tribunal finds that the piping, retention and detention pond would not be

capable of both removing the sedimentation to the same degree as the land in its natural state and more particularly, does not provide sufficient opportunity for the decomposition of plant life and microorganisms to take place and enter the main channel of the West Rainbow Creek. This impact is significant in that, being a first order stream within the headwaters, the role it plays within the watercourse is precariously fragile. The elimination of the nutrient discharge and uptake function, as well as increased sedimentation, will play a large role in changing the character of the main channel, the extent to which is unknown. However, if the type of proposed filling were allowed, and were generalized to many or a majority of first order streams, the quality of the water and the biological community found within the main channel will be degraded. There is no known means by which an alternative process can be added within the main channel to replace the functions described above or remedied their impact.

¶ 25 At page 71, she stated:

No model was presented at the hearing to indicate a threshold for intrusion into the watershed beyond which development should not be allowed. In the absence of such a model, the tribunal finds that it is appropriate to apply a precautionary principle to development involving first order and intermittent streams within the headwaters of a watercourse, so that, in the absence of calculation of a threshold or demonstration of no net impact, development within such land should not proceed. This precautionary principle is applied in recognition of the integral role of water in environmental and human health.

¶ 26 At pages 55 and 56 of her reasons the Commissioner makes certain key findings and I reproduce the paragraphs incorporating such findings.

The test for determining whether fill may be placed or dumped in an area within the jurisdiction of a conservation authority, as outlined in clause 28(1)(f), is, in the opinion of the authority or the tribunal in an appeal, whether "the control of flooding or pollution or the conservation of land may be affected". ... Regarded in the context of the clause, "conservation of land" must mean something separate and apart from flooding and pollution.

...

The use of Official Plans, Official Plan amendments and by-laws is of no assistance in determining the jurisdiction of a conservation authority or, under appeal, the tribunal. In fact, it must be recognized that

notwithstanding a designation of an Official Plan which would be favourable to development, a proposal must still obtain the permission of the conservation authority for lands within its jurisdiction.

The objectives of the Conservation Authorities Act are quite distinct in relation to subsection 28(1) applications. ...

The Issues as Argued by the Parties

1. The Commissioner erred in law in basing her decision on an incorrect interpretation of the purpose of s. 28(1)(f) of the Conservation Authorities Act in that she held that the section provided for the conservation of an ecosystem.

¶ 27 The basic submission of the appellant is that a careful reading of the entire Act and in particular ss. 20, 21, 28, 28(1)(f) and O.R. 158 makes it clear that the purpose of s. 28(1)(f) in the scheme of the Conservation Authorities Act is to prevent, in defined areas, sedimentation, erosion and flooding.

¶ 28 The submission of the appellant is that the phrase "conservation of land" in s. 28(1)(f) does not mean the retention of land in a state of nature and such a consideration would be outside the scope of the jurisdiction of the MTRCA.

¶ 29 The position of the respondent is that "conservation" should not be given a narrow construction. Conservation is an evolving concept and should be treated as such. The preservation, or keeping from harm of valley landforms forming part of the relevant watershed, is a legitimate purpose of the Conservation Authorities Act. It is incorrect to conclude that the conservation of land narrowly encompasses only such matters as sedimentation, erosion and flooding as the appellant would argue.

2. The Commissioner erred in law in imposing an onus upon the appellants that they prove irrevocably that the downstream (of the West Rainbow Creek) will not be significantly altered.

¶ 30 The appellant submitted that the Commissioner erred when it imposed an onus upon the appellant that it irrevocably prove that the downstream will not be significantly altered thereby exposing lands not currently prone to flooding when no such onus was imposed by the legislature and is unknown to the common law. Also, the Commissioner erred in imposing a burden upon the appellant to demonstrate that there would be no net impact before the fill could be placed.

¶ 31 The onus on the appellant should be no greater than rebutting the MTRCA's reasons for denying the granting of the permit to fill and that onus was on the balance of probabilities and there was no reasonable basis upon which the MTRCA could form an opinion that the placing of fill would adversely affect "the control of flooding, pollution or conservation of lands".

¶ 32 The position of the respondent on issue 2 is that the Commissioner did not impose any incorrect onus. The decision to allow or not allow the permit is a discretionary decision of the MTRCA and where there is evidence upon which the MTRCA could reasonably come to the conclusion that the placing of the fill would have an adverse effect on the conservation of land, as there is in the case at bar, then on appeal, neither the Commissioner, nor indeed this court should substitute her opinion, or its opinion, for that of an authority having expertise in the matter. The Commissioner found:

- (a) The piping retention and detention pond would not be capable of both removing the sedimentation to the same degree as the land in its natural state and more particularly does not provide sufficient opportunity for the decomposition of plant life and microorganisms to take place and enter the main channel of the West Rainbow Creek.
- (b) The appellant's evidence concerning sedimentation was not persuasive.
- (c) There was sufficient evidence that the proposed development would cause impacts elsewhere in the watershed which have not been provided for.
- (d) The proposed fill would affect the conservation of land.

3. The Commissioner erred in law in making her decision based on the "cumulative effects" of potential future development applications when no such applications were before her and there was no evidence that any such applications existed and no evidence that the effects of such applications would have if they did exist.

¶ 33 The appellant's position is that although the Commissioner had held that "cumulatively a few similar proposals to fill are found to have sufficient impact on the watershed, in respect of flooding, alteration to the channel, and the quality of water", no assessment of cumulative effects involving the collection and analysis of a great deal of base information was done in this case. There was no factual evidence of the cumulative effects from the future development within the Humber River watershed since no witnesses had undertaken any study of other development properties. The implication of the Commissioner's ruling about cumulative effects is that an onus was placed on the appellant to prove that its proposal would not contribute to the cumulative effects of potential future development.

¶ 34 There was no reasonable basis for considering potential future applications because any future application affecting the Humber River watershed could be refused by the MTRCA on the basis of a cumulative effect it might have in the light of existing approvals: Any assessment of cumulative effects is within the purview and jurisdiction of the Environmental Assessment Act and not the subject Act.

¶ 35 The position of the respondent is that the Commissioner was right in considering the cumulative effects of damage to the environment and the precedential implications of a decision permitting such damage to occur. In many instances the specific and actual effect of a particular filling may be small and difficult of measurement; the MTRCA is charged with dealing with the whole of the natural resource comprising the river system - which includes a depression feature such as the Milani Valley.

4. The Commissioner erred in law and fact in dismissing the appeal when there was no evidence that the placing of fill would affect the conservation of land through sedimentation, erosion or flooding.

¶ 36 The appellant's position is that the Commissioner erred in basing her decision on a "concern" for flooding when she found "that flooding concerns are minimal in headland areas and more particularly on the subject lands". The appellant submits that there was no evidence to justify any concern for sedimentation or erosion. The appellant argues that evidence was presented that suggests that engineered solutions would be used in combination with the fill which could have a beneficial effect on erosion and sedimentation.

¶ 37 The respondent, in respect of issue number 4, states that there was Indeed evidence on which the Commissioner could find that the placing of the fill in the Milani Valley would affect the conservation of land as that phrase is properly interpreted. Indeed, the Commissioner did not find that the evidence of the appellant was satisfactory on the question of sediment flow into the West Rainbow Creek. Flood control mechanisms by way of retention and detention ponds were required.

5. The Commissioner erred in fact and law in making her decision when evidence showed that there was no watercourse in the Proposed Fill Area which would affect or be affected by sedimentation, erosion or flooding.

¶ 38 The MTRCA established fill line 2 ten metres back from the top of the bank of a waterway. As there is no waterway on the property nor a waterway ten metres from the current fill line, the MTRCA established a fill line on an incorrect understanding of the features of the Milani Valley property. Since the West Rainbow Creek would not be significantly affected by the filling in of the Milani Valley, it would have no effect on the Milani Valley. Since the fill would have no such effect on the Milani Valley, which according to the appellant is not a watercourse, then the proposed fill application should have been granted.

¶ 39 The respondent's answer to the appellant's argument that there would be no effect on the Milani Valley, or, as the respondent states in its factum, no effect on the Milani watercourse, is that the fact that there is no flowing watercourse in the Proposed Fill Area does not affect the conclusion properly arrived at by the Commissioner that the proposed filling of the Milani Valley will adversely affect the conservation of land under the control of the MTRCA. It is not correct to state that the top bank is set 10 metres back from the top bank of a waterway. The fill line is set ten metres back from the assumed

top bank of a valley whether it has a watercourse within it or not. The top bank of the Milani Valley is present and observable. It is a functional part of the West Rainbow Creek system and ultimately of the Humber River drainage system. In this case, there is a watercourse clearly down the centre of the Milani Valley. It is not a watercourse in which there is constantly water; however, there is water that flows through the Milani Valley on an intermittent basis although not well defined at the present time. It is incorrect to say that there is no watercourse on the Milani Valley. The MTRCA made no error in identifying, mapping it and placing a fill line around it.

6. In the alternative, if the Commissioner correctly interpreted the purpose of s. 28(1)(f) of the Act then there was no evidence to show that the Proposed Fill Area served a significant ecological or environmental function.

¶ 40 The appellant submits that if the Commissioner correctly interpreted the purpose of s. 28(1)(f) as including the conservation of the ecosystem, then she erred in basing her refusal to grant the fill permit on speculative evidence as to what the effect of filling "many or majority" of similar properties would have.

¶ 41 There was evidence that the Proposed Fill Area contained no watercourse and served no ecological or environmental function of significance, and the Commissioner erred in not taking that evidence into account. The land was characterized as an "old field" and "not environmentally sensitive". Farmland is not a natural resource to be protected by the "conservation" powers granted to conservation authorities under the Conservation Authorities Act. The Commissioner erred in fact in failing to take account of the relevant consideration of the true character and function of the Proposed Fill Area.

¶ 42 In answer to issue 6, the respondent says that if the Commissioner properly interpreted the Act, then it was open to her to conclude, as she did, that there was clearly evidence of the ecological and environmental functions of this valley which would be lost upon filling.

7. There was insufficient evidence presented to justify the granting of the permit.

¶ 43 The Divisional Court may make any order or decision that ought or could have been made by the tribunal appealed from unless otherwise provided. The Mining Act in s. 133 places no restriction on the right of appeal in terms of the orders that may be sought.

¶ 44 The appellant submits that no witnesses provided evidence that placing fill in the Proposed Fill Area would cause instability, erosion, sedimentation, pollution, flooding or the loss of any significant existing valley function, nor was the Proposed Fill Area found to be "environmentally significant". Evidence given by the appellant's witnesses was that with appropriate engineering conditions in place, the effect of placing the fill would be minimal, and could even ameliorate existing problems. The appellant's request for permission to place fill on the property subject to the engineering conditions proposed in Exhibit 29, and referred to by the appellant's witnesses, should be granted by this court.

¶ 45 The respondent's position on issue 7 is that there was sufficient evidence to justify refusing the issuance of a permit particularly in circumstances where the function of the Commissioner is to sit in appeal from a discretionary decision of the MTRCA and the Divisional Court should not substitute its opinion of "conservation of land" for that of the MTRCA.

This Court's Decisions on the Seven Issues Propounded on this Appeal

¶ 46 Issue 1, the Commissioner did not err in her interpretation of the purpose of s. 28(1)(f) of the Conservation Authorities Act. The conservation of an ecosystem is comprehended in the words "or conservation of land" as stated in s. 28(1)(f) of the Conservation Authorities Act.

¶ 47 Issue 2, the Commissioner did not err by using language that suggested there was some onus placed on the appellant. The Commissioner stated that the appellant (in order to get a permit to fill the Milani Valley), "prove irrevocably that the downstream of the West Rainbow Creek will not be significantly altered". The proposition that the Humber River system will be degraded by the placing of fill in any of its first order streams such as the Milani Valley, is reasonably inferred from the evidence which the Commissioner obviously accepted. That being so, why should the appellant not be required to show that the placing of fill in the Milani Valley would be an exception to that proposition. We construe the words of the Commissioner in context to mean that in view of the reasonable establishment on the evidence of the foregoing proposition, the evidential burden had shifted to the appellant; if the appellant did not adduce evidence to undermine that proposition, then the appellant ran the risk of failure.

¶ 48 Issue 3, the Commissioner did not err in law in basing her decision on a consideration of the cumulative effects of potential future development applications in the context in which she made reference to cumulative effects in the course of her reasons.

¶ 49 Issue 4, the Commissioner did not err in fact and law in dismissing the appeal before her. There was evidence on which she could find that the placing of the fill would affect the conservation of land.

¶ 50 Issue 5, the Commissioner did not err in fact and law in her decision when the evidence showed there was no watercourse in the Proposed Fill Area that would be affected by sedimentation, erosion or flooding. The statement of this issue is flawed. Indeed there was a watercourse on the proposed fill area. The depression feature of the subject lands, i.e. the Milani Valley, was indeed a tributary of the West Rainbow Creek, and thus of the Humber River. The depression feature was a watercourse; even though it was a watercourse in which water flowed only on an intermittent basis; the watercourse in question was such notwithstanding that it was not well defined. As previously stated, to fill the depression feature called the Milani Valley, would be an incremental degradation of the Humber River system.

¶ 51 Issue 6, assuming that the Commissioner correctly interpreted the purpose of s. 28(1)(f) of the Act, then she did not err in fact in finding that the Proposed Fill Area served a significant ecological or environmental function.

¶ 52 Issue 7, there was sufficient evidence presented to justify the refusal of a permit by the MTRCA and the refusal of a permit by the Commissioner after a full hearing granted by the Commissioner in which all relevant facts were duly considered.

Disposition

¶ 53 The Commissioner on the evidence before her could come to the conclusion that the appeal of 611428 Ontario Limited be dismissed "due to the impact of the proposed placing of fill on the conservation of land."

¶ 54 Accordingly, this appeal is, for the above reasons, dismissed.

WHITE J.
FELDMAN J.
MacPHERSON J.

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