



Environmental Appeal Board

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DECISION NO. EAB-WCA-001(b)

In the matter of an appeal under the *Water Users' Communities Act*, RSBC 1996, c. 48.

BETWEEN:	The Nature Trust of British Columbia	APPELLANT
AND:	Comptroller of Water Rights	RESPONDENT
AND:	Allendale Water Users' Community	THIRD PARTY
BEFORE:	A panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on December 1, 2021	
APPEARING:	For the Appellant:	Tony Crossman, Counsel Don MacLeod, Counsel
	For the Respondent:	Kaitlyn Chewka, Counsel Alandra Harlinton, Counsel
	For the Third Party:	Ian Mavety

APPEAL

[1] This appeal addresses whether the Nature Trust of British Columbia ("NTBC") must contribute money to the Allendale Water Users' Community ("Allendale"), to help cover expenditures that Allendale estimated it would make, from July 20, 2018 to December 31, 2018.

[2] All parties agree that NTBC was a member of Allendale until April 20, 2018. NTBC says it withdrew from Allendale on that date, but Allendale and the Comptroller disagree. On August 24, 2018, Allendale issued an assessment roll (the "Assessment Roll") to what it considers were its members, including NTBC. According to the Assessment Roll, NTBC must pay money to Allendale, to help cover its projected expenses, from July 20, 2018 to December 31, 2018.

[3] After receiving the Assessment Roll, NTBC appealed it to the Comptroller of Water Rights (the "Comptroller"), who works for the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). On December 1, 2020, the Comptroller issued a decision (the "Decision"), dismissing NTBC's appeal and confirming the Assessment Roll.

[4] NTBC appealed the Decision to the Environmental Appeal Board (the "Board"). This decision addresses that appeal.

[5] In this appeal, the Board has the following abilities under section 105(6) of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "WSA"):

105 (6) On appeal, the board may:

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

INTRODUCTION

Legislative Overview

[6] Allendale is a water users' community. Under the *Water Users' Communities Act*, R.S.B.C. 1996, c. 483 ("WUCA"), water users' communities are public corporate bodies incorporated by the Comptroller. Under section 51 of the *WUCA*, the Comptroller may incorporate a group of 6 or more water licensees into a water users' community. By designating a group of water licensees as a water users' community, the Comptroller allows the community, as one body, to:

- acquire, hold, and control property and water licences;
- acquire, construct, hold, maintain, improve, replace, and operate works; and
- levy and enforce assessments on its members.

[7] The members of a water users' community may participate in governance of the community and must contribute financially to the community, through assessments. The assessments may be based on estimates of future financial liabilities, as is the case here.

[8] Voting rights and liability to pay assessments are apportioned among members based on the proportion of their interests in the water users' community. Section 54(1) of the *WUCA* provides that members' interests in their water users' community is generally proportionate to the maximum amount of water each member is entitled to divert and use under the licences incorporated into the water users' community. Section 54(2) provides that this method of calculating the respective interests of members may be changed by a majority vote in a general meeting of the water users' community. In this case, Allendale's members have not voted to change the method of calculation, and the default method contained in section 54(1) applies.

[9] Managers are appointed to run the business of water users' communities, including levying assessments on members through assessment rolls. Managers of water users' communities are initially appointed by the Comptroller, but subsequently as a matter of self-governance by the water users' community.

[10] The *WUCA* gives members of communities the right to appeal a manager's assessment to the Comptroller.

[11] Section 100.1 of the *WUCA* states that certain sections of the *WSA* apply for the purposes of the *WUCA*, including section 105 of the *WSA*. Under section 105(1) of the *WSA*, certain orders resulting from an exercise of discretion of the Comptroller may be appealed to the Board. The Decision confirming the Assessment Roll is such a decision.

Factual Background

[12] Allendale was incorporated as a water users' community in 1972. It originally included six water licensees, who shared four water licences.¹ The certificate of incorporation has been repeatedly amended or recalled and reissued by the Comptroller, to reflect changes in the makeup of the water licences and licensees that comprise Allendale. The most recent recall and re-issue of Allendale's certificate of incorporation is dated March 22, 1999, and lists eleven water licences and seven licensees that comprise Allendale. One is held by Allendale and is for communal water storage, and the other ten are for the diversion (or rediversion) of water for use in irrigation.

[13] Allendale's water licence authorizes the storage of water in Clark Meadows, Little Clark Lake, Big Clark Lake, and Allendale Lake. Some or all of this storage is possible because one or more reservoirs have been created by two dams (the "Dams"). The Dams are deteriorating and must be repaired or decommissioned.

[14] NTBC became a member of Allendale in 1993, when it acquired one of the licences referred to in Allendale's certificate of incorporation. Between 1993 and 2000, NTBC acquired a total of five conditional water licences (the "Licences") referred to in Allendale's certificate. The Licences were appurtenant (or legally attached)² to the parcels of land that NTBC acquired. NTBC says that three of the Licences were referred to in Allendale's certificate at its incorporation in 1972 (the "Original Licences"). The Licences allow the withdrawal of water from Allendale Lake.

[15] NTBC had also secured the right to have another member of Allendale, Thomas Ranches Ltd., ask the Comptroller to transfer to NTBC a sixth water licence (the "Thomas Licence") that was referred to in Allendale's certificate. NTBC was to request the transfer by November 30, 2003, but it did not do so until May 30, 2005. The Thomas Licence was not transferred to NTBC. The Thomas Licence remained appurtenant to land owned by Thomas Ranches Ltd.

¹ While NTBC asserts that there were originally six water licences comprising Allendale, a review of documentation from the founding of Allendale confirms the facts as described in this decision. Nothing in this decision turns on the distinction in any event.

² Under section 20(1) of the *WSA*, a water licence must specify an appurtenancy that consists of land, a mine, or an undertaking, or any combination of those things. Under section 25(2) of the *WSA*, an owner conveying or otherwise disposing of land, a mine or an undertaking to which a licence is appurtenant must give written notice to the Comptroller or a water manager before completing the disposition.

[16] Water rights granted under some or all of the Licences, as well as the Thomas Licence, were used until 2006. Before then, NTBC paid its assessments levied by Allendale, in respect of both the Licences and the Thomas Licence. NTBC continued to do so until 2016, paying \$41,183.10 despite not beneficially using any of the water rights granted in the Licences or the Thomas Licence. According to NTBC, it does not have the works required to withdraw water from the Allendale Lake.

[17] Allendale did not keep records of the amount of water stored, released for irrigation, and remaining in its reservoir(s) prior to 2015. According to Allendale's manager, Ian Mavety,³ after 2014, six hectares of formerly fallow lands were converted into vineyards that used and were maintained by water withdrawn through licences listed in Allendale's certificate. As a result, Mr. Mavety says, water usage was greater starting in 2015 than it had been previously.

[18] Allendale says that, from 2015 to 2020, all its members except NTBC used their full share of water for irrigation. Allendale says, for all those years except 2019, there was more water remaining in its reservoir than was allowed to be diverted under NTBC's Licences. In 2019, 79% of NTBC's allotted water remained available in the reservoir. According to Mr. Mavety, this was because of lower-than-normal water volumes being available due to an unusually small snowpack from the preceding winter.

[19] On October 5, 2017, NTBC applied to the Ministry to abandon three water licences: two of the Licences and the Thomas Licence.⁴

[20] On March 14, 2018, NTBC advised a representative of the Ministry as well as Mr. Mavety that it wished to change the formula by which voting rights and financial obligations were calculated in Allendale. Mr. Mavety responded that this proposal should be raised in a meeting of Allendale's members, so that it could be put to a vote. On April 10, 2018, NTBC reiterated its request to Mr. Mavety.

[21] On April 11, 2018, Mr. Mavety emailed Allendale's members, calling for a meeting on April 25, 2018, to discuss NTBC's proposal. Mr. Mavety requested that NTBC provide further details of its proposal by April 20, 2018.

[22] On April 20, 2018, NTBC provided further details, as requested, and advised that it wished to withdraw from Allendale, effective immediately.

[23] On April 25, 2018, Allendale met to vote on NTBC's proposal to change the method by which the members' interests were calculated. The motion failed. NTBC's email saying it wanted to withdraw from Allendale was not discussed at the meeting.

[24] On May 29 and 30, 2018, NTBC applied to the Ministry to abandon its three remaining Licences.

³ Mr. Mavety became the manager of Allendale on or around October 13, 1992.

⁴ Section 31(1) of the *WSA* provides that on application by the licensee, the Comptroller or a water manager may approve the abandonment of all or part of the rights held under the licence, subject to prescribed terms and conditions and on the terms and conditions the decision maker considers advisable.

[25] On August 24, 2018, Allendale issued the Assessment Roll. The Assessment Roll assessed all members, in total, \$96,260, of which \$1,260 was for the operation of works and \$95,000 was for the acquisition, construction and replacement of works. Allendale included NTBC in the Assessment Roll, as a member, and required that NTBC pay Allendale in respect of estimated future expenses, as authorized under the *WUCA*. NTBC's calculated share of the Assessment Roll was 41.38% (or \$39,830.46). The other three members of Allendale have proportions of 30.1%, 18.06%, and 10.48%. The Assessment Roll also assessed NTBC \$12,386.40 in arrears, for an overall total to NTBC of \$52,216.86.

[26] On September 10, 2018, counsel for NTBC appealed the Assessment Roll to the Comptroller⁵, saying that NTBC was not liable to pay because of section 59(3) of the *WUCA*. That section provides that a purchaser of land to which water is conveyed through works controlled by a water users' community is liable for the assessments and debts of the water users' community incurred after purchasing the land to the same extent as an original member, "unless and until the purchaser notifies the manager that he or she does not wish to be a member of the water users' community."

[27] On December 20, 2018, a water manager with the Ministry, Mr. Reilly, wrote to NTBC and stated that the Thomas Licence is appurtenant to land owned by Thomas Ranches Ltd., not NTBC. Mr. Reilly added that, as NTBC's liability calculated in the Assessment Roll was based on calculations including the Thomas Licence, NTBC's liability to Allendale should be 33.48%. This letter also discussed other issues not relevant to this appeal, including asking for more information regarding NTBC's applications to abandon its Licences.

[28] Over the months that followed, NTBC wrote to Mr. Reilly and met with the Comptroller and other Ministry staff. NTBC argued that it had been paying more than its share of Allendale's expenses, both because its water was being used without authorization by other members of Allendale and because not all of the Licences formed part of Allendale. NTBC also argued that it had withdrawn from Allendale on April 20, 2018, before the Assessment Roll was issued.

[29] During this period of communication between NTBC and the Comptroller, on April 16, 2019, Thomas Ranches Ltd. wrote to the Comptroller and asked to abandon the Thomas Licence.

[30] The communication during that time also included a May 14, 2019 letter from Dr. Jasper Lament, the Chief Executive Officer of NTBC, to Mr. Reilly. It reads, in part:

NTBC also holds a sixth water licence (C110854), which was given by Thomas Ranches Ltd. in approximately 2005 ... The appurtenant lands ... are still owned by Thomas Ranch. However, NTBC has been paying the AWUC [Allendale] fees and government rents ... since approximately 2006.

⁵ Under section 57(1) of the *WUCA*, a member may appeal the assessment that the manager made against them to the Comptroller.

[31] On December 1, 2020, the Comptroller issued the Decision. It states that he had completed an investigation of the Assessment Roll in accordance with section 57(2) of the *WUCA*. The Comptroller concluded that NTBC was:

...liable for the assessment, as [NTBC] was a member of [Allendale] at the time the Assessment was issued. Section 59(2) and (3) do not apply to [NTBC]'s membership in [Allendale] because [NTBC] has not transferred their interest in land to which their water licences are appurtenant.

[32] The Comptroller confirmed that NTBC was liable for 41.378% of the Assessment Roll, finding that NTBC was financially responsible for the Thomas Licence. In reaching that conclusion, the Comptroller reasoned:

... [the Thomas Licence], is not appurtenant to land owned by [NTBC], but is appurtenant to land owned by Thomas Ranches Ltd. Inc. No. 42894. The Comptroller of Water Rights office sought clarification on this issue and received confirmation of responsibility for [the Thomas Licence] in a letter from Jasper Lament, Chief Executive Officer, of [NTBC] dated May 14, 2019.

[33] Subsequently, according to Allendale, other members of Allendale completed a project to transition from use of surface water to use of groundwater (well water) to irrigate their lands. These users applied to abandon their water licences which are constituent to Allendale.⁶

Appeal

[34] NTBC initially applied to the Board to appeal three "decisions":

1. the Decision, which dismissed NTBC's appeal of the Assessment Roll and confirmed that Assessment pursuant to section 57(2) of the *WUCA*;
2. the Comptroller's failure to acknowledge NTBC's withdrawal from Allendale on April 20, 2018; and
3. the Comptroller's failure to exercise his discretion and make a decision on water licence abandonment applications that NTBC submitted pursuant to section 31 of the *WSA* on October 5, 2017, May 29, 2018, and May 30, 2018.

[35] In a letter dated January 12, 2021, the Board invited Allendale to participate in the appeals as a Third Party.

[36] In a preliminary decision dated April 26, 2021 (Decision No. EAB-WCA-20-A001(a)), I determined that the second "decision" appealed by NTBC was, in fact, a finding of fact that comprised part of the Decision. I reserved deciding whether the Board has jurisdiction over the third "decision" appealed by NTBC, pending additional evidence and submissions.

⁶ NTBC has noted that Allendale did not provide evidence to corroborate this information, which was provided in an affidavit by Mr. Mavety. Nothing turns on this information, as discussed below, so the question of corroboration will not be discussed further in this decision.

[37] The appeal of the third “decision” is proceeding, with the agreement of the parties, as a separate appeal to be decided after this one.

[38] In this appeal, NTBC submits that the Comptroller made errors in the Decision confirming the Assessment Roll. Specifically, the Comptroller erred in determining that NTBC was still a member of Allendale and was responsible for the Thomas Licence. NTBC seeks the following relief from the Board:

1. an order that the appeal is allowed, the Decision is set aside, and NTBC’s withdrawal from Allendale is recognized;
2. an order that NTBC withdrew from Allendale on April 20, 2018;
3. an order that NTBC has no liability to Allendale as of April 20, 2018;
4. an order that NTBC has no liability to Allendale for the Assessment Roll;
5. a declaration that NTBC has not beneficially used water since 2006;
6. a declaration that NTBC’s proportional interest in Allendale should be reduced to zero because it has not used water since 2006;
7. an order requiring the Comptroller to reassess NTBC’s required contributions to Allendale for the years prior to 2018;
8. in the alternative, an order that the Decision be sent back to the Comptroller with the direction that NTBC’s withdrawal from Allendale is recognized;
9. in the further alternative, an order that the Decision be sent back to the Comptroller with the direction that NTBC’s proportional interest in Allendale is limited to the Original Licences;
10. in the further alternative, an order that the Decision be sent back to the Comptroller with the direction that NTBC’s proportional interest in Allendale is 33.48%; and
11. such further or other order that is appropriate.

[39] NTBC and the Comptroller provided submissions with respect to the appeal. Allendale’s submissions only address factual information, some of which is summarized above.

[40] The Comptroller submits that he did not err in concluding that NTBC did not withdraw from Allendale on April 20, 2018, and in confirming the Assessment Roll. The Comptroller takes no position on the request to reduce NTBC’s proportional interest by 7.898% to account for the Thomas Licence, if Dr. Lament’s May 14, 2019 advice is incorrect, but the Comptroller says the Board should not make the declaration sought by NTBC, as the appropriate proportional interest should be determined in accordance with the *WUCA*.

ISSUES

[41] The issues I must decide are:

- whether NTBC is liable for any portion of the Assessment Roll;
- if NTBC is liable for any portion of the Assessment Roll, should its liability be reduced; and

- the appropriate remedy(ies) to grant to NTBC.

[42] In its reply submissions, NTBC stated that Allendale acknowledged that its members used up to 21% of NTBC's annual allotment of water under the Licences. NTBC stated that this was a benefit resulting to the other members of Allendale, for which no compensation had been offered to NTBC.

[43] These comments are not relevant to my analysis but deserve a response from the Board. The Licences are not a guarantee that the volumes of water granted by those licences will be available in any given year. NTBC's membership in Allendale is no guarantee of that either. NTBC's characterization of the reduced water supply in 2019 is, in effect, that Allendale (or its other members) ought to offer such a guarantee. The water was available for use by all members, to the extent that it was available. Simply because NTBC chose not to use any of its share of water that year does not raise concerns about liability or improper use by the other members of Allendale.

DISCUSSION AND ANALYSIS

Is NTBC liable for any portion of the Assessment Roll?

NTBC's Submissions

[44] NTBC says that Allendale can only levy assessment rolls on its members, and NTBC withdrew from Allendale on April 20, 2018. NTBC says that the Comptroller, in confirming the Assessment Roll, made two errors.

[45] First, NTBC says the Comptroller failed to recognize that section 59 of the *WUCA* sets out the liability of members for their share of a water users' community's expenses, and when those members cease to be liable. NTBC says that the *WUCA* allows for individuals to join water users' communities, and for members to withdraw. In support of this argument, NTBC references section 59(3) of the *WUCA*. It reads:

59 (3) A purchaser of land to which water is conveyed through works controlled by a water users' community is liable for the assessments made and the debts of the water users' community incurred after his or her purchase of the land to the same extent as an original member, unless and until the purchaser notifies the manager that he or she does not wish to be a member of the water users' community.

[46] NTBC argues that, by virtue of section 59(3) of the *WUCA*, NTBC was able to withdraw from Allendale by communicating its desire to do so to Mr. Maverty on April 20, 2018.

[47] NTBC says that "purchaser of land" is not defined in the *WUCA*, and as such the plain and ordinary meaning of those words should apply, unless other contextual factors alter that meaning. NTBC says that no such factors exist. Because NTBC purchased land to which the Licences were appurtenant between 1993 and 2000, it was a "purchaser of land" as described in section 59(3) of the *WUCA*.

[48] NTBC says that there is no time limit within which a “purchaser of land” must withdraw from a water users’ community. It does not matter that NTBC had not transferred any interest in the land before it communicated that it wished to withdraw from Allendale on April 20, 2018.

[49] NTBC says that the applicable principles of statutory interpretation come from *Rizzo v. Rizzo Shoes Ltd. (Re)*, [1998] SCR 27 [*Rizzo*]. NTBC summarizes those principles as follows:

1. The words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of legislature.
2. The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative intent.
3. Any statute characterized as conferring benefits must be interpreted in a broad and generous manner.
4. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

[50] NTBC also relies on three propositions that it says appears in *Sullivan on the Construction of Statutes*, Ruth Sullivan, 6th ed. (Markham: LexisNexis Canada, 2014) (“*Sullivan*”):

1. It is presumed that the ordinary meaning of legislative text is the meaning intended by the legislature. In the absence of a reason to reject it, the ordinary meaning prevails.
2. Even if the ordinary meaning is plain, courts must take into account the full range of relevant contextual considerations including purpose, related provisions in the same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.
3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

[51] According to NTBC, section 59 of the *WUCA* was first enacted in 1914⁷ and was then amended to “substantially its current form” in 1918 by *An Act to Amend the “Water Act 1914”*, S.B.C. 1918, c. 98 [the “*Amendment Act*”]. Section 39(11) of the *Amendment Act* provides:

- 39 (11) Every member of a water-users’ community who transfers or disposes of the lands upon which his membership is based, and who gives notice thereof in writing to the manager of the water-users’ community, shall thereupon cease to be a member; but he shall remain personally liable

⁷ In the *Water Act*, S.B.C. 1914, c. 81 (the “1914 *Water Act*”).

for all debts and obligations of the water-users' community incurred prior to the giving of such notice, to the like extent to which he was liable therefor immediately prior to his ceasing to be a member.

[52] NTBC referenced a *Victoria Herald* newspaper article from March 7, 1918. That year, the provisions now contained in section 59 of the *WUCA* were amended, after their introduction in 1914. According to the article, this amendment was intended to "... enable water communities to be formed with a view to permanency with a proper organization for management." The article also noted that then-Minister of Lands T. D. Pattullo, who was to introduce the amendment, had investigated conditions:

... in the dry belt and particularly where the farmer was dependent for his water upon the operation of water carrying companies, many of whom were in more or less straightened circumstances, and the water supply in jeopardy. This is one of the conditions Mr. Pattullo has set out to cure in the Bill now before the House.

[53] The author of the newspaper article also states:

The principle aimed at in amendments to any sections that have to do with irrigation is co-operation, and, in particular, the common use of ditches wherever such is possible among several users and to, as far as possible, simplify procedure for the small land-holder.

[54] Referencing a December 31, 1914 report (the "1914 Report") of the Water Rights Branch, NTBC submits that the legislature, in amending the 1914 *Water Act*, was "... attempting to provide some level of order to conserve water and ensure that those who have the right to use the water also have a say in how it was managed."

[55] The 1914 Report also states that legislative changes pertaining to irrigation "... have filled a long-felt need. The effect has been to encourage co-operation not only among small users, but in large communities."

[56] Noting that the legislative scheme governing water users' communities predates modern corporate law,⁸ NTBC argues that water users' communities are more like partnerships. NTBC notes that section 29 of the *Partnership Act*, R.S.B.C. 1996, c. 348 (the "*Partnership Act*"), allows for any partner to dissolve a partnership that has does not have an agreed duration, at any time, on giving notice to all other partners. NTBC maintains that the purpose of section 29 of the *Partnership Act* is to "... respect the ability of partners to make their own contract as to how they will do business together as a firm and ... how they will end their business relationship."⁹ NTBC says this is consistent with the wording of section 59(3) of the *WUCA*, and with modern corporate law principles.

[57] NTBC argues that it entered into a joint partnership with the other members of Allendale, based on its Certificate of Incorporation. The certificate does not have

⁸ See Official Report of Debates of the Legislative Assembly (Hansard), 40th Parl, 2nd Sess, Vol 11, No 4 (29 April 2014), at 1750, where the Hon. M. Polak, explained that it was important to keep the *WUCA* separate from the *WSA*.

⁹ *William Murray Law Corporation v. Christ*, 2013 BCPC 188, at paragraph 34.

any provisions that address or restrict withdrawal from the water users' community, and no party has argued there is any other agreement on that issue.

[58] NTBC says that, by confirming the Assessment Roll, the Comptroller assigned debts to NTBC that were incurred after NTBC communicated that it wished to withdraw from Allendale. NTBC says this is inconsistent with a reasonable and plain language interpretation of section 59(3) of the *WUCA*, and with modern corporate law principles. NTBC adds that the Comptroller's decision creates an absurd outcome by effectively preventing NTBC from withdrawing from Allendale. The outcome is absurd because it violates the "... fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest."¹⁰ This interpretation does so because it would allow parties to form a water users' community by declaring an intention to do so, but deny those same parties the right to withdraw by declaring that intention. This is particularly absurd in this case, where NTBC is not even using any of the water rights contained in the Licences. NTBC says it is unfair and unreasonable for the Comptroller to say that NTBC is liable for a share of Allendale's expenses, based on a proportion of water that NTBC is not using.

The Comptroller's Submissions

[59] The Comptroller agrees with NTBC that statutory interpretation lies at the heart of this appeal, and the Board must apply the modern approach to that exercise. The Comptroller describes the modern approach by saying that "... the words of an Act [must] be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".¹¹ However, the Comptroller disputes NTBC's interpretation of the *WUCA* as a whole and section 59(3) specifically.

[60] The Comptroller notes that removing a member or amending a certificate of incorporation is not listed as a power of water users' community under section 52 of the *WUCA*. Neither is it within the power of a manager, whose powers are listed at section 56. In order to remove a member of a water users' community, the certificate of incorporation must be amended under section 61 of the *WUCA*. That section provides:

61 (1) The Comptroller may at any time amend the certificate of incorporation of a water users' community in any respect or may recall the certificate and issue another in its place and, unless expressly provided in the amending or new certificate, the amendment, recall or reissue does not impair the assets, rights, claims and financial obligations of the water users' community.

(2) The comptroller may at any time cancel the certificate of incorporation of a water users' community and make the disposition of the assets of the water users' community that to the comptroller appears equitable, and unless an appeal is taken to the appeal board from the comptroller's

¹⁰ Quoting from *Bhasin v. Hrynew*, 2014 SCC 71, at para. 76.

¹¹ The Comptroller references *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, in describing the modern approach to statutory interpretation.

order and the appeal is allowed, the water users' community is dissolved as soon as the time for appealing has expired.

[61] Under section 61, the Comptroller may "at any time" amend the certificate of incorporation "in any respect" or "recall" the certificate and issue another in its place. The Comptroller says this process accords with the legislative scheme as a whole: it is the Comptroller who creates the water users' community by incorporation under section 51, and it must be the Comptroller who modifies or cancels it under section 61.

[62] Addressing section 59(3) of the *WUCA*, the Comptroller submits that it says nothing about a member withdrawing from a water users' community. The ordinary meaning of "purchaser" is "the person who buys something"¹² or "one who obtains property for money or other consideration; a buyer".¹³ The Comptroller says that NTBC asserts that someone who buys land can indefinitely be considered a "purchaser" under section 59(3) of the *WUCA*. This ignores that the *Water Act*, R.S.B.C. 1996, c. 483 (the "*Water Act*"), which was in place when *WUCA* became law, already had a definition that represented non-expiring ownership in land: an owner.

[63] Section 1 of the *Water Act* defined an "owner" as "... a person entitled to possession of any land, mine or undertaking in British Columbia, and includes a person who has a substantial interest in the land, mine or undertaking."

[64] The Comptroller says this definition is "substantially similar" to the current definition of "owner" that appears in section 1 of the *WSA*:

"owner", in relation to land, a mine or undertaking in British Columbia, means a person who

- (a) is entitled to possession of the land, mine or undertaking, or
- (b) has a substantial interest in the land, mine or undertaking;

[65] Furthermore, the Comptroller says that, under the *Water Act*, an owner of land could be issued a water licence, and section 7(a) of that Act specified that a water licence passed along with the land to which it was appurtenant, upon any disposition of that land. The same holds true today under section 25 of the *WSA*, which also requires that the owner disposing of land to which a licence is appurtenant must notify the Comptroller or a water manager before completing the disposition.

[66] The Comptroller says NTBC's argument conflates the meaning of "purchaser" with "owner". The Legislature took the time to define "owner" but did not use it in section 59(3). NTBC would have the Board change the meaning of the section by using the meaning of "owner" where it is not written. The Comptroller says this is

¹² See the definition from Cambridge Dictionary, available online at <https://dictionary.cambridge.org/dictionary/english/purchaser>.

¹³ See Black's Law Dictionary (9th Edition, 2009; Thompson Reuters).

not permissible, as the Board should only interpret the words in the section, not add new ones to it.¹⁴

[67] The Comptroller adds that section 160(12) the 1914 *Water Act* specified, upon providing notice of a disposition of a land or mine to which a water licence is appurtenant, or who cancels or abandons a water licence, "... shall cease to be a member of the community ...", although that person's prior debts remain. This section was amended by section 39 of the *Amendment Act*. That section limited those who would cease to be a member upon giving notice to their water community's manager to those who had transferred or disposed of the lands upon which their membership was based.

[68] Additionally, the Comptroller says that the context of the *WSA* supports his position. He notes that section 59(2) allows for the fair apportionment of expenses between an "owner" (or member of a water users' community) disposing of land and the purchaser of land. That section says:

59 (2) On disposing of the land to which is appurtenant the licence on which his or her membership is based and notifying the manager, a member may limit his or her liability for the debts of the water users' community to those incurred before the notice was given.

[69] The Comptroller emphasizes that this does not allow a member to withdraw from a water users' community upon giving notice to a manager.

[70] The Comptroller says it is not necessary to make analogies to partnerships. Water users' communities are a legislated scheme. The authority to create and amend them vests with the Comptroller. Sections 51 and 61 of the *WUCA*, respectively, grant to the Comptroller the authority to create and to amend or recall (and potentially reissue) a water users' community's certificate of incorporation. The Comptroller concedes that some language in the *WUCA* needs to be updated, but the scheme relies on water users' communities having certificates of incorporation that accurately reflect their memberships. The Comptroller says the exercise of his functions under the *WUCA* require up-to-date certificates of incorporation, and NTBC's position would mean that members could withdraw without ensuring that certificates of incorporation are kept up-to-date.

[71] The Comptroller says that NTBC did not expressly request that Allendale's certificate of incorporation be amended to remove NTBC as a member. Absent an explicit request, the Comptroller says it was not incumbent upon him to amend the certificate of incorporation.

NTBC's Reply

[72] NTBC says the Comptroller's argument makes a member of a water users' community synonymous with an "owner" and "licensee". NTBC says the Comptroller's argument is that a "purchaser" under section 59(3) is not the same as an "owner". By extension of this rationale, a "purchaser" cannot be a member. NTBC says this interpretation is inconsistent with section 59(3), as it equates a

¹⁴ See *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at para. 27.

purchaser's liability to a water users' community to that of the original owner. Functionally, that section assumes that purchasers will be owners, but distinguishes purchasers from original owners because the latter have had the ability to influence the expenses of their water users' community and the former would not have had that ability.

[73] NTBC also argues that, while section 11 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, says that a heading of a provision is not part of an enactment, the courts have read and relied upon headings when interpreting a statute. Courts have also held that provisions are presumed to relate to one another in some way, when they are grouped together.¹⁵

[74] In this case, section 59 of the *WUCA* has the heading "Liability for assessments" and its various subsections address the general liability of members of water users' communities and how members can limit their liability when disposing of land they previously owned. NTBC argues that section 59(2) contemplates that a member's liability to their water users' community continues even after disposing of land—and thereby ceasing to be an "owner" under the *WSA*. This means that one does not need to be an "owner" in order to be a member of a water users' community; "member" is a broader term.

[75] NTBC argues that section 59 of the *WUCA*, when read as a whole, says that a member is ordinarily liable to their water users' community, unless and until they limit their liability. A purchaser joining a water users' community can limit their liability at any time, while an original member can limit their liability after disposing of their property.

[76] NTBC also notes that section 54(1) of the *WUCA* defines the respective interests of members of a water users' community, proportionate to the maximum quantities of water they can divert and use. After selling their land, members have no entitlement to use water, and so no interest in the water users' community, and no liability to it.

[77] NTBC says that even if it is still a member of Allendale, it may not be liable to pay any part of the Assessment Roll. Noting that section 59(3) of the *WUCA* says that a member's liability continues "... unless and until the purchaser notifies the manager that he or she does not wish to be a member of the water users' community ..." [emphasis added in NTBC's submissions], NTBC says it did so in the letter of April 20, 2018.

[78] NTBC also argues that, if the Board accepts the Comptroller's argument, a member's liability to a water users' community would continue after notifying a manager that they did not wish to remain a member, until the Comptroller was able to change or reissue the certificate of incorporation. NTBC says this is inconsistent with the wording in section 59(3) of the *WUCA*.

[79] NTBC says that common law rules of partnership should apply to water users' communities, unless clearly and unambiguously changed by the Legislature. Where

¹⁵ See *Jacobs v. Laumaillet*, 2010 BCSC 1229, at paragraph 31.

such changes have been made, they must be constructed as narrowly as possible.¹⁶ At common law, a partnership is terminated by the overt act of a partner, and the April 20, 2018 letter was an overt act. Under the *WUCA*, however, a member can prevent the accumulation of liability to a water users' community by informing the manager of that community that they (the member) no longer wish to be part of it.

[80] Lastly, NTBC asserted in its reply submissions that Allendale had never levied an assessment roll before 2018, and only did so after NTBC notified it that NTBC no longer wished to be a member of Allendale. Allendale was also aware that NTBC was not using the water authorized to be diverted and used in its various licences, and still sought to have NTBC pay 41.28% of the costs for works that would provide no use or benefit to NTBC.

The Panel's Findings

[81] I agree with NTBC and the Comptroller that deciding the first issue involves statutory interpretation. There is no dispute that the appropriate approach is the modern one set out in Supreme Court of Canada decisions cited by NTBC and the Comptroller. This requires that I read the words of this section "... in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, its objects, and the intention of legislature", as described by NTBC. I am to avoid interpreting this section in a way that produces absurd consequences, and I am to interpret the *WUCA* in a broad and generous manner, insofar as it grants rights.

[82] NTBC suggests there are two reasons why it has no liability toward Allendale, as far as the Assessment Roll is concerned: that it ceased to be a member as of April 20, 2018; and, that it limited its liability, to end on that date. Both assertions rely on section 59(3) of the *WUCA*. Although that subsection has already been included in this decision, I do so again for convenience:

59(3) A purchaser of land to which water is conveyed through works controlled by a water users' community is liable for the assessments made and the debts of the water users' community incurred after his or her purchase of the land to the same extent as an original member, unless and until the purchaser notifies the manager that he or she does not wish to be a member of the water users' community.

[83] Section 59(3) does not, on a plain and ordinary reading, allow a purchaser of land, however the term might be defined, to withdraw from a water users' community upon giving notice. The wording under section 59(3) is distinct from that of its predecessor, in section 39(11) of the *Amendment Act*. That section says that, when a member of a water users' community gave notice of the transfer or dispossession of land to the manager of their water users' community, they "... thereupon cease to be a member".

[84] The Legislature had, at one point, contemplated that a member of a water users' community could withdraw from the community upon giving notice to the manager, even if only in limited circumstances. The current *WUCA* does not provide

¹⁶ In support of this argument, NTBC references *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, at paras. 29-30.

for this. Reading this ability in to the *WUCA* would involve introducing terms that the Legislature once included, but decided to stop including during the evolution of the provision at issue. The historical context does not support NTBC's position.

[85] I have also considered the language in section 59(3) in the context of the two subsections that precede it. Sections 59(1) and (2) expressly apply to a "member" of a water users' community. In contrast, section 59(3) does not; rather, it applies to a purchaser of land, to which water is conveyed through works controlled by a water users' community, from "an original member" of the water users' community. It is presumed that the Legislature intentionally chose to use the word "purchaser" instead of "member" (or "new member"), and therefore, "purchaser" means something different than "member". I elaborate on this later in this decision.

[86] The overall scheme of the *WUCA* likewise does not support NTBC's position. As noted by the Comptroller, it is he who has the authority to alter a water users' community's certificate of incorporation. This power, contained in section 61, is not also provided to the manager of the water users' community, or to any members of water users' communities. This suggests, by the principle of implied exclusion, that the Legislature decided to whom it wanted to grant this power. The Legislature granted this power only to the Comptroller in section 61, and not to anyone else, at any other place in the *WUCA*.

[87] The *WUCA* also contemplates that the membership of a water users' community will be accurately reflected in its certificate of incorporation. Section 51 provides that the Comptroller may incorporate a group of six or more licensees into a water users' community. Unlike individuals who may, on their own initiative, form a partnership, licensees do not incorporate themselves into a water users' community.

[88] Under section 52(2), the community has exclusive operation and control of only the works "... constructed or used under the licences mentioned in [the water users' community's] certificate of incorporation" The interests of members are defined under section 54 to be based on the proportionate water diversion and use authorized under "... the licences referred to in the certificate of incorporation ...". These sections describe critical elements of a water users' community's operation, including its exclusive control and operation of works, the relative voting power of its constituent members (and by extension of the relative interests of the membership), to what extent the manager can assess its members under section 56. Accordingly, the overall scheme of the *WUCA* supports that a member cannot withdraw from a water users' community without that withdrawal being reflected in the certificate of incorporation.

[89] NTBC has raised a concern about the delay between when a member of a water users' community ceases to hold an interest in a water users' community (and, consequently, to be liable for a portion of the expenses of that community) and when the Comptroller might get around to amending the community's certificate of incorporation. This concern is addressed by subsections 59(2) and (3) of the *WUCA*, by allowing a seller or purchaser of land to limit their liability to a point in time, where the land they are acquiring or transferring has an appurtenant licence that is listed in the water users' community's certificate of incorporation. There is a question as to whether NTBC did so in this case, but it is separate from

the present question of whether NTBC was able to withdraw from Allendale by advising Mr. Mavety that it wished to do so. That question will be discussed later.

[90] As noted in *Sullivan*, related provisions in other Acts may also be relevant when interpreting a statute. In this case, I note that the *WSA* contains similar provisions, whereby the Comptroller and water managers are those empowered to authorize the abandonment of a licence or other authorization (section 31) or with suspending or cancelling a licence (section 94). Furthermore, a licensee is liable to continue paying fees, rentals or charges associated with a licence as scheduled in that licence, until it is authorized to be abandoned, suspended, or cancelled (section 118). Looking at the regulation of water resources in British Columbia generally, I find that it is standard for the person(s) authorized to create a statutory instrument (such as a licence for the use of water or a certificate of incorporation for a water users' community) to be the one(s) that can amend, cancel, or suspend that instrument. As a result, the context of similar legislation does not assist NTBC's case.

[91] The historical context does not assist NTBC either. Media reports from 1918 support that the *Amendment Act* aimed to foster cooperation and shared use of works, to protect and safeguard water supplies for users. Part of this strategy involved allowing the formation of permanent, well-managed water users' communities. This aim is consistent with the wording December 31, 1914 report of the Water Rights Branch, provided by NTBC, which adds that those with the right to use the water should "... have a say in how it was managed." None of this suggests or requires that a member of a water users' community should have the ability to unilaterally withdraw from that community, upon providing notice of such a desire to the water users' community's manager. While this evidence is of secondary importance compared to the words in the relevant legislation, this evidence is consistent with my interpretation of the relevant legislation.

[92] In summary, I conclude that a plain and ordinary reading of section 59(3) of the *WUCA* does not allow NTBC to withdraw from Allendale by communicating its desire to do so to Mr. Mavety. Such an interpretation would involve reading words into that section which the Legislature did not put there, and which in fact it had removed from historical versions of the provision. Reading those words in would be inconsistent with the overall scheme of the *WUCA* and the *WSA*, which is closely related water resource legislation. The evidence provided, which describes the historical intention of the Legislature, also does not support this interpretation. Lastly, the result of the plain and ordinary reading of section 59(3) does not lead to an absurdity, in that there is an alternative mechanism by which members of water users' communities can seek to leave those communities, or the communities themselves can seek to have members removed. Either a member or a community could request a decision from the Comptroller, to amend or to recall and reissue the community's certificate of incorporation.

[93] The Comptroller might agree to the request or refuse it. If the Comptroller agrees, the terms of that amendment of, or recall and reissue of, the certificate of incorporation would be appealable to the Board. If the Comptroller refuses, that decision could be the subject of judicial review, as contemplated in section 2(2)(b) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. This section allows applications to be brought to the Supreme Court of British Columbia in respect of,

among other things, "... refusal to exercise ... a statutory power." It is because of this right of judicial review that I find it is implicit in the *WUCA* that there is a right to request the exercise of statutory powers and to a response to such a request. Otherwise, there would be no avenue to exercise the right of review for a refusal to make a decision.

[94] There are other potential grounds for absurdity that I have considered. One is whether, as a practical matter, a limitation of financial liability under section 59(3) is inconsistent with the Comptroller's authority to amend or to recall and reissue certificates of incorporation. I consider that, in the normal course, a limitation of financial liability under section 59(3) will motivate the water users' community to seek a decision from the Comptroller, to amend or to recall and reissue that community's certificate of incorporation. The reason is clear: after limiting its liability under section 59(3), a "purchaser of land" remains a member of that community, with all associated rights of water usage and voting, but without any further obligation to contribute financially. Such a situation would not normally be acceptable to a water users' community.

[95] It is not difficult to imagine circumstances that would seem unfair to a water users' community when section 59(3) applies. For example, in circumstances like those in this case, a water users' community might need to maintain or decommission shared works. The maintenance might not have given rise to a debt or to an assessment when one member sells land to a purchaser. Both the former member (under section 59(2) of the *WUCA*) and the purchaser of land (under section 59(3) of the *WUCA*) could limit their liability such that neither has any obligation to pay for later debts or assessments, that would include the expenses associated with maintenance. In these circumstances, the financial burden of historical water usage within the community could be unfairly large for the other members of the community.

[96] The risk of such a situation arising could be mitigated, however, by the water users' community ensuring that it levies its assessments regularly and regularly maintains its works. There may also be opportunities for the members of water users' communities to protect their own interests by contracting to ensure that each member must give prior notice to the rest of the members, of any impending dispossession of land. In short, while section 59(3) of the *WUCA* may give rise to some concerns of unfairness in some situations, it does not rise to the level of absurdity.

[97] Furthermore, those buying or selling land that has appurtenant licences that form part of water users' communities can, at least to some extent, limit their liability for debts and projected expenses of the associated water users' community.

[98] In reaching this conclusion, I do not agree that the *Partnership Act* or common law partnership concepts are persuasive. While there are some elements of water users' communities that are similar to partnerships, there are also significant differences. In particular, a partnership can be created when two or more people or organizations decide to form one. Water users' communities are incorporated by a statutory act of the Comptroller. Water users' communities are subject to certain requirements under the *WUCA*, and make their decisions according to votes of their memberships. Votes are split unequally among the members of a water users' community, to reflect the different levels of interest and

liability that each holds in the community. These features are some of the ones that make water users' communities distinct from partnerships, and that indicate that the rules that apply to partnerships do not necessarily apply to water users' communities. While the common law commitments of contracts allow parties "... the freedom ... to pursue their individual self-interest", as NTBC argues, I disagree that this notion should apply to water users' communities to the extent proposed by NTBC. Based on my statutory interpretation above, I find that the *WUCA* constrains that freedom, including by not allowing members to withdraw from water users' communities, without the Comptroller agreeing to amend or recall and reissue the community's certificate of incorporation.

[99] Lastly, I acknowledge but disagree with NTBC's submission that the Comptroller's decision produces an absurd result by preventing NTBC from withdrawing from Allendale. NTBC is not precluded, in the Comptroller's decision, from requesting that he amend or recall and reissue Allendale's certificate of incorporation. The Comptroller would be obliged to make a reasonable decision based on the relevant circumstances, including NTBC's reported non-use of water and any obligations it carries to Allendale. NTBC would enjoy a right of appeal to the Board of any decision the Comptroller made in the circumstances, further guaranteeing a reasonable decision on the question of NTBC's desire to leave Allendale.

[100] I move on to the second branch of NTBC's argument, that it was able to limit its liability to April 20, 2018. To do so, NTBC would need to be considered a "purchaser of land to which water is conveyed through works controlled by" Allendale under section 59(3). There is no dispute between the parties that, if NTBC qualifies as such, it would be able to limit its liability as it argues.

[101] NTBC's position is that it purchased the lands with appurtenant licences that are incorporated into Allendale and, without any description of any associated time limit, it continues to qualify as a "purchaser of land". NTBC says that, because the Legislature did not use the term "owner" of land in section 59(3), it must have meant something different. This argument is consistent with legislative drafting conventions, and specifically with the presumption of consistency.¹⁷

[102] I agree that a "purchaser of land" is properly assumed not to mean the same thing as an "owner" because the Legislature chose to use the two different terms. Based on a plain and ordinary reading of a "purchaser of land", I am satisfied that this means someone who buys land. This is consistent with the plain and ordinary meanings referenced by the Comptroller, and the other parties provided no persuasive alternate definitions for the plain and ordinary meaning of a "purchaser of land". The meaning of "owner", as described in the *Water Act* when it was in effect and in the *WSA*, has a broader meaning, including anyone with a "substantial interest" in the land. The Board has held, for example, that a first nation with treaty rights to hunt, trap, and fish in some land qualifies as an "owner" under this

¹⁷ The presumption of consistency says that different terms should not be used to express the same meaning in an *Act*, and the same term should generally not be used with different meanings within an *Act*.

definition.¹⁸ This all serves to illustrate that “purchaser of land” and “owner” are not interchangeable terms.

[103] I appreciate that the use of “member” in the context of section 59(2) of the *WUCA* implies that “member” includes the previous owner of the land, which illustrates that “member” is a broader term than “owner”. A member, which is not a defined term in the *WUCA*, has an interest in a water users’ community that is proportional to the water rights listed in the certificate of incorporation. As such, a member who disposes of their interest in land may cease to be an “owner” of the land to which a licence is appurtenant, but remains a member of a water users’ community until such time as the Comptroller amends or recalls and reissues that community’s certificate of incorporation. The Legislature prudently allowed someone finding themselves in this peculiar situation to limit their liability to the point in time when they ceased to be an “owner”, using section 59(2).

[104] Furthermore, it is clear that one can be an “owner” but not a “member”, where there is no water licence appurtenant to the land in question, or no appurtenant water licence listed in a given water users’ community’s certificate of incorporation. As such, one can be an “owner” and a “member”, one or the other, or neither.

[105] I have concluded that “owner”, “purchaser of land”, and “member” are all different concepts and that one can qualify as any one of those but not necessarily as the others. None of these terms are interchangeable; however, because section 59(3) pertains to liability for the debts and assessments of a water users’ community, and such liability only exists for members of that community, section 59(3) allows the liability for members to be limited. It does not matter whether that member is also an owner (even if, in practice, they must be), because section 59(3) does not affect non-member owners. Accordingly, the more significant question in the analysis is why the Legislature decided to use the term “purchaser of land” in section 59(3), instead of “member”. There is little to be gained in considering why the term “owner” was not used in section 59(3), because it is a much broader term.

[106] As section 59(3) affects the obligations of members, the Legislature must have intended “purchasers of land” to refer to a subset of that group. There are two elements of section 59(3) that serve to distinguish “purchasers of land” from the larger collection of “members”. First, water must be transferred to the land “through works”. Second, the “purchasers of land” are necessarily not “original members”, given that section 59(3) contrasts the obligations of those two groups.

[107] NTBC says that it does not have the works required to draw water from Allendale’s reservoir to its land. If this is so, a plain and ordinary reading of section 59(3) would suggest that NTBC could not benefit from that subsection. No party provided submissions on this point, however. As such, I prefer to rely on the second requirement, which I find to be determinative in this case.

[108] Neither “purchaser of land” nor “original member” is a defined term, within the *WUCA*, the *WSA*, or any other legislation referred to me. As noted by NTBC,

¹⁸ See *Chief Kathi Dickie v. Assistant Regional Water Manager, Water Act*, Decision No. 2012-WAT-013(a), November 6, 2012.

different subsections of the same section of an Act can provide useful context in interpreting provisions within them. In this case, subsections 59(2) and 59(3) have related functions:

- 59 (2) On disposing of the land to which is appurtenant the licence on which his or her membership is based and notifying the manager, a member may limit his or her liability for the debts of the water users' community to those incurred before the notice was given.
- (3) A purchaser of land to which water is conveyed through works controlled by a water users' community is liable for the assessments made and the debts of the water users' community incurred after his or her purchase of the land to the same extent as an original member, unless and until the purchaser notifies the manager that he or she does not wish to be a member of the water users' community.

[109] These subsections have complementary functions. Subsection (2) allows a member disposing of land to limit their financial liability up to the date they notify a manager of a water users' community of the disposal. Subsection (3) allows a purchaser of land to limit financial liability to the date that they advise the manager of the water users' community that they do not wish to be a member of it. These subsections both allow for the limitation of financial liability upon the transfer of land, one by the person disposing of their interest in the land and the other by a purchaser of the land.

[110] Given the adjacency of the subsections and their functional similarity, I find subsection (2) to provide useful context in determining the meaning of "purchaser of land" in subsection (3). Subsection (2) requires a temporal connection to the dispossession of land; it can only be triggered once the land is disposed of and notice is given to the manager of a water users' community. Consistency between these related subsections would mean that a "purchaser of land" should be able to limit their liability only up to a point in time, related to the purchase.

[111] This interpretation respects that a "purchaser of land" in section 59(3) is not intended to be a "member". It allows the distinction between "purchaser of land" and "member" to relate to the plain and ordinary meaning of the term "purchaser". This interpretation also allows consistency and harmony with closely and functionally related section 59(2), while avoiding the inequitable outcome that a purchaser of land could be bound into liability to a water users' community for licences they never intend to use.

[112] The interpretation offered by NTBC, that a "purchaser of land" in section 59(3) can give notice to limit their liability at any point, would mean that a "purchaser of land" is synonymous with any member other than an original owner. No party has explained why the Legislature would have intended such a distinction, particularly given the reported intention that water users' communities were created to foster permanent management solutions for improved water resource management in British Columbia. The circumstances of this case highlight this difficulty, as NTBC seeks to rely on section 59(3) roughly 25 years after it last purchased land with appurtenant licences listed in Allendale's certificate of incorporation.

[113] I appreciate that, at one point, NTBC was a “purchaser of land”, with respect to Allendale. The parties did not provide submissions on when one might cease to be a “purchaser of land”. In the circumstances of this case, I am satisfied that NTBC is no longer a “purchaser of land” within the meaning of section 59(3). There are two fact-based reasons for this.

[114] First, NTBC spent from 1993 to 2018 as a member of Allendale before advising Mr. Mavety that it no longer wished to be a member of Allendale. There is a lack of any temporal connection between NTBC’s purchase of the land and its message to Mr. Mavety given this roughly 25-year span.

[115] Second, NTBC used, or allowed others to use, the water rights granted under the some or all of the Licences, from 1993 until 2006. This further emphasizes that, for roughly thirteen years after it purchased the relevant lands, it enjoyed the benefits of membership in Allendale and paid water rental fees associated with the Licences and, for some or all of that time, the Thomas Licence. This is not a question of delayed communication of a wish to cease being a member of a water users’ community; these facts indicate that NTBC accepted the responsibilities and benefits of being a member for many years before deciding it no longer wished to be one. I find that NTBC’s wish, at the time it purchased the land, was to be a member of Allendale.

[116] Additionally, no persuasive reason has been suggested to me, and I see none, why a member should be able to rely on section 59(3) after roughly 25 years, but an “original member” could not. This is the sort of inequity, without any apparent purpose, that leads to absurdity. For all these reasons, I conclude that NTBC was no longer a “purchaser of land” when it advised Mr. Mavety that it did not wish to be a member of Allendale in 2018.

[117] I recognize NTBC’s argument, that it should not be required to pay for Allendale’s expenses and debts, given that NTBC has not used any of its water rights for several years, and cannot do so because it no longer has the required works. NTBC had the option to apply for abandonment of its water licences for many years and it only chose to do relatively recently. It is not uncommon for similar arrangements to exist through contract, where liability is incurred until someone cancels the associated benefit being paid for. There is nothing so unfair in these circumstances to say that the outcome is absurd or unjust.

[118] Furthermore, while NTBC has argued that this is inconsistent with modern corporate law principles, it did not provide sufficient explanation or authorities to indicate as much. I have already found that partnership law is not persuasive in this regard, and NTBC provided no other persuasive arguments on applicable corporate law concepts.

[119] For the reasons provided above, I conclude that NTBC did not withdraw from Allendale or limit its financial liability as a “purchaser of land” under section 59(3) of the *WUCA*, in its correspondence to Mr. Mavety on April 20, 2018. As a result, NTBC remained a member of Allendale, with interest and liability as set out in the *WUCA*, when the Assessment Roll was issued.

[120] I dismiss NTBC’s appeal on this issue.

If NTBC is liable for any portion of the Assessment Roll, should its liability be reduced?

NTBC's Submissions

[121] Alternatively, NTBC says that it is not responsible for the 7.898% share of the Assessment Roll attributable to the Thomas Licence. NTBC says the Comptroller cannot determine that NTBC is responsible for that licence.

[122] NTBC says that the Thomas Licence is appurtenant to land owned by Thomas Ranches Ltd. Therefore, although Dr. Lament advised the Comptroller that he understood that NTBC was financially responsible for that licence, NTBC says it is not, and therefore, it cannot be held liable for the associated portion of the Assessment Roll.

The Comptroller's Submissions

[123] The Comptroller argues that NTBC's interest in, and obligation to, Allendale is defined by the certificate of incorporation. In support of that position, the Comptroller references two sections of the *WUCA*. Section 54 provides:

- 54 (1) The respective interests of the members of a water users' community, unless altered under subsection (2), are proportionate to the respective maximum quantities of water the members would be entitled to divert and use under the licences referred to in the certificate of incorporation if each member were making the greatest possible use of the rights granted under those licences.
- (2) The members of a water users' community at any time at a general meeting, on the vote of a majority interest as shown by the last confirmed assessment roll of the water users' community, or if no assessment roll has been confirmed, then as ascertained on the basis set out in subsection (1), may determine that, after the determination, the interest of each member is in proportion to one or both of the following:
- (a) the area of the member's land irrigated by means of the works operated by the water users' community;
 - (b) the amount of water delivered to the member's land for domestic or waterworks purposes.

The Comptroller also references section 59(1), which states that, "A member of a water users' community is liable for that part of the debts of the water users' community that is proportionate to the members' interest in the water users' community."

[124] The Comptroller says that a water users' community's powers are listed at section 52 of the *WUCA*, which provides:

- 52 (1) A water users' community is a public corporate body and may
- (a) acquire, hold and control property and licences,
 - (b) acquire, construct, hold, maintain, improve, replace and operate works, and

- (c) levy assessments on its members and enforce payment of those assessments by suit in a court of competent jurisdiction.
- (2) A water users' community has the exclusive control and operation of the works constructed or used under the licences mentioned in its certificate of incorporation, and may refuse the use or benefit of those works to a member who is in default in paying an assessment or complying with a rule of the manager.

[125] The Comptroller says that it is not open to him to relieve NTBC from its obligation to pay assessments to Allendale as a result of NTBC not using the water authorized under its licences. The apportionment of obligations is set under section 59 of the *WUCA*, and Allendale has not amended that method of calculation, as it can under section 54(2) of the *WUCA*.

[126] The Comptroller says that Dr. Lament's letter of May 14, 2019, without any other information available, was a sufficient reason for him to conclude that NTBC would be responsible for the proportion of Allendale's expenses assigned to the Thomas Licence. The Comptroller says that it is open for NTBC and Thomas Ranches Ltd. to agree as to who should be responsible for payment of the Thomas Licence's share of Allendale's assessment rolls.

[127] The Comptroller says that NTBC's argument that it cannot "legally" be responsible for the portion of Allendale's expenses that is assigned to the Thomas Licence is incorrect. Section 27 of the *WSA* deals with transfers of appurtenancy. An agreement that one party will pay another party's fees and rental expenses is different from a transfer of appurtenancy, which has not happened in this case.

[128] The Comptroller says that if NTBC wishes to change its arrangement with Thomas Ranches Ltd., then that is between them.

[129] The Comptroller takes no position if the Board reduces NTBC's share of the Assessment Roll by 7.898% based on the evidence NTBC provides in the appeal to reflect NTBC not being responsible for the Thomas Licence. The Comptroller says that, in such a case, Thomas Ranches Ltd. should be provided notice of that possible decision.

NTBC's Reply

[130] NTBC says that Dr. Lament's statement relied upon by the Comptroller was a "mistake". Regardless, NTBC says that sections 54 and 56 of the *WUCA* require that each member of a water users' community is liable to the community based on the proportion of their entitlements to divert and use water. Dr. Lament's statement did not alter Allendale's certificate of incorporation, and NTBC's liability must be calculated in accordance with the requirements of the *WUCA*.

Panel's Findings

[131] The parties agree that NTBC does not hold the Thomas Licence. It is appurtenant to land owned by Thomas Ranches Ltd. Even if NTBC had contracted for the use of water under the Thomas Licence, the right "... to divert and use water under the [Thomas Licence] ..." belongs to the licensee; in this case, that is not NTBC. Under the provisions of the *WUCA*, Allendale cannot assess a member more or less than the proportion described under the statute. Under section 56(1)(b) of

the *WUCA*, Allendale can assess a sum against each of its members, proportionate to the member's interest in Allendale. Section 54(1) describes how members' interests are calculated, unless the members of the community opt to use one of the alternative methods of calculation in section 54(2). In this case, the members of Allendale did not and the default provision from section 54(1) applies. The interest of each member is proportionate to the maximum quantities of water they can divert and use "... if each member were making the greatest possible use of the rights granted under those licences." The right as described in the Thomas Licence is not granted to NTBC, so NTBC's interest in Allendale—and accordingly the sum it can be assessed—cannot include the quantity described in the Thomas Licence.

[132] Allendale deviated from those default calculations by assessing NTBC for the portion attributable to its Licences, plus the share attributable to the Thomas Licence. It does not matter if NTBC and Thomas Ranches Ltd. (or any other party) have an arrangement that NTBC will pay that portion or not. If they do, that is a matter of private contract between those two entities, and does not allow Allendale to levy an assessment that places a larger share of liability on NTBC than permitted under the *WUCA*.

[133] For these reasons, I find that NTBC's liability under the Assessment Roll should be reduced by the proportion of liability attributable to the Thomas Licence.

What is/are the appropriate remedy(ies) to grant to NTBC?

NTBC's Submissions

[134] NTBC did not, in its initial submissions, provide submissions to support the remedies it requested, beyond those described above.

The Comptroller's Submissions

[135] The Comptroller says the Board only has the powers expressly granted to it by statute and that are, by implication, necessary for it to fulfill its mandate.¹⁹ In this case, the Comptroller argues, the Board's authority is derived from section 105 of the *WSA*. This allows the Board to make decisions that the Comptroller could have made on appeal from the Assessment Roll, and nothing more. The Comptroller notes that his authority to review an assessment roll is contained in section 57(2) of the *WUCA*, which reads:

57 (2) The comptroller, after the investigation the comptroller considers necessary, may confirm the assessment roll or order its amendment.

[136] The Comptroller says that the orders NTBC seeks are not grounded in statutory authority and generally conflate findings of fact with orders.

[137] The Comptroller addressed NTBC's request that the Board "order that [NTBC] withdrew from [Allendale] on April 20, 2018." The Comptroller references a preliminary decision on jurisdiction made in this case, where I concluded that the Comptroller's comment that NTBC remained part of Allendale was "... not an exercise of discretion under section 57(2) of the *WUCA* to confirm the 2018

¹⁹ See *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, at para. 38.

Assessment”, and “... not an appealable decision as described in section 105(1) of the *WSA*.”²⁰ The Comptroller argues that NTBC is asking the Board to make a finding of fact an order.

[138] The Comptroller says the same concern applies to NTBC’s request that the Board order or declare that NTBC: has no liability to Allendale as of April 20, 2018; no liability to Allendale for the Assessment Roll; not beneficially used water since 2006; and should have no proportional interest in Allendale because it has not used water since 2006. Furthermore, the Comptroller says that the last request would mean that the Board would act in place of Allendale’s members, as they are empowered to do under section 54 of the *WUCA*.

[139] Furthermore, the Comptroller says the request that the Board refer the matter back to the Comptroller, to set NTBC’s liability in Allendale as proportional to the Original Licences, is not supported by evidence. The Comptroller notes that NTBC itself says it subsequently acquired other licences from Thomas Ranches Ltd.

[140] The Comptroller argues that I can only sent the matter back to the Comptroller; confirm, vary, or rescind the Decision; or make any other order the Comptroller could have made under section 57 of the *WUCA*.

[141] The Comptroller says that NTBC’s proportional liability to Allendale is set by section 54 of the *WUCA*, to be based on the proportion of water authorized to be diverted and used under its licences, compared to the total for all of Allendale. The Comptroller also says that Allendale’s certificate of incorporation from 1999 provides that each members’ rights are transferrable to the successors-in-title to the lands appurtenant to Allendale’s constituent licences.

[142] The Comptroller adds that I should be cautious about concluding that NTBC did not complete the transfer of the Thomas Licence, as there is neither evidence to support nor to refute that the transfer took place.

NTBC’s Reply

[143] NTBC says that it is asking the Board to “step into the role of the Comptroller” and make a decision under section 57 of the *WUCA*, as authorized by section 105(6)(c) of the *WSA*. NTBC notes that the Comptroller may, under section 57(2) of the *WUCA*, order the amendment of an assessment roll. NTBC says there is no restriction on the Comptroller’s ability to do so. NTBC says the Board should exercise this power to correctly identify the sum assessed against each member, proportionate with their interest in the water users’ community, as required by section 56(1)(b) of the *WUCA*. This function includes ensuring that only members of the water users’ community are named in an assessment roll and that the liability for each is correctly calculated.

Panel’s Findings

[144] NTBC sought 11 forms of relief from the Board, reproduced here for convenience:

²⁰ See *The Nature Trust of British Columbia v. Comptroller of Water Rights*, EAB-WCA-20-A001(a) (April 6, 2021).

1. an order that the appeal is allowed, the Decision is set aside, and NTBC's withdrawal from Allendale is recognized;
2. an order that NTBC withdrew from Allendale on April 20, 2018;
3. an order that NTBC has no liability to Allendale as of April 20, 2018;
4. an order that NTBC has no liability to Allendale for the Assessment Roll;
5. a declaration that NTBC has not beneficially used water since 2006;
6. a declaration that NTBC's proportional interest in Allendale should be reduced to zero because it has not used water since 2006;
7. an order requiring the Comptroller to reassess NTBC's required contributions to Allendale for the years prior to 2018;
8. in the alternative, an order that the Decision be sent back to the Comptroller with the direction that NTBC's withdrawal from Allendale is recognized;
9. in the further alternative, an order that the Decision be sent back to the Comptroller with the direction that NTBC's proportional interest in Allendale is limited to the Original Licences;
10. in the further alternative, an order that the Decision be sent back to the Comptroller with the direction that NTBC's proportional interest in Allendale is 33.48%; and
11. such further or other order that is appropriate.

[145] NTBC's requested remedies numbered one, two, three, four, and eight are based on NTBC's position that it either withdrew from, or limited its liability to, Allendale on April 20, 2018. I have concluded that NTBC was unable to do either. Accordingly, I deny those requests for relief.

[146] The fifth and sixth requested remedies are for declarations based on NTBC not having used water rights since 2006. The Board's jurisdiction is constrained to the decision(s) appealed to it. The Decision, which was appealed in this case, pertains to whether the Comptroller should have confirmed the Assessment Roll. The answer to this appeal did not involve consideration of whether NTBC used its water rights since 2006, because its liability to Allendale was based on the default statutory formula, not on actual water usage by the various members of Allendale. As a result, I make no finding about NTBC's water usage since 2006 and I deny NTBC's fifth and sixth requested remedies.

[147] NTBC's seventh requested remedy is likewise not properly before the Board. The Board must address the Assessment Roll, and not NTBC's liability for earlier years. Section 57(1) of the *WUCA* provides that a member may appeal, to the Comptroller, the assessment made against the member within 14 days after the mailing of a copy of the assessment roll or the assessment notice. There is no evidence that NTBC filed appeals of any pre-2018 assessment rolls within the 14-day period specified in section 57(1). As such, it appears that the Comptroller has no jurisdiction to investigate or amend those assessment rolls, and the Board cannot order or direct the Comptroller to do so. As a result, I deny this requested remedy.

[148] NTBC's ninth requested remedy is that I order the Comptroller to calculate NTBC's liability to Allendale based on the Original Licences. NTBC has not provided any persuasive reason why I should do so. As I have stated, NTBC's liability is based on the proportion of water it was entitled to divert and use under all of its Licences at the time the Assessment Roll was created. I have concluded that NTBC was unable to limit its liability on April 20, 2018, including to the extent of an "original member". For these reasons, I deny NTBC's ninth requested remedy.

[149] NTBC's tenth requested remedy is that I order the Comptroller to reduce NTBC's proportional interest in Allendale to 33.48%. I decline to assign a precise figure in my order because there are issues which I find require further investigation. Accordingly, I return the matter to the Comptroller with the following directions:

1. the Comptroller is to determine whether the Thomas Licence remains current (as opposed to being abandoned or cancelled);
2. if so, the Comptroller is to determine who is the owner of the land to which the Thomas Licence is appurtenant; and
3. the Comptroller is to recalculate the Assessment Roll, apportioning liability as described in sections 54(1) and 56(1)(b) of the *WUCA*, with each member of Allendale liable to pay a proportion of the assessed amount, based on the proportion of water they are entitled to divert and use from the total amount from all licences listed in Allendale's certificate of incorporation.

[150] I agree with the Comptroller that Thomas Ranches Ltd. should be provided notice of any decision that may affect its interests. That said, this decision does not impact Thomas Ranches Ltd. I have concluded that NTBC has been apportioned more liability than is permitted under the *WUCA* in the Assessment Roll. The Comptroller, in implementing this decision, may make decisions affecting Thomas Ranches Ltd., and should include Thomas Ranches Ltd. (as well as the rest of Allendale's members) in the investigative process leading up to his decision.

[151] NTBC also asked that I consider making any other or further order that is appropriate. I do not consider any further orders to be appropriate given the evidence and submissions provided to me.

[152] In particular, I considered whether to make an order that the Comptroller amend or recall and reissue Allendale's certificate of incorporation, to remove NTBC from Allendale. I do not make this order, however, as NTBC did not expressly request that it be removed from Allendale's certificate of incorporation. Further, NTBC did not provide persuasive submissions to indicate that it would be appropriate for the Comptroller to make such an order in the circumstances. Lastly, it is unclear what internal processes of the Comptroller may be impacted or implicated in such a decision and I do not consider it appropriate to make an order without a clear understanding of the impacts of the order.

[153] I recommend that the Comptroller consider this course of action voluntarily, however, as NTBC reportedly does not use the water rights associated with Allendale, reportedly cannot use those rights, and does not wish to remain a part of Allendale.

DECISION

[154] I have considered all the evidence and submissions made in advance of this decision, whether or not it was specifically referenced in my decision.

[155] For the reasons provided above, and pursuant to section 105(6)(a) of the *WSA*, I send the appeal of the Assessment Roll back to the Comptroller, with the following directions:

1. the Comptroller is to determine whether the Thomas Licence remains current (as opposed to abandoned or cancelled);
2. if so, the Comptroller is to determine who is the owner of the land to which the Thomas Licence is appurtenant; and
3. the Comptroller is to recalculate the Assessment Roll, apportioning liability as described in sections 54(1) and 56(1)(b) of the *WUCA*, with each member of Allendale liable to pay a proportion of the assessed amount, based on the proportion of water they are entitled to divert and use from the total amount from all licences listed in Allendale's certificate of incorporation.

The appeal is allowed, in part.

"Darrell LeHouillier"

Darrell LeHouillier, Chair
Environmental Appeal Board

February 15, 2022