



APPEAL NO. 86/35 WAT

JUDGEMENT:

Appeal by Quest Resorts International Ltd. against the decision of the Comptroller of Water Rights, dated October 7th, 1986, to refuse their application for a water licence on Ginnard Creek.

APPELLANT:

Quest Resorts International Ltd.,
Box 570,
Tofino, B.C.

HEARING DETAILS:

The hearing was held at the Hospitality Inn, Port Alberni, B. C., on May 14th, 1987, before a Panel of the Environmental Appeal Board, of

Mr. H.D.C. Hunter, Panel Chairman
Mr. G. E. Simmons, P. Eng., Member
Mr. J. D. Watts, P. Eng., Member

Miss Shirley Mitchell, Executive Secretary of the Board, acted as Recorder of the proceedings.

APPELLANT:

Quest Resorts International Ltd., represented by

Mr. J. A. Watson of Counsel
Mr. J. English gave evidence

RESPONDENT:

Comptroller of Water Rights, represented by

Miss L. Meret of Counsel
Mr. P.M. Brady and Mr. G. Bryden gave evidence

PARTY APPEARING:

The District of Tofino had been granted full party status and was represented by Miss B.M. Smith of Counsel. Mr. N. Bernard and Miss J. Housser gave evidence.

EXHIBITS:

- No. 1 - Water Licence Application and Proof of Posting
- No. 2 - Set of 4 photographs downstream of spillway - 12 May 1987
- No. 3 - Set of 4 photographs of dam/spillway - 12 May, 1987
- No. 4 - Set of 4 photographs - reservoir and pipes

- No. 5 - Set of 4 photographs - pumphouse - tank
- No. 6 - Photograph - water intake - July/August, 1986
- No. 7 - Photograph - spillway - July/August, 1986
- No. 8 - Photograph showing empty concrete sacks - July/August 1986
- No. 9 - Photograph showing empty concrete sacks - July/August 1986.
- No. 10 - Photograph showing severed line and bleeder valve - July/August 1986.
- No. 11 - Alberni Water District Map
- No. 12 - C.W. Bullock & Associates' map - District of Tofino pipeline.
- No. 13 - Two-page rainfall data, Tofino Airport
- No. 14 - Letter of June 3rd from the District of Tofino's lawyer to Quest Resorts International, paragraphs 2 and 3 only.
- No. 15 - Letter of October 7th from P.M. Brady to Quest Resorts International Ltd. refusing application for water licence.
- No. 16 - Information bulletin by District of Tofino (See para. 9).
- No. 17 - Letter of District of Tofino to Quest Resorts International, February 19, 1986.
- No. 18 - Statement of Accounts - District of Tofino Water Department.
- No. 19 - Book of Documents filed by Tofino
- No. 20 - Agreement for Sale dated 18 April 1986.
- No. 21 - Appeal Book of Comptroller of Water Rights
- No. 22 - Order of Supreme Court - 4 November, 1986

The evidence disclosed that Quest Resorts International had applied in December, 1985, for a Conditional Water Licence for 275,000 gallons per day for its campsite and resort. The application was subsequently amended to apply for 3000 gallons per day. The Comptroller refused the application in October, 1986. The grounds for refusal were that the stream, Ginnard Creek on Meares Island, was fully recorded and that the District of Tofino had a municipal system available and capable of providing full service to Quest Resorts International Inc. property.

The predecessor to Quest Resorts in operating the resort had installed a system from an intake on Ginnard Creek with a 4-inch plastic pipe about 1975, and the system was part of the total assets purchased by Quest Resorts about 1984. In 1985, the District of Tofino had upgraded the intake structure and had installed its own system in the intake to supply its municipal system. It had plugged up, and subsequently cut Quest Resorts' intake, and Quest Resorts had been forced, although under protest, to connect to the municipal supply. It was still connected.

Documents from the Comptroller's files showed that the Clayoquot Sound Waterworks District had obtained a water licence for 250,000 gallons per day from Ginnard Creek, and had authorized the owner of the resort to install his system under that licence. He had also supplied other properties nearby. This agreement was dated April 23rd, 1975, and was for one year, extendable by agreement for up to one year at a time. Subsequently, the Waterworks District entered into another similar agreement with a new operator of the resort in May, 1982. This agreement was to be on an annual basis, but it provided in Clause 8 -

"The Owners shall, when the District or some other public statutory authority has constructed a community water system capable of serving the Owners' lands, make application for connection and abandon or remove all temporary works which are presently in use."

By Clause 11, it is provided -

"However this agreement may be terminated by the District whenever the District or some other public statutory authority has installed a community water system capable of serving the Owners' lands".

By Order in Council 1655 of October, 1983, the Waterworks District was dissolved and all its assets and rights were transferred to the District of Tofino.

The District of Tofino had obtained additional water licences on Ginnard Creek. The District of Tofino had its system operating sometime prior to June, 1985. It is, therefore, clear that as of July, 1985, Quest Resorts International Ltd. had no legal right to take water from Ginnard Creek.

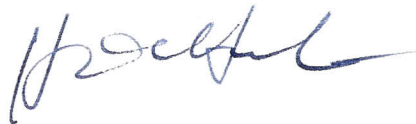
Quest Resorts International Ltd. applied for a water licence to enable it to continue to use its system. The evidence given by the Comptroller and his engineer, Mr. Bryden, indicated that Ginnard Creek was fully recorded by the licences granted to Tofino. In considering whether a creek is fully recorded, the projected 7-day minimum flow over a 10-year period is used. No evidence was produced to show that this generally accepted method was incorrect or that the records available could support a higher minimum flow.

The Comptroller also based his decision on the fact that Tofino could supply (and was supplying) all the requirements of Quest Resorts. Quest Resorts alleged that paying Tofino for water was significantly more expensive than operating its own system. The Board is not convinced that this allegation will be found to be correct. In any event, it is not sufficiently clear or significant in amount to set aside the Comptroller's decision.

There was much evidence given about the events which compelled Quest Resorts to connect to the municipal system. The evidence from Mr. Bernard on this subject was hearsay and conflicted with that of Mr. English. Fortunately, it is not relevant to the decision. The Board, however, is of the opinion that Tofino acted in an arbitrary manner in damaging the Resort's system. The Comptroller clearly had the right to issue an order to Quest Resorts to disconnect its supply. He was not asked to make such an order. Tofino took the law into its own hands in this matter.

The Board also had considerable sympathy for Mr. English. He appears to have purchased a resort with an established water supply without being informed, or finding out, about the precarious nature of his rights to the water supply; however, sympathy is not enough.

The decision of the Board is that the appeal must be rejected and the decision of the Comptroller of Water Rights upheld.



H.D.C. Hunter,
Panel Chairman,
Environmental Appeal Board

Victoria, B. C.
June 17th, 1987.