

Environmental Appeal Board

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DECISION NO. 2006-WAT-010(a)

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

BETWEEN:	Double 00 Ranch Ltd.	APPELLANT
AND:	Assistant Regional Water Manager	RESPONDENT
AND:	Linda Olsen Leonore M. Scheck and Patrick G. Scheck Allan Fridlington and Ernest Fridlington David R. Wootten and Gertrude M. Wootten	THIRD PARTIES
AND:	Green Mountain Ranch Co. Ltd. Quesnel Timber Management Ltd. Beaver Pass Excavating Ltd. CN Railway Ministry of Transportation Allan Thideman and Ruth Thideman Ralph Zwicker Don Tibbles	PARTICIPANTS
BEFORE:	A Panel of the Environmental Appeal Board David H. Searle, Panel Chair Don Cummings, Member Gary Robinson, Member	
DATE:	May 15 and 16, 2007, concluding in writing on July 6, 2007	
PLACE:	Quesnel, B.C.	
APPEARING:	For the Appellant: Brian Gilson, Counsel For the Respondent: W.S. Klopp and L. Meret, Counsel For the Third Parties: Linda Olsen: Linda Olsen Leonore M. Scheck and Patrick G. Scheck: Leonore M. Scheck Allan Fridlington and Ernest Fridlington: Allan Fridlington, Ernest Fridlington	

David R. Wootten and Gertrude M. Wootten: David R. Wootten

For the Participants:

Green Mountain Ranch Co. Ltd.: A.F. Bensted
Quesnel Timber Management Ltd.: A.F. Bensted
Beaver Pass Excavating Ltd.: A.F. Bensted
Ministry of Transportation: Wes Wiebe
Allan Thideman and Ruth Thideman: Ruth Thideman
Ralph Zwicker: Ralph Zwicker
Don Tibbles: Don Tibbles

APPEAL

The Appellant appeals an undated order (the "Order") of W.S. Klopp, Assistant Regional Water Manager, Cariboo Region, Ministry of Environment (the "Ministry"), acting in his capacity as an Engineer under the *Water Act*. The Order was issued on or about August 18, 2006 and requires the Appellant to restore a stream channel on District Lot 5042, Cariboo District, civically known as 5501 Bottom Hill Lake Road (the "Property").

The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 92 of the *Water Act* (the "Act"). Section 92(8) of the *Act* provides that the Board may

- (a) send the matter back to the comptroller, regional water manager or engineer, with directions,
- (b) confirm, reverse or vary the order being appealed, or
- (c) make any order that the person whose order is appealed could have made, and that the board considers appropriate in the circumstances.

The Appellant seeks a reversal of the Order.

BACKGROUND

The Property is 640 acres (approximately 259 hectares) in area, and square in shape, with its boundaries approximately 1,600 metres in length. It is located almost in the middle of the Kersley Creek watershed, approximately 25 kilometres southeast of Quesnel, B.C.

The Kersley Creek watershed has an area of 4,600 hectares (approximately 11,400 acres). Elevation ranges from 455 metres at the confluence with the Fraser River to 1,320 metres along the eastern drainage divide (approximately twelve kilometres east of the Fraser River). Private land holdings cover approximately 60% of the watershed, with the remainder being Crown land comprising part of the Quesnel Timber Supply Area. Approximately half of the Crown land is managed under woodlot licenses.

Kersley Creek can generally be described as having a south fork (Kersley Creek) and a north fork (North Kersley Creek), which converge at a point approximately four kilometres upstream of its confluence with the Fraser River. A tributary of Kersley Creek (the south fork) enters the Property midway along the southern boundary of the Property, flows north for approximately 500 metres, then originally made a loop to the west crossing over an alluvial fan, and then flowed south, exiting the southern boundary of the Property approximately 250 metres east of the southwest corner.

The Appellant's witnesses and the Third Party, Linda Olsen, testified that the flow in Kersley Creek, running through the Property, is seasonal. Photographs show the Creek dry at certain times of the year (summer).

In July 1999, Earl and Linda Olsen bought the Property.

Mrs. Olsen testified that, in August 2001¹, Earl Olsen (now deceased) excavated a 1,600 foot diversion ditch (the "Diversion") that intercepted the Creek where it made a loop to the west and diverted it south along the eastern toe of the alluvial fan and then immediately west just north of, and parallel to, the southern boundary of the Property, to a point where the diverted stream exits the southern boundary of the Property a few metres east of where the original stream channel exited the Property. The diversion drops approximately 50 feet in elevation along its length.

Material from the excavation was used to fill in the original stream channel, and excess material was transported off-site. Approximately thirty cottonwood trees were felled on the north-south reach of the original stream channel.

Mr. Olsen did not have an approval or permit under the *Act* when he made these changes to the Creek.

Mrs. Olsen testified that approximately two months after the Diversion was excavated, a Fisheries Officer expressed concern about the Diversion's impact on fish. When Mr. Olsen asked what he should do about it, the officer apparently replied "that the elevation is okay".

On May 4, 2003, Mr. Olsen was issued a violation ticket under the *Act*, for making changes in a stream without lawful authority.

On June 3, 2003, Mr. Olsen served notice that he would dispute the ticket. Mrs. Olsen testified that a stay of proceedings against him was issued one day before the date of the trial, whereas documents provided to the Panel shows the disposition as "Withdrawn".

On May 1, 2006, the Appellant purchased the Property. The Appellant holds no water licence, nor has it applied for one. Further, the Appellant has made no

¹ Information shown on a violation ticket (discussed below) shows the violation to be on or about May 22, 2002.

alteration, change, introduction of works, or change to the Property since the purchase.

In June 2006, M.J. Milne & Associates Ltd. submitted a report titled *Watershed Assessment for Kersley and lower Menzinger Creeks* (the "Milne Report") to the BC Ministry of Forests and Range, Quesnel District. The Report is signed by Michael J. Milne, Project Hydrologist, and his seal as a forest professional recognized by the Association of B.C. Forest Professionals is affixed to the report.

The Milne Report highlights the fact that the Kersley Creek watershed is "somewhat unique" given the number and distribution of alluvial fans. The Milne Report states that the Creek "is currently unstable on alluvial fans within District Lots (DL) 10, 191, 5047, and 3980", all downstream of the Property, due in part to "elevated sediment load." The author studied several causes that are exacerbating problems with stream sedimentation, channel erosion, and lateral movement issues on alluvial fans.

On page 5 of the Milne Report, the author wrote:

While some stream sedimentation, channel erosion and lateral movement issues are to be expected on alluvial fans ... the situation on lower Kersley Creek ... has been exacerbated by deliberate stream channel diversions on private land that have bypassed or reduced the sediment deposition and filtering effect of alluvial fans in local and upstream areas, **most notably within DL 5042** [the Property]"

[emphasis added]

On page 6 of the report, the author wrote:

Reductions in sediment input and transport on the Kersley Creek system can be achieved through restoration of natural fan processes within DL 5042 [the Property]

At this time the deliberate diversion of Kersley Creek within DL 5042 is considered to be a very high sediment source area ... and the main cause of channel infilling and likely avulsion on the fan within DL 10, 191, and 5047. If natural fan processes are not restored at this site as soon as possible, efforts on the part of the CNR, MoT [Ministry of Transportation], and private landowners to manage flow and channel conditions in downstream areas will be compromised.

Restoration of natural fan processes within DL 5042 would require the re-establishment of flow into pre-diversion (i.e. natural) channels on the fan, filling of the excavated diversion channel, and re-establishment of vegetation on the fan. These works would forgo the use of the fan for agriculture. This treatment will reduce sediment generation and delivery to downstream areas but the effects will not be fully realized for several years as sediment in the channel(s)

downstream of this site will continue to move into fan areas in DL 10, 191, 5047, and 3980.

[emphasis added]

On August 18, 2006, the Respondent wrote to George and Caroline Gilson, on behalf of the Appellant company, stating:

Earlier this week I received a report from a Forestry Professional concerning the conditions of Kersley Creek and man-made conditions associated with it. The report is to be made public soon.

...

... It is the work of land clearing and the work done in/and or about the creek that is causing a greater bed load of material to be actively moving downstream. I agree with this aspect of the report.

The report states this work was done a few years ago. I am also aware the property was purchased this year by the Double OO Ranch. However, as the present owners of the property you are the party that I will direct to make repairs to the creek at this location....

...

Enclosed with the letter was the Order, which was issued under section 88 of the *Act*. The Order reads, in part:

WHEREAS Double OO Ranch Ltd. Inc. ... is the present owner of District Lot 5042 Cariboo District

WHEREAS the work done in/and or about Kersley Creek has not been authorized under Section 9 of the Water Act and is causing detrimental watershed conditions downstream

...

I HEREBY ORDER YOU, Double OO Ranch, as follows:

- (1) To have a qualified professional in stream channel restoration, design the restoration of Kersley Creek drainage within District Lot 5042 Cariboo District. The proposed restoration design is to be presented to me no later than October 6th, 2006. The design must ensure bed load and flow conditions leaving District Lot 5042 restore flows to conditions that would have been present prior to the unauthorized work being done.
- (2) Once acceptance of design is given, onsite restoration work to be supervised by a qualified professional in stream channel restoration and completed by November 17th, 2006.

- (3) A qualified professional in stream channel restoration to submit to me a signed statement that on-site restoration has been completed as designed. To be submitted by November 17th, 2006.
- (4) Copy of this order and restoration plans to be on site when work is being done and available for inspection by Environmental Officers.

...

On September 15, 2006, the Appellant appealed the Order to the Board and requested a stay of the Order. On October 2, 2006, the Respondent agreed to a stay "pending the conclusion of the appeal process."

ISSUES

In considering this appeal, several issues will be examined separately:

1. The jurisdiction of the Respondent to issue the Order.
2. Whether the Appellant should be named in the Order.
3. Whether there is a sufficient basis to issue the Order.
4. Whether the requirements set out in the Order are fair and reasonable in the context.

RELEVANT LEGISLATION

Section 1 of the *Act* defines the following terms:

"engineer" means a professional engineer employed by the government or a government corporation and designated in writing by the comptroller as an engineer and includes a regional water manager;

...

"stream" includes a natural watercourse or source of water supply, whether usually containing water or not, and a lake, river, creek, spring, ravine, swamp and gulch;

"works" means

...

(d) changes in and about a stream,

...

Vesting water in government

- 2** (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.
- (2) No right to divert or use water may be acquired by prescription.

Changes in and about a stream

- 9** (1) The comptroller, a regional water manager or an engineer may grant an approval in writing authorizing on the conditions he or she considers advisable
- (a) a person to make changes in and about a stream,

...

...

Powers of engineers and officers

- 88** (1) In addition to all other powers given under this Act and the regulations, an engineer may do one or more of the following:

...

- (e) order the restoration or remediation of any changes in and about a stream;

...

General Offences

- 93** (2) A person who does any of the following commits an offence:

...

- (i) constructs, maintains, operates or uses works without authority;

...

- (p) fails to do an act or thing required to be done by the person under this Act or under an order of the comptroller, regional water manager, engineer or officer;

DISCUSSION AND ANALYSIS**1. The jurisdiction of the Respondent to issue the Order**

In the Appellant's Statement of Points, it raised the issue of the Respondent's jurisdiction to issue an order under the *Water Act* to a current property owner, a *bona fide* and innocent purchaser for value, who inherits unauthorized works performed by the previous owner.

At the hearing, neither the Appellant nor the Respondent cited any legal authority in relation to this matter. However, the Panel had available to it a prior decision of the Board (*Raymond Glen Creed et al. v. Engineer under the Water Act*, Appeal No. 98-WAT-28(a), March 11, 1999) (unreported) (hereinafter *Creed*), which the Panel made available to the parties. In that case, the Board considered whether an order under the *Water Act* "runs with the land" or follows the person who received the order. At page 4, the Board found that an order issued by an Engineer under the *Act* to restore or remediate changes in and about a stream "are appurtenant to the land affected, and run with the land if the land is transferred...".

At the conclusion of the oral hearing, the Panel requested that the Appellant and Respondent provide written legal argument on the following jurisdictional question:

Whether an Order under the *Water Act* "runs with the land" or, follows the person who committed the breach [in this case, the Diversion].

Or, put differently, did the Respondent have the jurisdiction to issue the Order to the Appellant, which did not cause the unlawful Diversion, and is named in the Order only because it is the current owner of the Property.

Submissions on this jurisdictional issue were filed by counsel on behalf of the Appellant and the Respondent, as well as by the Participants, three of which were granted Third Party status at the hearing; specifically, the Schecks, the Fridlingtons and the Wootens.

None of the parties cited any authority to suggest that *Creed* had been overruled. Although the Panel is not bound by previous decisions of the Board, the Panel concurs with the reasoning in *Creed*. Accordingly, the Panel finds that the *Creed* decision, as it relates to the jurisdictional issue posed by the Board, ought to be followed in this matter.

Taking into consideration all of the submissions on the jurisdictional issue, the Panel finds that orders made pursuant to section 88(1)(e) of the *Act* run with the land. Accordingly, the Respondent does have the jurisdiction to name the Appellant in the Order. The next question is whether he should have done so.

2. Should the Appellant be named in the Order.

Even if the Respondent has the jurisdiction to issue an order to a subsequent property owner, an order is not issued in every case. The Respondent has a discretion under the *Act* to issue orders. In this case, the Appellant submits that there are a number of reasons why it should not be named to the Order; why the Respondent should have exercised his discretion differently.

Both at the oral hearing and in the Appellant's written argument, much was made of the fact that Mr. Olsen had been charged (ticketed) pursuant to section 41 of the

Act for making “changes in a stream without lawful authority” and that, upon notification by Mr. Olsen that he intended to plead “not guilty”, the charge was withdrawn. Further, the Appellant suggests that if the Ministry chooses not to pursue enforcement action against the actual “culprit”, it should be prevented from later taking enforcement action against a subsequent owner.

While it is true that “the issued ticket is a matter which could only attach personally to Mr. Olsen” as the Appellant claims, the Panel finds that this fact is irrelevant to the Order by virtue of section 99 of the *Act*, which provides as follows:

- 99** A proceeding, conviction or penalty for an offence under this Act or the regulations does not relieve a person from any other liability.

There are many tools of enforcement that may be taken under the *Act*, quite independent of each other. It may be that the fact of the withdrawal of the charge against Mr. Olsen lulled the Appellant, and others, into believing that no further enforcement action could be taken. If so, then that is not a correct view of the law.

Further, as noted above, the issuance of an order involves an exercise of discretion. There may be many reasons why the Ministry did not initially require Mr. Olsen to remove the Diversion and restore the creek. In this case, the fact that an order was not issued to Mr. Olsen does not, in and of itself, prevent the Ministry from now determining that an order is warranted and issuing it to the current owner, the Appellant. As will be discussed later in this decision, it appears that new information, i.e., the Milne Report, provided the rationale for the Order. This report did not come out until 2006.

The Appellant also argues that, in essence, it is being unfairly targeted by the Respondent because there are many examples of unauthorized works in the area but those works are being ignored - no orders for remediation are being issued to those people. It submits that, while there are many modifications/activities that are negatively impacting Kersley Creek’s water quality, the Appellant has been singled out to “take the fall”. In addition, the Appellant claims that the Respondent portrays bias by failing to “put a prospective buyer on notice of the alleged situation.” Regarding the latter point, the Panel finds that the Respondent is not under an obligation to notify prospective buyers of potential breaches of the *Act* that may run with the land.

The Panel notes that there was much evidence at the hearing that not only did Mr. Olsen unlawfully divert the stream in question, but also many of the alluvial fans in the watershed had been altered, based on Mrs. Scheck’s evidence. Various Participants and Third Parties acknowledged that they were also engaged in questionable practices. In the case of Alan Fridlington, there is in-stream interference by his cattle. In the case of David Wooten, he admitted to building dykes on his property to contain the stream. Clearly, some farmers and ranchers have regarded the streams and creeks that cross their land as theirs to do with as they choose. That, however, is not the law.

The Panel notes that, under section 2 of the *Act*, the government holds the rights of property and use of all water in streams in the province, except insofar as private rights have been granted under licenses or approvals. In addition, the Panel agrees with the following submissions stated in the Respondent's written argument:

Section 9 of the *Water Act* provides that a person may only make changes in and about a stream in accordance with an approval under that section or in accordance with the regulations or a licence or order under the *Act*. In the absence of that lawful authority, the making of a change in and about a stream is prohibited (section 93(2)(q) of the *Water Act*). Further, the continued use of works (including changes in and about a stream by definition) is also prohibited (93(2)(1) of the *Water Act*).

While it is clear from the evidence that there are other unauthorized works in the area that, to date, have not been the subject of enforcement proceedings, those diversions are not the subject matter of the decision now under appeal. The question for this Panel is whether this Order, as issued, should have been issued to the Appellant. The fact that others have either escaped detection, or have not yet been subject to enforcement proceedings, is not something that can be addressed in the context of this appeal, and does not convince the Panel that the Respondent was biased against the Appellant, or that the Appellant should not have been named in the Order.

Finally, the Appellant, both at the oral hearing and in its written submissions, refers to itself as an "innocent purchaser". The Panel finds that this characterization of the Appellant has no basis in the evidence before the Panel.

The Panel notes that, in her oral testimony, Mrs. Olsen stated that the Gilsons had been informed on three separate occasions that the Creek had been diverted on the Property. The Appellant did not call evidence to rebut this statement.

In any event, regardless of whether the Appellant was told about the diversion, there is no dispute on the evidence that the Diversion occurred four or five years prior to the Appellant's purchase of the Property. It is apparent from the photographs that the Diversion is quite visible, in that it is clearly not the natural channel of the Creek. As stated earlier, the Diversion is a 1,600 foot ditch, which proceeds in a relatively straight path through the Property. That being so, the Appellant either knew, by an onsite visual inspection, or ought to have known, of the existence of the Diversion, and ought to have made appropriate enquiries of Mr. Olsen prior to completing the transaction. This would include seeking a copy of any authorization under the *Act* to construct the Diversion.

Being unaware of the requirements of the *Act* is no excuse, as there is a presumption in law that we are all deemed to know the law. Having proceeded with the purchase in the absence of obtaining a copy of the required authorization, makes the Appellant either willfully blind, or prepared to take the risk that further

enforcement would likely not follow. In either event, the Panel finds on the evidence that the Appellant is not an "innocent purchaser". While the Panel need go no further, even had the Panel determined that the Appellant is an "innocent purchaser", based upon the *Creed* decision, the result would be the same.

It is also clear from the evidence, as well as from the Appellant's written submissions, that the Diversion turned the Property into a much more productive hay field, making it a more attractive purchase to the Appellant.

Finally, the Panel notes that, in the Appellant's Statement of Points, the issues of estoppel, bias of the Respondent and abuse of the powers of the Respondent's office were raised in relation to his naming the Appellant to the Order. At the hearing, however, while these matters were not abandoned, they were not convincingly pursued and, in any event, not established on the evidence.

Accordingly, the Panel finds that, provided that an Order should be issued on the facts of this case, the Appellant is properly named.

3. Whether there is a sufficient basis to issue the Order.

The Appellant submits that the Respondent based the order on "third hand information which is not supported by any evidence." It submits that the Respondent based the Order on hearsay information provided to a separate branch of government (the Ministry of Forests and Range), for a different purpose, and the Respondent did not call the writer of that evidence as a witness. The Appellant states that, the issuance of such an order based on such information, without any foundation being presented, results in an unfair process levied against the Appellant as there is no means to question the basis of the Order made.

The Respondent indicated that he became aware of the issues related to the Diversion on or about August 15, 2006, during a conference call with the Ministry of Forests and Range. The Ministry of Forests and Range supplied him with a copy of the Milne Report, which was not publicly available at the time. The Respondent indicated that he confirmed that the Ministry of Forests and Range was accepting the Milne Report. In his submissions, the Respondent also noted that the report was sealed by M.J. Milne, Project Hydrologist (Association of British Columbia Forest Professionals), and that the Ministry of Forests and Range use qualified consultants for contract work. During the conference call, the Ministry of Forests and Range advised the Respondent of its intention to publicly release the report in about one week's time.

In his written submissions, the Respondent states, "In my opinion, the most urgent change required on private land was noted in the report as District Lot 5042, Cariboo Region [the Property]." Therefore, along with a letter dated August 18, 2006, to the Appellant, the Respondent issued the Order.

The Panel notes that the very fact that the Diversion was done without authorization is, in itself, a sufficient basis for the Order, given sections 2, 88(1)(e) and 93(2)(i) of the *Act*. However, in reply to questions from the Panel, the

Respondent indicated that he based his decision to issue the Order entirely on the recommendations of the Milne Report. He stated that he is not a qualified forest hydrologist and it is customary to rely on expert reports. In this particular instance, he did not refer the Milne Report for review by experts in the Ministry, nor did he seek advice from outside of the Ministry. In this particular case, he believed that the urgency for issuing the Order arose because there was significant public infrastructure at risk. He states in the beginning of the Order that the Diversion "is causing detrimental watershed conditions downstream".

The Milne Report states that past timber harvesting in the Kersley Creek drainage "has likely made more water available for runoff throughout the year and, also likely increased the magnitude and/or frequency of high flow events on tributaries and the mainstream channel." The Milne Report states that the Kersley Creek system is unstable on alluvial fans downstream from the Diversion as a result of high sediment load, insufficient or inappropriate drainage structure use on the CNR and the Kersley-Dale Landing Road, and the old stream location works on DL 3980. At page 5, the report further states that the situation on the lower Kersley and Menzinger Creeks has been exacerbated by:

- deliberate stream channel diversions on private land that have bypassed or reduced the sediment deposition and filtering effects of alluvial fans in local and upstream areas, most notably within the Property;
- failure or removal of beaver dams on private lands other than the Property;
- sediment input from roads, development in woodlot licence areas, and livestock accessing riparian areas; and
- a likely increase in peak streamflow magnitude or the frequency of high streamflow occurrences from changes in forest cover on both private and public land.

Appendix A of the Milne Report lists 20 distinct sediment sources; five are given a "High" sediment source rating (including the Diversion) and the remainder a "Moderate" rating.

The Milne Report states, that, "At this time the deliberate diversion of Kersley Creek within DL 5042 is considered to be a very high sediment source area and the main cause of channel infilling and likely avulsion of the fan within DL 10, 191, and 5047." The report contains no supporting documentation for that conclusion, nor did the author testify at the appeal hearing. Consequently, the basis for that conclusion is unclear.

The Appellant submits that Kersley Creek has been subject to many modifications to its natural flow and function. The Appellant cites many of the same causal factors cited in the Milne Report, including the loss of forest cover with the consequential higher flows, the contribution from roads, deteriorated culverts, loss of beaver dams and the like. However, the Appellant's position is that "any deterioration of the water quality of the down stream licence holders is solely as a consequence of the logging practices utilized by forestry tenure holders...." Oral

evidence by Mrs. Gilson was that the stream through the Diversion was clear, which was supported by photographs presented as exhibits. Mrs. Olsen, in her oral testimony, stated that she took drinking water directly from Kersley Creek while living on the Property, before and after the Diversion. Mrs. Olsen indicated that the speed of the stream current did not change after the Diversion.

The Third Parties and Participants down stream of the Diversion presented evidence of the unstable stream channel and high sediment loads in recent years. Mrs. Scheck's evidence was very helpful to the Panel in understanding the scale of diversions affecting the watershed over the past fifty years. Other evidence identified the increase in sediment and stream channel instability, which has led to siltation of wells, and the extension of dyking on the Wooten property (located near the confluence of Kersley Creek with the Fraser River) to protect agricultural fields. It was indicated that these events only became pressing problems after the Diversion was completed.

Don Tibbles gave evidence that Mr. Olsen excavated the Diversion to a width of one excavator bucket, or approximately three feet in width. He stated, and photographs submitted by both the Appellant and the Respondent verified, that the present channel width has since expanded, cutting a channel with sloped banks. Mr. Tibbles also stated that, during the next high water period following completion of the Diversion, he had never seen the Creek so muddy.

For the Panel, the question of whether the Diversion causes sedimentation that contributes to downstream aggradation in the stream channel, as found in the Milne Report and accepted by the Respondent, has been difficult to assess. The factors that result in the streambed instability downstream of the Diversion are several, and their inter-relationships are complex. The Respondent did not call a qualified professional (e.g., Mr. Milne), to explain the events that are impacting the Kersley watershed, their individual and collective ramifications to the Creek's hydrology, and more specifically, the role of the Diversion in the circumstances. However, neither did the Appellant call an expert witness to substantiate its opinion.

There is no dispute that the Respondent relied upon the Milne Report as a basis for the Order, that he relied upon the expertise of its authors, and that the report was prepared for a different Ministry for a different purpose. Although these are relevant concerns, the Panel is also of the view that the findings and conclusions of the report are important to consider in relation to the Diversion and its contribution to the problems downstream. While caution should be exercised when reviewing the Milne Report for the purposes of issuing an order under the *Act*, its content can not, and should not, be ignored.

The Panel has had the benefit of hearing from all parties and the Participants during this appeal. Some of the evidence was at odds with aspects of the Milne Report, other evidence confirmed aspects of the report. Considering the totality of the evidence, the Panel finds that there is sufficient basis for the Order. Aside from the general authority to issue an order for an unauthorized diversion, the Panel concludes that the Diversion has contributed to the downstream sediment load; it exacerbated downstream impacts both in terms of volume of flow and sediment

loading. Despite the evidence of Mrs. Olsen and Mrs. Gilson of "clear water", the Panel finds that a 1,600 foot Diversion, sending water in a relatively straight line which drops approximately 50 feet in elevation along its length, will increase the rate of flow and increase the sediment load exiting the Diversion. The Panel accepts the statements in the Milne Report (page 5) that when water flows through an alluvial fan, there is a natural filtering and sediment deposition that occurs. There is no question that this effect was lost when the Diversion was constructed in 2001.

However, the exact amount of the contribution is, in the Panel's view, uncertain. The Milne Report states that the Diversion is presently "a very high sediment source" but does not document the likely volume of material sourced from the Property, as compared to other sources. Further, the Panel did not have the benefit of expert opinion as to how the Diversion may have affected the transport of sediment both upstream and downstream of the Property. These uncertainties do not undermine the basis for the Order *per se*, but they are relevant to the terms and requirements of the Order which will be discussed next.

In conclusion, there is no question that the Diversion was unauthorized, and that there is a valid basis for an order of this nature. Further, the Panel finds that the Diversion is contributing to some of the problems in the watershed, and that those problems need to be addressed.

4. Whether the requirements set out in the Order are fair and reasonable in the context.

The Order describes the work to be done to address the problems created by the unauthorized Diversion, and establishes the time frames for completion of various stages of the work. The Order was sent to the Appellant on or around August 18, 2006 and the Order required the first things to be done (provide a design by a qualified professional) by October 6, 2006.

As noted previously in this decision, when the Respondent issued the letter accompanying the Order, he made a vague reference to the Milne Report in his decision letter as a basis for the Order. However, there was no indication in the letter that the Respondent would make efforts to make the report available to the Appellant, or what office it might contact to obtain it. It is also noted that the Milne Report, obtained by the Appellant, appears to have the last three pages missing (i.e. pages 12 to 14). Point 1, on page 12 (missing in the Appellant's copy) specifically addresses matters of the Diversion.

However, closely following issuance of the Order right through to October, the Respondent was infrequently in his office. The Respondent testified that he could not find anyone to look after this matter when he was away from his office. The Panel considers this a material point since the Order required the Appellants to comply with the first condition by "no later than" October 6, 2006.

In reply to a question from the Panel, the Respondent agreed that, while he was "pressed for time" around the time the Order was issued, he did not agree that he acted hastily. The Respondent testified that he would have preferred to append the

Milne Report to the Order. The Respondent also stated that, generally, in similar circumstances, he prefers to discuss the matter with the affected party before issuing an order. To achieve that end, he would have preferred first to send the Appellant the Milne Report and a draft of the Order he intended to issue, asking for a written response within a reasonable period of time. That way a successful conclusion might have been negotiated.

The Respondent testified that he agreed to a stay of the Order because the threat to public infrastructure had been lessened by actions, or acknowledged awareness, of the agencies responsible for the respective infrastructure regarding the threat of Kersley Creek.

Essentially, the Appellant was given one and half months in which to submit a restoration design, or be in contravention of the Order. Mrs. Gilson testified she was not aware of the impending Order before it was received. Upon receipt, the Appellant attempted to contact the Respondent, but he was not available. The Appellant sought assistance from the Respondent's office regarding a list of qualified professionals in stream channel restoration. However, the stated policy of the Respondent's office is not to recommend individual practitioners.

Thus, the Panel finds that the Order was issued without the professional report that was the sole basis for issuing the Order. When the Appellant obtained a copy of the Report, it was incomplete, and was missing a material section. The time available to respond to the Order, while apparently one and half months, was in fact much less, due to the time required for the Appellant to retain the professional, and due to the fact that the Respondent did not delegate his responsibility concerning the Order while he was away from the office. This compounded the difficulties associated with properly interpreting the Order, and the Appellant's ability to respond to it whilst minimizing its financial costs.

Clearly, more time should have been taken to contact the Appellant, and an effort should have been made to provide the Appellant with a draft of the proposed Order and a complete copy of the Milne Report for consideration, followed by a face-to-face meeting to discuss the issues. And while it may be government policy not to recommend a particular consultant, the Panel suggests that some help could have been provided so that the Appellants would have known how to find such persons.

Although the Respondent initially believed that there was some urgency involved, this is not supported by the evidence. The Panel agrees that many people downstream are experiencing serious problems. However, the Panel notes that the Milne Report states that even if the natural fan processes on the Property are fully restored, the effects "will not be fully realized for several years as sediment in the channel(s) downstream of this site will continue to move into fan areas in DL 10, 191, 5047 and 3980." Further, the Respondent acknowledged at the hearing that the urgency that essentially drove the issuing of the Order, and the subsequent timelines, was addressed by other mechanisms.

In these circumstances, the Panel finds that the Respondent could have taken more time to discuss this matter with the Appellants, provide the report and provide

longer time frames within the Order. The Panel finds that the timelines in the Order are unreasonable and should be amended.

Regarding the main requirement of the Order, clause (1), the Panel notes that it attempts to address the problems created by the Diversion by requiring that a qualified professional in stream channel restoration “design the restoration of Kersley Creek drainage within District Lot 5142” to “ensure bed load and flow conditions leaving District Lot 5142 restore flows to conditions that would have been present prior to the unauthorized work being done” (i.e., prior to 2001).

The wording of this condition is important. It is asking the Appellant’s professional to restore the drainage to ensure that the bed load and flow conditions leaving the Property are what they would have been before Mr. Olsen created the Diversion in 2001.

The target bed load and flow conditions are not stated in the Order, nor are the target values identified in Milne’s Report. Presumably, the qualified professional would specify these conditions and produce a suitable design. However, given the modifications upstream of the Property, it is plausible that reasonable people may disagree as to what the present flow conditions of the pre-Diversion channel might be. Such disagreement would necessarily lead to disagreement with regard to restoration design. It would have reduced the Appellant’s uncertainty and potential needless expense if the Respondent had quantified the parameters.

More importantly in this case, the Panel is of the view that requiring the Appellant to restore the flow off of their Property to pre-Diversion levels is unreasonable.

Based on the evidence presented to the Panel it is clear that things have changed over the years, and are continuing to change. Due to various factors, the evidence is that the inflow conditions to the Property have changed quite dramatically from what they were before. For instance, the Panel notes that the Milne Report states that timber harvesting in the drainage “has likely made more water available for runoff throughout the year and, also likely increased the magnitude and/or frequency of high flow events on tributaries and the mainstream channel.”

Although the Panel agrees that the Diversion is contributing to the issues downstream, it is unreasonable to require the Appellant to restore the bed load and flow conditions leaving the Property to what they were prior to the Diversion. This ignores the fact that there have been, and will continue to be, changes to the flows onto the Property which are different than those in 2001, and which should not be the sole responsibility of the Appellant to address.

In addition, the expected contribution of the Diversion to downstream sediment in the future is unclear. It has been six years since the Diversion was created. The channel has likely reached a level of stability. It is not at all clear to the Panel that making the changes required under the Order will be of future benefit. The Panel notes that the implication of the Milne Report is that the Diversion will make a larger contribution to downstream issues in the future. However, how much larger, and for how long, is open to speculation. These matters may be outside the scope of the Milne Report, but the Panel finds that considering the future impact of any

changes made to the Diversion should also be taken into consideration in the ultimate design.

For all of these reasons, the Panel finds that some of the requirements in clause (1) are not fair and reasonable in the circumstances and should be amended.

DECISION

In making this decision, the Panel has considered all of the relevant documents and oral evidence, whether or not specifically reiterated herein.

For the reasons stated herein, the issuance of the Order to the Appellant is confirmed, but the requirements are varied as set out below.

Clauses (1) through (4) of the Order shall be deleted, and the operative clauses of the Order, as varied by the Board, shall be:

1. To have a qualified professional in stream channel restoration, submit for approval to an Engineer under the Act, a design for the Kersley Creek drainage within District Lot 5042 Cariboo District that will eliminate or, to the greatest extent possible, mitigate, the effects of the unauthorized diversion. The design must be submitted by October 31, 2007.

(This wording is intended to take into consideration the fact that flows entering the Property have changed, and will likely continue to change. Had the alluvial fan existed today on the Property, it would have changed as the conditions upstream changed, and the Appellant should not have to ensure that the water conditions leaving its Property are in a pre-Diversion state. It should just be required to "mimic" the natural process that would occur if the fan was still on the Property.)

2. Complete that work consistent with the design approved in clause 1, by **May 31, 2008**, in accordance with any approvals that may be required from provincial or federal fisheries authorities regarding the timing of the in-stream work.
3. File with the Engineer, within 30 days of the completion of the work, a certification from a qualified professional that the work at Kersley Creek has been completed in accordance with the approved design.
4. A copy of this Order and the design approved by the Engineer must be onsite where work is being done, so that it is available for inspection by Environmental Officers.

In setting the dates in the Order, the Panel has attempted to highlight the need for things to get under way, but also recognize that work on the stream may only occur at certain times of the year. Should the Appellant require an extension of time of any of the dates, it should apply to the Engineer for an extension.

Finally, the Panel directs the Respondent to consider the following:

- whether the design submitted in accordance with clause 1 is reasonable and cost effective; and
- whether there is an agency of government that might assist the Appellant either with funds or expertise, in which event the Panel directs the Engineer to assist, to the extent possible, in identifying such agencies to the Appellant.

The appeal is allowed, in part.

David H. Searle, C.M., Q.C.
Panel Chair
Environmental Appeal Board

Don Cummings, Member
Environmental Appeal Board

Gary Robinson, Member
Environmental Appeal Board

September 10, 2007