

Environmental Appeal Board

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DECISION NOS. 2005-WAT-024(a); 2005-WAT-025(a); 2005-WAT-026(a)

In the matter of an appeal under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	Barry & Marilyn Burgoon and Helen Elzinga	APPELLANTS
AND:	Christopher & Birgit Chart	APPELLANTS
AND:	Regional Water Manager	RESPONDENT
AND:	McFayden Creek Water Users Community	PARTICIPANT
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on September 12, 2007	
APPEARING:	For the Appellants Barry Burgoon Marilyn Burgoon and Helen Elzinga: David M. Aaron, Counsel For the Appellants Christopher and Birgit Chart: Christopher Chart and Donald Scarlett For the Respondent: Christopher H. Jones, Counsel	

APPLICATIONS

On August 24 and 29, 2007, Barry Burgoon, Marilyn Burgoon and Helen Elzinga (the "Applicants") made applications to the Board for orders requiring Christopher and Birgit Chart (the "Charts") and the Regional Water Manager to produce certain documents, and requiring the Regional Water Manager to appear at the hearing of the appeals.

The Board provided the other parties with an opportunity to make submissions on the applications. Submissions on the applications were received from the Charts and from the Regional Water Manager. The Board's decision on the applications was issued to the parties by letter on September 17, 2007, and is reproduced below

in its entirety except for the additional formatting, explanatory notes and legislation.

BACKGROUND

On May 17, 2005, Andrew Whale, Regional Water Manager, (referred to at the time as the Land and Water Manager, Southern Service Region, Land and Water B.C. Inc.), issued a conditional water licence (the "Licence") to Christopher and Birgit Chart (the "Charts"). The Licence authorizes the diversion and use of water from McFayden Creek in the Nelson Water District for residential power purposes, and includes a number of conditions.

On June 22, 2005, Barry Burgoon, Marilyn Burgoon and Helen Elzinga, neighbouring water licence holders, appealed the issuance of the Licence. They appealed the decision on the grounds that the Licence posed a risk to the homes, properties, water and lives of the residents downslope from McFayden Creek and that the Regional Water Manager had failed to take those concerns into consideration when making his decision.

On June 30, 2005, the Charts appealed the decision of the Regional Water Manager to refuse their application for a water licence for consumptive purposes. The Charts also appealed some of the conditions attached to their Licence.

On August 24 and 29, 2007, before the hearing of the appeals commenced, counsel for the Applicants wrote to the Board to request that a number of documents be provided to the Applicants by the Regional Water Manager and the Charts, and that the Regional Water Manager be compelled to attend the appeal hearing.

The particulars of the two applications are as follows.

In the letter dated August 24, 2007, the Applicants apply for:

- an order compelling the Charts to produce documents and particulars regarding:
 - copies of all correspondence, contracts, notes, memoranda and/or any other documents or data pertaining to communications between Dr. A. Salway, P. Geo., and Donald Scarlett, P. Eng. [the Charts' consultants];
 - copies of all correspondence, contracts, notes, memoranda and/or any other documents or data pertaining to communications between Dr. Salway and the Charts;
 - copies of all correspondence, contracts, notes, memoranda and/or any other documents or data pertaining to draft reports prepared by Dr. Salway regarding the above-referenced matter; and
 - full particulars and copies of all correspondence, contracts, notes, memoranda and/or any other documents up to July 30,

2004 pertaining to the financial terms of the relationship between Mr. Scarlett and the Charts and/or remuneration of Mr. Scarlett by the Charts.

- an order compelling the Regional Water Manager to produce documents and particulars regarding any and all maps, computerized records, correspondence, notes, memoranda and/or any other documents and records in the possession of the province of British Columbia pertaining to Order in Council 334/1927, dated April 6, 1927 (the "OIC"), and/or the resulting water reserve, in so far as the OIC or reserve relates to McFayden Creek or a location including McFayden Creek.
- an order requiring the attendance of Andrew Whale [the Regional Water Manager] at the appeal hearing scheduled for October 16-19, 2007.

In the letter dated August 29, 2007, the Applicants apply for:

- an order compelling the Charts to produce documents and particulars regarding exact and reliable GPS coordinates so as to allow the Applicants to identify with certainty the proposed points at which the Charts propose to drill into the creek bed for the installation and construction of the proposed intake structure.

The Board characterized those requests as two applications: number "1" pertaining to the Charts, and number "2" pertaining to the Regional Water Manager.

The Board considered the applications, and the submissions that were received from the Charts and the Regional Water Manager. The Board issued the decision below on September 17, 2007, by a letter to the parties.

ISSUES

1. Whether the Board should order the Charts to produce the documents requested by the Applicants.
2. Whether the Board should order the Regional Water Manager to produce the documents requested by the Applicants and to appear at the hearing.

LEGISLATION

The *Environmental Management Act*, S.B.C. 2003, c. 53, states as follows:

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93 (11) For the purposes of an appeal, sections 34 (3) and (4), 48, 49 and 56 of the *Administrative Tribunals Act* apply to the appeal board.

Section 34(3) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, states as follows:

Power to compel witnesses and order disclosure

34 (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

- (a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or
- (b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

DISCUSSION AND ANALYSIS

Pursuant to section 93(11) of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act*, the Board has the power to order the attendance of a person at a hearing, and to order a person to produce for the Board, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

The Board's *Procedure Manual* states as follows at pages 25 and 29:

In deciding whether to issue an Order for pre-hearing disclosure, the Board will consider whether the party has requested voluntary compliance before making the request to the Board, whether the information sought to be obtained through this person is relevant to the appeal, and any other factors that the Board considers relevant.

...

In deciding whether to issue an Order [for attendance of a witness or production of documents], the Board will consider whether the party has requested voluntary attendance/compliance before making the request to the Board, whether the information sought to be obtained through this person is relevant to the appeal, whether that person is reasonably likely to be able to supply the information, and any other factors that the Board considers relevant.

ISSUES

1. Whether the Board should order the Charts to produce the documents requested by the Applicants.

1. (a) Application for the Charts to produce documents pertaining to Dr. Salway and Mr. Scarlett

Regarding the requested documents pertaining to Dr. Salway, the Applicants submit that they requested the documents by a letter dated August 1, 2007 to Mr. Scarlett, and neither he nor the Charts have responded or provided the requested information.

The Applicants note that the Charts advised the parties by a letter dated May 19, 2006, that Dr. Salway's expert report would be available to the other parties by the end of May 2006. Subsequently, the Charts advised that his report would be available by June 12, 2006, but the report was not provided at that time, and eight months passed without further information or explanation until the report was circulated in March 2007.

The Applicants submit that the unexplained delay in providing Dr. Salway's report raises questions about the reason for the delay and the report's credibility. The Applicants are particularly concerned that the report's contents were the subject of negotiations and re-drafting between the Charts, Mr. Scarlett, and Dr. Salway. The Applicants submit that it is well-established law that communications between a party and their expert witnesses (including draft expert reports) leading up to the tendering of an expert report are relevant to witness credibility.

Regarding the requested documents pertaining to Mr. Scarlett, the Applicants submit that they requested the documents from him by a letter dated May 18, 2006, and neither he nor the Charts have responded or provided the requested information.

The Applicants submit that Mr. Scarlett made misleading representations in a letter dated July 30, 2004, to the Regional Water Manager; namely, he portrays himself as a dispassionate party with a technical interest in the Charts' project. The Applicants further submit that, on that basis, he provided information and submissions that were relied on by the Regional Water Manager in making his decisions that are the subject of these appeals. The Applicants contend that Mr. Scarlett had a personal and financial interest in the proposed works at the time of the July 30, 2004 letter, and his letter should not have been relied on by the Regional Water Manager.

In reply, the Charts decline to provide any further documentation. They submit that the Applicants' primary concern appears to be that "re-drafting" of Dr. Salway's report occurred as a result of negotiations between the Charts, Dr. Salway and Mr. Scarlett. The Charts submit that counsel for the Applicants already possesses the first draft of Dr. Salway's report, and therefore, he should be in a position to ascertain the changes made between the first draft and final draft of the report.

The Board notes that the Applicants have requested voluntary compliance regarding these documents, and the Charts have declined to provide further documentation. Regarding the relevance of the information sought to be obtained through this application, the Board finds that the Applicants' primary concerns appear to be: (1) Mr. Scarlett's objectivity, or lack thereof, when he wrote his July 30, 2004 letter to the Regional Water Manager; and, (2) whether the contents of Dr. Salway's final report were the subject of negotiations and re-drafting between the Charts, Mr. Scarlett, and Dr. Salway.

The Board finds that communications between a party and their expert witnesses (including draft expert reports) leading up to the tendering of an expert report may be relevant to witness credibility, and may be subject to disclosure as long as they are not subject to some form of privilege. The Charts have not asserted that any form of privilege applies to the documents requested.

Regarding the Applicants' specific requests, the Board finds as follows:

- Regarding the request for copies of "all correspondence, contracts, notes, memoranda and/or any other documents or data pertaining to communications between" Dr. Salway and Mr. Scarlett, and between Dr. Salway and the Charts, the Board finds that such documents are relevant to the credibility of Dr. Salway's report if those documents address any re-drafting of Dr. Salway's report that may have occurred, including previous drafts of his report, or relate to any negotiations that may have occurred between the Charts, Mr. Scarlett, and Dr. Salway regarding re-drafting his report.
- Regarding the request for "full particulars and copies of all correspondence, contracts, notes, memoranda and/or any other documents up to July 30, 2004 pertaining to the financial terms of the relationship between Mr. Scarlett and the Charts and/or remuneration of Mr. Scarlett by the Charts", the Board finds that these documents have some relevance to the appeals. The Board finds that any documents regarding any financial or business relations that Mr. Scarlett had with the Charts up to July 30, 2004, may be relevant to the credibility of statements made in his letter of that date to the Regional Water Manager. However, the Board notes that the question of Mr. Scarlett's interest in the proposal at that time is only relevant to the credibility of his statements, and not to the question of whether the Regional Water Manager may have unduly relied on Mr. Scarlett's statements in that letter in deciding whether to issue the Licence. As discussed further under heading #2 (a) below, the Board has the authority under section 92(7) of the *Water Act* to conduct these appeals by way of a new hearing. As such, the Board may consider afresh the merits of the Regional Water Manager's decisions, and the Board may draw its own conclusions about the credibility or reliability of the statements in Mr. Scarlett's July 30, 2004 letter. In addition, any errors that may have occurred during the decision-making process of the Regional Water Manager may be corrected by a new hearing before the Board.

The Board further finds that the Charts are reasonably likely to be able to supply the information requested regarding Dr. Salway, if such information exists and is in their possession.

For these reasons, the Board finds that this application should be granted only to the extent that it requires the Charts to disclose copies of:

- all correspondence, contracts, notes, memoranda and/or any other documents or data pertaining to communications that address any re-drafting of Dr. Salway's report which may have occurred, or that relate to any negotiations which may have occurred between the Charts, Mr. Scarlett, and Dr. Salway regarding re-drafting of his report; and
- all correspondence, contracts, notes, memoranda and/or any other documents up to July 30, 2004 pertaining to the financial terms of the relationship between Mr. Scarlett and the Charts and/or remuneration of Mr. Scarlett by the Charts.

The Board finds that this application should be denied in all other respects.

1. (b) Application for the Charts to produce documents pertaining to the proposed points at which the Charts propose to drill into the creek bed

The Applicants submit that they requested GPS coordinates from Mr. Scarlett, and the coordinates have not been provided. The Applicants submit that the requested information is relevant to the contention of their expert witness, Mr. Isaacson, that the construction of the proposed works on the stream bed threatens to reduce surface water due to cutting through the stream seal.

As noted above under heading #1, the Charts decline to provide any further documentation.

The Board notes that the Licence contains a number of conditions, including condition (i), which states that the authorized works "shall be located approximately as shown in the attached plan" [underlining added]. The diagram attached to the Licence shows the approximate location for the works. Also, condition (o) states that the works "must be designed by... a Professional Engineer...". Conditions (i) and (o), together, indicate that the works' exact location would be determined at a later date.

Additionally, the Board notes that the Charts' letter to the Board dated May 9, 2006, lists "9. Other options for siting microhydro system" as one of the points they intend to address at the hearing of the appeals.

As stated in the Board's letter of August 29, 2007, any potential Board order for the production of documents would be limited to existing documents only and not the creation of new ones. The Board finds that this application should be denied, because it requires the Charts to produce information that does not currently exist. In addition, it appears that Mr. Scarlett has already made reasonable efforts to respond to this request, as indicated in his email dated August 26, 2007 to counsel for the Applicants.

2. Whether the Board should order the Regional Water Manager to produce the documents requested by the Applicants and to appear at the hearing.

2. (a) Application for the Regional Water Manager to produce documents pertaining to the OIC and water reserve

The Applicants submit that they have requested this information from the Regional Water Manager, and their request was rejected in a letter dated July 18, 2007, from the Regional Water Manager's counsel.

The Applicants submit that they seek these documents to support their argument that McFayden Creek is subject to a reservation under section 44(1) of the *Water Act*, and therefore, the Regional Water Manager should not have issued Conditional Water Licence 119440 (the "Licence"). They submit that the reservation in question was established by the OIC. In support of those submissions, the Applicants provided a copy of an email dated March 28, 2007, from Jim Gilliland of the Ministry of Environment, stating that McFayden Creek is covered by the reservation in question. The Applicants seek copies of the documents that Mr. Gilliland reviewed in reaching that conclusion.

The Regional Water Manager submits that Ministry of Environment staff searched for documents in the Ministry's possession pertaining to the Lieutenant Governor in

Council's intention in creating the OIC, and made inquiries to the BC Archives, but no documents relevant to determining whether the OIC pertains to McFayden Creek were discovered. He submits that the Applicants' application is worded broadly enough that it may include documents that refer to the OIC or the water reserve, but were created after the OIC. He maintains that such documents would have little or no relevance, since they would only reflect the author's opinion of the meaning of the OIC.

The Regional Water Manager notes that Mr. Gilliland has provided the Applicants with a copy of a Reserves Report which indicates that McFayden Creek is included in the reserve in question. However, he submits that the Reserve Report was generated sometime after the enactment of the OIC, and it is not known what documents were referenced in creating the Reserve Report. The Regional Water Manager takes the view that the Reserve Report is incorrect, and that the intention of the OIC is reflected in its language, which refers only to the Kootenay River and not any of its tributaries or their tributaries. He submits that the information provided by the Reserve Report is incorrect, and does not amount to an admission in these appeal proceedings.

In support of those submissions, the Regional Water Manager cites the following comments by Parrett J. in *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)*, 2003 BCSC 570:

With the greatest respect to those Ministry officials responsible for administering legislation once it is passed, it is not their opinion of what the legislation means that forms the proper basis for statutory interpretation but the intention of the legislature at the time it adopted the legislation...

The Board agrees with the Regional Water Manager that the Applicants' request is overly broad, and that the Ministry of Environment has already made reasonable attempts to find documents that would be relevant to the Applicants' request.

In any case, the Board finds that the proper approach in determining the intention of the OIC is, first and foremost, to consider the plain and ordinary meaning of the words it contains, in their legislative context. Only if the statutory language is vague should secondary sources be considered in ascertaining the Lieutenant Governor in Council's intention.

For these reasons, the Board finds that this aspect of the application should be denied.

2. (b) Application for an order requiring the Regional Water Manager's attendance

The Applicants submit that Mr. Whale, the Regional Water Manager, has a "history of undue reliance on the opinion of Mr. Scarlett in the context of another matter...". The Applicants maintain that they seek to cross-examine the Regional Water Manager on "the independence of his relationship with Mr. Scarlett."

The Regional Water Manager submits that he is not compellable to appear at the appeal hearing, because the Applicants have provided no indication that his evidence would be relevant or necessary to the appeals, and moreover, at law, he cannot be compelled to testify regarding the substance of his decision-making process.

The Board notes that, in its letter dated August 27, 2007, counsel for the Applicants was asked to "clarify whether you have asked Mr. Whale to appear voluntarily as a witness and whether Mr. Whale has refused to do so." The Board also advised that it is the Board's policy to consider issuing summonses only in cases where a witness refuses an invitation to appear voluntarily.

The Board finds that the Applicants have not indicated whether they have asked Mr. Whale to appear voluntarily as a witness and whether Mr. Whale has refused to do so. In these circumstances, the Board finds that it would be premature to grant this application.

Moreover, the Board finds that any testimony Mr. Whale may provide regarding the independence of his relationship with Mr. Scarlett would be of limited relevance to the appeal. As noted above, the Board has the authority under the *Water Act* to conduct these appeals by way of a new hearing. The Board may consider afresh the merits of the Regional Water Manager's decisions, based on new evidence as well as any evidence that was before him. In addition, any errors in the Regional Water Manager's decision-making process may be corrected by a new hearing before the Board.

For these reasons, the Board finds that this aspect of the application should be denied.

DECISION

For the reasons provided above, the application regarding the Charts is granted, in part.

The application regarding the Regional Water Manager is denied.

Accordingly, the Board orders the Charts to disclose copies of:

- all correspondence, contracts, notes, memoranda and/or any other documents or data pertaining to communications that address any re-drafting of Dr. Salway's report which may have occurred, or that relate to any negotiations which may have occurred between the Charts, Mr. Scarlett, and Dr. Salway regarding re-drafting of his report; and
- all correspondence, contracts, notes, memoranda and/or any other documents up to July 30, 2004 pertaining to the financial terms of the relationship between Mr. Scarlett and the Charts and/or remuneration of Mr. Scarlett by the Charts.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

September 17, 2007