

700 Bay Street
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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 the Corporation of the Township of Kinloss for approval of the location of a dam adjacent to the road allowance between Lots I and J in Concession 25, Township of Greenock and for diversion of the interconnecting waters between Silver Lake and Clam Lake in the Township of Kinlo&s.

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 the dam is fair, sound and reasonably necessary for the purposes of the Lakes and Rivers Improvement Act. The hearing was held in Kincardine on the 14th, 15th and 16th days of May, 1986.

At the hearing C.E. Mansfield appeared on behalf of the Ministry of Natural Resources. The applicant was not represented by counsel but was represented by George A. Davis, P.Eng. At the hearing a number of landowners appeared and were made parties to the hearing. The names of these parties appear in column 1 of the following chart. Column 2 sets out the original position of each party and Column 3 shows the ultimate position at the end of the hearing of each party. The initials N.F.S. means no final submissions were made, either by reason of the absence of the party at the appropriate time or failure to make a submission. G.C. Magwood appeared on behalf of Mrs. T. Affleck.

PARTY	POSITION	FINAL POSITION
Township of Kinloss	For weir and diversion	No change
Ministry of Natural Resources	Against weir	Against weir Supports diversion
Township of Greenock	Against weir No knowledge of diversion	N.P.S.
Thelma Affleck	Against weir Three foot reduction satisfactory For diversion	No change

Allen & Wilda McArthur	No change from existing If changed - for weir and against diversion	Against both Supported M.N.R.
Charles Brindley	Agrees with weir Against diversion	N.F.S.
Reuben Zettler	Against weir and drainage project Not affected by diversion	N.F.S.
William Hinton	Against weir Against diversion Agrees with Brindley	N.F.S.
Neil MacDonald	No evidence	N.F.S.
Alvery Hayes	Against weir Neutral re diversion	Against weir Supports diversion
Allan Lamont	No evidence	N.F.S.
Patrick McCurdy	Against weir and diversion	Supports M.N.R.
Mrs. Thomas Melvin	No evidence	N.F.S.
Joseph Keip	No evidence	N.F.S.
Anthony Aarts	For weir - not affected by diversion - against cost of drainage works	Supports M.N.R.
Township of Culross	Full clean out of creek as contrasted with a new channel was adequate Neutral on both points	Supports M.N.R.

At the outset it appeared that the application was in respect of an approval of a dam. This aspect was clarified by counsel for the Ministry in that as far as the Ministry was concerned, the application at the present time was restricted to approval of the location of the dam and that the Ministry was satisfied that subsequent plans and specifications would have to be approved in the event a decision were made to proceed with the dam. A second matter which was not contained in the notices of the proceedings was the diversion of the natural watercourse between Silver Lake and Clam Lake. When it appeared that the proposal of the township included this second matter which falls within the Lakes and Rivers Improvement Act it was agreed by the parties that the second matter should be considered at the hearing.

The background of the matter is that in the twenties a municipal drain known as the Black Creek Drain was constructed

from the easterly end of Clam Lake which is situate in the Township of Greenock to the Teeswater River which is situate approximately sixteen concession lots to the east. The drain was constructed through the Township of Greenock and the Township of Culross and outletted at the Teeswater River in the Township of Greenock. Clam Lake is a lake containing approximately 200 acres and is partially in the Township of Greenock and partially in the Township of Kinloss. Silver Lake is situate in the Township of Kinloss, contains approximately the same acreage and is situate to the northwest of Clam Lake. An interconnecting waterway through a swampy area with pools flows through Lots 23 to 26 in Concession II S.D.R.

Subsequently other municipal drains have been constructed. The Black Creek Southwest Drain drains an area lying to the southwest of Clam Lake and outlets into Clam Lake. The Black Creek Northwest Drain drains an area to the west of Silver Lake and outlets into Silver Lake. The McEwan Drain drains the area to the north of Silver Lake and outlets into Silver Lake. There was no evidence that the watercourse between the two lakes had ever been established as a municipal drain.

Following an application by landowners and tenants on Silver Lake, the Township commenced a repair project of the Black Creek main branch. The proposal was to clean out the main branch, removing debris that had been placed in the creek by lumber operations, natural sediment and natural growth. It was not anticipated that more extensive deepening of the drain than had been done in the first instance would be made. In order to create a more orderly flow of water out of Silver Lake and into the drain it was proposed to by-pass the existing watercourse joining the two lakes and construct a ditch along the southerly edge of the swamp area. This diversion was suggested on the basis of economy of construction rather than an attempt to place heavy equipment in the swampy areas along the existing watercourse.

The effect of the proposal would be to lower the waters affected by the clean out of the main branch from three to five

feet and it was proposed to construct a weir at a location two concession lots downstream from Clam Lake. It was Mr. Davis' opinion that such a weir would provide an element of a controlled water level approximately three hundred millimetres below the existing levels in Silver Lake. One or two meetings were held to discuss the proposal and serious objection was taken to the overall work under the Drainage Act. The project under the Drainage Act was postponed pending the outcome of an application for approval of the weir.

The applicant, apart from its legal obligation under the Drainage Act, was moved to proceed with a clean out of the drain by reason of the extensive damage that has occurred to the properties surrounding Silver Lake from the rise in the water level of that lake resulting from the beaver dams and debris that has been deposited in the system. The evidence showed that the water level of Silver Lake had, generally speaking, increased significantly. The engineer compared plans that had been drawn in 1885, 1966 and 1967 and by proceeding the measured distance from the shorelines at the various times concluded that the increase in height varied from 300 millimetres to 640 millirnetres. These figures were supported by evidence of the existence of flooding over existing docks. Docks on Silver Lake were flooded on May 28, 1985 to depths varying from .5 metres to .25 metres. The evidence of damage resulting from the high water was reflected in damaged and flooded docks, disappearing beaches, eroding shorelines and death of trees. As a compromise it was proposed to lower the water by approximately 300 millimetres which elevation would still leave flooding on some of the docks in their present condition. The reason for the weir was to maintain an elevation which would create as little interference as possible with the McArthur property and it had been hoped that there would be agreement among the landowners that the proposed elevation based on the weir would be satisfactory. The Ministry followed up this approach and as there does not appear to have been any consensus it opposed the location of the weir which by definition is a dam under the Lakes and Rivers Improvement Act.

On cross-examination by G.C. Magwood, counsel for Thelma

Affleck, a daughter of the King family that established an extensive camp known as King's Kamp, the engineer admitted that there had been considerable water added to the system since the original construction of the main drain in 1920, that if the weir were not inserted there would be a drop in the water levels of approximately three feet and that it was necessary to provide an outlet for Silver Lake if the water levels of Silver Lake are to be reduced. The engineer agreed that the water level should be reduced and should be reduced substantially and he gave evidence that it would be cheaper to construct the weir than repair the damage done to the docks on Silver Lake and prepare erosion preventative devices on the lake to prevent further erosion.

On cross-examination by counsel for the Ministry, it was brought out that Black Creek was a natural watercourse prior to the dredging in 1920. The engineer was asked his opinion on the effect of a partial cleaning out of the drain. He suggested that this might possibly provide an answer but it would not provide as much control as a full clean out would provide. Problems relating to beaver in the area were discussed and the witness indicated that it would be necessary, even with a clean out to have ongoing maintenance of the beaver problem. He felt that the construction of the weir would not prevent the activities of beaver and that regular inspections and removal of beaver from the ditch after it is cleaned out would be required.

With reference to the nature of the local objection to the proposal it was brought out that at the first meeting the witness felt that a reduction of 300 millimetres would be acceptable to the riparian owners. The McArthurs were present at the meeting and agreed to a 300 millimetre reduction in elevations on Silver Lake. This would make an eight inch change on their lake and they indicated that they could "live with such a reduction" but preferred that there be no reduction. At a subsequent meeting the McArthurs indicated that they would not be agreeable unless the weir were placed in the drain. However, many other people were present at the second meeting expressing objection to the drain proposal. With reference to his estimate

of the lowering of the levels without the drain, the witness indicated that his estimate was three and one half feet but there could be a margin of error of one foot, particularly as the levels are dependent on the levels of the water in the Teeswater River into which the Black Creek outlets. If the Teeswater River is higher there will be less outlet and consequently higher levels in the drain. The witness was unable to identify the persons objecting to the proposal. With reference to the grounds of objection, the witness indicated that some landowners had requested that the level of Clam Lake be lower than proposed and also that the level of the southwest drain be lowered.

The witness was cross-examined on the benefits from the drain and the witness referred to lesser flooding in the spring and earlier working of land with drainage of wet areas which would become more productive. The witness was not sure of whether any of the farms along the drain were subject to flooding. He pointed out that most areas along the creek are bush areas and that there can be a benefit to bush lands as lower water levels assist tree growth. The witness indicated that he was not an expert in this field but with reference to farmland he felt that all farmland upstream of the cleaned out area would benefit from the lowering of water levels. The witness, although he had said earlier that the McEwan Drain was functioning, indicated that he felt that there was not an adequate outlet for this drain and that if the proposal were carried out the excess waters from this drain could be dealt with.

With reference to the diversion between the two lakes, which was referred to as Branch Z in the project, the witness indicated that although there was a small body of water in the existing watercourse, he assumed it was a spring fed body of water and that its existence would continue from this source. The only alternative to this proposal was to construct a straight line watercourse but this would affect three landowners on Silver Lake.

The witness confirmed that the McArthur property known as Fisherman's Cove on Clam Lake is a viable camp operation and

that he believed that a reduction of 300 millimetres should be acceptable for that property. When asked regarding the problems of proceeding with the project without the weir in respect of this property, he felt that there would be some problems as the landowners have been making strong objections to the proposal. He felt that lowering the level of Silver Lake by 300 millimetres would create a reduction of 200 millimetres on Clam Lake. This converts to eight inches and he felt the operators could adjust fairly well to such a reduction in water levels. He felt that the lowering of docks would be unnecessary with such a drop and he was unaware of whether it would be necessary for docks to be extended if the water level were dropped this depth. Counsel referred to canals and campsite areas. The witness had not examined the effect of the proposed lowering on these canals but he did not feel that there would be any significant effect. With reference to docks, the witness indicated that a dock owned by persons by the name of Steward had settled but he was unaware of the amount of settling. This was the dock that would still be flooded if the reduction of 300 millimetres was made as there were 500 millimetres of water on the dock when he inspected it. The witness was of the opinion that the King and Affleck docks were stable and he had indicated previously in his evidence that the reduction would bring these docks out of the water. It was the witness's opinion that the erosion was limited to the Affleck property as he did not notice serious erosion on other properties. However, he admitted that if the waters continued to rise other properties could be affected.

With reference to cost the witness indicated that he had not taken into account the cost to other riparian owners resulting from the lowering of the water levels. In his view if the water were lowered there would be a better outlet and this should benefit the properties. With reference to fisherman, the witness felt that the weir would provide a stability of levels which would be beneficial to fisherman.

Mrs. McArthur, in cross-examining the witness, took the position that the lake level was lower than it had ever been on

that date and that nothing was required to be done in connection' with the drain. She stated that they only wish a weir if there is a change between the two lakes and a weir would be necessary to maintain the level of Clam Lake. She expressed the view that even if the levels of the Teeswater River were higher than normal, that the landowners would not be seriously affected by failure to carryon the project. With reference to the canals on her property, she pointed out that there were 1,200 feet of canals that have been dredged to a depth of eight feet and now contain seven feet of water. When the beaver dams were removed last year the water in the canals dropped twelve inches.

Mr. Brindley questioned the witness on whether the desired result could be achieved by maintaining the beaver. In the witness's opinion, the objective is a better reaction time between the two lakes. He indicated that there is not a good reaction time at the present and this is the reason for the project.

Mr. Brindley also inquired as to the risk of settlement of sediment in the lakes affected by the scheme and the witness' opinion was that there would be no problem particularly as the lakes are spring fed and would be self-cleaning.

Mr. Hayes discussed with the witness the program of beach protection that he had carried out on Lot 203 which he owns and which consisted of the placing of fill involving the use of a drag line. Mr. Hayes asked the witness the changes of Silver Lake in the event of major storms. The witness replied that the answer was dependent on the nature of the storm and because of the flat area of the lot there would be a loss of one foot of property with each inch of additional water. The witness had no evidence in respect of a regional storm other than that there would be a considerable amount of flooding. In a minor storm the witness felt that there would be three or four inches of flooding on the subject lot with the waters held at the present levels.

Mr. Hayes questioned the witness on actual benefit to his lot resulting from the proposed drainage works. The witness indicated that there would in his opinion be a benefit to all

properties as there would be a fixed level to which all landowners could determine the use they make of their properties. When asked if he was of the opinion that it was necessary to make the proposed expenses to dispose of the excess water from the drains the witness indicated that he was of such an opinion and referred to the fact that if Silver Lake is to be lowered by one foot it would be necessary to lower Clam Lake by such an amount or even more.

Mr. Anthony Aarts, the owner of four concession lots at the east side of Clam Lake including the two lots on either side of the proposed site of the weir, which are farmed, inquired as to the benefit he could expect, particularly as his land had been drained and his drains were working well. The witness referred to the general benefit of outlet.

Mr. Brindley inquired as to the ability to retain the cost of the repairs to \$30,000 and the witness indicated that if there was an increase in cost of ten per cent it would be necessary to revert to the appeal court for authority.

In reply evidence the witness stated that if a change were made to utilize the natural course for Branch Z it would be necessary to use mats as the land base is poor for machine work.

Mrs. Thelma Affleck gave evidence in respect of the property known as King's Kamp. She has been an owner of this property since 1962 becoming a complete owner in 1977. King's Kamp consists of twenty-one private cottage lots which are held under lease and fifty campsites which are run by Mrs. Affleck. The camp was in business prior to her purchase of the camp. The cottages on the leased lots are erected by the occupants and are considered to be privately owned and held under lease. There are four rental units and a boathouse. There are a number of docks providing access to the lake.

Mrs. Affleck produced a number of surveys showing in effect that in 1966 there was at least a thirty-seven foot beach. This beach continued until approximately 1978 and since that time the water has risen consistently. The entire beach is under water today. The photographs produced show docks under wa-er,

shoreline erosion and dead trees which presumably have resulted from the higher water levels.

Mrs. Affleck gave evidence that in August of the year 1985, the water levels dropped following the removal of beaver by Mr. Brindley.

Mrs. Affleck indicated that she had on numerous occasions corresponded with the Ministry and with the local conservation authority respecting the cause and erosion protection devices but this had not alleviated the problem. She stated that trapping by Mr. Brindley did not get rid of the problem. She indicated that she would like to see a controlled water level. The proposal of the engineer to hold the water at 300 millimetres lower than the level at the time that Mr. Davis made his investigation would in her submission only provide them with twenty feet of beach which was approximately half of the beach that they originally had. Further, the water would be deeper. She indicated that her camp could live with twenty feet of beach but would prefer to see a natural flow of water.

Mrs. Affleck indicated that the petition for the cleaning out of the beach had been initiated by her son and his wife. She also pointed out that in August of the year 1985, Mr. Brindley was able to get the water levels reduced and a number of landowners signed a petition that was filed as Exhibit 45 and which was signed by a number of the occupants of the camp, primarily requesting that the water level be held at the then present water level, i.e. the level on August 10, 1985. She indicated that this principle was in conflict with the landowners on Clam Lake who wished to have the level retained at its current level. Such a level would not be of assistance to the landowners on Silver Lake.

Mrs. Affleck indicated that she was aware of the proposed weir prior to the signing of the petition of August 10, 1985. She indicated that she did not understand the purpose of the weir but she now understands that its purpose is to keep Clam Lake at a level above the natural level and in so doing the level of Silver Lake would be retained higher than the natural level.

She indicated that she appreciates that there was a need for an improved outlet and would like to see a natural watercourse if possible. She agreed with the engineer that the cost warrants the diversion of Branch Z.

The witness filed as Exhibit 46 a background report on Silver Lake prepared by the Township of Bruce which had been prepared because of concerns related to high water. She pointed out that this report had been prepared by the planners and in effect illustrates the problem rather than provides answers. She emphasized that as a riparian owner she felt entitled to protection from changing water levels and stated that her business was affected and would be seriously affected if the water level were not lowered.

In cross-examination by Mrs. Mansfield, Mrs. Affleck indicated that the business loss consisted of the loss of attraction for fisherman and the excellent swimming areas which have disappeared, which swimming areas were used not only by the lessees but the fifty campers who can be accommodated. These users do not return if swimming is not available. She indicated that her campgrounds were full in the sixties and seventies and now she is operating at fifty per cent utilization. She had not calculated the dollar value of the loss, indicating that there were losses other than the fees for occupying the sites such as the purchase of supplies and boat rental.

Mrs. Mansfield inquired as to whether there had been attempted negotiations with the McArthurs and whether they were prepared to operate with a different level. The witness indicated that they were unable to say that there was an area which would be satisfactory to both parties.

Mr. Jack Riley, the Reeve of the Township of Greenock, inquired as to whether there had been an appreciable result from the blowing of beaver dams in 1986. The witness indicated that in her opinion the water was lower but it was not sufficient to cure the problems.

In reply to Mrs. McArthur, the witness confirmed that in her opinion the problem was the beaver dams and the witness

indicated that if there had been a continuous program of beaver removal, the situation would be improved. The witness indicated, although she would like the level to be lower than the level on August 18, 1985 following considerable action by Mr. Brindley in eradicating beaver and their dams, such level would be satisfactory.

Mr. Brindley suggested to the witness that a proper removal of the beaver dams might control the problem. The witness indicated that she was not satisfied that this was the answer and she did not wish to be faced with a five foot differentiation in water levels over the period of a week. The objective of the witness is to have stable water levels in July and August and the witness was not concerned regarding higher levels in the spring.

Mr. Brindley suggested to the witness that the main problem was in the area between the two lakes and that a solution did not necessarily affect the property below Clam Lake including the maple swamps and he indicated that he would be attempting to remove the two beaver dams that are presently in this area.

Mr. Hayes inquired as to the effect of one and one half inches of rainfall on the lake. The witness indicated that she was not aware of what the end result would be. She indicated that she felt the removal of the dams might correct the problem but she was not aware as to whether this was a sufficient action.

On re-examination, the witness indicated the weakness of a program based on the availability of trappers and the obtaining of the authority to destroy the beaver dams. When asked as to whether she was satisfied with the August, 1985 level, she indicated that this was a problem as their practice has been to put their boats in the water on the 24th of May weekend and the beach was essential for this purpose. She indicated that there was excellent fishing in the lakes and that summer activities extend from May until October. There is no dependency of the resort operators on hunting activities.

Mr. Davis inquired as to the depth of water in August, 1985 at the time of a petition dated August 10, 1985 that stated

that the petitioners, including Mrs. Affleck, were satisfied with the present level if it could be maintained. The witness indicated that she had not measured the depth and estimated that the concrete dock was one foot out of the water. Beyond the concrete dock there is a floating dock. The witness also indicated that in 1985 the satisfactory level existed only for a period of two weeks and thereafter the fall rains caused the water to raise.

The evidence on behalf of the Ministry was given by Warren Douglas Wright, the extension services technician of the Ministry of Natural Resources of the Wingham District Office, Michael William Malhiot, the district biologist for the Wingham District Office, and Marvin Smith, the management forester for the Wingham District Office.

Among Mr. Wright's activities is the administration of the Lakes and Rivers Improvement Act applications. It is his role to receive and distribute the applications to interested outside authorities and landowners and obtain comments. He outlined the distribution of the particular application and was advised by the fish and wildlife officials of the Ministry that that branch of the Ministry had no concerns regarding the proposal. Some concern was expressed from riparian landowners, mainly the McArthurs and based on their concerns the Ministry decided not to approve the application. He referred to a letter dated July 15, 1985 from the McArthurs outlining nine matters which indicated that rather than lowering the lake they wished the lake to be raised an additional six inches.

The general response to the inquiries of the Ministry were against the project. The main reasons given were the cost of the project, the lack of any visible benefit and the harmful effects on the soft maple woodlots along the main branch. He also indicated that some of the cottagers did not want the water lowered including the McArthurs whose position was that the lower water would affect their business. The Ministry proposed to refuse the application on the grounds that it would affect the interest of riparian owners. He indicated that if all of the

owners would agree on a level the Ministry would be prepared to issue the approval. When asked as to the reason for the flood situation, the witness indicated that in the current year the main reason is the beaver. He indicated that although beaver are removed, new beaver come in and it would be necessary to have a program to constantly remove beaver. The proposal does not relieve the problem without the control of beaver. When asked regarding the effect of erosion, his position was that it did not appear to be serious from the point of view of buildings, as no building appeared to be threatened. However, he confirmed that there was erosion along the toe of the bank and loss of beach. He indicated that there was erosion but the seriousness depends on the scale of values. On a provincial scale he did not consider that the erosion was a serious matter.

On cross-examination by Mr. Magwood, the witness confirmed that the Ministry had no concerns regarding the basic proposal other than the matter of riparian rights and that he felt that it was only fair that the McArthurs should have an opportunity of a hearing so that they might protect their rights. With reference to Mrs. Affleck's rights, the witness indicated that he had visited the property on two occasions. The witness was unaware of the date of the construction of the canals on the McArthur property. If the canals have been constructed five years ago the water levels probably would have been lower than they were in the last year or two. The witness indicated that the fish and wildlife officials had no concern regarding the project and that the only concern was the rights of riparian owners.

On questioning by Mr. Brindley, the witness indicated that he felt that beaver may build obstructions in the Branch Z diversion. Mr. Brindley suggested to the witness that there were interests other than the interests of the McArthurs and Mrs. Affleck. He inquired regarding the soft maple bush which might be affected by the cleaning out of the drain below Clam Lake.

Mr. Hayes raised questions regarding notices that were

sent out. It appears that he and a Mr. Steward may not have received notice.

Mr. Aarts referred to a proposed meeting of the three townships which had resulted in an agreement to remove all beaver dams and observe the results and consider the action to be taken. He suggested to the witness that nothing should be done until the beaver were completely removed from the drainage system.

Mr. Davis questioned the witness on the effect on the canals on the McArthur property. It was suggested that a drop in the water level of six inches to one foot would not affect the use of the canals. The witness indicated that the only requirement to maintain the canals would be dredging and that he had not seen them for some two years, although he had noted that there was a drag line in the area recently. He indicated that he had walked the Black Creek Drain and had noted the obstructions of brush and willow trees and agreed that beaver looked to these obstructions in building their dam.

On re-examination, the witness pointed out that the Ministry policy was to authorize local licensed trappers to conduct a program in respect of nuisance beaver and that no program is carried out by the Ministry.

Mr. Malhiot had visited the site and walked from Silver Lake to Clam Lake and down the Black Creek Drain. He was satisfied that there was no significant effect on fish and wildlife resources in the area of the proposed weir or the diversion. He did note that there were certain critical periods from the point of view of spawning of some species but these matters could be dealt with. The witness indicated some concern regarding the lowering of water and creating the drying up of the areas around the edge of Clam Lake and the reduction of fish and wildlife habitat. However, his evidence was that this concern was not significant if the reduction were limited to 300 millimetres.

With reference to beaver the witness indicated that they have always been native to this part of Ontario but their populations are cyclical and their habits are migratory. For

these reasons it may appear during some periods of time that beaver were not present in an isolated area and subsequently they will return. The beaver in this part of Ontario were not the result of a transplant program of the Ministry but were a natural growth of the beaver population. The witness was of the opinion that a reduction of 300 millimetres should have no effect on the fur-bearing populations of the area. The witness also confirmed that it would be necessary to maintain a program of beaver removal if the proposal were carried out. The witness outlined the Ministry's approach respecting landowners removing nuisance beaver. It was his opinion that as long as there were forested lands along the area in question that beaver would remain and could not be eradicated.

On cross-examination by Mr. Magwood, the witness indicated that the removal of the natural obstructions would not deter beaver activity. He indicated that there was no concern regarding Branch Z. The only concern he mentioned was the decrease of the level of Clam Lake but he pointed out that the evidence indicates that the levels twenty or fifty years ago were much lower than they are today. With reference to existing populations, the witness indicated that there were extensive marshy shores on Clam Lake and a similar condition is developing on Silver Lake but in his opinion the reduction of the water levels would not affect the marshy shores or the fish habitat. On questioning by Mrs. Mansfield the witness indicated that he did not distinguish between Clam Lake and the small lake in the interconnecting channel even though there was an area of vegetation between the two. When he observed the area it appeared to be part of Clam Lake and in his opinion the proposed rechannelization would not affect this area. The witness also indicated that with the reduction of three feet the area would not be so affected to reduce the support of the resources. On cross-examination by Mr. Brindley the witness indicated that a three and one-half foot drop might have some overall reduction on the populations of muskrats.

The witness also agreed that if the depths of the new channel were more than 300 millimetres there was a risk of the

water presently flowing through the existing channel being dried up.

On the second day of the hearing, Mr. Roy Pennington, Reeve of the Township of Culcross appeared on behalf of that township. On that day the cross-examination of Mr. Malhiot continued. In response to questions of Mr. Hayes, the witness indicated that the lowering of the water would affect the vegetation but he did not consider that a drop of 300 millimetres would be a matter of concern. On questioning from Mr. Davis, the witness indicated that if a beaver darn were removed with a shovel it would only be a matter of hours before the beaver would have reconstructed any work that could be achieved by a shovel. He indicated that it would be a full time job keeping up with the beaver.

After clarification that the proposal would reduce the levels below the proposed weir by three feet, the witness indicated that there might have been some effect on the wetlands, particularly as he did not realize that there was a risk of the water being lowered three feet until he attended the hearing.

The evidence of Mr. Marvin Smith indicated that the lowering of the water by 300 millimetres should have no effect on species in that area, particularly as lower levels had existed more than ten years ago. He felt that the lowering should have a beneficial effect on tree growth. In the witness's opinion if the area below the weir were reduced by three feet this would be lower and if such were lower than the area to which the trees had been accustomed for a significantly long period of time, the trees would be subject to some stress but they could adjust to a lower level. He pointed out that the present level appears to be two feet above the level the trees were accustomed to ten years ago and a three foot proposal would only reduce the level one foot below that to which the trees had been accustomed ten years ago. In his opinion such a lowering of the water level in the Black Creek Drain was not a significant factor and probably would be more beneficial than harmful. He pointed out that one of the serious problems is a fluctuating water level and the program of

establishing a constant level and maintaining that level should assist the tree population.

On cross-examination by Mr. Magwood, the witness confirmed the death of trees on Silver Lake was probably attributable to the higher water which removes the access to oxygen for the roots. He indicated that the high water could kill a tree in a period of two or three years.

Mr. Brindley directed his questions toward the soft maple species. The witness pointed out that this species required a depth of soil without saturation ranging from six inches to thirty-six or forty inches. The species will grow on relatively dry sites if planted. One of the difficulties of the species is that it cannot compete with other species. It does need a few inches of soil that are not saturated to survive. It was suggested to the witness that his evidence that the water in the creek had been two feet lower ten years previously was not correct and that the levels at that time were probably at the same level as they are today. If such were the case the witness agreed that a drop of thirty-six inches might have a significant affect on such species. In reply to Mr. Hayes, the witness indicated that if a tree had become half dead as a result of high water, there was little expectation the tree would recover.

Mr. Davis questioned the witness with regard to ground water movement and draw down, producing drawings from the Ministry of Transportation and Co-munications showing that the ground water level is not affected except for a relatively short distance from an installed ditch and it was agreed by the witness that the trees that were beyond the draw down area would not be affected by a reduced water table. It was also given in evidence that the soil was heavy in nature and the curve illustrating the area of dropping in the ground water level would be less than in sandy soil. It seemed with this principle that the effect on the tree growth in the Black Creek Drain would be restricted to an area which would probably be subject to cutting in a normal situation under the Drainage Act although it was not proposed in

this particular case to do so.

Mr. Jack Wallace Riley, Reeve of the Township of Greenock, presented a position statement that was supported by a letter of agreement between the three townships dated June 10, 1985 in which the construction of the weir was strongly opposed on the basis of the maintenance costs, the risk of instability and the effect on adjoining lands and it was recommended that the Ministry's position should be that the townships be permitted to carry out the agreement they reached in 1985 to reduce the water levels to those existing subsequent to the construction of the Black Creek Drain and presumably, the tribunal may add, prior to the construction of the more recent drains.

Mrs. Wilda McArthur gave evidence on behalf of herself and her husband regarding their camp which is known as Fisherman's Cove and consists of six township lots on the south side of Clam Lake. This park was begun in 1935. The McArthurs purchased it in 1971 at which time there were seven cottages on the property. Now there are 330 serviced lots, an indoor pool and a whirlpool rendering a high-class campground service. There are seven permanent employees and eight to ten students are employed in the summer. There are between 20,000 and 25,000 guests annually.

She referred to a Woods, Gordon report indicating a ripple effect of 1.50 for each dollar spent and although she did not provide the gross income of the camp, it was inferred that the camp is a serious asset in the local economy.

Mrs. McArthur is the chairperson of the Ontario Private Campgrounds Association, which organization provides expertise to other camp owners and she expressed concern that Mrs. Affleck might lose business and indicated a desire to assist her for the sake of the industry. She felt that a solution which would permit both operations to remain in existence was essential. She felt the investment in the Fisherman's Cove was over one million dollars. There is a proposal for expansion of the Fisherman's Cove. It is intended to expand the campsites to 700 in number and construct a nine-hole golf course. She filed as Exhibits 60

to 64, a series of memoranda of meetings, letters and finally a statement of "concerns. In summary these concerns are:

1. Low water in 1985 attributed to the removal of beaver darns by Charles Brindley in the summer of 1985.
2. The effect on canal construction done in 1984. The canals are 1,200 feet long, forty feet wide and eight feet deep with an initial cost of \$9,000.
3. Speed limits and size of boats resulting from access of boats from Silver Lake into Clam Lake through the proposed Branch Z.
4. Beach construction eight years ago during periods of high water which will not be utilizable unless further work is done.
5. Floating boat docks are geared to present lake level.
6. In 1985 evidence of weed problems resulting from lower water levels, perhaps.
7. The effect of low water in 1985 was the expenditure of money and time repairing sites on the edge of the canals and lake to adjust to the water level.
8. Concern over fish and wildlife.

Her position was that without the weir, her property would become "a mudpuddle". On the other hand she indicated that the lake is eighty feet in depth in places. However, the concern appears to be that all docks and artificial beaches have been constructed according to the levels that existed in the late seventies which, according to her evidence, are higher than they are this year.

On cross-examination by Mr. Riley, the witness admitted that when she and her husband purchased the property in 1971 they were aware that there was a municipal drain draining the property at the time of purchase. It was also pointed out that other landowners on Clam Lake would not be affected by the restrictions that they impose on their customers and could launch larger boats on Clam Lake.

The witness admitted to Mr. Brindley that the eighty foot depth was only in one small part of the lake and that the greater part of the lake was quite shallow, particularly around the shoreline.

Mr. Hinton suggested that he had attended a meeting at

Walkerton in 1985 in which it was suggested that the cause of the weeds was runoff. He also questioned why, if the weir was only of a benefit to the McArthur property that the other landowners should bear the cost and suggested the cost of the weir should be borne by the McArthurs. Mrs. McArthur suggested in reply that frequently the benefits from a business are such that that business may receive the benefit of programs on the justification of the overall benefit from the business. Mrs. Melvin echoed the suggestion that the McArthurs should pay for the weir. Mr. Pennington raised the matter of taxes paid and the witness indicated that \$7,500 was paid in municipal taxes and \$50,000 was paid to Revenue Canada. On cross-examination by Mrs. Mansfield, the witness indicated that she did not wish the water to be lowered more than three inches. Mr. Davis inquired as to whether she could adjust her operations with a reduction of six inches which six inch level would be a stabilized one and would provide a longer term basis on which operations could be conducted. She suggested that if the water were dropped it would cost \$5,000 to repair the canals and that if the water were stabilized at its present levels there would be a significant cost in readjusting the canals. Following further discussions, it became apparent that Mrs. McArthur's position was unclear. On one hand she appeared to wish to have a weir even higher than the weir proposed by Mr. Davis and again she took the position that she was prepared to have the weir approved rather than take the risk that the clean out might be conducted without the installation of a weir.

The evidence of Mr. Roy Pennington, the Reeve of the Township of Culross through which the greater part of the Black Creek Drain is constructed outlined the meetings that had taken place in conjunction with concerns that have been raised in recent years and he indicated that as far as the Township of Culross was concerned they felt the responsibility was limited to cleaning out the debris that had gathered in the part of the drain in the Township. He indicated that they had ordered a

lumber company to remove debris that it had placed in the drain and consideration would be given to the removal of a bridge if necessary. He felt that the taxpayers should not be obliged to assume further costs of a weir. The position of the Township was that it was neutral on both points in issue before the inquiry officer.

Charles Brindley gave evidence that he is one of the two local trappers. He owns Lot F in Concession 25 in the Township of Greenock which is east of the Aarts' farm and is situated approximately one-half a township lot northerly of the creek. He also owns a part of Lot E in that Concession which again is a similar distance from the creek. He also has an interest in the part of Lot 29 in Concession 15 in the Township of Culross that lies northerly of the Black Creek Drain.

Mr. Brindley's evidence was that the area sustains an abundance of wildlife and Exhibit 65 illustrates his 1985-86 catch which included 840 muskrats, 82 foxes, 5 coyotes, 25 mink, 43 beaver, 7 squirrel, 166 raccoon and 2 weasels. This catch did not include any of the beaver that were removed during the summer as nuisance beaver. He expressed concerns regarding the effect on the soft maple swamps along the Black Creek Drain. He also was concerned that the lowering of the water would make it more difficult for cattle to water in the drain. It was his submission that the control of the beaver dams, if it were carried out on a constant basis would resolve the problems. He was also concerned that the waterway between Silver Lake and Clam Lake would be destroyed by the diversion. He was also concerned that the lowering of the water level would affect the muskrat and otter populations along the waterway. On cross-examination by Mr. Magwood, the witness disagreed with the position of the foresters of the Ministry indicating that he felt that they had not fully investigated the swamp to determine whether there was a risk of the reduction of the water level affecting the existing species.

On cross-examination by Mrs. McArthur, the witness indicated that he felt that he could enter into an agreement with

the township, the conservation authority or the Ministry to control the beaver on a permanent basis. On cross-examination by Mr. Hayes, the witness indicated that if he was unable to carry on such an agreement there were 500 trappers in the County of Bruce who could assume the responsibility and that he felt procedures could be worked out to keep the beaver out of the existing watercourses. On cross-examination by Mrs. Mansfield, reference was made to recent removal of beaver and their effect on the elevations of Silver Lake indicating that some of the concrete dock had been exposed as a result of the removal of a beaver darn a few days prior to the hearing. On cross-examination by Mr. Davis, the witness agreed that the only remuneration for removal of beaver was a \$25 bounty paid by the local municipality and that it often took several days work to catch one beaver and earn this bounty. He agreed that this was not a very remunerative business arrangement.

Mr. William Hinton gave evidence. He was one of the first campers at Silver Lake utilizing the facilities in 1935 with a group of people from Windsor on a fishing expedition. After his marriage in 1940 he has come on a regular annual basis and ultimately became a tenant in 1965. He indicated that the water levels were quite consistent at that time. He has always had a boat and had put in a dock constructed of gabions. This dock was one foot above the water. In 1977 or 1978 the water rose and covered the dock. It became necessary to place a wooden platform over the dock which was removed in the fall. Higher levels of water occurred in the following years and it became necessary to raise the stakes in the platform higher each year. In 1985 the situation reversed and it was necessary to lower the platform. In the week before the hearing the elevation of the water was higher than it had been in the previous year although he had come up earlier this year than he normally comes. On the previous Friday the water went down two inches. It went down further on Saturday and in a five day period the water level receded eleven to twelve inches. On the morning he gave evidence the water was level with the top of the gabions and this

occurrence had only happened once in the last eight or nine years. This occurred in the summer of 1985 when the water fell to three inches below the top of the gabions after the beaver dam had been cleared out that summer. Mr. Hinton was against both the weir and the diversion as he felt a bit of work on the watercourses would be a suitable solution. Mr. Magwood asked the witness whether beaches were exposed at the time the water dropped to below the height of the gabions. The witness was unable to answer this question as he had not made an examination. However, he felt the beach at his location had been reduced from twenty-five feet to sixteen or eighteen feet in width.

No evidence was given by Mr. Neil MacDonald, Mr. Allan Lamont, Mrs. Thomas Melvin or Mr. Joseph Keip as they were not present at the hearing when their time to present evidence arrived.

Mr. Alvery Hayes owns a three acre parcel at the northwest end of Silver Lake which is northwesterly of the Affleck property. He is a permanent resident. His evidence was that he preferred the diversion over deepening of the existing watercourse between the two lakes on the basis of lower costs. He did not feel there was any problem regarding the small lake in this watercourse as he felt it was spring fed. He also objected to the construction of the weir as he felt it was of no benefit to him as a landowner. He referred to some discrepancies in the proposed report of the engineer regarding the levying of the various levies and expressed objection to the proposal on this basis. He also expressed concerns regarding the maintenance of the weir particularly from ice and frost. He indicated that there is a serious flow of ice in the spring and he had doubts as to the stability of a weir. He also suggested it might be a place that would attract beaver activity. He expressed concern that the McArthurs wished a higher level of water. He has spent a considerable amount of money on his property to increase the height of the property to protect it and objects to any higher elevations. He referred to a photograph taken in 1975 (Exhibit 73). On the morning that he gave evidence he indicated that the

water was seventeen inches higher than when the picture was taken. He also produced other photographs showing the effects of high water and the steps taken to deal with the higher water levels. He also produced as Exhibit 81, a photograph taken in 1800. It was his position that the water should be lowered below the level that it has been at during the last five or six years. He suggested because there are a number of springs feeding Silver Lake that with a lower elevation, there would be a greater flow from the springs providing more oxygen for fish and the lake should clean up.

With reference to Clam Lake, Mr. Hayes stated that the drain is blocked by a floating mass of cattails and weeds which on occasion breaks lose and floats through the lake. He suggested that this should be corrected. In passing, it may be noted that this is one of the items in the project. He also gave evidence that the area around Clam Lake had been flooded to the extent of one foot creating dead trees, particularly in areas where he had hunted in past years. He also gave evidence that in 1978 he had worked on Clam Lake and the elevations of that lake were lower at that time in his estimation by one foot. Mr. Magwood inquired from the witness as to the cost of the measures that he had taken by way of erosion control and the witness had made no serious calculations of these costs but estimated his expenditures to have exceeded \$900. He further estimated that if a similar program were applied to the Affleck property, several thousands of dollars would be involved. He also indicated that it would not be possible to carryon a similar type of program on the Affleck property as part of the property has a steep grade and it would not be possible to reclaim the beach by the dumping of sand and other fill. He referred to an area where there is a thirty foot drop-off. He indicated that in his view it was necessary to have the water lowered in order to preserve the shoreline and beaches. Any further raises in the elevations would not be acceptable. He also indicated that he could live with the weir and with a reduction of twelve inches in the water. He stated that he was familiar with the McArthur property in the

fifties. He indicated that it had originally been a farm and that there had always been weeds in the lake.

In cross-examination he agreed that the land surrounding Clam Lake was low and he submitted to Mrs. McArthur that her actions in the placing of sand created a levelling of the edge of the lake. He submitted that the filled beaches created a greater appearance of shallowness. With reference to his evidence regarding the outflow of springs, Mr. Davis suggested to the witness that a drop of elevation of two feet would not create a significant difference as it would only reduce the pressure by one pound per square foot.

In his summations, Mr. Hayes stated his view that the matter could only be resolved by a compromise on the part of all interested parties. He indicated that he and Mrs. Affleck were prepared to make a compromise and he felt that the McArthurs should similarly make a compromise in respect of the elevations of the lake.

Mr. Anthony Aarts, who owns a farm on the east side of Clam Lake indicated that he had owned the farm since November 1, 1980. He knew little of the history but he bought the farm because of its shoreline on the lake. In the first two years he had water problems on the land and he felt that if the water were dropped one foot, his land would have been improved. He had obtained the services of a drainage expert who recommended that the outlet of his drains be lowered. This was done and his farmland is now workable. He is not in favour of a weir, particularly so close to his property as he is concerned with flooding and the accumulation of debris above the weir. He is also concerned with the cost of construction which would be charged against the landowners. He indicated that many landowners were against the cleaning out of the ditch. Mr. Aarts indicated that in his view, the creek if it were cleaned up, was capable of providing an adequate outlet. He indicated that there are other outlets as well as Black Creek which reduce the elevation of Clam Lake and are quite capable of lowering the water level of that lake. He was concerned with the possibility

of additional navigation from Silver Lake into Clam Lake. He owns 2,600 feet of shoreline on the lake which is in a marshy forested condition without beach and he would not wish to have the peaceful nature of his shoreline disturbed by additional boating traffic.

Mr. Reuben Zettler, who owns the part of Lot 31 in Concession 15 of the Township of Culross, south of the Black Creek and all of Lot 27 in that concession through which the Black Creek flows, gave evidence that he was not concerned with Branch Zas he has no use of such a waterway. In his view the real problem was the outlet into the Teeswater River and he felt that the digging out of the creek would not be of assistance as the water would back up through the creek from the river. He did not consider that the weir would be of any use to him.

Mr. Patrick McCurdy, who owns Lot 24 in Concession 15 of the Township of Culross, although the plan prepared by Mr. Davis shows it owned by John McCurdy, produced evidence of high water levels on the lots in his area in the spring of 1982. His evidence reflects on the problem of achieving drainage by reason of the elevations of the Teeswater River. His lot and the lots between it and the Teeswater River are lots which may be subject to additional flooding by reason of the drainage works and which are extensively flooded in the spring. He was against the insertion of the weir and the diversion as he thought that they would be instrumental in providing more water on his and his immediate neighbours lots which are severely flooded, particularly in the spring. He also raised the matter of whether the speeding up of the runoff would create an undue reduction of water in dry periods.

Mr. Hinton indicated with reference to Mr. Hayes' evidence that he had had some experience in connection with pressures and flows of oil equivalents. He supported Mr. Hayes' view regarding the increased flows from the springs if the water were lowered.

Thelma Affleck was called to give reply evidence. She indicated that her beach was shallow to an embankment. The water

approached the embankment and this is where the erosion occurs. She had made a calculation that it would be necessary to place eight thousand cubic yards of material to replace the beaches that had been lost. She has no source of such material on her land and it would be necessary to import such fill, particularly sand for beach use. She indicated that such cost would be substantial and of course would affect the existing docks as they would have to be rebuilt. Further, there would still be erosion problems on the entire lake if the lake were not lowered.

Turning to submissions, Mr. Davis on behalf of the applicant, the Township of Kinloss, submitted that the township had made a reasonable attempt to effect a compromise which would protect not only the historical levels of the lakes but the business of the McArthurs that had been built in times of high waters. He pointed out that although many people do not want the weir they also do not want to have the lake dropped three feet which would be the result of cleaning out the ditch to its original elevations. He submitted that the basic principle would be that the water levels should be regulated at a reasonable rate and fluctuations prevented. Such would be effected by the weir and the maintenance of the drain including the removal of beaver darns and constant inspection and cleaning of the drain.

Mr. Magwood on behalf of Mrs. Affleck submitted that in considering this matter and the Lakes and Rivers Improvement Act that it should be kept in mind that the purposes of the Act as contained in section 2 create what might be referred to as people purposes and land purposes. He suggested that the land purposes are found in clauses 2(~) and (~) which provides for the management of the natural resources and the amenities thereof. He submitted that there was no evidence that there would be any significant affect on the natural environment if the proposal recommended by the township were carried out. With reference to the weir and the danger to trees, he referred to the evidence of Mr. Brindley indicating that it was contrary to the expert evidence produced by the Ministry officials and that the evidence of the latter should be accepted. With reference to the weir, he

suggested that the evidence of Mr. Malhiot should be accepted and it should be found that there would be no serious problem to the forested areas below the weir. He referred to the fact that no persons other than the township and Mrs. McArthur wanted the weir and indicated that his client was prepared to live with the water levels that would result without a weir. In contrast he mentioned that there are people issues involved in the considerations under the Lakes and Rivers Improvement Act. He noted particularly that in clause 2(~) the protection was afforded for the "interest" of a riparian owner as contrasted with the rights of a riparian owner. He submitted that his clients were riparian owners and their rights were being affected. Consequently, he submitted that steps should be taken to lower the water which was interfering with their riparian rights. Accordingly, his client supports Branch Z for that purpose as it provides a better outlet and at less cost. As far as the McArthur position was concerned, he submitted that the McArthur position is based on an assumption that the entire lake was the property of that camp. He pointed out that there were other landowners on the lake who have interests in the lake as well and with reference to boat traffic he submitted that the diversion would be over private land and the owner could exercise control over it to prevent boat traffic through the diversion.

He submitted that the evidence produced on behalf of his client and Hayes and other landowners on Silver Lake was dramatic and uncontradicted. He submitted that they were entitled to the protection of the project proposed by the township and that as far as his clients were concerned the weir could be deleted from the project. with reference to the McArthur property it was submitted that the investment was made at a time of unusually high water created by unnatural circumstances such as the placing of debris and the failure to maintain the ditch. The drainage ditch had been in existence since 1920 and the McArthurs should have known or should have investigated and Qetermined if they did not know of the existence of the ditch and the townships' responsibility to maintain that ditch prior to the expenditures

made on their property with relation to the high waters of the late seventies.

Reference was made to the Supreme' Court of Canada's decision of International Fertilizers Limited v. Harbour Development Ltd. 67 D.L.R. (2nd) 688 in which it was held that a dry dock channel constructed off a salt water estuary did not attract any legal status where the federal government pursuant to its statutory authorities did dredging work and reduced the water level damaging a boat in the dry dock. It was submitted that the statutory authority to do the work prevailed over any private rights and accordingly the McArthurs are in no position to complain if the township performs its statutory duties of maintenance of the drainage ditch. He submitted that after considering all equities and rights of all parties it should be recommended that the weir not be approved and that the Branch Z be approved.

Mrs. McArthur submitted that she agreed with the refusal of the proposed weir or channelization and supported the Ministry of Natural Resources' position. She relied on their investment of over \$800,000 over a fifteen year period and proposed expansion over the next five year period in submitting that there was no other landowner with such a significant investment.

Mrs. Mansfield on behalf of the Ministry submitted that the diversion should be approved and that the weir should not be approved. She indicated that the position of the Ministry had changed. The original refusal was made on the basis of the weir. The only objection that was made to the diversion or Branch Z was the concern over boating and she submitted that controls might be made under the Small Vessel Regulations under the Federal Fisheries Act.

The Ministry agreed that there was no effect on the natural resources programs such as fish, wildlife or forests. She submitted that the term "interests of a riparian owner" in clause 2(~) of the Act extended the area of consideration beyond the actual legal rights of a riparian owner and included a broader area of consideration. The reasoning for the proposal to

refuse the permission to insert the weir was based on the fact that none of the riparian owners that appeared at the hearing were in favour of the weir. The owners on Silver Lake took the position that it held the water too high. Mrs. McArthur was concerned that it lowered the water too much and because none of the parties wished the weir, the position of the Ministry was that it should not be approved. Any other concerns that the Ministry had could be dealt with in the proceedings under the Drainage Act.

In reply Mr. Davis referred to the statutory obligation of the township to clean out an existing drainage ditch and the difficulties it might face if it did not proceed where a proper request or petition had been made for such purpose. He indicated that the Drainage Act did not contain any provision for the control of waters and it was only through the procedures that they were adopting that any relief could be provided for the McArthur property. In his view it was a compromise which would provide a fair and equal opportunity for both parties and that approval should be given in order to be fair and equal to both parties and approval should be given to the township to do the work for which it would be liable if they did not proceed.

Mrs. Melvin's petition which she had indicated on occasion she wished to present was received by mail subsequent to the hearing. It appears to be a copy of a petition to the Township of Kinloss signed by a number of landowners prior to a meeting on August 1, 1984. No facts or reasons are contained in the petition but it has been added to the exhibits as Exhibit 83.

With reference to the finding of fact, there was no serious conflict of fact in the evidence. There was some suggestion that Branch Z may have been dredged in 1920. However, this evidence is inconsistent with the evidence of Reeve Pennington who indicated that he had seen the original documentation which indicated that the upper edge of the Black Creek Drain was the extension of the road allowance across Clam Lake which is downstream from Branch Z. There was a conflict between the expert evidence given by experts and the evidence of

Mr. Charles Brindley which was based on his practical experience and knowledge of the particular area. However, the bulk of this issue relates to the area downstream from the weir and the concerns if they exist are more related to the issue of whether the project to clean out the drain should proceed or not rather than whether the project if it proceeds should contain the weir proposed by Mr. Davis, the engineer under the Drainage Act appointed by the Township of Kinloss.

With reference to legal matters, there appear to be a number of technical matters respecting the responsibility of the three townships involved which have not been considered or resolved. These matters are not within the purview of this inquiry and will not be dealt with. Further, the rights of the McArthurs and in respect of any project were not addressed on a legal basis to this tribunal other than the reference made by Mr. Magwood. The position of the tribunal is that such matters should be resolved under the Drainage Act as that Act provides a mechanism for resolving conflicts related to the construction of municipal drains.

The tribunal concurs with the position of counsel for the Crown that the interest to be examined by the Minister in dealing with applications affecting riparian owners is probably broader than a consideration of their technical rights. However, in this particular instance the tribunal is of the opinion that the technical rights of the parties should be dealt with under the Drainage Act and that in this particular case the Minister, if other aspects of the Lakes and Rivers Improvement Act are not in issue should leave such matters to be resolved under the Drainage Act. However, this would lead to the position that if the township or the engineer's project includes a weir that no owner wishes, the matter would appear to be one which should be dealt with under the procedures contained in the Drainage Act.

Accordingly, the position of this tribunal in making a recommendation to the Minister is that, as all other matters relating to applications under the Lakes and Rivers Improvement Act are not against the proposed dam, the Minister should advise

the applicant that upon completion of all procedures and appeals under the Drainage Act if it is still an inherent part of the project the requisite approval of location would be forthcoming.

One of the aspects that appears to have been overlooked in dealing with this matter is that in a Drainage Act procedure there is an offsetting of rights and interests. Certain lands are improved and other lands are adversely affected by the scheme. The Drainage Act provides for compensation for the lands adversely affected and it may well be that those persons who see their lands now adversely affected are the holders of land in respect of which some compensation was made in the past. Accordingly, it is very difficult in the absence of the presentation of the original project for this tribunal to assess or for the landowners to appreciate the full extent of their rights and liabilities. By way of example, there was no evidence before the tribunal as to whether the properties surrounding Silver Lake were awarded compensation when the McEwan Drain and the Black Creek Northwest Drain were constructed. Similarly, we are not aware of the obligations arising from the 1920 project. It may well be that the riparian rights of the parties to this hearing are not in accord with the rights of riparian owners at common law by virtue of the drainage schemes of the past. There was no evidence before the tribunal to determine what the rights or interests of the parties are and accordingly, it is most difficult for this tribunal to make a recommendation to the Minister of Natural Resources based on the interference with the interests of the riparian owners. It may well be, while the word "interest" is broader than "rights", that the lands are legally subject to flooding or the owners or the previous owners of the lands may have received some compensation in the past which reflects on the present rights of the parties which may prevail over any "interest" the riparian owner has at this time. It may well be that some of lands such as the McCurdy lands or the Affleck lands may have been required by the procedures under the Drainage Act to assume waters in addition to what they would have been subject without the municipal drains and accordingly, it is

impossible on the evidence produced to this tribunal to make an assessment of the positions of some of the owners of riparian lands.

For the foregoing reasons, the tribunal recommends to the Minister of Natural Resources that the applicant be advised that upon completion of all procedures and appeals under the Drainage Act and if at that time it is still one of the components of the project that the weir be constructed that the requested approval shall be forthcoming. It is further recommended to the Minister of Natural Resources that there being no serious objection against the diversion of the natural watercourse between Silver Lake and Clam Lake that approval be granted for this diversion.

DATED this 16th day of September, 1986.

Original signed by G.B. Ferguson

G.H. Ferguson