



APPEAL NO. 82-23 WAT.

J U D G E M E N T

Reasons for decision of the Panel pursuant to Section 38 of the Water Act and Section 11 of the Environment Management Act.

APPELLANT

Mrs. Doreen Mary Ensign of Westbank, B.C., represented by Mr. Joseph T. Hattori, Solicitor of Kelowna, B.C.

1.0 GENERAL

- 1.1 The hearing of the appeal by a Panel of the Environmental Appeal Board was held in Capri Hotel, Kelowna, B.C. on September 8, 1982.

The Panel members were:

Mr. Valter Raudsepp	-	Chairman
Mrs. Dianne Kerr	-	Member
Mr. H.D.C. Hunter	-	Member

The stenographer taking proceedings before the Panel was Mrs. Kathleen McKay of PRS Professional Reporting Services Ltd.

- 1.2 The appellant Mrs. Doreen Ensign was present, represented by her solicitor Mr. Hattori. Mr. Russell Ensign also gave evidence.
- 1.3 The Comptroller of Water Rights was represented by the following persons:

Mr. Paul Jarman, Solicitor, Ministry of Attorney General
Mr. J.E. Farrell, Deputy Comptroller of Water Rights
Ministry of Environment
Mr. D.B. Lovdahl, Regional Manager

Mr. J.A. Botham, Senior Technician
Mr. A. Allport
Mr. G.W. Robinson, who did not give evidence.

- 1.4 Two persons whose rights would be affected by the appeal were present and gave evidence;

Mr. Jack Paynter
Mr. George Yeulett

- 1.5 Exhibits filed by the parties during the hearing are as follows:

- No. 1 - Book of 23 sheets of copies of documents, filed by the appellant.
- No. 2 - A letter signed by T. Smithwick, December 31, 1974.
- No. 3 - A copy of Affidavit by Doreen Ensign, March 4, 1974.
- No. 4 - A book of 25 tagged copies of documents.
- No. 5 - A brief prepared by Paynters Orchard Meadows Ltd. and G. R. Yeulett.
- No. 6 - Plan showing McDougall Creek licensing, Ministry of Environment.

Exhibits Nos. 2,3,4 and 6 were presented by the Comptroller of Water Rights.

2.0 APPEAL

- 2.1 The appeal was against the order of Mr. J.E. Farrell, Deputy Comptroller of Water Rights, herein called the Comptroller, made on May 17, 1982, in a letter to Mr. J.T. Hattori, Solicitor. The order reads as follows:

"Being satisfied that the joint use of works would conserve water, and in accordance with Section 31 of the Water Act,

it is hereby ordered that the rights to use water granted under Conditional Water Licence 18812 and Final Water Licence 21619 shall be exercised by the joint use of works authorized under Conditional Water Licence 54365."

2.2 The grounds of appeal given in the Notice of Appeal dated June 16, 1982, by Mr. J.T. Hattori, are as follows:

- "1. The order has the effect of cancelling the water licences of the appellant;
2. The decision counsels a breach of an easement agreement between the appellant and Arthur Ferdinand Johnson and Paynters Orchard Meadows Ltd."

"AND FURTHER TAKE NOTICE that the appellant seeks an order that the order of the Deputy Comptroller appealed from be rescinded and the lands restored to its original use, or alternatively, that the order of the Deputy Comptroller be made subject to the provision by Paynters Orchard Meadows Ltd. of water to the extent provided by Conditional Water Licence 18812 and Final Water Licence 21619 to the appellant."

During the hearing the appellant raised additional grounds of appeal which are discussed in Section 4.

3.0 WATER USE AND CONVEYANCE WORKS FROM McDUGALL CREEK

3.1 The order of the Comptroller from which the appeal was taken deals with the use of water from McDougall Creek which is a small stream discharging into Okanagan Lake near Westbank, B.C. A sketch, attached hereto, depicts a section of McDougall Creek, land subdivisions and land owners, and the water licences referred to in Order of the Comptroller and in the appeal. This sketch is similar to a plan in Exhibit No. 4. It was used during the hearing to clarify some of the evidence.

3.2 The appellant owns District Lot 2684, except Lot 1, Plan 19617 and Parcel A, Plan 3930. She and Mr. Russell Ensign have occupied the land since 1967 or 1969, first renting and then purchasing in 1973 from Mr. Taylor.

Three water licences are appurtenant to the appellant's land, namely:

- i) Final Water Licence 21619, for irrigation, priority date October 6, 1945, point of diversion at P^P on McDougall Creek.
- ii) Conditional Water Licence 18812, for irrigation, priority date June 14, 1948, point of diversion at the outlet of "23 Acre Meadows" water storage facility, from which the released water will be directed to McDougall Creek at its headwaters and rediverted from McDougall Creek for use at point of diversion P^P.
- iii) Conditional Water Licence 54365, for irrigation, priority date January 24, 1907, point of diversion at J⁸ on McDougall Creek. Point J⁸ is approximately 1.2 km downstream from P^P and lower in elevation.

3.3 The water authorized to be diverted under the two licences from point P^P was conveyed to the appellant's property by a ditch and flume system which was in existence when the appellant first occupied her land. According to the evidence, this ditch and flume system conveyed water also to lands immediately downstream from the appellant; namely, to District Lot 2602, except Lots 1,2,3,4,5, Plan 23091, owned by Paynters Orchard Meadows Ltd., and to Lots 2 and 4, District Lot 2602, Plan 23091, presently owned by George and Ruth Yeulett, previous owner, Arthur Ferdinand Johnson.

The water licences held by Paynter and Yeulett and by the appellant authorized diversion from McDougall Creek at point P^P and the construction of the flume and ditch for conveyance of water to their points of use. Some of the water licences held by Paynter and Yeulett from point P^P have an earlier priority date than the licences held by the appellant. In addition to the water licences already mentioned, there are several others both upstream and downstream from the appellant's licences.

3.4 At point P^P there exists a concrete diversion dam by which some of the water in McDougall Creek can be diverted to the conveyance system which consisted of sections of metal and wood flume supported by trestles, and sections of ditch excavated into earth or shale talus slope. The upper end of the ditch and flume system crosses two parcels of private land, one owned by Mr. Lobb and the other by Mr. Causton. Immediately downstream

and before entering the appellant's land, the system crosses Crown land. A permit to allow a right-of-way over Crown land has been issued under the Water Act in connection with the water licences.

- 3.5 The appellant filed at the hearing a copy of a registered easement agreement, dated August 15, 1974, between the appellant, Doreen Mary Ensign, as Grantor, and Arthur Ferdinand Johnson, (previous owner of the land now owned by G. and R. Yeulett), and Paynters Orchard Meadows Ltd., as Grantees. In it, the appellant gives the Grantees and their successors in title, full right and liberty for the purpose of the construction of a ditch and flume for the carriage and delivery of water in, under and upon those portions of the appellant's land shown outlined in red on a plan of easement deposited in the Land Registry Office at Kamloops under No. 10745, and to participate in the keeping and maintaining of same at all times in good condition and repair, and of renewing or replacing the same in whole or in part from time to time, and for every such purpose the Grantees, their successors and assigns, shall have access to the said lands at all times by them or their agents, servants, employees and workmen. The agreement contains certain other additional conditions, such as compensation for damage, which do not appear to be relevant to the issues involved in this appeal. It is understood that this easement agreement was the result of right-of-way expropriation by the Grantees under Section 24 of the Water Act.

The plan of easement mentioned in the agreement was not presented at the hearing. However, the Panel believes that the easement referred to is that on which the ditch and flume system from point P^D was situated.

- 3.6 The appellant also filed during the hearing a copy of another agreement between the Federal Minister of Citizenship and Immigration as the Grantor of the first part, and Arthur F. Johnson and Harry Paynter, as the second part, dated August 21, 1952. It was stated at the hearing that this agreement has not been registered in the Land Registry Office. The agreement refers to an intention by the Federal Department to obtain a water licence from McDougall Creek for irrigation of Westbank Indian Reserve lands which are situated downstream of the lands so far discussed.

The Minister agrees in that agreement to construct the water intake and conveyance works from McDougall Creek at no cost to Messrs. Johnson

and Paynter and to allow the latter to use the works for taking water authorized under their existing licences at no cost to Messrs. Johnson and Paynter.

Messrs. Johnson and Paynter agree to provide a right-of-way through District Lot 2602 at no cost to the Minister. It should be noted that District Lot 2602 is mostly owned now by Paynters Orchard Meadows Ltd. and by G. and R. Yeulett, as described in Section 3.3.

Messrs. Johnson and Paynter further agree that they will maintain and keep in repair without cost and to the satisfaction of the Minister, the constructed ditch, flumes and other works from and including the intake at the point of diversion from McDougall Creek, as described in the licence to be obtained, to the western boundary of Lot 2602.

The agreement contains, among other provisions, a paragraph saying that the Minister agrees that the agreement, copy attached thereto, dated December 12, 1945, between Messrs. Johnson and Paynter and E.J. and G.E. Taylor, shall remain in force according to the terms and conditions as set out therein, as agreed by E.J. and G.E. Taylor in their letter dated July 26, 1952, attached.

The last mentioned agreement dated December 12, 1945, and a letter dated July 26, 1952, involving E.J. and G.E. Taylor, were not attached to the copy of agreement filed with the Panel at the hearing of the appeal. Therefore, their contents are unknown.

- 3.7 It was established by the evidence at the hearing that the agreement, referred to in Section 3.6, refers to the ditch and flume system and the intake structure by which water was diverted from McDougall Creek at point P^P, and from which conveyance works the appellant was taking water authorized under her two water licences. Similarly, the downstream water users also took water from that system which was constructed by the Federal Department for the irrigation of Indian Lands. There was no evidence indicating that the appellant owned or was a part-owner of the diversion structure and ditch and flume system from point P^P. It was owned by the Westbank Indian Band. There may have been split ownership agreements with other parties.

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- 3.8 There was sufficient evidence submitted by the Comptroller and Mr. J. Paynter that the ditch and flume system from point of diversion P^P suffered substantial losses of water diverted into it from McDougall Creek. The losses measured in the section of the ditch and flume on the appellant's property indicated losses 16 to 18% and higher of the total diversion. The system, both ditch and flume sections, lost water by seepage and leakage into the ground. The appellant has also stated in an affidavit, sworn in 1974, that excessive leakage from the ditching resulted in waste of water and damage to the land through flooding.
- 3.9 The Comptroller submitted evidence that McDougall Creek is a particularly watershort source of water supply during periods of low flow. This has forced the officials of the Comptroller to cut off or restrict junior water licences during periods of low flow under Section 37 of the Water Act, including licensees using water for domestic use, or by appointing a water bailiff under Section 33 of the Water Act to regulate the use of water.
- 3.10 According to the evidence submitted by the Comptroller, and jointly by J. Paynter and G. Yeulett, the water licensees immediately downstream from the appellant's property started in 1972 to replace the ditch and flume system on their land by installation of pipes in order to reduce water losses. In 1977, they applied to the Comptroller for change of works under their licences to replace a section of ditch and flume on the appellant's property, from the north boundary of District Lot 2602 to a point approximately in the middle of District Lot 2684, where the appellant took her water from the ditch and flume system. The Comptroller approved this change of works under Section 15 of the Water Act in June, 1978. This was called Phase I of the pipe system.
- 3.11 In January, 1979, Mr. G. Paynter invited all licensees on McDougall Creek to discuss a new water supply system from McDougall Creek. The appellant was included but was not interested. The technical studies done by the Provincial Government later in 1979 still included the appellant's water demands. There was an unsuccessful effort to receive government funds for the new system.
- 3.12 The construction of the new works authorized by the Comptroller in July, 1978, mentioned in Section 3.10, commenced in July 1980, and the clean-up of construction was completed in April, 1981.

- 3.13 In February, 1981, the Paynters, Yeuletts, and Shannon Lake Estates Ltd., applied to the Comptroller to replace the remaining ditch and flume that is upstream from Phase I (see Section 3.10 and 3.12) by a pipeline up to the diversion structure at point P^P. This change of works was called Phase II. The appellant and her solicitor attended a meeting in the Ministry of Environment office in Kelowna, held in February, 1981, to discuss the proposed pipeline to replace the remaining section of ditch and flumes system. The size of the pipeline was proposed to be between 10 to 12 inches depending on whether the appellant wished to be included. The appellant made it clear that she did not wish to be included.
- 3.14 The Comptroller approved this Phase II of change of works on January 25, 1982 under Section 15 of the Water Act. Apparently, no appeal was taken under Section 38 of the Water Act from that decision of the Comptroller.

The construction commenced on April 30, 1982 and after expropriation of an easement at the upstream end, the work was completed in May, 1982.

- 3.15 According to the evidence, the new pipeline from point P^P on McDougall Creek is constructed on the appellant's land, on the easement referred to in the agreement mentioned in Section 3.5, between the appellant and Paynters and Johnson (now Yeulett). The old ditch and flume system no longer exists. The Westbank Indians had approved the removal of flumes and received salvaged flume materials.

The size and carrying capacity of the new pipeline was determined by the parties who paid for the project based on their existing water rights and additional water rights which they had applied for in anticipation that the pipeline will substantially reduce previous conveyance losses, thus making available water for additional licensing. Evidence was submitted at the hearing that the Comptroller has recently decided to grant new water licences to these land owners.

- 3.16 According to the evidence submitted by the Comptroller and Mr. Paynter, the new pipeline from point P^P on McDougall Creek has no excess capacity to convey water to the appellant's land. The Comptroller advised the appellant that in the circumstances existing after the installation of the new pipeline, the appellant should give consideration to installation of her own pipeline from point P^P, and to apply for a change of works

under her two licences accordingly. The appellant did not accept that suggestion. Alternatively, the Comptroller indicated to the appellant that an order will be issued under Section 31 of the Water Act that the two licences with point of diversion at P^P shall be exercised jointly with her Conditional Water Licence 54365, authorizing the diversion of water by pumping at point J⁸.

- 3.17 According to the evidence, the appellant did not accept the suggestion made by the Comptroller. The Comptroller then issued a letter to the appellant, dated May 17, 1982, advising her of his decision to issue an order from which the present appeal has been taken. See Section 2.

The Comptroller added in his letter that the water licences involved will be amended accordingly and that, if at any time the appellant decides to install her own pipeline from point P^P, the Comptroller will give consideration to an application for change of works to authorize such a pipeline.

4.0 GROUND OF APPEAL (See also Section 2)

- 4.1 In determining the merits of the appeal, the first question is whether the Comptroller had authority to issue the order for joint use of works.

Section 31 of the Water Act provides as follows:

"31. Where satisfied that a joint use of works would conserve water or avoid duplication of works, the Comptroller may order joint use and fix its terms."

Also relevant are Section 15, authorizing the Comptroller to amend a water licence, and Sections 35 and 38, under which the Comptroller or an Engineer may determine, among other things, what constitutes beneficial use of water and allowances of water to offset evaporation and seepage.

The next question is whether there were other reasons the Comptroller should have considered before issuing the order.

- 4.2 As discussed in Sections 3.8 and 3.9, the Comptroller had good reasons for approving the change of works from an open to a closed system. For him it was important that the installation of the pipeline resulted in significant conservation of water in the water-short McDougall Creek. The old ditch and flume system was then no longer in existence. The appellant did not respond to the Comptroller's suggestion to install a separate pipeline from point P^P. In the circumstances the Comptroller issued the order from which the appeal was made.
- 4.3 The appellant has advanced several grounds of appeal in the Notice of Appeal, (see Section 2.2), and in addition has put forward others during the hearing purporting to indicate that the order should be rescinded. These grounds are reviewed below.
- 4.3.1 The appellant states that the order issued by the Comptroller has the effect of cancelling the water licences held by the appellant from point P^P, or at least changing the priorities of these two licences. The evidence shows that the appellant received water under her two licences from point P^P on McDougall Creek by gravity via a diversion structure, and ditch and flume systems, which she did not own and did not maintain, thus at little or no cost to her. Under the joint works order, the appellant is forced to install a new pumping plant and pipeline at point J⁸, the cost of which she claims to be very high. As mentioned in Section 3.2, point of diversion J⁸ is substantially lower in elevation than P^P. The appellant stated that the existing pump at J⁸, installed under Conditional Water Licence 54365, is not capable of lifting water by some 350 feet, which would be required in order to sprinkle-irrigate some 36 acres of land upstream from the old ditch and flume, which lands are presently not irrigated. The cost of the new pumping and piping installation, in the opinion of the appellant, is prohibitive. Therefore, the appellant argues, the Comptroller's order has the effect of cancelling these two water licences previously authorizing diversion at point P^P.

There is no doubt that the appellant has lost the opportunity to receive gravity water at low or no cost to her from the old ditch and flume system. This was the result of the Comptroller's approval for replacement of ditch and flume by pipeline in order to conserve water. Whether or not the new pump and pipe system from J⁸ involves prohibitive costs was not sufficiently determined. Mr. Ensign gave some guesses of the cost.

There was no evidence of reliable cost estimate.

It is quite possible that the appellant would have faced substantially less capital and annual operating cost if she had agreed to participate in the installation of the new pipeline from point P^P or if she had applied for the construction of her own pipeline from P^P. In both of these alternatives, which she decided not to consider, she would have continued to receive water by gravity. As mentioned in Section 3.16, the Comptroller is still prepared to consider an application from the appellant for the construction of such pipeline.

The Panel concludes that the appellant's rights to use water from McDougall Creek have not been cancelled. Similarly, the priority dates of these licences have not been changed. If there are stream losses from McDougall Creek between points P^P and J⁸, and the flow of water at J⁸ is insufficient to allow to divert water authorized by the licences held by the appellant, the regulatory powers of the officials under Section 37 of the Water Act will allow them to give full consideration to the priorities of all licences affected by shortage of supply.

The order of the Comptroller was made as the result of the construction of the new pipeline in order to conserve water. Appellant's own decision not to participate in this improvement was the deciding factor in the decision of the Comptroller.

The Panel is satisfied that the Comptroller had ample reasons to approve the replacement of the old ditch and flume system by a pipeline.

- 4.3.2 The appellant has stated that the order of the Comptroller counsels a breach of an easement agreement between the appellant and A.F. Johnson, now G. & R. Yeulett, and Paynters Orchard Meadows Ltd. This agreement was discussed in Section 3.5.

The appellant is of the opinion that when she acquired the land she presently owns, she "inherited" the ditch and flume system that existed on the land, and that the Grantees of the agreement were obligated to keep the ditch and flume system in operation, thus guaranteeing the conveyance of the appellant's water from McDougall Creek to her land.

The Panel finds that this view is not supported by the evidence. The agreement gives the Grantees (Paynter and Yeulett), the right to enter the

easement on the appellant's land and the right to maintain the system. However, the agreement does not obligate them to do so.

The other agreement, discussed in Section 3.6, apparently un-registered, between the Federal Government and the owners of District Lot 2602, appears to grant the owners of D.L. 2602 the right to use the ditch and flume system, which was constructed by the Federal agency for the irrigation of Westbank Indian lands. The Panel can find no evidence that the appellant had acquired right to take water from the system or had any legal interest in this agreement.

Evidence at the hearing indicated that the Westbank Indian Band agreed with the dismantling of the system when it was replaced by a pipeline, and it received salvaged flume material. Thus, the Panel cannot find evidence to support the claim by the appellant. However, should the appellant have legal grounds for expecting delivery of water from the works now operated by Paynters Orchard Meadows Ltd., this would be a question between her and the other party. The Comptroller correctly pointed out that he was not a party to the ditch and flume easement agreement. Section 24 of the Water Act, and Division 4 of the Regulations issued under the Water Act, provide authority to a licensee to expropriate private land reasonably required for the construction, maintenance and operation of works authorized under his licence. The Comptroller is not necessarily aware of a private land easement and its conditions. The appellant's complaint at the hearing that the Comptroller should not take steps that may give grounds for litigation between licensees is, in this case, not justified by the evidence.

4.3.3 The appellant, in the grounds of appeal, seeks an order that the Comptroller's order be rescinded and the land restored to its original use. Apparently, this refers to the Comptroller's approval of the application for change of works to replace the ditch and flume system by a pipeline. As discussed in Sections 3.13 and 3.14, this approval was given in January 1982. No appeal was taken from that decision. The Panel has now no authority to review or change that decision.

In addition, the evidence has shown that the replacement of ditch and flume system by pipeline was a necessary decision to eliminate excessive water losses. Installation of another ditch or flume system

from a water-short source would again very likely create an unreasonable water loss situation.

- 4.3.4 The appellant stated at the hearing that the ditch and flume system, particularly the ditch sections carrying flowing water, was a factor enhancing the value of her land, which enhancement has now been lost, thus injuriously affecting the appellant.

The Panel finds that the appellant does not hold a water licence for land improvement purpose. Further, the evidence submitted by the Comptroller casts doubt that an incidental enhancement from the ditch did exist. The evidence contained statements made by the appellant in 1974 that the ditch and flume system could be a hazard to animals and that seepage from it caused damage to her lands. Thus, this ground of appeal is not substantiated.

- 4.3.5 Finally, the appellant complained that the Comptroller, instead of issuing the order from which this appeal was taken, should have considered other alternatives, such as: i) an economic and technical feasibility study of improving the ditch and flume system to keep water losses at a tolerable level, and ii) ordering the owners of the new pipeline to convey water to the appellant's land under a joint use order.

There was evidence that some engineering studies were made in connection with the proposed pipeline. It appears to be reasonable to believe that the possibility of improving the ditch and flume system to make it a viable alternative for operation and maintenance did not exist. Further, the Comptroller took a reasonable stand that the design and construction of works by a licensee from a cost point-of-view is primarily a matter for the licensee to consider. The proposed pipe would definitely eliminate the excessive water loss problem which was an important factor for the Comptroller.

After the approval of the pipeline, the appellant would be the only user of the ditch and flume system. Evidence submitted at the hearing indicated that water losses from that portion of the ditch and flume system which carried water to the appellant were too high to allow continued use of it. After construction of the pipeline, the ditch and flume system did not exist.

Regarding the complaint that the Comptroller did not consider ordering the owners of the new pipeline to convey water to the appellant's land under a joint use order, it must be remembered that, according to evidence submitted by the Comptroller and Mr. Paynter, the appellant was invited more than once to participate in the jointly constructed pipe. She decided not to join. There was also evidence submitted by Mr. Paynter and the Comptroller that the appellant and Mr. R. Ensign had in the past taken a number of uncooperative and even disruptive actions against downstream users of the ditch and flume.


Mr. Paynter testified that in June, 1982, Mr. Ensign attempted to connect a pipeline to Paynter - Yeulett's pipeline on the easement through the appellant's land. This attempt, not authorized by the Comptroller or by the owners of the pipeline, was reported to the Regional Manager of the Comptroller who ordered immediate removal of the unauthorized pipeline under Section 37 of the Water Act.

The Comptroller submitted at the hearing that one of the factors when considering a joint use of works possibility is the cooperative attitude of the parties involved. In this case, the Comptroller had ample reason to doubt that such an attitude existed.

The Panel finds that the Comptroller had sufficient reasons not to consider a joint use of works order allowing the appellant to receive water from the new pipeline, even if the pipeline could be modified to have excess capacity.

5.0 DECISION

Having considered all the evidence submitted at the hearing the Panel decides to refuse the appeal.


V. Raudsepp, P. Eng.
Panel Chairman
Environmental Appeal Board

October 25, 1982.