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IN THE MATTER OF

The Lakes and Rivers Improvement Act;

AND IN THE MATTER OF

The proposed refusal of the application of Kenneth W. MacDonald for approval for the location of a dam on Rigaud Creek on Lot 20 in Concessions VII of the Township of Lochiel in the County of Glengarry.

REPORT TO THE MINISTER OF NATURAL RESOURCES

Pursuant to an appointment dated the 18th day of October, 1977, of the Honourable Frank S. Miller, Minister of Natural Resources, under subsection 1 of section 8b of The Lakes and Rivers Improvement Act, the undersigned has held an inquiry to determine whether the proposed refusal of the approval for the location of a dam on the Rigaud River on Lot 20 in Concession VII in the Township of Lochiel in the County of Glengarry, is fair, sound and reasonably necessary for the achievement of the purposes of the Act.

The hearing was held in the County Court house in Cornwall on December 1, 1977. Mr. J. B. Johnston of the Ministry of the Attorney General appeared on behalf of the Ministry of Natural Resources. The applicant, Kenneth W. MacDonald appeared in person. Mr. Neil Lloyd McLeod appeared and was made a party. The applicant owns Lot 20 in Concession VII of the Township of Lochiel. Mr. McLeod owns Lot 20 in Concession VIII which is situate to the north of the lot owned by Mr. MacDonald. Mr. McLeod also owns part of Lot 21 in Concession VII and his buildings are situate on this property. A brother of Mr. McLeod, Alexander Donald McLeod, owns the south half of Lot 21 in Concession VIII. The Rigaud River flows in a southwesterly direction. It

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originally crossed the concession road between Concession VII and VIII at a location that was a short distance west of the southwest corner of Lot 20 in Concession VIII, i.e. the property of Neil Lloyd McLeod. In the early sixties the bridge on the road allowance crossing the river washed out. At that time the river was relocated and the bridge was erected a distance to the west of this location. The road was continued in an easterly direction with a turn-around in the vicinity of Mr. McLeod's northerly parcel of land.

It would seem from the boundaries of the respective properties, as drawn by the parties on an aerial photograph that was filed as Exhibit 8, that the easterly boundary of Lot 20 in Concession VIII is some 300 feet easterly of the east limit of Lot 20 in Concession VII. The river flows south across the road allowance midway between this jog in the lot lines and enters the applicant's property at this location. It flows southerly approximately 500 or 600 feet and then turns and flows in an easterly direction a distance of approximately 300 feet. It makes a fairly sharp oxbow returning to the concession road allowance and continuing in a southerly direction for a distance of approximately 700 or 800 feet before curving in an easterly direction onto the lands of Alexander Kenneth McLeod and Kenneth Campbell McLeod. These measurements are only approximate and have been derived from observation of the aerial photograph which was said to have a scale of approximately 600 feet to the inch. As a result of the meanderings of the river a part, approximately three acres in size, of Lot 20 in Concession VII is separated from the balance of the lot by the westerly part of the oxbow. I will refer to the part of the meanderings that flows northerly into and subsequently out of Concession VIII as the oxbow. A very small parcel of land, the measurements of which I was not given and being part of Lot 20 in Concession VIII lies on the southerly side of the river in the apex of the oxbow. Lying to the northeast of the easterly side of the oxbow and the part of the river flowing in an easterly direction there is another parcel of land said to contain

approximately three acres which forms part of Lot 20 in Concession VII and is owned by the applicant. Immediately to the east in the lot owned by Alexander Kenneth McLeod and Kenneth Campbell McLeod there is a fifteen-acre parcel in respect of which the applicant has obtained an offer to purchase. The applicant has access to the first mentioned parcel across the bridge on the concession road. However, he has no access to the three-acre parcel on the northeast corner of his lot or to the fifteen-acre parcel that he has agreed to purchase from Alexander Kenneth McLeod and Kenneth Campbell McLeod. In order to provide access to these two parcels the applicant proposed to cut a channel between the ends of the oxbow and to insert causeways with culverts therein on the south side of the road allowance. These causeways would be on his own land. There was some question as to whether he was going to put a culvert in both causeways and the understanding of the Ministry and of Mr. McLeod was that there would only be a culvert in the first causeway and that the water from the river, if any, that would move into the oxbow would not be able to flow through the easterly causeway but would have to back out of the river or in effect remain stagnant. The purpose of the causeways was to permit the applicant to cross the oxbow in both places and thereby have access to the part of his lot that would become inaccessible by virtue of the creation of the new channel and the northeasterly part of his lot, i.e. the three-acre parcel and the fifteen-acre parcel that he proposed to purchase.

Raymond Andre Pleau, the District Land Supervisor for the Cornwall District of the Ministry of Natural Resources, indicated that the river is approximately 40 to 60 feet in width at this location and has an average depth of five feet. At this location the river has clearly defined banks and in the witness's opinion for administrative purposes the river is navigable. It was apparent from his evidence and from the evidence of the other witnesses that there is a severe spring flooding condition in this area and that the new bridge is not of sufficient width to prevent the accumulation of ice and consequent flooding of the lands adjacent thereto. The Ministry had obtained a complaint regarding the proposal from Mr. McLeod. Following an investigation the applicant made a formal application

and the Ministry was of the opinion that there were two problems in connection with the proposal. The first problem was that the diversion would either in whole or in part deprive Mr. McLeod of the flow of water to Lot 20 in Concession VIII. Secondly, the Ministry was concerned that the removal of the oxbow might have the effect, particularly if it were coupled with other improvements in the river, of increasing the velocity of the stream and of permitting an increased flow by reason of the shortening of the channel with the result that there was a danger to downstream properties of increased erosion and flooding as a result of the potential increased flow.

Mr. McLeod's evidence was that over the years the applicant would have had an adequate opportunity of negotiating access to his property but that this had not been done. This illustrates that there is a deterioration of relations between these two neighbours and the deterioration may not have been related solely to this particular matter. However, such matters are not relevant to the issues that I have to consider. He also suggested that the applicant could obtain access to his three-acre parcel and the fifteen-acre parcel by building a causeway or a bridge across the river at a location on the east boundary of Lot 20 in Concession VII. He also suggested that there was a road allowance, across which access might be obtained, on the east side of Lots 20 or 19. A hand drawn sketch of the area was filed as Exhibit 9 but it appeared during the evidence that there are a number of inaccuracies in the sketch. Also there was filed as Exhibit 6 a portion of a map of the United Counties of Stormont, Dundas and Glengarry and on examination of this map there does not appear to be a road allowance along the east boundary of either of these lots.

Mr. McLeod pointed out, and at this stage he may not have been aware of the pending purchase of the fifteen-acre parcel, that the three-acre parcel was not cleared and that a municipal drain passed through the parcel from the northeast. He stated that his lawyer had advised him that his land would have a lower value if the river were diverted from his lot.

On questioning by the undersigned it appeared that the lands of Mr. McLeod in Concession VIII have been used in the past for

agricultural purposes including the growing of hay, grain and corn and for pasturing. It has been used for watering cattle. It is the only point on both farms of Mr. McLeod at which there is access to the Rigaud River. He indicated he had no additional uses of his land planned for the area. He also pointed out that he has a tile drainage system flowing into the river and that the outlet of this drainage system is in the oxbow. He has not been able to determine whether there would be any effect on his drainage system.

Mr. McDonald read a brief that raises questions as to why the bridge was originally constructed and also why it was reconstructed. It appears to be fairly obvious that the purpose of the bridge was to provide actual access as contrasted with theoretical access along the road allowance laid out in the original plan to the south half of Lot 20 in Concession VIII and also to provide access to a parcel of land the acreage of which was not given in evidence but which I have indicated earlier was approximately three acres and lies to the west of the oxbow. He suggests that it was unnecessary to have a bridge as there was a hard bottom crossing or a ford which might have provided access across private property on Lot 21 in Concession VIII. However, in passing I might note that this would not be legal access for Lot 20.

Apart from the problems of access to these northerly portions of Lot 20 in Concession VII, there is a problem of fencing. If the areas are to be used for pasture there is a risk of the cattle straying and without access it is difficult and impractical to construct and maintain fences of these northerly parcels. Accordingly, he has made arrangements to acquire the fifteen-acre parcel in order that the capital costs of fencing would be reduced.

The applicant consulted with the township council regarding access to his property but they refused to open the road allowance along the north end of Lot 20 in Concession VII. This of course would have necessitated the construction of two fairly large bridges the cost of which was far in excess of the value of the benefits.

Accordingly, the witness concluded that a scheme of reducing the flow of water through the oxbow and building causeways over the stream to permit access was the cheapest method and would not involve

any public expense. He admitted that he was not aware at the time of the legal issues related to riparian ownership and if he had, he might not have commenced this project on which he has expended considerable time and effort. The applicant also gave evidence that a number of beaver dams in the area have caused considerable flooding and that the area currently is a wilderness which is dangerous to livestock, a neighbour having lost a cow due to freshen sometime ago. The applicant had not consulted with any engineers. However, he was of the opinion that a culvert could be placed in the causeway which would provide adequate outlet for any drainage program that would be laid out on the McLeod land. He indicated that the area drained was approximately thirty-five acres and much larger areas had been drained with culverts of forty-two inches.

The applicant's brief also indicates that the area in question is quite flat and accordingly the river runs quite slowly. He felt that the new channel would not have any effect on the river and that there would be no significant differences in elevation, that, following the principle that water finds its own level, there would be water in the oxbow at all times and that the diversion would not drain the oxbow of its water.

The applicant suggested that the river had not been used by the owner of Lot 20 in Concession VIII for 40 years as a source for watering livestock. Mr. McLeod denied this allegation and stated that both cattle and horses have used the river as a means of obtaining water. The applicant indicated that this must have occurred during very short periods of time if it did occur.

The applicant indicated that there is a chance that in the course of nature the oxbow will disappear. He indicated that there is a fairly high bank along the westerly side of the lands encompassed by the oxbow which results in the water flowing in a northerly direction. However, as a result of the diversion of the river for the construction of the bridge there is evidence of erosion of the bank somewhere to the south of the oxbow with the result that in the course of nature a new channel may be constructed which would straighten the river without any interference on the part of man.

On the top of page 5 of the brief there is a reference to a

benefit to Mr. McLeod in that the proposals of the applicant would resolve the matter of a line fence dispute. No evidence was given of this dispute and as far as the issues of this case are concerned it appears to the undersigned that they would be entirely not relevant.

On cross-examination by Mr. McLeod there was, as indicated above, evidence of some pasturing and use of the river by livestock. In addition, the applicant pointed out that while Mr. McLeod can use an electric fence for the purpose of fencing his properties at very little expense and preventing his livestock from getting into the river, this type of fencing is not satisfactory for his purposes. He did admit however, that he had used his land for pasturing but his point in this connection was that he had to rely on the attractiveness of the pasture to prevent the cattle from moving into the dangerous areas and he moved his cattle from the area as soon as the pasture was used to the degree that it ceased to be attractive. There was some question as to whether there had ever been buildings on Lot 20 in Concession VIII. It seemed that Mr. McLeod was of the opinion that there had been buildings. If such were the case there would be the possibility of using the river as a source of water in connection with such buildings. Perhaps in this day and age it may not be the best source but historically I understand that even though there was no evidence of this that such might have been a use of the river. With reference to crossings on Mr. McLeod's brother's property, the applicant, in answer to a suggestion that the evidence was not relevant, pointed out that the properties to the northwest of his property were benefited by having hard bottom crossings. His property had no such crossings and he was not aware of any crossing in the river lying to the east of his property. When Mr. McLeod asked why he did not make a crossing in the easterly part of his property he indicated that this would require a bridge and would be very expensive and uneconomic.

On cross-examination by Mr. Johnston the witness indicated that he had two reasons for his project. The first was to gain access to the northerly parts and the second was to assist in the maintenance of fencing of these properties. He indicated that he had been in touch with the township council but they could not afford to assist him with

the problem of utilizing his northerly parcels of land. He was not aware of any farm bridges in the area and felt that no other farmer had gone to this expense to conduct his operations. He admitted that until now there had been little use of the three-acre parcel in the northeast corner of the lot. Part of the fifteen-acre parcel had been used in the past but it had not been so used for a period of fifteen years.

The applicant admitted that access to a river on a farm adds to the value of the farm. However he took the position that his proposal did not effect the value of the McLeod farm and he did not feel that it would create a backwater or stagnant water. It appears from his brief that he intends to have culvert in both causeways but he did not indicate in his evidence how he felt that there would be any flow through the oxbow. He indicated that he felt there would be water in it at all times but he did not comment on the quality of the water or the movement of the water.

At the request of the undersigned James Roland Stork, the regional Engineer for the Kemptville Region of the Ministry and a professional engineer, was called. There is no plan of the elevations of the subject site. No hydrology studies have been done and no one has determined the elevations of the end of the two sides of the oxbow. On being asked whether, from listening to the evidence that had been given, he felt there were any concerns regarding the proposal the witness indicated two concerns. His first concern was the increase in the velocity that would be created by straightening the river. His second concern was that there could be no assurance that any water would flow through the oxbow and that at best a reduced flow was all that could be hoped for and this would be obtained only with the installation of some artificial devices. He was satisfied that if any water were to come into the oxbow it would be stagnant water.

The argument of Mr. McLeod was that his riparian rights were being interfered with. The argument on behalf of the Crown was that Mr. McLeod had clear riparian rights and that there was nothing in the proposal suggested by the applicant to demonstrate that his proposal would not affect the riparian rights of Mr. McLeod. He took the position that the onus was on the applicant to establish this absence

of effect and that there was no evidence before me on which I could be satisfied that there would not be an interference with riparian rights. He pointed out that there was a significant flow. The river was at least thirty feet wide and had a depth of five feet on an average. Part of it was considered navigable by local officials and the river must have been a natural amenity for the McLeod property.

Counsel suggested that the evidence went further. The evidence indicated that the summer flows were quite low reaching depths of only eight inches. It was apparent, he suggested, that dividing this flow would clearly effect the riparian rights of Mr. McLeod and in addition the quality of the water would be reduced. He submitted that the proposal was a clear breach of Mr. McLeod's rights and should not be approved.

The submissions of Mr. MacDonald were that problems exist and that his proposal is the cheapest method of resolving a number of problems. He admitted he was not aware of the potential interference with the riparian rights of the owner of the McLeod land. He did suggest that a number of benefits would result from his proposal. The line fence problem would be resolved. His problem of access and maintenance of fencing would be resolved and he felt there would be no serious or significant effect on the McLeod property. He concluded his argument by suggesting that he felt that he was dependent on this hearing to provide some measure of justice on his behalf. He admitted that if riparian rights are untouchable, the hearing was an exercise in futility and he further admitted that this matter should have been resolved between neighbours sometime ago.

With reference to the latter submissions of the applicant, this tribunal has no jurisdiction to deal with or resolve them either on a legal basis or on an arbitration basis. The evidence did not deal with the nature of the disputes between the parties and such was proper. I suspect that any differences of opinion should be dealt with by negotiation or by the court.

The sole jurisdiction of the undersigned in this matter is to conduct a hearing and make a report to the Minister of Natural Resources. This duty is set out in subsection 4 of section 8b of The

Lakes and Rivers Improvement Act and reads as follows:

“8b.-(4) The person holding an inquiry under this section shall hold a hearing as to whether the refusal of approval or the proposed order is fair, sound and reasonably necessary for the achievement of the purposes of this Act.”

The purposes of The Lakes and Rivers Improvement Act are contained in section 1a of the Act which reads as follows:

“1a. The purpose of this Act is to provide for the use of waters of the lakes and rivers of Ontario and to regulate improvements in them, and to provide for:

- (a) the preservation and equitable exercise of public rights in or over such waters;
- (b) the protection of the interest of the riparian owners;
- (c) the use, management and perpetuation of the fish, wildlife and other natural resources dependent on such waters;
- (d) the preservation of the natural amenities of such waters and on the shores and banks thereof; and
- (e) ensuring the suitability of the location and nature of improvements in such waters, including their efficient and safe maintenance and operation and having regard to matters referred to in clauses a, b, c and d, their operation in a reasonable manner. 1971, c.50, 8.50(1).”

It is noted that clause b of section 1a provides that one of the purposes of the Act is to provide for the protection of the interest of riparian owners.

The nature of a riparian right is described at page 26 of the article on Waters and Watercourses found in 22 C.E.D. 2nd Ed. as follows:

“4. The right to running water has always been properly described as a natural right, just like the right to the air we breathe, they are gifts of nature, and no one has a right to appropriate them (m). It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging

to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from his without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state.....”

Again at page 37 it is said with respect to the rights of a riparian owner,

“7. The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established, each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purpose of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above (a).”

The applicant referred to a publication of the Ministry of Agriculture and Food that suggested that there may be some circumstances which would warrant a reduction of the basic rights.

However, the applicant failed to draw any legal exception to my attention and I am not aware of any principle that would encompass the present case.

Accordingly, it must be concluded that the issue by the Minister of approval of the location of a dam under The Lakes and Rivers Improvement Act would be, in the words of the applicant, an exercise in futility as, notwithstanding the issue of such approval, the riparian owner could commence legal proceedings to prevent the carrying out of the project. For this reason I can only recommend that the proposed refusal of the granting of approval is, fair, sound and reasonably necessary for the achievement of the purposes of The Lakes and Rivers Improvement Act.

DATED this 19th day of December, 1977.

Original signed by G.H. Ferguson

G. H. Ferguson.