



Province of
British Columbia

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

DECISION NO. 2006-WAT-005(a)

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

BETWEEN:	Mary Desmond on behalf of the Shawnigan Lake Watershed Watch Association	APPELLANT
AND:	Regional Water Manager	RESPONDENT
AND:	Teresa Elaine Erb	LICENCE HOLDER
AND:	Estate of Tom Bradbury David Avren	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on June 22, 2006	
APPEARING:	For the Appellant: Alana DeGrave, Counsel For the Respondent: Livia Meret, Counsel	

PRELIMINARY ISSUE OF STANDING

On March 1, 2006, Ron Creber, Regional Water Manager (the "Regional Manager"), Ministry of Environment, issued Conditional Water Licence 120469 (the "Licence") to Teresa Elaine Erb. The Licence authorizes the construction of a dam and a dugout, known as the "Oasis Lake Dugout," for use as a water ski pond. The Licence also authorizes the diversion of water from Oasis Brook, located near Shawnigan Lake, British Columbia, into the dugout.

On March 31, 2006, Mary Desmond appealed the Regional Manager's decision on behalf of the Shawnigan Lake Watershed Watch Association ("SLWWA"). On April 18, 2006, the Regional Manager challenged the standing of Ms. Desmond and the SLWWA to appeal this matter.

The Third Parties, Tom Bradbury and David Avren, are objectors under the *Water Act* and have also appealed the issuance of the Licence. Neither the Licence Holder nor the Third Parties made submissions in respect of this application.

BACKGROUND

The Licence was issued to Ms. Erb for the creation of a water ski pond near the community of Shawnigan Lake. The Licence authorizes the storage of 200,000 m³ of water per year and has a precedence date of February 22, 2005.

The proposed site for the Oasis Lake Dugout is next to Shawnigan Creek which supplies water to Shawnigan Lake. Some households draw water directly from Shawnigan Lake, while others obtain water through water supply companies that draw water from the lake.

Ms. Desmond resides in a lakefront home with her mother, Glen Ellen Bentley, on Shawnigan Lake. Ms. Bentley is the owner of the property. Ms. Desmond and her mother draw drinking water from the water purveying systems supplied by the lake water. Neither Ms. Desmond nor her mother has a water licence, nor have they ever applied for a water licence.

Ms. Desmond is the president of the SLWWA, which is a non-profit organization with a membership of approximately 110 households from the community of Shawnigan Lake. Approximately 39 members of the SLWWA are lakefront homeowners.

Ms. Desmond submits, on behalf of the SLWWA, that the safety and quality of the water within the dugout is of great importance to the Shawnigan Lake community. She submits that there is the potential of overflow from the Oasis Lake Dugout into the community's drinking supply via Shawnigan Creek. She further submits that there has been inadequate consultation with the community concerning the dugout.

Although Ms. Desmond's Notice of Appeal indicates that she filed the appeal on behalf of the SLWWA, she states in her submissions regarding this preliminary issue of standing that she has acted as agent for Ms. Bentley in the past and, therefore, has standing to appeal the Regional Manager's decision on behalf of the SLWWA. In the alternative, she asks that her name be replaced by that of Jack Eaton, a lakefront homeowner and member of the SLWWA.

RELEVANT LEGISLATION

The following section of the *Water Act* is relevant to the preliminary issue of standing:

Appeals to Environmental Appeal Board

- 92** (1) Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by
- (a) the person who is subject to the order,
 - (b) an owner whose land is or is likely to be physically affected by the order, or
 - (c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

ISSUES

The issue to be determined is,

Whether Ms. Desmond and the Shawnigan Lake Watershed Watch Association have standing to bring the appeal.

In order to answer this question, the Panel has considered the following two sub issues:

- 1) Whether Ms. Desmond can bring an appeal in her own right.
- 2) Whether the appeal can be filed on behalf of the SLWWA.

DISCUSSION AND ANALYSIS

Whether Ms. Desmond can bring an appeal in her own right?

Ms. Desmond submits that her mother, Ms. Bentley, qualifies for standing as an appellant under section 92(1). Ms. Desmond further submits that she is acting as an agent for Ms. Bentley, who is the owner of lakefront property on Shawnigan Lake. Ms. Desmond submits that her mother is elderly and unable to represent her own interests in this matter. Ms. Desmond submits that she and her mother draw drinking water from the water purveying systems supplied by the lake water and that the distinction drawn in section 92(1)(c) between licenced and unlicenced water users is irrelevant to this case.

The Regional Manager submits that Ms. Desmond does not qualify as an appellant under section 92(1) of the *Water Act*. Ms. Desmond is not, according to the Regional Manager, "the person subject to the order," "an owner whose land is or is likely to be physically affected by the order" or a "licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order."

The Regional Manager acknowledges that Ms. Bentley is a riparian owner and that as such, she would have standing to appeal. However, in reply to Ms. Desmond's submissions, the Regional Manager submits that neither Ms. Bentley's, nor Ms. Desmond's unlicenced use of the lake water is sufficient to confer standing on Ms. Bentley or Ms. Desmond, as it is dependent upon that water being unrecorded. In support of this contention, the Regional Manager cites section 42(2) of the *Water Act*:

42(2) It is not an offence for a person to divert unrecorded water for domestic purpose or for prospecting mineral, but in a prosecution under this Act the person diverting water must prove that the water is unrecorded.

The Regional Manager has acknowledged that, as the owner of a lakefront property, Ms. Bentley is a riparian owner, and consequently, she has standing to appeal. In *McClusky v. British Columbia (Assistant Regional Water Manager)* (Environmental Appeal Board, 2004-WAT-003(b) and 2004-WAT-04(b), August 9, 2005) ("*McClusky*"), the Board found that, in the context of the *Water Act*, "riparian"

applies to lakes and that lakefront property is riparian land for the purposes of the *Water Act*.

The Panel is not satisfied that Ms. Desmond can bring an appeal in her own right as she is not an owner whose land is or is likely to be affected by the order nor is she a licensee, a riparian owner or an applicant for a licence.

However, as is conceded by the Regional Manager, the Panel finds that Ms. Bentley has standing to appeal under section 92(1)(c), and that Ms. Desmond may act as agent for and on behalf of Ms. Bentley in this matter. Therefore, the Panel finds that Ms. Bentley has standing to file an appeal of the Licence.

Whether the appeal can be filed on behalf of the SLWWA?

In regard to the standing of the SLWWA, the Regional Manager submits that the SLWWA does not have standing as it does not own land that might be physically affected by the order, nor is it a licensee, a riparian owner, or an applicant for a licence.

The Regional Manager relies on *Columbia River & Property Protection Society, East Kootenay Environmental Society v. Deputy Comptroller of Water Rights* (Environmental Appeal Board, Appeal No. 95/42, August 15, 1996) ("*Columbia River*") where the Board found that the Society did not have standing under the *Water Act* to appeal the issuance of an approval. The Board found that a society does not assume the legal status of licensee or riparian owner by virtue of its membership. In order for a society to represent its members in an appeal there must first be an appeal by an individual member or members of a society who are themselves riparian owners or licensees.

In reply, Ms. Desmond submits that *McClusky* supports her contention that the SLWWA has standing. In *McClusky*, the Appellants were lakefront property owners who sought standing to appeal on behalf of the Area "A" Quality Water Association. The Board found that as lakefront property owners who used the waters of the lake, the Appellants qualified as "riparian owners... who consider that their rights are or will be prejudiced by the order." The Board granted the Appellants standing.

Ms. Desmond submits that the *McClusky* decision more closely resembles the facts in this case. She further submits that in *McClusky*, the Board recognized the right of individual owners and licensees to exercise their collective right of appeal through a representative.

Ms. Desmond submits that she is acting as a representative of the SLWWA. She submits that there are approximately 39 household members of that organization that would be eligible to appeal the Licence.

Ms. Desmond submits that it is more economical for the Respondent, the Appellants and the Board, for Ms. Desmond to represent the SLWWA and its eligible members in this matter. She submits that it is contrary to principles of economics and accessibility to deny the Society standing because the Society itself is not an owner or licensee when the majority of its members meet the standing requirements prescribed by section 92(1) of the *Water Act*.

Ms. Desmond submits that she should be granted standing on behalf of the SLWWA.

The Panel notes that in *McClusky* the Appellants, Joanne McClusky and Terry and Joyce Mulligan, were lakefront property owners. The Panel also notes that in *McClusky* the Board only granted standing to Ms. McClusky and the Mulligans. It did not grant standing to the Area "A" Quality Water Association. Further, in *Columbia River*, the Board found that in order for a society to have carriage of an appeal on behalf of its members, there must first be a proper appeal by an individual member or members of the society who are themselves riparian owners or licensees. In this case, Ms. Desmond seeks the opposite result. She wishes to represent the SLWWA even though the Association lacks standing in its own right. The *Water Act* does not contemplate such a result. Under the circumstances, the Panel is not prepared to recognize the SLWWA as a party to this appeal. This is the identical result that the Board arrived at in *McClusky*.

However, this does not preclude the SLWWA or its membership from being witnesses or otherwise participating in Ms. Bentley's appeal to the extent that Ms. Bentley and Ms. Desmond may determine.

Other Matters

In her submissions, Ms. Desmond asks that, in the alternative to allowing her leave to appeal, the Board replace her name with that of Jack Eaton, a lakefront homeowner and member of the SLWWA, and that he be allowed to bring the appeal on behalf of the SLWWA.

The Panel finds that Mr. Eaton does not have standing to appeal because Mr. Eaton did not file a Notice of Appeal within the time limit prescribed by the *Water Act*. Furthermore, for the reasons outlined above in regards to the standing of the SLWWA, if Mr. Eaton was given leave to appeal, he could not appeal on behalf of the SLWWA because the SLWWA does not have standing. Accordingly, this request is denied.

DECISION

In making this decision, the Panel has considered all of the evidence and submissions before it, whether or not specifically reiterated herein.

For all of the reasons set out above, the Panel finds that Ms. Bentley has standing to appeal and that Ms. Desmond may file an appeal as agent for her mother, Ms. Bentley. The Panel will amend the Notice of Appeal and replace Ms. Desmond's name with that of Ms. Bentley to indicate that Ms. Desmond has appealed this matter on behalf of Ms. Bentley.

Finally, the standing of the SLWWA is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

July 5, 2006