



Province of
British Columbia

Ministry of
Environment
and Parks

ENVIRONMENTAL APPEAL BOARD
Victoria
British Columbia
V8V 1X5

APPEAL NO. 87/26 WAT

JUDGEMENT:

In the appeal of Arthur Chesters and Berna Chesters under the Water Act and the Environment Management Act against the decision of the Deputy Comptroller of Water Rights, dated August 12th, 1987.

APPELLANT:

Arthur and Berna Chesters
Ganges, B. C.

HEARING DETAILS:

The hearing was held on January 12th, 1988, in Ganges, B.C., before a Panel of the Environmental Appeal Board. Board members in attendance were:

Mr. H.D.C. Hunter - Chairman
Mr. G.E. Simmons - Member
Mr. J.D. Watts - Member

Miss Shirley Mitchell acted as recorder of the proceedings.

APPELLANT:

Mr. Arthur Chesters
Mrs. Berna Chesters

represented by Mr. J. L. Oldroyd, Counsel

Mr. Arthur Chesters gave evidence.
Mr. P. Grange, P. Eng., gave evidence.

RESPONDENT:

Mr. J. E. Farrell, P. Eng.,
Deputy Comptroller of Water Rights

represented by Miss L. Meret, Counsel

Mr. J. E. Farrell gave evidence
Mr. R. Penner, P. Eng., gave evidence.

LICENCE HOLDER:

Mr. Andrew Patrick Fraser was granted party status.

Mrs. Margaret Fraser and Mr. Ted Gear gave evidence on his behalf.

EXHIBITS:

- EX. 1 Appeal Book prepared by the Comptroller's Department.
- EX. 2 Set of five photos taken August 1987 by Mr. Chesters.
- EX. 3 Statutory Declaration by Mr. Ron Spencer, dated 11 January, 1988.
- EX. 4 Statutory Declaration by Mr. Perry Booth, dated 11 January, 1988.
- EX. 5 Notice of Application for a Water Licence received by Mr. Chesters on 12 November 1985.
- EX. 6 Application for a Water Licence, sent to Mr. Chesters by Mr. Farrell.
- EX. 7 Application for a Water Licence sent to Mr. Oldroyd by Mr. Farrell, date stamped.
- EX. 8 Application for a Water Licence sent to Mr. Oldroyd by Mr. Farrell with no date stamp.
- EX. 9 Extract of Water Resources Map.
- EX. 10 Extract of a text book by Oscar E. Meinzer
- EX. 11 Set of seven photographs presented by Mr. Penner
- EX. 12 Copy of postage receipts and of a memo by Mrs. Marchinski.

EVIDENCE:

Mr. Chesters appealed against the granting of a conditional water licence for 500 g.p.d. for domestic purposes to Mr. Fraser. The point of diversion is within a legally registered easement on Mr. Chesters' land. Mr. Chesters maintains that the water licensed by the licence is ground-water and, therefore, under the Water Act, is not licensable by the Deputy Comptroller of Water Rights.

In addition, Mr. Chesters claimed that because of failure by the licensee in applying for the licence to comply with the regulations, the Comptroller's Department had no jurisdiction to issue a licence.

Mrs. Fraser claimed, in reply, that Mr. Fraser had fully complied with the regulations and that the source of water was a spring as defined in the Water Act and was, therefore, fully licensable.

The Deputy Comptroller of Water Rights did not admit any breach of the Regulations, but had decided that if there were any, they were of a minor nature and that there had been substantial compliance. In his opinion, as shown in his decision of August 12, 1987, from which this appeal arose, the source of water was a spring and was, therefore, licensable.

Mr. Chesters gave evidence that he had purchased his property in 1977. The easement in favour of Mr. Fraser was registered prior to his purchase. His own water supply was a well near his house which was in place when he bought.

When he bought the property, the Frasers's well was a sump with wood cribbing which had a low spot in the southeast corner. The ground around the well at this low spot was sometimes wet in times of wet weather, but there was no sign of any channel in the surface of the ground.

The Frasers's well used to have an overflow pipe which Mr. Chesters had put in to intercept water in periods of high water, and divert it into a pond which he had constructed nearby. This never flowed as a full torrent and sometimes it was dry. This overflow pipe was about 6 - 8 inches below the ground level at the low point. Recently, this well has been cased in concrete rings and the overflow pipe seemed to have been disconnected.

With respect to the application for a water licence, he claimed not to have received the applications. The one that he did receive was only partially completed, and no copy was ever posted on the ground. He produced two statutory declarations to support this latter claim.

Under cross-examination, Mr. Chesters admitted that his solicitor must have received some of the documents he claimed not to have seen. He admitted that Mr. Fraser has a legal right to use the well and the easement.

Mr. Phillip Grange, P. Eng., gave evidence that he had visited the site in October 1987, and had seen no water on the surface near the well, and the water level was about one foot below the ground surface. The level of water in the pond was also about one foot down. He could find no sign of any naturally occurring surface water in the area, except for seepage about six feet below ground level behind the barn.

He produced a water map to indicate the catchment area for the wells on these properties, and he introduced part of a textbook by Dr. O. E. Meinzer as a definition of a spring.

Under cross-examination, he admitted that the definition of spring in a report by Mr. Ryzuk, P. Eng., (in Exhibit 1) was restrictive to one type of spring.

Mr. J. Farrell, P. Eng., gave evidence that from the evidence before him when he made his decision, he was satisfied that water came to the surface naturally at this so-called well for a significant period, and was, therefore, licensable. After hearing the evidence of Mr. Chesters, he was more convinced of this.

With respect to the compliance with the regulations, he was satisfied that there had been at least substantial compliance, and Mr. Chesters had not been prejudiced as he had taken part in the process and had exercised his right of appeal to him and now to the Board.

Under cross-examination, he pointed out that a trickle coming out of the ground was licensable, and the well or works were "works" as defined in the Water Act.

Mr. Penner, P. Eng., is Acting Head of the Appeals Unit in the Water Management Department. He had prepared the Appeal Book (Exhibit 1) and he was present when the photographs (Exhibit 11) were taken in May, 1987. He had visited the site on May 22, 1987, when Mr. Chesters and Mr. Oldroyd were present. At that time, the ground below the casing was

wet and water was visible on the surface. The flow was not measured and was not large. The use by the Frasers of their well cannot affect Mr. Chesters's well as the latter is higher up the slope and is a significant distance away.

Under cross-examination, he admitted that May could be a period of high ground-water flow. When the top of the casing was removed, the water level was about 2 inches below ground level, but this was not surprising as the Frasers had sprinklers going.

The ground below the well was wet and soft. Even if the water was coming through joints in the casing, there had to be enough pressure to cause the water to penetrate the joints.

Mrs. Fraser called Mr. Ted Gear to give evidence. He had owned the property (both Chesters and Frasers) when the well was dug. At that time, there were several wet areas on the hillside. He had a diviner select this particular spot. They had dug down with little water inflow until they removed a large rock at the bottom. Then the water came in very fast and they had difficulty in building the crib before the water came up. He had used large volumes of water for his turkeys and cattle.

Under cross-examination, he maintained that the water had spread over the area; it had not formed a specific channel. This happened in several areas and interfered with the haying.

Mrs. Fraser maintained that Mr. Fraser had posted the notices on the property as required and introduced a memo from a Mrs. Marchinsky to confirm one such posting.

Miss Meret and Mr. Oldroyd then summed up their cases and introduced various judgements and extracts of textbooks.

DECISION:

The Board is not satisfied from the evidence whether there was or was not strict compliance with the regulations with respect to the application for a water licence. Mr. Oldroyd urged the Board to hold that strict compliance is required, particularly with respect to posting the application on the ground. In his opinion, this is necessary to alert the applicable people other than the landowner who may be affected.

However, the Water Act, in Section 9, limits severely the number of people who may object to the granting of a licence to "a licensee, riparian owner or applicant for a licence." Failure to post on the ground would not affect these persons as they have to be served personally.

It is clear from the evidence that Mr. Chesters was alerted to the application for a licence. His solicitor, on October 16, 1985, acknowledged this fact. The double-register receipts show that Mr. Chesters received the revised application. Neither the Regional Manager nor the Frasers can be faulted if the solicitor did not understand the document or did not follow up on an enquiry.

The Board upholds the decision of the Deputy Comptroller of Water Rights that, in this case, any failure to comply with the regulation, none of which was clearly proved to the Board, was of a minor nature and could be ignored.

The question of whether the water subject to the conditional licence is ground-water and, therefore, unlicensable, or is from a spring and, therefore, licensable, is one of law. Most of the cases quoted are of small assistance as they do not deal with British Columbia law.

The key to the law of water in British Columbia is found in section 2 of the Water Act, which dates back well into the last century. Section 2, reads: "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.....". This abrogates any common law rights which may have existed in "right to the use and flow of all water in a stream."

A "stream" is defined in the Act as "includes a natural water course or source of water supply, whether usually containing water or not, ground water, and a lake, river, creek, spring, ravine, swamp and gulch."

This definition requires careful consideration. First of all, it says, "includes". It is, therefore, not exclusive and may include other water sources of a similar nature.

The word, "natural" governs "water course or source of supply". It may also govern "ground water", but this is immaterial as it is difficult to envisage ground water which is not natural unless it is the result of deliberate artificial recharge. It is also important to note that "stream" includes ground water. It is clear from all the cases and text books that ground water is not found in a stream but relates to general percolation.

The word, stream, also includes a "spring" and this is not qualified by "natural".

The Act, in section 2, thus conveys to the Crown the right to all waters in the province including ground water. Section 3, however, contains an exception and provides that the Act does not apply to ground water until an Order in Council makes it apply. It is common knowledge that no such Order in Council has been passed in the province.

The principles of construction require that "ground water" in section 3 be interpreted narrowly because it is an exception to the general policy. There is no need to go to text books or case law to define "ground water" because the Act itself defines it. "Ground water means water below the surface of the ground": here, the definition is "means". There is no room for expansion or restriction.

As long as water is below the surface of the ground, it is ground water; the moment it comes above the surface of the ground, it ceases to be ground water and is subject to the provisions of the Act.

The definition of stream also makes it clear the "source of supply" does not have to be continuous, it may be intermittent. There is nothing to show how intermittent is enough, but clearly there must be more than water on occasions of unusually heavy rain or floods.

The next consideration comes in "diversion". The licence under attack is to "divert and use" certain volumes of water. It refers to a "point of diversion". Divert and diversion are also defined in the Act to mean (not include) "taking water from a stream, and includes causing water to leave the channel of a stream and making a change in or about the channel that permits water to leave it".

If at "the point of diversion", the water is ground water because it is below the ground, and artificial means have to be used, such as pumps, to bring the water above ground, it would remain ground water. The use of pumps could not convert ground water into surface water. However, if works are constructed such as a well to allow the water to rise to the surface and to flow over the surface of this ground, the water at the ground surface becomes licensable. Cribbing or casing to improve the taking of the water are "works" which also require authority from the Comptroller.

In this case, the Board is satisfied from the direct evidence of Mr. Chesters, Mrs. Fraser, Mr. Gear and Mr. Penner, that the well dug by Mr. Gear many years ago allows water to rise to the ground surface without any other artificial assistance and to flow over the surface of the ground. Such flow may be intermittent, and obviously the more water the Frasers abstract for use on their property, the less will overflow onto the ground surface. The Board is satisfied that the volume of water coming above the ground is present a sufficiently large portion of the time to be licensable under the Act.

The Board, therefore, upholds the decision of the Deputy Comptroller of Water Rights, set out in his order dated 12 August, 1987, and dismisses the appeal.

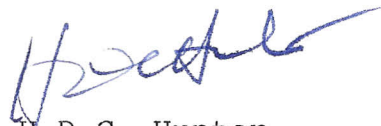
The Board cannot leave this appeal without expressing its profound concern over this particular appeal which really amounts to an abuse of the appeal provision in the law. The results of this process could never have altered the rights of the parties to any degree.

If the appellant had won his appeal and the licence had been cancelled, he would have had no right to interfere with the Frasers's rights to the spring. Mr. Chesters admitted that they had the legal right to the spring and the easement.

The licence does not detract in any way whatever from his own rights to his well or to other ground water beneath his property. Its cancellation would not increase them. The licence now upheld does not increase to any noticeable degree the Frasers's rights to the water from the spring. Equally, the cancellation would not have reduced them.

Unfortunately, the Board has no jurisdiction to make an order for costs for or against anybody.

The Board has not allowed its feelings of disquiet to influence its decision in any way.



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

Victoria, B. C.
February 1st, 1988