



# Environmental Appeal Board

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## APPEAL NO. 95/40 WATER

In the matter of an appeal under section 38 of the *Water Act*, R.S.B.C. 1979, c. 429

**BETWEEN:** Walter McKersie APPELLANT

**AND:** Deputy Comptroller of Water Rights RESPONDENT

**BEFORE:** Christie Mayall, Chair  
Harry Higgins, Member  
Bill MacFarlane, Member

**DATE OF HEARING:** July 16, 1996

**PLACE OF HEARING:** Cranbrook, British Columbia

**APPEARING:**

<b>For Appellant:</b>	John Van Steinburg Robert Richardson
Witness:	Walter McKersie
<b>For Respondent:</b>	Jack Farrell
Witnesses:	Joyce Hutchinson Bill Westover Ken McLennan Dave Phelps John Truscott

## APPEAL

This is an appeal against the December 21, 1995, decision of the Deputy Comptroller of Water Rights to order Walter McKersie to rehabilitate changes made by him to a marsh on Columbia Lake.

The authority for the Panel of the Environmental Appeal Board to hear this appeal is found in section 11 of the *Environment Management Act* and section 38 of the *Water Act*.

The grounds for appeal are:

1. That the error was induced by government officials who gave Mr. McKersie the impression that he had the necessary authority to carry out the works on Columbia Lake.
2. That the project created no harm, but rather improved the site.

3. That the events leading up to and subsequent to the works being done on Columbia Lake were unfair to Mr. McKersie.

The appellant sought to have the decision of the Deputy Comptroller of Water Rights overturned.

## BACKGROUND

The area under discussion is part of a large marsh at the south end of Columbia Lake in south-eastern British Columbia. Permission to construct works in this area is required from three different government agencies in two levels of government: federally through the Canadian Coast Guard; and provincially through BC Lands in the Ministry of Environment, Lands and Parks (MELP), and the Water Management Division, also in the MELP. The Canadian Coast Guard has jurisdiction under the *Navigable Waters Protection Act* to determine whether the works will interfere with navigation. BC Lands has jurisdiction under the *Land Act* for the issuance of Licences of Occupation for private boat moorage. The Water Management Division has jurisdiction under the *Water Act* over changes that are made in and about a stream, in this case Columbia Lake.

In November of 1992, after receiving a Declaration of Exemption from the Canadian Coast Guard, but without authorization under the *Land Act* or the *Water Act*, Mr. McKersie constructed a 210m long by 4m wide by 1.5m deep channel from the open water of Columbia Lake southwest through the marsh to dry land. At the end of the channel adjacent to the dry land he constructed a 30m long by 9m wide by 1.5m deep boat basin with four pilings at one end. An additional shallow channel extended south from the boat basin through the marsh. The excavated material was placed in a berm adjacent to the channel. Watercress Creek empties into the western side of the boat basin. The boat basin fronts on Lot 2, District Lot 110, Kootenay District, Plan 2917, owned by Mr. McKersie. To the north of the boat basin and channel there is a large artificial peninsula that was created in the early 1980's to accommodate a public picnic site and boat launch.

A February 20, 1995, letter from Mr. John Dyck, Regional Water Manager, ordered Mr. McKersie to rehabilitate the site of the channel by March 15, 1995. Mr. McKersie appealed this Order to the Deputy Comptroller of Water Rights, Mr. Jack Farrell. In his December 21, 1995, decision regarding this issue the Deputy Comptroller of Water Rights dismissed the appeal and ordered that the rehabilitation be completed by March 15, 1996. Mr. Van Steinburg, Counsel for Mr. McKersie, received this decision during the week of January 15, 1996, and, in a letter dated January 19, 1996, requested an extension of time from Mr. Farrell in which to file an appeal and an extension of time for completion of the rehabilitation.

Mr. Farrell denied the request for an extension of time to appeal. The Environmental Appeal Board overturned this decision in a letter dated February 5, 1996. On February 12, 1996, the December 21, 1995, Order of the Deputy Comptroller of Water Rights regarding Mr. McKersie's boat basin was appealed to the Environmental Appeal Board.

On April 3, 1996, Mr. McKersie was charged under Section 41(1)(q) of the *Water Act*, with failing to complete the rehabilitation as ordered. In a letter dated April 18, 1996, Mr. Farrell notified Mr. Van Steinburg that the request for an extension of time for completion of the project would not be granted.

## ISSUES

In the course of the hearing a number of issues were identified and addressed. The major issues follow in no particular order.

### Issue 1. Communications between government officials and Mr. McKersie

Mr. Van Steinburg, counsel for the Appellant, contested that the error in constructing the boat basin and channel was induced by officials. He argued that, given Mr. McKersie's treatment by officials, it was reasonable for him to believe that he had the necessary authority to proceed with his construction on Columbia Lake. The chronology of events is as follows.

On December 3, 1991, Mr. McKersie told MELP employees, Joyce Hutchinson, Fisheries Technician, and Pat Picton, Water Management Technician, that he was interested in constructing a channel and boat basin in the marsh adjacent to his property on Columbia Lake. Ms. Hutchinson testified that at that time Mr. Picton advised Mr. McKersie regarding the government procedures that he would have to go through in order to construct the channel. Ms. Hutchinson and Mr. Picton also advised Mr. McKersie regarding some precautions that he would have to follow should he obtain authorization to proceed.

Mr. McKersie then obtained a package of applications from Dave Butler, Senior Land Officer of BC Lands. Mr. McKersie stated that he assumed that these were all of the applications that were required, but he did not know if there was an application under the *Water Act*. He also testified that he thought that these works would be covered by another Water Licence that he has on Watercress Creek and therefore would not require an additional Water Licence. He posted a notice on the site and his wife filled out the applications and submitted them. In a January 22, 1992, letter from Mr. Butler, Mr. McKersie was advised by BC Lands that his application and application fee for these works had been received and that they 'hoped' to have a final decision within three months or more. In this same letter he was also instructed to advertise his application in the Kootenay Advertiser and the B.C. Gazette. Mr. McKersie carried out the advertising requirements.

Mr. McKersie stated that he then received a letter from the Canadian Coast Guard stating that the area was under their jurisdiction and that their authorization would be required. This letter was not submitted as evidence. Mr. McKersie testified that when he received this letter he understood that the authority of the Canadian Coast Guard superceded that of the Province.

In October of 1992 Mr. McKersie received a Declaration of Exemption under the *Navigable Waters Protection Act* from the Canadian Coast Guard stating, "This document authorizes the work in terms of its effect on marine navigation. It is the

applicant's responsibility to obtain any other forms of approval, including building permits."

Mr. McKersie also testified that he went back to BC Lands after receiving the approval from the Coast Guard and was concerned to find out that his application had not been processed in the nine months since it had been submitted.

In early November of 1992 Mr. McKersie hired equipment and constructed the boat basin at a cost of approximately \$10,000.

A February 11, 1993, letter from Environment Canada advised Mr. McKersie that BC Environment was opposed to the proposed construction and that an application under the *Water Act* had not yet been received. Mr. McKersie testified that he ignored this letter because the work had already been completed. On February 15, 1993, a letter was sent from Herb Hess of MELP to Mr. McKersie advising him that BC Lands had decided not to proceed with his application because the area was within an Order-In-Council Reserve for public recreation and habitat management. Mr. McKersie testified that he did not receive this letter.

In late February, 1993, Ms. Hutchinson noticed, while driving by on the road, that the boat basin and channel had been constructed. On February 24, 1993, a notice was posted on the property directing Mr. McKersie to cease work. A letter dated February 25, 1993, from Pat Picton to John Dyck, the Regional Water Manager, recommended that Mr. McKersie be charged under the *Water Act* for working in and about a stream without approval and that he also be charged under any other applicable act.

On February 20, 1995, two years after the original referral to Mr. Dyck, Mr. McKersie was ordered, under the *Water Act*, to rehabilitate the marsh by March 15, 1995.

The evidence shows that Mr. McKersie was informed of the need for authorization under the *Water Act*, the *Land Act*, and the *Navigable Waters Protection Act*. He applied for authorization under the *Land Act* and the *Navigable Waters Protection Act*, but not under the *Water Act*. It is understandable that, with three different Acts involved, it may have been difficult for Mr. McKersie to keep track of what was required. Mr. McKersie may not have realized at the outset that he was in contravention of the *Water Act*, but after going to BC Lands and learning his application was not yet processed in October of 1992, his subsequent actions in constructing the boat basin, indicate to this Panel that he knowingly contravened the *Land Act*. In addition, his inaction on receipt of the January 11, 1993, letter show disregard for both the *Land Act* and the *Water Act*.

## **Issue 2. Environmental impact of the boat basin and channel**

The Appellant contended that construction of the boat basin and channel, in addition to providing a private boat moorage, also improved the habitat in the marsh.

Mr. McKersie stated that many years ago there had been a natural channel from Watercress Creek through the marsh, but that beavers had dammed it up. Prior to his construction of the channel he said that the water spread out over the marsh creating a breeding ground for mosquitoes, that the area was not good for birds and that his cattle (which graze on the marsh because there is no fence to keep them out) "mucked it up". Mr. McKersie felt that channelizing the flow into the wetland would help to dry up 5 or 10 acres, reduce the mosquitoes, and create a fire break between the upland forest and the grasses, sedges, and rushes of the wetland. As well, Ducks Unlimited had expressed an interest in putting goose nests on the berm. He stated that the water in the channel was clear and that both mature and young fish had been observed in the channel. Mr. McKersie stated further that he had followed the recommendations regarding construction which were made to him by Mr. Picton, of the Water Branch, in December, 1991.

Robert Richardson, a professional engineer, testified on behalf of the Appellant, and qualified as an expert witness in the area of soil stability and construction of dams and berms. He testified that plants were becoming established on the sides of the channel and that the slopes could remain quite stable. He stated further that the channel could not be restored to its original condition and that an attempt to do so would only redisturb the environment. Mr. Richardson also stated that the disruption to the environment was relatively minor compared to the impact of the artificial peninsula immediately to the north.

The Respondent's evidence showed that the site of the channel and boat basin lie within the Columbia Valley Wetland Reserve. The Reserve was established by Order-in-Council in 1947 in recognition of its waterfowl and wildlife values and to prevent the area from falling into private hands. More recently the Commission on Resources and Environment (CORE) recommended that the area be designated as a Wildlife Management Area under Section 4 of the Wildlife Act. David Phelps, Land Management Biologist with MELP, testified that it is of international significance to migratory birds and is Class 1 winter range for elk. He stated that boat activity within the channel would cause a disturbance to wildlife using the area.

The Panel finds that the development of the channels and boat basin adversely affected the water regime of the wetland because they resulted in the channelization of a stream which previously spread out on to the wetland, and the construction of what amounts to a drainage ditch through the wetland. Contrary to the assertion of Mr. McKersie, aerial photos from 1951 show no evidence of an historic channel through the marsh. Photographs taken by John Truscott in September, 1995, do show water flowing out of the drainage ditch into the south end of the boat basin. The extent of the area affected by the works, then, is both the area occupied by the channel, boat basin and berm, and the adjacent area that is drier than its natural state because of drainage and reduced inflow.

Bill Westover, Fisheries Biologist with MELP, was concerned about the deposition of silt on fish habitat both during the construction phase and from sloughing of the berm and channel sides. Some organic silt is currently visible on the channel bed.

Mr. Westover stated further that his primary concern was the precedent that would be set by allowing this unauthorized channel to remain. While the impacts of this particular channel on the overall fishery of the lake may be relatively minor, such works in the vicinity of other streams that are more important to the fishery could have a serious impact, and if every property owner around Columbia Lake dug an unauthorized boat basin, the impacts on the fishery resource would be cumulative and severe.

Ms. Hutchinson stated that she was concerned that Mr. McKersie's fish farm on Watercress Creek was no longer separated from Columbia Lake by the marsh. Separation of the domestic rainbow trout used in fish farming from wild rainbow trout in Columbia Lake is a requirement of operating the fish farm.

The Panel finds that the natural marshes on Columbia Lake are of considerable importance to wildlife, and that the boat basin and channel reduce the area of the marsh, drain part of the marsh, may contribute to siltation of the lake, and reduce the separation of domestic rainbow trout from wild stocks.

### **Issue 3. Rehabilitation of the channel**

It is undisputed that rehabilitation of the site would cause environmental damage. Mr. Richardson stated that the area could not be restored to its original condition and that it is now beginning to recover from the original excavation. Mr. McKersie stated that, from his experience in excavation, the material in the berm would not be sufficient to fill in the channel. In addition, both parties acknowledge that there may have been some loss of material through sloughing of the berm and channel sides. The Respondent pointed out that the cleanliness of the gravel on the berm indicated that fine material had been eroded into the channel.

The Respondent stated that siltation of the lake could be reduced by blocking off the end of the channel prior to filling in the rest of the channel and boat basin.

Mr. McKersie stated that he could not imagine how he could follow the engineer's order to remove the fish from the channel prior to infilling. However, Mr. Westover described two methods for removal of the fish - seining and electrofishing.

The Appellant argued that the time frame for rehabilitation was unreasonable. Completion of the rehabilitation work during the winter months would be difficult because of freezing of the channel and the marsh surface. Mr. Westover put forth an additional time constraint, stating that the rehabilitation would have to be at a time when fish are not spawning in the lake.

The Panel finds that environmental damage would occur during rehabilitation, but that it could be minimized by blocking off the end of the channel. The Panel finds that fish could be removed from the channel by electrofishing or seining. The Panel also finds that there are a number of considerations that must be taken in to account in determining the best time for rehabilitation. These include the level of the lake, freezing of the marsh surface, and spawning.

**Issue 4. Bureaucratic handling of the case**

The parties agreed that there was a two year hiatus between the time when a complaint was filed with Mr. Dyck by Mr. Pictin and the time when Mr. Dyck ordered Mr. McKersie to rehabilitate the site of the channel. At that time Mr. McKersie was given three weeks to complete the rehabilitation. During the appeal process to Mr. Farrell, Mr. Van Steinburg argued that government officials took months to prepare documents and then gave the Appellant very little time to respond to them. Mr. Farrell testified that when the matter came to his attention he was told that this was an urgent matter and the file was "fast-tracked". This meant that, instead of giving the customary 30 days to respond, Mr. Farrell allowed 14 days for the Appellant to review information supplied by government officials and present a response in writing. An examination of the correspondence between Mr. Farrell and Mr. Van Steinburg shows that, while Mr. Dyck, the Regional Water Manager, took almost four months to respond to Mr. Van Steinburg's submission without objections by the Deputy Comptroller, he gave Mr. Van Steinburg only 14 days to respond to the submissions made by government officials.

The Panel finds that, given the length of time that the Regional Water Manager took to issue the Order for rehabilitation of the channel and to respond to Mr. Van Steinburg's submission, there was no justification for fast-tracking the file or for allowing only three weeks for rehabilitation.

**DECISION**

Section 2 of the *Water Act* states:

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

Section 7(1)(c) of the *Water Act* stated at the relevant time:

The comptroller or the regional water manager may, without issuing a licence, approve the diversion or use, or both, of water on the conditions he considers advisable where a public corporate body or a person desires to make changes in and about a stream.

Section 37(1)(e) of the *Water Act* states:

In addition to all other powers given under this Act and the regulations, an engineer may order the restoration or remediation of any changes in and about a stream.

It is clear that, under the *Water Act*, authorization is required for any works in or about a stream. The definition of stream under the *Water Act* includes lakes, in this

case Columbia Lake. The works undertaken by Mr. McKersie required an approval under Section 7(1)(c) of the *Water Act*. It is also clear that an engineer may order the restoration of any changes in and about a stream.

Walter McKersie constructed a channel in marshland on Columbia Lake without authorization under the *Water Act*. This, in itself, would be sufficient grounds on which to dismiss the appeal.

However, the Panel is particularly concerned that the marsh lies within the Columbia Valley Wetland Reserve. The presence of the channel and boat basin removes land from the marsh, allows boats to penetrate the marsh area, may add damaging silt to the lake, and alters the water regime of the adjacent marsh. Rehabilitation of the marsh will have an immediate detrimental effect on the environment, but over the long term will allow the marsh to return to its natural state. In addition, it is essential that the precedent of allowing construction in this important marsh not be established.

Timing for rehabilitation work on the marsh requires consideration of lake level, freezing of the marsh surface, and spawning. A sufficient time span must be allowed for all of these factors to be taken into account. The MELP should be consulted to identify times in the year when rehabilitation could safely take place.

It is, therefore, the unanimous decision of this Panel of the Environmental Appeal Board that the appeal is dismissed and that the rehabilitation be completed by August 27, 1997.

## COMMENTS

### 1. Cattle grazing within Columbia Lake Wildlife Reserve

In the course of the hearing Mr. McKersie testified that he had a grazing agreement with Crestbrook Forest Industries (CFI). Because there are no fences between CFI lands and the Columbia Valley Wetland Reserve his cattle graze on the marsh up to the channel. He testified further that, prior to construction of the channel, his cattle "mucked up" the marsh. David Phelps testified that cattle grazing on marshes can cause problems, but also can be used as a management tool for rejuvenating wetlands. The Panel recommends that the Ministry of Environment work together with Mr. McKersie to determine whether cattle grazing is appropriate in the marsh and, if so, to develop an appropriate management strategy.

### 2. Time delays

The Panel noted that significant delays in the processing of this file occurred while it sat on the desk of the Regional Water Manager, both before issuing the initial order for rehabilitation of the site and in responding to Mr. Farrell's request for input in to his decision. The Panel encourages the office of the Regional Water Manager to attend to this problem.



**3. Rehabilitation methods**

The Panel recommends that Mr. McKersie consult with the MELP to investigate the feasibility of creating a series of dams and ponds. This would have the effect of rehabilitating the marsh with the reduced material available, reducing expenses and creating additional nesting sites and other waterfowl habitats.

Christie Mayall, Panel Chair  
Environmental Appeal Board

August 27, 1996