



# Environmental Appeal Board

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## **APPEAL NO. 94/46 - WATER**

In the matter of appeal under section 40 of the *Water Act* R.S.B.C. 1996, c. 483.

**BETWEEN:** Elkink Ranch Ltd. **APPELLANT**

**AND:** Deputy Comptroller of Water Rights **RESPONDENT**

**AND:** Christine J. Smith **THIRD PARTY**

**BEFORE:** A Panel of the Environmental Appeal Board  
Judith Lee, Chair  
Helmut Klughammer, Member  
Laurie Nowakowski, Member

**DATE OF HEARING:** April 25-27, 1995  
Written submissions concluded September 15, 1995.

**PLACE OF HEARING:** Penticton, BC

**APPEARING:** For the Appellant: K.S. Webb, Counsel  
For the Respondent: L. Meret, Counsel  
For Third Party: Darlene MacMillan  
Executrix for Christine J. Smith

## **APPEAL**

The authority for the Panel of the Environmental Appeal Board to hear this appeal is found in section 11 of the *Environment Management Act* and section 40 (formerly section 38) of the *Water Act*.

This is an appeal from the June 3, 1994, decision of the Deputy Comptroller of Water Rights confirming the engineer's order of September 20, 1990, which required Elkink Ranch Ltd. to remove an obstruction placed in the channel of Swartz Creek within Lot 259, S.D.Y.D. except Plan A3060 without authority, and to restore the flow in the channel to its "natural course" towards the swamp.

The Appellant argues that the obstruction was placed in the Creek to allow it to flow in its "present natural direction", directly towards Richter Lake. This is said to be a "natural modification of the water course from the time in which it flowed into the swamp". The Appellant argues that the decision of the engineer and the Deputy Comptroller are incorrect having regard to all the facts and law. It seeks a

determination from this Board that the natural surface water flow is towards Richter Lake and an order that the flow be allowed to proceed in that direction.

The Respondent asks that the Board uphold the Deputy Comptroller's order and dismiss the appeal. It asks that Swartz Creek be permitted to continue to flow in its channel leading to the swamp without interference.

## **BACKGROUND**

After three days of hearing and numerous written submissions, it is fair to say that there is a long, 80 year, contentious history surrounding the watercourse at issue in this appeal. Some fairly detailed background facts are required to fully appreciate the issues.

The Appellant, Elkink Ranch Ltd., has operated since the 1930s and now carries on a cattle ranching operation of 1300 to 1400 head of cattle on approximately 10,000 acres in Richter Pass, located in the Okanagan Valley. The ranch land was purchased by the Appellant in 1967.

Precipitation in this semi-arid region averages less than 12 inches annually. Water is therefore a valuable commodity and is often the source of conflict. The water from Swartz Creek is no exception.

### The Creek

Swartz Creek is an intermittent stream which means that it is dry for much of the year. The amount of flow in the Creek is dependent on the time of year, the amount of snow pack and rainfall, and whether there has been human interference with its flow.

When water is flowing into Swartz Creek from nearby hills, it proceeds through a small alluvial fan on the Appellant's land referred to as the "upper fan area", also referred to in this appeal as the "point of bifurcation". If the flow out of the point of bifurcation proceeds in a southwesterly direction, the flow will go to Richter Lake, located in part on the Appellant's land. This is the direction the Appellant believes to be the Creek's present natural flow.

If the flow proceeds down the centre or the east side of the fan it will flow into a lower swamp or poplar grove also located on the Appellant's land. This is the direction the Respondent believes to be the natural flow of the Creek.

When the Creek flows into the swamp, the evidence suggests that the flow has then historically divided. Part of it has proceeded in a westerly direction to Richter Lake, and part has proceeded in a southeasterly direction to Conifryd Creek and Conifryd Lake. The percentage of flow out of the swamp towards the respective lakes, which is largely underground, is also a point of contention between the Appellant and Respondent. The Appellant believes that, if there is flow to the swamp, 100% of the flow now goes to Richter Lake. The Respondent submits that there is a 50-50 split between the two lakes.

Thus, there are two different ways that water may flow from the Creek to Richter Lake; directly from the point of bifurcation, or indirectly after it flows from the swamp.

Additional undisputed evidence also established that determining the natural flow of Swartz Creek, is additionally complicated because:

1. From year to year, in the normal natural course of events and due to variants such as snowfall, drought, flooding, etc., water may flow in different directions over the alluvial fan;
2. Under a temporary Conditional Water Licence ("CWL") 121138 issued in 1934, the predecessor owner of the Elkink Ranch was permitted to, and did build, an authorized diversion consisting of two ditches each 1/4 mile long. They were located below the point of bifurcation but above the swamp, and directed the flow of Swartz Creek towards Richter Lake and the Elkink Ranch. When the temporary licence expired the works were not authorized nor removed as required by Final Licence ("FL") 10945 issued on April 15, 1940 (this licence was replaced by FL 20514). However, it appears the diversion works were largely disintegrated by the 1980s and their exact location is uncertain.
3. All parties testified to numerous attempts to create unauthorized diversions during the last 50 years by neighbours and persons known and unknown.

Other local water bodies referred to in the Hearing were Musselwhyte Lake and Spotted Lake. At times, Musselwhyte Lake may have received surface flows from Conifryd Lake although no flows have been observed for many years. Similarly, there is evidence that water from Conifryd Lake has historically made its way to Spotted Lake, a unique feature in the area due to its 365 "spots". This lake is said to have "healing qualities" and is of spiritual significance to local native bands. No *surface* flow has been observed from Swartz Creek to Spotted Lake for many years.

At the time of the Hearing, the two main lakes referred to in the appeal were dry. Conifryd Lake had been dry for several years: the water levels in Richter Lake had been slowly lowering until it reached its current state.

#### Relevant Water Licences

The Appellant holds the only water licence issued on Swartz Creek: FL 62888. This licence permits it to divert a maximum quantity of 1000 gallons a day for the purposes of stock watering. It has a precedence date of May 5, 1934. The licence states that the "stock may be watered from the creek within the boundaries of the appurtenant land (Lot 253 and Lot 259, except Plan A3060). The Board notes that no diversion "works" are authorized by this licence.

The Appellant also holds FL 20514 which authorizes the diversion and use of water in the quantity of 97 acre-feet per annum from Richter Lake for the purpose of irrigation. The works authorized by this licence are "intake, pump, pipe and sprinkler system". This is the licence which is of most importance to the Appellant.

To grow enough feed for his cattle, the Appellant needs to irrigate 450 acres across the valley. If the Appellant does not have sufficient water, it claims that it will go out of business. Thus, it is fair to say that the Appellant wants Richter Lake to receive as much flow from Swartz Creek as possible.

There are also licences held on Conifryd Lake and Spotted Lake by Pat and Charles Robertson and Christina Smith, respectively. The Board offered these licensees as well as the Okanagan Indian Band, with aboriginal interests in Spotted Lake, full party status. Only Ms. Smith accepted full party status and was represented at the Hearing. However, the Panel reviewed letters from the Lower Similkameen and Osoyoos Indian Bands that were entered as exhibits.

### The Order

To fully appreciate the significance of the 1990 order, it is useful to consider events in the preceding year, 1989.

In 1989, employees of the Water Management Branch found an obstruction at the point of bifurcation on the Appellant's property which they believed to be an "illegal diversion". The obstruction consisted of a tree with chainsaw markings and some debris which effectively blocked the channel leading to the swamp. Any flow in the Creek would proceed directly towards Richter Lake.

Mr. Banara, an engineer under the *Water Act*, approved the removal of the tree and debris, the placement of a berm to block any flow from proceeding southwest towards Richter Lake, and the creation of a deep ditch in the channel leading to the swamp. Mr. Banara testified that he approved these works in order to restore the direction of the flow to the swamp which, in his view, is the natural course of the Creek, and so the channel would not be obstructed in the future without obvious tampering.

The Branch did not notify the Appellant of the works, nor ask permission to enter its property and perform the works. The Respondent's witnesses claim that, at the time, they believed the illegal obstruction was on Crown land.

There is no dispute that during the summer of 1990, Ace Elkind, one of the two shareholders of Elkind Ranch Ltd., "levelled" the berm in Swartz Creek constructed by the Water Management Branch. He also placed fill in the stream channel thereby directing the *entire* flow of Swartz Creek back towards Richter Lake, bypassing the swamp altogether. There is no dispute that Mr. Elkind did not obtain an approval or licence before removing the Branch's works and filling in the swamp channel. As he had not been given notice of the Branch's work, Mr. Elkind's evidence was that he believed the diversion was unauthorized or illegal.

On September 18, 1990, an inspection of the area revealed the actions of the Appellant. Mr. Banara then issued an order requiring the Appellant to remove the "unauthorized obstruction" and to restore the channel of Swartz Creek to "its natural course" - to Mr. Banara's satisfaction. The Appellant did not comply with this order until after the Deputy Comptroller's decision.

Deputy Comptroller's Decision

In his June 3, 1994 decision, the Deputy Comptroller of Water Rights, Mr. Farrell, upheld the order. After reviewing the evidence presented, Mr. Farrell found that, as a result of historical interference with the stream, a "natural channel no longer exists". He went on to say:

It is not possible to state where the natural location of the channel of Swartz Creek would be, had none of the unauthorized diversions taken place.

However, the Deputy Comptroller concluded that, "in 1990, Ace Elkink of Elkink Ranch, made changes in and about the channel of Swartz Creek without authority under the *Water Act*" whereby he dismissed the appeal from Mr. Banara's order and issued a new order to Elkink Ranch requiring Swartz Creek be restored to its channel leading to the swamp.

The Appellant appealed this decision to the Environmental Appeal Board on June 23, 1994.

The Appellant removed the fill he had placed in the channel and complied with the order in the fall of 1994, before the Environmental Appeal Board hearing in 1995.

**ISSUES**

The issues raised by the arguments of the parties can be framed in the following manner:

1. Did the Respondent have the statutory authority to issue the 1990 order requiring Elkink Ranch to remove the "obstruction" placed in the channel of Swartz Creek and restore the flow in the channel toward the swamp?
2. Were the Respondent's actions in entering the Appellant's land and removing the "obstruction" without notice to the Appellant and other licence holders illegal, despite the 1990 order?
3. Was the Appellant required to obtain prior approval under the *Water Act* before removing the Ministry's works and placing fill in the stream?

**Issue 1: Did the Respondent have the statutory authority to issue the 1990 order requiring Elkink Ranch to remove the "obstruction" placed in the channel of Swartz Creek and restore the flow in the channel to the swamp?**

As a preliminary point, it is clear that Swartz Creek is a "stream" for the purposes of the *Water Act*. "Stream" is defined under section 1 as follows:

"stream" includes a natural watercourse or source of water supply, whether usually containing water or not, ground water, and a lake, river, *creek*, spring, ravine, swamp and gulch. [emphasis added]

According to the Respondent's evidence, Mr. Hare, a technician with the Branch, entered onto the Appellant's property in 1990 without notice or permission from the Appellant, after receiving complaints that Conifryd Lake was dry. The Respondent submits that entry upon the Appellant's property was authorized by section 32 (formerly section 30) of the *Water Act* which provides:

- (1) The comptroller, deputy comptroller and every engineer, officer and water bailiff...has, so far as is necessary in the discharge of his duties or exercise of his or her rights, at all times a free right of entry and exit on, in and over any lands and premises.
- (2) Subsection (1) applies also to a person working under the direction of the comptroller, the regional water manager or an engineer.

Based upon this section, the Board agrees that there was statutory authority for Branch staff to enter upon the Appellant's land to investigate the situation in the discharge of their duties. Was the order made by Mr. Banara, and confirmed by the Deputy Comptroller, consistent with his powers under the *Act*? The engineer's order states:

In the matter of Swartz Creek, which crosses, Lot 259, S.D.Y.D, except Plan A3060;

Whereas an obstruction has been placed in the channel of Swartz Creek within Lot 259...without authority (the "Obstruction");

Whereas an Approval under Section 7 (now section 9) of the Water Act authorizing changes in and about Swartz Creek within Lot 259...has not been granted by the Comptroller of Water Rights...to authorize the Obstruction;

Whereas, I, N.G. Banara, P. Eng., Engineer under the Water Act have evidence that you are making use of the unauthorized Obstruction;

Whereas I, N.G. Banara ... am empowered under Section 37 of the Water Act to order the repair, alteration, improvement, removal of or addition to any works, including the removal of obstructions from the banks and beds of streams;

I, N.G. Banara ... now Therefore Hereby Order [sic], Elkink Ranch Ltd. ... to remove the unauthorized Obstruction within Lot 259 ... and to restore the channel of Swartz Creek to its natural course to my satisfaction by October 31, 1990.

Section 39 of the *Water Act* recognizes the powers of engineers and officers as including the power to do the following:

- (d) order the repair, alteration, improvement, removal of or addition to any works,

...

(e) order the restoration or remediation of any changes in and about a stream,

"Works" is defined in the *Water Act*, R.S.B.C. 1979 as "anything capable of or useful for diverting, storing, measuring, conserving, conveying, retarding, confining or using water,... and includes access roads to any of them, and includes the placing of booms and piles in and the removal of obstructions from the banks and beds of streams."

Mr. Banara's order for the removal of the obstruction in Swartz Creek served to restore or remediate the changes to the Creek caused by the obstruction and was well within his powers under section 39(d) and (e). Similarly, his order to divert the channel to its natural course was within his authority under section 39(e).

The Deputy Comptroller was similarly authorized to confirm this order in accordance with his power under section 40(9) (formerly 38(5)), to make any order that appears just.

Having found that the engineer and Deputy Comptroller could lawfully make these orders, the Board turns to consider how the order was carried out.

**Issue 2: Were the Respondent's actions in entering the Appellant's land and removing the "obstruction", without notice to the Appellant and to other licence holders illegal (and abuses of discretion) despite the 1990 order?**

In 1989, the Ministry unilaterally decided to ensure that the flow would proceed in this direction, once and for all, by excavating a channel down to the bedrock and constructing a berm to prevent any flow proceeding towards Richter Lake. The Respondent effectively "changed" the course of the Creek. In doing so, the overall amount of water that would otherwise flow to Richter Lake was reduced. Richter Lake would not receive the benefit of water overflowing the swamp channel during spring freshet, nor directly benefit from the water that would have been diverted *naturally* at certain times. As a result of the Respondent's actions, Richter Lake would only receive that portion of the flow out of the swamp that made its way towards Richter Lake; 50% according to the Respondent.

The Appellant, as owner of the land and licensee on Richter Lake, therefore stood to be affected.

The Board finds that, whereas the Respondent can make decisions regarding the use and flow of a stream, it does not have authority under the *Water Act* to unilaterally change the course of a stream, without notice or permission to the owner of the land and the affected licensees. If the Respondent wants to change the flow to ensure the Creek will only flow in one direction, it should notify those potentially affected by its actions before performing the works.

In this case, the Respondent's evidence is that it did not notify the Appellant because it thought it was performing the works on Crown land. This is not credible. According to its own evidence, the Respondent has had many dealings with the

Appellant, and previous owners, regarding diversions in this location. In fact, the Respondent has issued both formal and informal orders to the Appellant in relation to the fan area.

Although the Ministry has a statutory right of entry and exit under section 32, and possibly the authority to clear diversions from the stream channel, the Board can find no authority for the Respondent to bring machinery onto a property, to dig a deep ditch and build a berm without notice and without permission from the owner. It appears to be trespass.

However, even if the Respondent did have authority to perform the works without the owner's *permission*, it is the Board's view that notice of the works should have been provided as the Respondent's actions were to have an impact on licensees on Richter Lake. Such notice would be consistent with the requirements of the Act and Water Management Branch policies which gives affected riparian owners and licensees an opportunity to object.

The Panel is concerned about such reckless behaviour by government officers despite their best intentions. It treads on the efforts of many dedicated public officers and tends to increase disrespect for, and even rebellion against the fair administration of justice, as evidenced by the Appellant's subsequent behaviour.

**Issue 3: Was the Appellant required to obtain prior approval under the *Water Act* before removing the Ministry's works and placing fill in the stream?**

The Appellant's primary argument is that the natural flow of Swartz Creek is in the direction of Richter Lake. While the Appellant does not deny that the Creek has, at times, naturally flowed in the direction of the swamp, it maintains that the *present* natural flow of Swartz Creek is toward Richter Lake. Thus, the Appellant submits, the works constructed by the Ministry in March of 1989 served to *divert* the flow of the Creek from its present natural course. The Appellant argues that its actions in the summer of 1990 were justified in so far as it was only *restoring* the Creek to its "*present natural flow*" for which no prior approval under the *Act* was required.

Both parties presented extensive evidence pertaining to the "natural flow" of Swartz Creek. Hundreds of pages of documents were entered in evidence stretching back to the 1800's. Expert evidence by Mr. Pat Leslie was given on behalf of the Appellant regarding the natural flow from the point of bifurcation, as well as from the swamp area. There was also oral and documentary evidence of local residents, Ministry technicians and officials. From the sheer quantity of what was often conflicting evidence, one comes to appreciate the complexity and confusion surrounding the Creek's history.

Most of the evidence and argument presented by the parties related to the authorized and unauthorized diversions, repairs, and other activities at or around the point of bifurcation which are said to have affected the natural course of Swartz Creek over the years. In a document prepared for the Deputy Comptroller, there is mention of an early diversion by Mr. Swartz in the 1870's or 1880's towards the centre of the "flat area" for domestic water purposes. In 1934, there is evidence of



an *authorized* diversion of water in the direction of Richter Lake by way of 2 irrigation ditches about 1/4 mile in length. Whether there was an existing channel prior to the irrigation ditches is unclear from the evidence. However, it is clear that no final licence was issued for the irrigation ditches as the Ministry decided to restrict Swartz Creek to stock watering due to the limited water supply. The ditch was closed down by the Ministry in 1940.

Since the closure of those ditches in 1940, there has been a history of complaints regarding alleged "illegal" diversions directing the Creek toward Richter Lake. Most of the complaints were made by downstream property owners concerned about the low water levels in their wells and local lakes (e.g., Conifryd Lake), and also by Fish and Wildlife Branch officials and biologists concerned about the state of the lakes. Since 1940, the Water Management Branch has issued six orders requiring the Creek to be returned to the channel leading towards the swamp. Three of the orders have been issued to the present owner, the Appellant.

The Appellant argues that the Creek has changed pathways naturally at various times as a result of heavy runoff. The ease with which the flow can change is confirmed by, among others, Ministry technician Dave Kalyn, who observed in a letter to the Deputy Comptroller dated June 2, 1994, that "at the apex of this alluvial fan ... Swartz Creek can very easily be altered, by man or mother nature, to change the direction of flow from one watershed to the other. Flow directed down the west side will go in the direction of Richter Lake while flow directed down the centre or east side of the fan will enter the swamp area."

The Appellant argues that an unusually heavy runoff in the late 60's or early 70's led to the water flowing towards Richter Lake. The Respondent disagrees. It suggests that the water flowing in this direction was due to the Appellant's activities in and around that location when the Appellant is said to have "leveled" the ground. The Board notes however, that the stronger evidence suggests that any leveling that took place occurred above the point of bifurcation, at or near a well site.

The parties' positions regarding the "natural flow" of the Creek are diametrically opposed. The Appellant says the movement of the Creek towards Richter Lake at the point of bifurcation is natural. Conversely, the Respondent maintains that, if the Creek has naturally moved towards Richter Lake, which it denies, it has only occurred as a result of the unauthorized actions of the Appellant or others in and around the channel.

In a May 10, 1974 report, a Water Management Branch engineer quoted an August 10, 1955 report of a geologist who held the opinion that:

"...it appeared that the natural water course was into the swamp and that from the swamp the water divides ... the greater part flowing *underground* into the spring on lot 1044, the lesser part flowing into the natural water course draining into Richter Lake."

He recommended that the flow should be diverted 75% to the swampy wooded areas and 25% to Richter Lake - without considering that the jurisdiction of the *Water Act* continues to be limited to surface water.

The Panel found compelling objective evidence of where water flowed for specific dates in aerial photographs tendered by the Respondent.

A May 1938 photograph had been enlarged and showed surface flow as indicated by significant plant growth or greening, in an easterly direction to the swamp area and to the lakes eastward. This photo also showed a pronounced flow southward to Richter Lake. A 1963 aerial photograph is similar, with more greening in the channel towards Richter Lake.

A 1974 photograph apparently showed 5 culverts placed over the years, intended to allow no restrictions on runoff and showed flow mostly towards the swamp and less green darkening in the Richter Lake channel above the swamp.

The Appeals Technician for the Respondent reported that, in 1976, a site survey determined that the two outlets were virtually equal in elevation at that time so about 50% of the flow from the swamp would go toward Richter Lake and the other 50% [eastwards] towards Conifryd Lake. Overall the more recent topographic evidence permits a similar conclusion.

May 1985 aerial photographs showed greening away from the swamp and towards the Richter Lake channel and Elkink corral. A Respondent witness felt that this was because of a diversion channel made by the Appellant.

In 1984 and 1985 there was correspondence and orders containing more conflicting observations. In May 1985 Water Management Branch officer, Mr. Jack Botham, made an inspection with Mr. Elkink and reported seeing surface flow all directed to the Elkink corral west of the swamp with the flow disappearing underground just before the corral. He expressed concern about unauthorized diversion ditches in the swamp. These findings are consistent with the 1985 aerial photograph. However, Mr. Botham's affidavit confirmed his report of January 2, 1986 that there "has been no determination that the present pattern of flow resulted from unauthorized interference" that is, from Swartz Creek into the swamp where the swamp acts to divide the flow towards both Conifryd Lake and Richter Lake.

The 1991 aerial photograph showed very little growth and greening in the channel towards the swamp.

Having considered all the evidence, the Board finds that it is entirely possible, if not probable, that the Creek has naturally flowed in the direction of Richter Lake at certain times. Movement back and forth across the point of bifurcation is entirely consistent with what typically occurs in an alluvial fan of this nature, a fact which the Respondent's own witnesses have acknowledged. Mr. Kalyn, in his statement above, indicated that the flow can be easily altered. Similarly the Deputy Comptroller found as a fact in his decision that "... the pattern of flow and channel location of streams across active alluvial fans are typically unstable."

Having said that, the Board also accepts the Respondent's evidence that there has been authorized and unauthorized interference with the Creek channel over the last hundred years. Neither channel at the point of bifurcation appears to have been completely free from some form of human interference.

Given the various unauthorized diversions, it is not known whether the Creek would have been flowing towards Richter Creek in 1989 and 1990, as alleged by the Appellant. However, even if it wasn't, the Board finds that it is almost certain to have proceeded that way at some time in the past. The Board finds this would have occurred even if there had been no previous authorized (in 1934) and unauthorized diversions in that direction. Mr. Leslie testified that the topography of the fan area is such that the channel would naturally proceed towards Richter Lake due to its slightly lower elevation. Although the Ministry alleges that this was due to human interference by leveling the ground in the area, as stated above, the Board can find no credible evidence that this is the case.

In light of this finding, was the Appellant entitled to proceed with its actions without first obtaining approval under the *Water Act*? In arguing that he was, the Appellant is presumably arguing that it has some kind of "right" to the natural flow. Does such a right exist?

At common law, the courts have long recognized riparian rights. As stated by Lord Wensleydale for the House of Lords in *Chasemore v. Richards* (1859), 7. H.L. Cas. 349 at p. 382, 11 E.R. 140:

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 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 him without obstruction.

Therefore, the right to the flow of water in its natural state was found to be incidental to the riparian rights acquired by a landowner whose lands adjoin a natural watercourse.

When the *Water Act* was brought into force, it abolished most, if not all riparian rights established at common law. Section 2 of the *Water Act* provides:

- 2 (1) The property in and the right to the use and flow of all the water at any time in a stream in the Province are for all purposes vested in the Crown in the right of the Province, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.
- (2) No right to divert or use water may be acquired by prescription.

Section 2 vests the property in and the right to the use and flow of all water in a stream with the Crown. A licensing and approval system was created in the *Act* to allow the Crown to control and regulate the use of water in the Province. Under the *Act*, it is only by way of licence or approval that a person may obtain a "right" to the use and flow of water in the Province.

From a review of the legislation, it appears that, when allocating a resource of this nature, which in many cases is relatively scarce, it wants to ensure that it is put to its "best use" or most beneficial use. In *Steadman v. Erickson Gold Mining Corp.* [1987] B.C.J. No. 1948 (B.C.S.C.), the Court recognized the purpose of the *Act* as being "to control and regulate the use of all water in the province and to prevent its waste and misuse."

The problem created by Swartz Creek, is that the "Crown", i.e. the Respondent, clearly believes the best use of the Creek occurs when the Creek flows directly towards the swamp. This appears to be based upon their view that:

- a) it is the historical natural pathway, in spite of minor variations that may occur as a result of natural forces,
- b) when water flows toward the swamp (both above and below ground), it contributes to a variety of local water sources such as wells and lakes, including Conifryd Lake, Musselwhyte Lake, and the one of concern to the Appellant, Richter Lake,
- c) there are water licences held on Conifryd Lake (Robertsons) and Richter Lake (the Appellant),
- d) when water proceeds directly to Richter Lake, it negatively impacts these other water sources,
- e) if the water is diverted to Richter Lake and away from the swamp, it may lower the water level of Spotted Lake. The flow to the swamp is believed to contribute to Spotted Lake which the Ministry wants to ensure is protected due to the Smith's water licence, and the Lake's unique features. The Ministry admits that there is presently no surface flow to this Lake, but believes the flow to the swamp contributes to the "recharge" of the Lake, i.e., there is underground flow.

However, having said that, the problems noted with the Respondent's actions are not determinative of the question at hand; i.e., whether the Appellant was required to obtain prior approval.

The Appellant performed "works", by filling in the channel to the swamp, to ensure the *entire* flow proceeded towards Richter Lake. In doing so, it interfered with the bed and banks of a stream and interfered with the natural course, which the Board has found would otherwise move back and forth over time. Although the Respondent's works enhanced the "swamp channel", the Board finds that facts suggest that the enhanced channel was at or near the natural channel.

Under section 41 of the *Act*, it is an offence to place, maintain or make use of an obstruction in the channel of a stream without authority. It is similarly an offence to construct, maintain, operate or use works, without authority. Neither of the Appellant's water licences authorized its actions. The Appellant's licence on Swartz Creek does not authorize the diversion of water at the point of bifurcation and does

not give it the "right" to the *entire* flow of the Creek. Nor is there any common law right to the "natural flow" such that the Appellant's actions may be justified.

Therefore, the Board finds that the Appellant required prior approval for its actions. In the Board's view, after finding the works in 1990, the Appellant should have contacted the Branch to notify them of the obstruction (berm and "ditch") and sought permission, in the form of an approval or a licence, to deal with it.

The history of unauthorized activities on the Creek has created an atmosphere of suspicion and mistrust between the Branch and the various owners of the land, which has been manifested in accusations of wrongdoing and an attitude of intolerance by all involved. By taking matters into its own hands, the Appellant reinforced these attitudes and contributed to the present situation.

## DECISION

The Board has considered the extensive evidence in this case, whether specifically referred to or not.

The positions of the parties in this case have been diametrically opposed. The Respondent has asserted that the entire flow should go towards the swamp; the Appellant says the entire flow should go towards Richter Lake. The Board has concluded that the flow would naturally change over time such that at one time it may go 100% in one direction, at other times it may go 100% in the other direction and during certain flows, it may do both.

The Board has found that the Appellant required approval for its actions. Thus, the Respondent had the authority to issue an order against the Appellant. However, as we have found that the natural flow varies, and is not simply towards the swamp, the Board rescinds that part of the order requiring the Appellant to redirect Swartz Creek towards the swamp. This brings us to the very difficult question of what should happen to Swartz Creek?

Pursuant to section 40(9) (formerly section 38(5)) of the *Water Act* the Board may make any order that "appears just". Given the lengthy history of disputes over the water from this Creek, it is our view that it would not be just to simply order that the Creek be returned to its "natural course", i.e., allowing the flow to move back and forth across the fan area in accordance with nature. The same disputes would continue to arise between the parties.

The Board notes that the Respondent's main reasons for wanting the Creek to flow towards the swamp, is to ensure the nearby wells are not affected. Similarly, the Respondent wants to ensure that Conifryd Creek and Conifryd Lake get a portion of the flow out of the swamp to avoid a lowering of, in particular, Spotted Lake.

However, a letter from the licensees on Conifryd Lake stated a preference that *no* flow go towards that lake, although they want to keep their licence.

Regarding Spotted Lake, there is no evidence that surface flows have proceeded to this lake for many, many years. However, the Ministry suggests that the flow of the Creek to the swamp area may affect the level of Spotted Lake, apparently by way of

underground flows. As no tests or studies have apparently been performed to confirm this belief, the Board is unable to conclude that it is anything more than a suspicion. The Board notes that, in any event, groundwater is not currently covered by the *Water Act*.

Thus, at the time of the Hearing, the only "beneficial user" of the water from Swartz Creek appears to be the Appellant.

The Board, therefore, finds that on the best available evidence, the natural flow of Swartz Creek at the point of bifurcation above the swamp, goes toward Richter Lake up to 50% of the time and this freshet flow varies from year to year, being derived from the melting snow pack, directed by a changing alluvial fan.

The Board orders the Respondent to either amend the Appellant's current licence or issue the appropriate authorization to allow the Appellant to divert 50% of the flow of Swartz Creek toward Richter Lake.

Although the parties asked the Board to address the "natural flow" of the Creek from the swamp, it is not within the jurisdiction of the Board as the matter before us dealt solely with the obstruction at the point of bifurcation.

The Respondent's requests for orders relating to removing alleged, artificial and unauthorized blockages and diversions *within the* swamp are likewise not within the jurisdiction of the Panel.

The appeal is allowed.

Judith Lee, Panel Chair  
Environmental Appeal Board

May 15, 1997