



Environmental Appeal Board

APPEAL NO. 95/58 - WATER

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

BETWEEN:	Maxine McKeown	APPELLANT
AND:	Deputy Comptroller of Water Rights	RESPONDENT
AND:	Ernest and Bridget Brown	THIRD PARTY
AND:	Leslie Brown	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Christina Mayall Chair Sheila Bull Member Bill MacFarlane Member	

DATE OF HEARING: Written submissions concluded August 19, 1996

APPEAL

This was an appeal against the November 3, 1995 decision of the Deputy Comptroller of Water Rights to uphold the decision of the Regional Water Manager to cancel Conditional Water Licence 26928 (the "Licence").

The grounds for appeal are:

1. That water was beneficially used on the property within three years prior to the cancellation of the Licence, and
2. That there was misconduct on the part of the Deputy Comptroller and his staff throughout the investigation of the cancellation.

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*.

BACKGROUND

Waterfront Spring is located on Crown foreshore on the eastern side of Finlayson Arm of Saanich Inlet. First water rights on the spring are held under Conditional Water Licence (CWL) 23801 by Ernest and Bridget Brown for 500 gallons a day for domestic use and 0.5 acre-feet per year for irrigation. A second water licence, CWL

26928, was issued on February 1, 1962, authorizing 1000 gallons per day for domestic use in two dwellings on property that is currently registered to Myrtle McKeown. In 1992, a domestic water licence application for 500 gallons per day was filed by Leslie (son of Ernest) and Shirley Brown.

In a September 24, 1992, letter to the Regional Water Manager, the McKeowns objected to the water licence application of Leslie and Shirley Brown. In a May 3, 1993, sworn affidavit, Ernest Brown declared that there had been no beneficial use of the water in the spring by the McKeowns for 15 years and that the flow had decreased and was insufficient for more than one user. This affidavit resulted in an inspection of the site by Walter Van Bruggen of the Water Management Branch and Ernest and Leslie Brown on May 5, 1993. Mr. Van Bruggen found the Appellant's works to be in a state of disrepair.

On November 3, 1994, the McKeowns were notified that, unless they could show beneficial use of the water in the previous three years, their water licence would be cancelled on January 2, 1996. On November 16, 1994, the McKeowns were advised by Eileen Wright of the Water Management Branch that the cancellation could possibly be stopped by writing to the Regional Water Manager and informing him that water had been used in the previous three years and confirming their intention to use the water. The McKeowns wrote to the Regional Water Manager on December 2, 1994, to inform him that, although they had not used the water in the previous three years, they were intending to either sell the property or subdivide and build a new house, and therefore required the water licence.

On January 20, 1995, CWL 26928 was cancelled. The cancellation was appealed to the Deputy Comptroller of Water Rights. On February 15, the licence holder, Myrtle Rosa McKeown, appointed her daughter, Maxine McKeown, to act and speak on her behalf.

In a letter dated April 21, 1995, the Appellant retracted the statement that water had not been beneficially used in the three years prior to the cancellation and changed that to 'approximately two years'. A second site inspection was conducted on May 16, with Ernest and Bridget Brown, Maxine McKeown and friend (Alex), Walter Van Bruggen, and Dave Kalyn (Appeals Technician) in attendance. On May 24, the Appellant requested that the appeal be held in abeyance until June 30, to allow them to explore the condition of a buried holding tank. On July 4, the Appellant requested an extension for this exploration until August 31. The exploration was never carried out. On September 7, the Appellant requested joint use of the works currently in existence (the works belonging to the Browns).

The appeal was dismissed in a November 3, 1995, decision of the Deputy Comptroller. This decision was appealed to the Environmental Appeal Board on December 3, 1995.

ISSUES AND EVIDENCE

Issue 1. Water use under CWL 26928

The Licence authorizes use of water in the two dwellings on the McKeown's land "or any two dwellings replacing same but not in any other dwellings".

Several letters submitted by the Appellant document beneficial use of the water up to approximately 1982.

The Appellant stated that water had again been beneficially used in the summer of 1992, two and a half years prior to the licence cancellation, by Henry Weremi. Mr. Weremi camped at the site of an abandoned dwelling on the McKeown's property on three separate weekends and for the course of one week. Conflicting evidence was submitted regarding Mr. Weremi's use of the water, however, the Panel accepts that Mr. Weremi may have used the Appellant's water and works on those occasions.

At issue, however, is whether weekend use by a camper adjacent to the site of a razed dwelling constitutes beneficial domestic use in a replacement dwelling as intended by the Licence.

The Oxford English Dictionary defines 'camp' as 'temporary quarters, formed by tents, vehicles, or other portable or improvised means of shelter occupied by a body of nomads, gypsies, travellers, or parties camping out'. 'Dwelling' is defined as 'a place of residence'. 'Residence' is defined as 'ones usual dwelling place or abode'.

The definitions for dwelling and camp contain a clear distinction that is based on permanence. Mr. Weremi's brief and intermittent use of the site cannot be construed as his usual dwelling place. The Panel finds, therefore, that Mr. Weremi's use of the water in 1992 does not constitute beneficial use as intended under the Licence.

Issue 2. Affidavit of Ernest Brown

The 1993 sworn affidavit of Ernest Brown stated that there had been no works and that water had not been beneficially used under the Licence for 15 years. Letters submitted by the Appellant documented relatively continuous beneficial use of the water under that licence until approximately 1982, 11 years prior to the affidavit. The Appellant also gave evidence that the works had been used as recently as 1992. Water Management Branch personnel found works on the site that were inoperable.

The affidavit also states that there is insufficient water for more than one user. This would deny the licence application of Lester and Shirley Brown, but that application appears to have been made with the assent of Ernest Brown.

The Panel finds, therefore, that the affidavit is inaccurate and should not be considered as credible evidence.

Issue 3. Alleged violations of the *Water Act* by Ernest and Lester Brown

A number of violations of the *Water Act* by Ernest and Lester Brown were alleged by the Appellant. These alleged violations are not a subject before this Panel and will not be addressed in this decision.

Issue 4. Condition of the Works

The Appellant contends that the works were operable until at least the summer of 1992, when Mr. Weremi camped at their property. The works were viewed by Mr. Van Bruggen in May of 1993 and were found to be in a state of disrepair. The works were again viewed during the May, 1995, visit to the site by the Appellant, Third Party, and Water Management Branch, and it was agreed that the works were inoperable.

The Panel finds that the McKeown's works are still at the site of the spring, but that they are in a state of disrepair.

Issue 5. Allegations of Misconduct by Water Management Branch Staff

The Panel reviewed the many allegations of misconduct made by the Appellant and the evidence given to support these allegations and finds that the allegations of misconduct are not supported by the evidence.

One error that was made by Ministry staff was that the date of the May 10, 1993 report of Mr. Van Bruggen was earlier than some of the events which are documented in the report. The Panel attributes this to a clerical error which in no way affects the outcome of the decision.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence and testimony placed before it, whether or not specifically reiterated here.

The *Water Act* has been developed to regulate the use of water in British Columbia and to help to resolve disputes over the use of water. In areas that are short of water it is important that the water be used as efficiently as possible.

Section 20(2) of the *Water Act* states, in part:

“...every licence and all rights under it are subject to cancellation in whole or in part by the comptroller or regional water manager for:

(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.”

Section 20(6) of the *Water Act* states, in part:

"...Where the engineer reports in writing to the comptroller or a regional water manager that he examined the works and found them unfit or unsuitable for use or that he examined the place of use referred to in the licence and found no indication of recent beneficial use of water, the onus lies on the licensee to prove that he has complied with this Act, the regulations and the licence."

Site visits in 1993 and 1995 showed that the works were in a state of disrepair and that there was no evidence of recent beneficial use. The onus, then, lays with the Appellant to prove that she had complied with the *Water Act*.

Beneficial use was documented by the Appellant until 1982. While there may have been some use of the water and works by a camper for a brief period in 1992, the Panel found that this did not constitute beneficial use of the water as intended under the Licence. The Appellant was given a number of opportunities to explore the condition of the works on the site, but did not avail herself of the opportunities provided.

It is, therefore, the decision of this Panel of the Environmental Appeal Board that the appeal be dismissed.

Christina Mayall, Panel Chair
Environmental Appeal Board

March 19, 1997