



# Environmental Appeal Board

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## APPEAL NO. 95/59 - WATER

In the matter of an appeal under section 40 of the *Water Act*, R.S.B.C. 1996, c. 483.

<b>BETWEEN:</b>	Department of Indian Affairs and Northern Development	<b>APPELLANT #1</b>
<b>AND:</b>	Westbank First Nation	<b>APPELLANT #2</b>
<b>AND:</b>	Deputy Comptroller of Water Rights	<b>RESPONDENT</b>
<b>AND:</b>	William Berscheid	<b>THIRD PARTY</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board David Perry, Chair Gary Robinson, Member Helmut Klughammer, Member	
<b>DATE:</b>	July 4, 1996	
<b>PLACE:</b>	Kelowna, B.C.	
<b>APPEARING:</b>	For Appellant #1	Donald McKay, Counsel
	For Appellant #2	Pat Hutchings, Counsel
	For Respondent	Livia Meret, Counsel
	For Third Party	William Berscheid

## APPEAL

This is an appeal brought by the Department of Indian Affairs and Northern Development ("DIAND") and by the Westbank First Nation against orders made by the Deputy Comptroller of Water Rights on October 26, 1995. The three orders under appeal cancel Final Water Licence 12083, Conditional Water Licence 30389 and Conditional Water Licence 22961. All three licences are held under the name of DIAND and permit diversion of water from Marshall Brook for the purposes of irrigation. All of the irrigated area is located on the northerly portion of Indian Reserve No. 9, Tsinstikeptum Reserve.

A third party to this action also participated in the appeal. Mr. William Berscheid is the owner of adjacent land and also holds water licences on Marshall Brook. If licences number 12083 and 22961 are cancelled this will improve the priority of Mr. Berscheid's Conditional Water Licence 62201.

In the same order, Mr. Farrell suspended Conditional Water Licence 22502 which permits diversion of water for domestic use from Marlow Spring. This licence is also held by DIAND on behalf of the Westbank First Nation. This aspect of the order has not been appealed by either the Appellants or the Third Party.

All of the orders made by Mr. Farrell for cancellation were for failure to use the licences contrary to section 20 (now section 23, Water Act, R.S.B.C. 1996 c. 483) of the *Water Act*. (References to the new section number will be made following the appropriate citation.) For ease of reference section 20 is reproduced below:

### **Suspension and cancellation of rights and licences**

20. (1) In this section "licence" includes a permit or an approval under section 7 and "licensee" includes a holder of a permit and a person who has obtained approval under section 7.
- (2) The rights of every licensee under a licence are subject to suspension for any time by the comptroller or a regional water manager, and every licence and all rights under it are subject to cancellation in whole or in part by the comptroller or a 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;
  - (b) failure by the licensee within the time specified to construct the works authorized under the licence;
  - (c) failure by the licensee for 3 years to pay the rentals due to the government in respect of the licence;
  - (d) failure by the licensee for 6 months to pay any water bailiff's fees payable by him;
  - (e) the licensee's failure to comply with this Act or the regulations;
  - (f) the licensee's failure to comply with a term or condition of the licence;
  - (g) the licensee's failure to comply with an order of the comptroller or a regional water manager or an engineer;
  - (h) material misstatement or misrepresentation in the application for the licence or in the information furnished the comptroller or a regional water manager with respect to it; or
  - (i) cancellation or other termination of the licensee's title to the land or mine on which the water is to be used, where the cancellation or termination results from the operation of a statute or the exercise of a statutory authority.
- (3) Three days' notice of the comptroller's or regional water manager's proposal to suspend rights under a licence shall be given to the person exercising the

rights or to the person occupying the land to which the licence is appurtenant and, where the comptroller or the regional water manager considers the matter urgent, the rights may be suspended without a hearing.

- (4) In the case of a licence appurtenant to land, notice of the proposal to cancel the licence shall be sent by registered mail to every registered owner of the land and to every person who has notified the comptroller or a regional water manager that he has an interest in it, but where the land comprises more than 20 parcels notice of the proposal to cancel the licence may be given by registered mail to every person who has notified the comptroller or a regional water manager that he has an interest in the land and by publication in a local newspaper of not less than one insertion each week for 4 consecutive weeks.
- (5) In the case of a licence that is not appurtenant to land, notice of the proposal to cancel the licence shall be sent by registered mail to the person shown in the records of the Ministry of Environment as the holder of the licence and to every person who has notified the comptroller or a regional water manager that he has an interest in the licence.
- (6) If within 60 days after mailing of the notice or the last publication of it an objection to the proposed cancellation is filed with the comptroller or a regional water manager by a person claiming an interest in the licence, the comptroller or a regional water manager shall, on the hearing he considers suitable, determine whether the alleged grounds for cancellation are substantiated and shall make the order he considers proper. Where the engineer reports in writing to the comptroller or a regional water manager that he examined the works authorized under the licence 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.
- (7) The rights of the different licensees under a licence are separable, and fulfillment by a licensee of his or her obligations as a licensee does not prevent or delay the suspension or cancellation of the rights of another licensee.
- (8) Every person in possession of a copy of a licence that has been cancelled shall deliver it to the comptroller or a regional water manager without delay.
- (9) When a licence has been cancelled in part, the comptroller or a regional water manager may issue to the licensee
  - (a) a conditional licence on the conditions he considers advisable; or
  - (b) a new final licence;

but the licensee shall not thereby obtain or retain any right, power or privilege that has been the subject of the cancellation.

## FACTS

There has been a long and unhappy relationship between the Third Party, Mr. Berscheid, and the Westbank First Nation. Mr. Berscheid purchased his property adjacent to the Westbank First Nation Reserve in 1984. As found by a previous hearing of the Environmental Appeal Board in July 1989, Mr. Berscheid purchased his property from a Mr. Ensign believing that all of the water available from Marshall Brook could be used by him for irrigation purposes.

After occupying the property, it came to Mr. Berscheid's attention that, in fact, there were water licences held by Westbank First Nation with an intake point on his property. There were also water licences with intake points on the Indian Reserve.

The 1989 Environmental Appeal Board hearing was held to determine whether or not the same three licences which are before this Panel should be cancelled for lack of use, namely licences number 12083, 22961 and 30389. It was held by then Chair of the Board, Mr. Hunter, that because Mr. Ensign had falsely represented to the Westbank First Nation that only he was entitled to draw water from Marshall Brook, the lack of use was due to this misrepresentation and, accordingly, the licences should not be cancelled. The Board held that

The Board also instructs the Deputy Comptroller of Water Rights to take steps to ensure that the licensees abide by the terms of the licences and observe the statutory rules of precedence. If the matter comes up in the future, the lack of use of the water by the Indian Band prior to 1990 should be ignored. (page 6)

Following the direction of the Board, Mr. Farrell sent notices to Westbank First Nation on August 10, 1989. Mr. Farrell sent the notices to Mr. Steven Kozey, a representative of DIAND who had appeared as a witness at the earlier Environmental Appeal Board hearing. Mr. Farrell in his letter says

the Board has directed me to ensure that the licensees abide by the terms of the licences and observe the statutory rules of precedence. It is my understanding that the Westbank Indian Band's works for diverting, conveying, and distributing water from Marshall Brook must be rehabilitated to properly carry water to the point of use. Therefore, please advise me, in writing, when the works have been upgraded so they can be inspected by staff from the regional office in Penticton. At that time, steps will be taken to ensure that water from Marshall Brook is diverted in accordance with the licence priorities.

According to evidence before this current appeal, the steps requested by Mr. Farrell were never completed by either the Westbank First Nation or by DIAND.

In the interim, relations between Mr. Berscheid and the Westbank First Nation continued to deteriorate. According to evidence before this Board, Mr. Berscheid is a highly inflammatory individual, given to making threats to the personal safety of persons who disagree with him. Mr. Berscheid had earlier severed a pipeline used

by the Westbank First Nation in April of 1988 after giving notice as required under the *Water Act*. Because of perceived injustices in how he was dealt with by DIAND, the Water Branch and by the Westbank First Nation he installed signs on his property in 1992 and 1993 containing grotesque caricatures and inflammatory statements about members of the Westbank First Nation, government officials and politicians. These signs are currently the subject of a complaint before the Human Rights Tribunal.

According to affidavits filed by the Westbank First Nation Mr. Berscheid has repeatedly threatened members of the Nation with physical harm should they enter onto his property.

Mr. Farrell upheld in his orders with respect to Conditional Water Licence 22502 these allegations. He held that

there have been a number of direct and indirect threats, as well as public displays of derogatory comments, directed towards the licensee by Bill Berscheid. These were significant enough to result in complaints to the RCMP and the British Columbia Human Rights Commission.

I find there is justification for the licensee not pursuing its right of expropriation under the circumstances.

It should be noted that Mr. Berscheid has also threatened officials of the Water Branch. In the course of cross-examination, Mr. Cairns gave evidence that on December 1, 1993, Mr. Berscheid said that a carload of people had stopped at his property and that if that ever happens again, heads are going to roll and you (Mr. Cairns) can include yourself in that.

The licences before this Board all concern a point of diversion called P4 which is located in the far northern end of the Tsinstikeptum Reserve. Licence number 12083 provides for works that cross the south-east corner of District Lot 2044 along a series of ditches to permit irrigation of an area of the Reserve directly to the south of District Lot 2044. This same series of ditches is also used by licence number 22961 and licence 30389.

The licence which has been suspended, licence number 22502, has a point of diversion on Marlow Spring at a spot immediately north of District Lot 2044 on Mr. Berscheid's property. Evidence before the Board is that Mr. Berscheid owns a parcel of property consisting of two lots, one immediately to the north of District Lot 2044 and one consisting of a subdivided portion of that same lot.

When the licences under appeal were obtained in the '30s and '40s, the area in question was undeveloped and used for farming purposes. The Board was provided with aerial maps showing District Lot 2044 and the current condition of the property where the right-of-way ditches were once located. The area has now been subdivided and is used for housing. It should be noted that the diversion and ditch system for each of licences number 12083, 22961 and 30389 have been in a state of disrepair for many years. However, given the direction of Mr. Hunter at the

previous Environmental Appeal Board hearing to disregard the lack of use before 1990, there is no need to explore this earlier history of lack of use.

In July of 1993, Mr. Larry Derrickson met with Randy Cairns to discuss the question of the licences. Mr. Derrickson represented the Westbank First Nation and Mr. Cairns was a representative of the Water Branch. The Board heard conflicting evidence as to what occurred at that meeting. Mr. Derrickson said in effect that he was instructed by Mr. Cairns to not enter onto Mr. Berscheid's property because of his unstable history and his predilection for making threats. Mr. Derrickson left the meeting with the impression that any moves to cancel the licences due to lack of use would be put on hold until such time as Mr. Berscheid either sold his property or changed his point of view about entry onto his property.

Mr. Cairns gave evidence that in fact there was a discussion about water licences. However, Mr. Cairns said that he told the Westbank First Nation that they had no authority to enter Mr. Berscheid's property to exercise rights for any water licences until such time as they had obtained an easement or other permission. Mr. Cairns also advised Westbank First Nation that in his view the irrigation lines, namely licence numbers 12083, 22961 and 30389 had more value than the domestic water licence 22502 which had access to Marlow Springs on Mr. Berscheid's property. Mr. Cairns strenuously disagreed that he had agreed to wait before considering any cancellation of licences.

Mr. Derrickson also gave evidence on behalf of the Westbank First Nation that it was his understanding until the eve of this hearing that District Lot 2044 was owned by Mr. Berscheid. It was his view until driving by the area the week before the hearing when he found out that he had been mistaken and that the ditch servicing the three licences under appeal did not cross Mr. Berscheid's property. Before that date in late June 1996, Mr. Derrickson was aware that the diversion point for the three licences was on Indian Reserve land but that he thought the ditch system which permitted the water to travel from the diversion point to the use point crossed Mr. Berscheid's property.

Mr. Berscheid also gave evidence at the hearing. His concern dealt with priority and use of licences that had diversion points on his property. As none of these licences were being appealed before the Board, the Board makes no finding on these issues. However, it was noted at the conclusion of the hearing that Mr. Farrell had undertaken to discuss with Mr. Berscheid his concerns about diversion points and whether or not historical water licences were correct in showing a diversion from Marlow Springs as opposed to Marshall Brook.

## **ISSUES**

Westbank First Nation and DIAND make essentially the same argument. Both parties say that the reason the Westbank First Nation did not make beneficial use of the three licences under appeal is because of the threats from Mr. Berscheid. Both Appellants say that it was reasonable for Westbank First Nation to not attempt to use their licence given the inflammatory behaviour of Mr. Berscheid and the warnings from RCMP and Water Branch officials to not enter onto Mr. Berscheid's property.

The Appellants make a supplementary argument that even though the Westbank First Nation was mistaken in its belief that it was necessary to enter Mr. Berscheid's property to use their licences, there was a duty on Mr. Cairns to advise the Westbank First Nation that they were mistaken. Had they been advised at the July 1993 meeting or subsequently, they could have taken steps to rehabilitate the diversion point and system of ditches allowing them to make beneficial use of these licences.

On behalf of the Water Branch, it is noted that there has been uncontradicted evidence that the diversion point and system of ditches for the three licences under appeal are in a state of disrepair and remain unusable to the date of the hearing. None of the diversion points or works necessary to make use of the water are located on Mr. Berscheid's property. As for an obligation on the part of the Water Branch to advise Westbank First Nation of how they can exercise their rights, the Water Branch notes that there is an obligation on the licensee to establish that their licence should not be cancelled, an onus which neither of the Appellants has met in this case.

The Board is disturbed by the seeming complete inattention to the works necessary to use the licences under appeal by both of the Appellants until the very eve of this hearing. A prior hearing by the Board in 1989 considered exactly this question, i.e. whether or not the three licences under appeal should be cancelled for lack of use. One would have thought that the hearing process itself would have been enough warning to the Appellants that there was a significant danger that the licences would be cancelled for lack of use as is provided for in section 20(2)(a) of the *Water Act*.

Although the hearing itself should have been sufficient warning that the beneficial rights of the water were threatened, subsequent to that date the Deputy Comptroller of Water Rights wrote to the Appellant, DIAND, and specifically advised them on August 10, 1989 that there should be steps taken to upgrade the works necessary to use these licences. There was never any response given to this direction from the Deputy Comptroller.

Mr. Derrickson from the Westbank First Nation says that the reason no steps were taken to rehabilitate the works is because he was told not to by Mr. Cairns in July of 1993. Although there was contradictory evidence given as to what occurred at that meeting, it should be noted that on July 21, 1993, immediately after this meeting, Mr. Derrickson wrote to the Comptroller of Water Rights. In his letter which is reproduced in full it states:

This letter is to seek permission to move our current water licence on Marshall Brook to a more desirable point for better use of the land.

We would like to move the licenced area from property 30-7 (attached map) to property 30-6 (attached map). We are looking at the diversion point for the licence in the northwest corner of 30-6. This would free up more land for agriculture by allowing us access to more usable land. The ground is quite saturated and unusable in the general area of the current licence.

Please feel free to contact me if you require further information on this matter.

The letter was accompanied by a map illustrating the diversion point being present clearly on Indian Reserve land.

This letter does not appear to be consistent with an agreement with the Westbank First Nation to take no steps with respect to exercising their water rights and neither does it support any agreement by the Water Branch to leave aside any question of cancellation of the licences until such time the Berscheid problem simply went away. Rather the letter indicates an active interest by the Westbank First Nation in rehabilitating their water works and taking positive steps to make beneficial use of the water.

In response to this July 21, 1993 letter, Mr. Farrell responded on November 3, 1993 and Mr. Cairns followed up on May 2, 1994 and December 5, 1994 seeking further information. In the last letter of December 5, 1994, Mr. Cairns says "I wish to advise you that I will be preparing recommendations to the Deputy Comptroller on the matters of your desire to change the works under Marshall Brook irrigation licences and Bill Berscheid's request for cancellation of Marshall Brook and Marlow Springs licences. Those recommendations will be complete by December 12, 1994."

The only response received to any of these letters was a brief letter from Mr. Kontic of DIAND "this is just a brief note to inform you that in the letter to DIAND dated November 30, 1994, the Westbank First Nation has stated that they do intend to make a beneficial use of the water provided by all four licences." This appeared in a letter dated December 13, 1994. The course of this correspondence does not support the version of events at the July 1993 meeting as related by Mr. Derrickson. Both the Westbank First Nation and the Water Branch continued to act as if there was active consideration of Mr. Berscheid's request to cancel the licences. However, inexplicably, the only step taken to preserve the licences was the Kontic letter expressing an interest in keeping them.

It should be noted that extensive evidence was lead at the last Environmental Appeal Board hearing with respect to the licences under appeal including the location of the diversion points. Exhibit #5 in the hearing before this Panel contains a sketch drawn onto an aerial photograph showing the boundaries of Mr. Berscheid's property and indicating the boundaries of District Lot 2044. Similar evidence was presented in a sketch prepared for the prior environmental appeal board hearing and overlays placed on aerial photographs again illustrating the boundaries of District Lot 2044, the location of the ditches which service the licences under appeal, the location of Mr. Berscheid's property and outlining the boundaries of Reserve No. 9. All of this evidence makes it amply clear that the ditch systems servicing the water licences under appeal are hundreds of metres distant from the boundaries with Mr. Berscheid's property.

It should also be noted that at the prior environmental appeal board hearing in 1989, representatives of both Appellants appeared at the hearing and gave evidence.



Mr. Derrickson was very frank in his evidence before this Board. Judging from his demeanour, he was slightly embarrassed to advise the Board that he had only found out the boundaries of Mr. Berscheid's property the week before this hearing. The Board finds that he was genuinely unaware of the location of the ditches servicing the water licences under appeal. However, this leaves as a live issue the question as to who is responsible for ensuring that Westbank First Nation is aware of the boundaries of the property surrounding the reserve and what steps are necessary in order to exercise rights to the water licences under appeal.

The Appellants say that there is an obligation on the Water Branch to take steps to ensure that the licensee is aware of the names of the owners of adjoining properties and where the boundaries of those properties are located.

The Board finds that this contention is neither borne out by the *Act* nor by common sense. It was argued particularly by Westbank First Nation that Mr. Cairns should have known that Mr. Derrickson was unaware of the name of the owner of District Lot 2044. And after having ascertained this lack of knowledge, Mr. Cairns should have then taken steps to personally inform Mr. Derrickson of this fact.

The structure of the *Act* is that rights to water are granted by historical usage in priority over other users. There is a competitive use of water and in order to guarantee that a licensee continues to have that beneficial use of water there must be active use. Failure to make that active use means that according to the scheme of the *Act* someone else could make better use of it and accordingly a licence which is not in use will be cancelled. Section 20(2)(a) [23(2)(a)] provides that "the rights of every licensee under a licence...and all rights under it are subject to cancellation in whole or in part by the comptroller or regional water manager for failure by the licensee for three successive years to make beneficial use of the water for the purpose and in the manner authorized under the licence." Section 20(4) [23(4)] provides that notice of the cancellation must be given to the licence holder and section 20(6) [23(6)] allows a licensee to make an objection. If the grounds for cancellation are substantiated then the comptroller may make the order he considers proper.

In this case, neither of the Appellants has taken the slightest amount of care that their licences were being used beneficially. All of the information necessary to make a determination as to whether the ditches and diversion points were located in areas accessible by the Westbank First Nation was available to the Appellants by simple checks at the land title office or by reviewing the water licence maps themselves. In addition, detailed maps and sketches were provided at the first Environmental Appeal Board hearing, which make it amply clear that the Westbank First Nation could have exercised all of their rights under the three licences under appeal without disturbing Mr. Berscheid in any way. Given all of this information available, it is very credible when Mr. Cairns gives evidence in the course of the July 1993 meeting with representatives of the Westbank First Nation that he was unaware that Mr. Derrickson did not know that the ditches supporting the licences crossed District Lot 2044 and that this lot did not belong to Mr. Berscheid.

The Board rejects any argument that there is positive obligation on the Water Branch to inform the licensee of material facts regarding neighbouring landowners. Even if there was such a obligation, the Water Branch has met that obligation by

providing detailed sketch maps and aerial photos in the course of the 1989 EAB hearing.

### ALTERNATE ISSUE

It was argued by the Appellant Westbank First Nation that they have an aboriginal right to water outside of the structure of the *Water Act* and, accordingly, the licences should not be cancelled. The Board had held prior to the commencement of the hearing that it had no jurisdiction to make a finding as to aboriginal rights. That continues to be the position of the Board. However, a supplementary argument was made by the Westbank First Nation that the Minutes of Decision creating Indian Reserve No. 9 granted water from a creek flowing into Okanagan Lake. Westbank First Nation argue that the creek in question was Marshall Brook and accordingly the Minutes of Decision had historical priority over the grant of licences to either Westbank First Nation or to Mr. Berscheid.

The Minutes of Decision dated October 19, 1888 provide "twenty-five (25) inches of water from a creek flowing into Okanagan Lake near the western boundary of the reserve is assigned to the use of the Indians." An accompanying map shows a creek labelled as Smith Creek on the far western edge of Indian Reserve No. 9. It is to be noted that a lot identified as Lot 434 or Allison's Ranch is located to the immediate south-east of the Indian Reserve.

Comparing the location of Smith Creek to sketches provided at the hearing, an illustration of the reserve prepared by Mr. Cairns shows a Smith and Tomat Creek entering into Westbank Creek on the far western edge of the reserve. Given no other information, this would appear to be the same creek illustrated on the Minutes of Decision.

However, it is also of interest to note that there is currently a lot of the same shape located in the south-east corner of the Indian Reserve marked Lot 434. Running through this lot is a creek named McDougall Creek located on the eastern edge of the Reserve. This is the only creek on the reserve that comes anywhere near Marshall Brook. It should be noted in passing that Marshall Brook does not connect with McDougall Creek but, in fact, disappears into the ground at some point downstream from diversion point P4 for the licences under appeal.

Given that McDougall Creek is certainly not the source of water referred to in the Minutes of Decision, the Board finds that the Minutes of Decision are of no assistance in determining priority on Marshall Brook. Any rights that the Westbank First Nation has according to its Minutes of Decision are not affected by cancellation of the water licence under appeal.

### CONCLUSION

The Appellants argue that there was no distinction between water licence 22502 and the licences under appeal. They said that the findings of the Deputy Comptroller of Water Rights that it was reasonable to not enter onto Mr. Berscheid's property to exercise rights under licence 22502 also made it reasonable to not exercise rights under the licences under appeal.

There is, however, a vital distinction between these two classes of licences. The licences which have been cancelled have nothing to do with Mr. Berscheid's property. The diversion point for the licences is on Indian Reserve No. 9. The system of ditches leaves the diversion point and crosses District Lot 2044, a property which is owned by unnamed third parties.

District Lot 2044 now contains a small and growing subdivision. It would not be possible for the current drainage ditch servicing the licences under appeal to pass through a subdivision of houses. Expensive renovations would be required to both the diversion point and the lengthy series of ditches before these licences could be rehabilitated. It is clear that there has been no attempt made whatsoever to rehabilitate these licences since the date of the last Environmental Appeal Board hearing. The Board is forced to conclude that given that Mr. Derrickson did not even visit the site of the ditches until the week before the hearing, at which time he discovered that the ditches did not cross Mr. Berscheid's property, that these licences have simply been a very low priority for both of the Appellants. It is only when steps have been taken a second time to cancel the licences that a minimum amount of due diligence was carried out to determine whether the licences were in fact usable in their current form.

Accordingly, the Board rejects the arguments of the Appellants and upholds the decision of the Deputy Comptroller of Water Rights.

David Perry, Panel Chair  
Environmental Appeal Board

June 5, 1997