



Environmental Appeal Board

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DECISION NO. 2012-WAT-033(a)

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

BETWEEN:	Carolyn Hopp (nee Lawrence)	APPELLANT
AND:	Assistant Regional Water Manager	RESPONDENT
AND:	Jiri Cizinsky and Nada Cizinska	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Blair Lockhart, Panel Chair	
DATE:	Conducted by way of written submissions concluding on April 22, 2013	
APPEARING:	For the Appellant: Carolyn and Nigel Hopp For the Respondent: Phil Madeley For the Third Parties: Chantelle M. Rajotte, Counsel	

APPEAL

[1] Carolyn Hopp appeals the decision dated September 21, 2012 of Phil Madeley, the Assistant Regional Water Manager (the "Manager"), Ministry of Forests, Lands and Natural Resource Operations (the "Ministry"), refusing her application for a Conditional Water Licence on Irish Spring. The Manager wrote that his decision to refuse the application was because "[t]he source on which you applied Irish Spring is fully recorded under existing licences, and there is not sufficient water in the source to enable a new licence to be issued."

[2] 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, on an appeal, 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.

[3] The Appellant asks the Board to reverse the Manager's decision and issue her a Conditional Water Licence authorizing the diversion and use of 2,000 litres per day (which is roughly equivalent to 500 gallons per day) from Irish Spring for domestic purposes. She maintains that:

1. sufficient water exists to support the new licence, and
2. the existing licence granted on Irish Spring is not being used and, therefore, should be revoked.

BACKGROUND

[4] Irish Spring is a small water source located on Lot 12, District Lot 2372, Lillooet District Plan 5847 ("Lot 12") in the vicinity of Bralorne, British Columbia.

[5] On March 1, 1978, Conditional Water Licence ("CWL") C049720 was issued for 500 gallons per day on Irish Spring, appurtenant to Lot 9, District Lot 2372, Lillooet District Plan 5487 ("Lot 9"). Lot 9 is across Pioneer Road from Lot 12, a distance of approximately 100 metres.

[6] In 1995, Gerard Toorenburgh acquired both Lots 9 and 12. In 1999, Mr. Toorenburgh requested that the appurtenancy of CWL C049720 be transferred from Lot 9 to Lot 12. This request was granted. On June 15, 1999, Conditional Water Licence C114411 was issued in substitution for CWL C049720, and was appurtenant only to Lot 12.

[7] The Appellant acquired Lot 9 on June 23, 2000.

[8] The Third Parties to this appeal, Jiri Cizinsky and Nada Cizinska acquired Lot 12 on July 26, 2002, and accordingly, they hold the rights conveyed under CWL C114411.

[9] On October 6, 2008, the Appellant applied for a water licence on Ogden Spring, which is adjacent to the northern boundary of Lot 12. On December 23, 2009, she was granted Conditional Water Licence C124330 allowing the diversion and use of up to 500 gallons per day on Ogden Spring. This licence is appurtenant to Lot 9.

[10] On December 9, 2008, the Appellant also applied for a water licence on Irish Spring, requesting "2,000 L" per day (500 gallons per day) for domestic purposes. Parenthetically, the Panel notes that the Appellant's spouse subsequently confirmed to Ministry staff that 200 gallons per day would be sufficient for the Appellant's requirements.

[11] In her application for a licence on Irish Spring, the Appellant indicated that, although the proposed diversion works would be located on Lot 12, she was unable to obtain the Third Parties' consent to have those works on their property.

[12] As directed by Ministry staff, the Appellant notified the Third Parties of her application for a water licence on Irish Spring on March 9, 2009, although it wasn't until December 2009 that the Third Parties notified the Ministry of their objections to the application.

[13] Three separate flow estimates have been obtained for Irish Spring:

- a. Based on information provided by the Appellant's spouse to the Ministry in November 2008, the estimated flow from Irish Spring was 1,458 gallons per day;
- b. A Water Stewardship Officer estimated that the flow was approximately 130 gallons per day on September 8, 2010; and
- c. A Water Stewardship Officer estimated that the flow was approximately 100 gallons per day on September 18, 2012.

[14] Based upon the field review and the above-noted flow assessments, the last two which were conducted during low flow periods, the Manager refused the Appellant's application for a licence on Irish Spring. As stated earlier in this decision, he concluded that Irish Spring is "fully recorded under existing licences, and there is not sufficient water in the source to enable a new licence to be issued."

[15] The Appellant filed her appeal on November 23, 2012. The Appellant argues that:

1. sufficient water exists to support the new licence; and
2. the existing licence granted on Irish Spring (CWL C114411) is not being beneficially used by the Third Parties and, therefore, should be revoked.

[16] The Appellant submits, "With enough supply, and the violation of the beneficial usage clauses by the current holders of the licence, we believe the licence is being unfairly held from us." The Appellant provides the Board with two potential outcomes that would be satisfactory:

1. The current licence could be revoked because of disuse, but this would inconvenience any future use of that property.
2. A second licence could be issued which technical staff site inspections supports. This second licence does not interfere with the primary user.

ISSUES

[17] The issues to be decided by the Panel are as follows:

1. Did the Manager err when he determined that Irish Spring has insufficient water to support the requested licence?
2. Should the Manager have cancelled the Third Parties' water licence (CWL C114411) for lack of beneficial use under section 23 of the *Act*?

RELEVANT LEGISLATION

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.

Who may acquire licences

- 7** A licence for any one, 2 or 3 of the purposes defined in section 1 may be issued by the comptroller or the regional water manager to any of the following:

- (a) an owner of land ...,

“Domestic purpose” is one of the purposes defined in section 1. It means “the use of water for household requirements, sanitation and fire prevention, the watering of domestic animals and poultry and the irrigation of a garden not exceeding 1 012 m² adjoining and occupied with a dwelling house”.

Powers of comptroller or regional water manager respecting applications

- 12(1)** With respect to an application, whether objections to it are filed or not, the comptroller or the regional water manager may

- (a) refuse the application,
- (b) amend the application in any respect,
- (c) grant all or part of the application,
- (d) require additional plans or other information,
- (e) require the applicant to give security for the purposes and in the amount and form the comptroller or the regional water manager considers in the public interest, and
- (f) issue to the applicant one or more conditional or final licences on the terms the comptroller or the regional water manager considers proper.

...

Suspension and cancellation of rights and licences

- 23(1)** In this section:

“licence” includes a permit or an approval under section 8 or 9;

“licensee” includes a holder of a permit and a person who has obtained approval under section 8 or 9.

- (2) The rights of a licensee under a licence are subject to suspension for any time by the comptroller or a regional water manager, and a licence and all rights under it are subject to cancellation in whole or in part by the comptroller or a regional water manager for any of the following:

- (a) failure by the licensee for 3 successive years to make beneficial use of the water for the purpose and in the manner authorized under the licence;
- (b) failure by the licensee within the time specified to construct the works authorized under the licence;

...

[Emphasis added]

DISCUSSION AND ANALYSIS

1. Did the Manager err when he determined that Irish Spring has insufficient water to support the requested licence?

[18] The Appellant submits that "ministry staff site visits indicated that enough water was present to support an additional license." She also submits that the consequences of issuing a second licence are minimal because "the first license will still have first rights to the water".

[19] The Appellant explains that the water supplied by Ogden Spring is adequate for her household "except in the driest of years", which is when she would need the water from Irish Spring. She submits that 200 gallons per day from Irish Spring would be sufficient to supplement their existing supply when needed. She has had a water meter installed and states they she and her husband are "responsible users of the resource."

[20] The Manager and the Third Parties provided detailed submissions in response to the appeal.

[21] The Manager submits that the Appellant's assertion that Ministry staff have indicated that there is enough water present to support an additional licence is not supported by the technical assessments conducted in 2010 and 2012.

[22] The Manager further submits that, even though the Third Parties' licence would have "first rights" to the water, "there is no justification for creating a situation of having to enforce inevitable water regulation requirements when none would be necessary if we did not issue that additional licence."

[23] In his September 8, 2010 field inspection notes, Duane Wells, Water Stewardship Officer, calculated the water at 0.59616 cubic metres per day (130 gallons per day). He writes "Even if the level were to have reached the nail at this point it would not be sufficient water for the existing licences."

[24] The September 18, 2012 inspection notes by Water Stewardship Officer Kim DeRose show a final calculation of 0.4593 cubic metres per day (100 gallons per day).

[25] The Third Parties submit that the Manager was correct when he refused the Appellant's application. Jiri Cizinsky provided evidence in an affidavit sworn on March 27, 2013.

[26] Based upon their observations and use of Irish Spring over the past 11 years, the Third Parties submit that there is insufficient water, particularly in the summer and early fall, to support the taking of water in excess of the 500 gallons per day authorized under their licence. The Third Parties submit that there are significant seasonal variations in the supply of water for Irish Spring, and that, in some years, the supply dries up almost entirely between July and October. This is consistent with the disparity in water flows estimates that were taken in November 2008 and September 2010 and 2012. Consequently, the Third Parties maintain that there is insufficient water available from Irish Spring and that, if the Appellant is granted a licence, it would prejudice their rights under CWL C114411.

The Panel's Findings

[27] Despite the Appellant's assertion that there is sufficient water to support a licence for at least 200 gallons per day, the Panel finds that this is not supported by the evidence.

[28] The Appellant provided no technical evidence in support of her claim that there is sufficient water available in Irish Spring to support two licences, even if she reduced the quantity sought from 500 gallons per day (2,000 litres per day) to 200 gallons per day.

[29] Conversely, the Ministry staff site visits in 2010 and 2012 resulted in water estimates that would not even supply the existing licence of the Third Parties. In other words, there is simply not enough water to support an additional licence on Irish Spring.

[30] The Appellant explained that the water supplied by Ogden Spring is adequate for her household "except in the driest of years", which is when she would need the water from Irish Spring. Clearly, however, as the Third Party notes, this is precisely the time each year when Irish Spring would be least able to support an additional licence.

[31] The Panel finds that Irish Spring is fully recorded, and even with the Third Parties having priority, the evidence presented does not support issuing a second licence for Irish Spring.

2. Should the Manager have cancelled the Third Parties' water licence (CWL C114411) for lack of beneficial use?

[32] The Appellant submits that, although the Third Parties have held CWL C114411 on Irish Spring since they purchased the property in 2002, as of 2013, there are still no works, no plumbing, no garden, no septic on the property. Site visits by ministry staff can confirm this. With no use, the spring water runs to surface and across the road.

[33] The Appellant notes that the *Act* allows the Ministry to suspend or cancel a licence when there has been a lack of beneficial use for 3 years. She submits that this lengthy lack of beneficial use by the Third Parties is a further reason to issue her a licence.

[34] There is evidence before the Panel that Mike Edwards, Water Stewardship Officer, visited Lot 12 in 2008. At that time, he noted a small cabin, but no sign of any works supplying water from Irish Spring to the cabin.

[35] In December 2009, in response to a request from the Water Stewardship Division, the Third Parties filed a Beneficial Use Declaration confirming domestic and seasonal irrigation use of the water from Irish Spring.

[36] In recent years, there has been development on Lot 12 by the Third Parties. When she attended the property in September 2012 for a site visit, the Water Stewardship Officer (Ms. DeRose) noted that there was no sink or bathroom inside the dwelling on the property, but that there was an outdoor shower as well as a construction site and pipes inside the new dwelling under construction.

[37] In his affidavit, Mr. Cizinsky confirms that he and his wife formerly used the property as a vacation property, but that their intention is to construct a new home to which they will retire on a full time basis sometime in 2014. He also states that, since 2011, they have used Irish Spring to irrigate their vegetable garden. They have used water from Irish Spring for cooking, washing, bathing and drinking. Finally, according to Mr. Cizinsky, they have worked to develop the water source to a more productive state.

The Panel's Findings

[38] Section 23 of the *Water Act* authorizes a regional water manager to suspend the rights, or even cancel a licence, in various circumstances, including a failure by the licensee to make beneficial use of the water "for the purpose and in the manner authorized under the licence". The scope of the present appeal on one licence application, however, does not extend to authorizing the Panel to decide whether to revoke an entirely different licence. Even if it did, the Panel finds that there is evidence of beneficial use by the Third Parties of CWL C114411.

DECISION

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

[40] Accordingly, having considered all of the evidence and arguments presented, the Panel confirms the Manager's decision to refuse the water licence application.

[41] The appeal is dismissed.

"Blair Lockhart"

Blair Lockhart
Panel Chair

May 22, 2013