



BRITISH
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DECISION NOS. EAB-WSA-20-A009(b) & EAB-WSA-20-A012(b) [Group File: EAB-WSA-20-G001]

In the matter of two appeals under the *Water Sustainability Act*, S.B.C. 2014, c. 15

BETWEEN:	Kenneth and Dawn Olynyk	APPELLANTS
AND:	Winfried and Astrid Reuter (Estate of)	APPELLANTS
AND:	Assistant Water Manager	RESPONDENT
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Chair	
DATE:	Conducted by way of written submissions concluding on June 18, 2021	
APPEARING:	For the Appellants Kenneth and Dawn Olynyk: Winfried and Astrid Reuter (Estate of):	Self-represented Erica Reuter and Rob Johnson
	For the Respondent:	Livia Meret, Counsel

APPEALS

[1] These appeals relate to an ongoing series of disputes between some land owners over the use of water from McGillivray Creek. This waterway is found in the southwestern interior of British Columbia, between Lytton and Lillooet.

[2] The appeals are both from decisions made by Patrick Farmer (the "Respondent"). The Respondent is an Assistant Water Manager with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry").

[3] On November 4, 2020, the Respondent issued conditional water licence #502279 (the "Licence") to Kenneth and Dawn Olynyk (the "Olynyks"). The Licence grants them the right to divert water from McGillivray Creek for "lawn, fairway, and

garden" purposes on their property, from April 1 to September 30 each year. The Licence is effective until December 31, 2025. The Licence also allows the Olynyks to build works, so that they can divert the water. Construction of those works is subject to several conditions.

[4] The Olynyks appealed the Licence. They object to certain conditions in the Licence as unwarranted. They argue the Licence should have no expiry date and certain conditions related to the construction of works authorized under the Licence.

[5] Winfried and Astrid Reuter (the "Reuters") obtained a licence for the diversion and use of water from McGillivray Creek before the Olynyks did. The Reuters are deceased and their licence has passed to their estate (the "Estate"). The Estate has also appealed the Licence, through its representative, Erica Reuter. The Estate argues that the Licence should not have been granted, or that alternatively, it should be amended.

[6] The Environmental Appeal Board (the "Board") has the authority to hear the appeals under section 105 of the *Water Sustainability Act* (the "Act"). Section 105(6) of the Act provides that, 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.

[7] The appeals were heard based on written submissions.

BACKGROUND

History of water use on McGillivray Creek

[8] The area around McGillivray Creek is semi-arid. Several local land owners rely on water from the creek for a variety of uses, including irrigating crops and domestic use. There are four parties that have a history of water licencing that is relevant to these appeals, and four associated points of diversion.

[9] Joanne Warren holds conditional water licence #C109458 on McGillivray Creek with a priority date of January 23, 1961, for year-round industrial (stock watering) and domestic use. Ms. Warren's point of diversion from McGillivray Creek is the furthest downstream.

[10] Frederick Watkinson operates Foster Bar Ranch and holds two water licences on McGillivray Creek. Both allow him to divert water from McGillivray Creek from April 1 to September 30 each year, for irrigation. Conditional water licence #C104455 has a priority date of February 15, 1983, and also allows for domestic use throughout the year. Conditional water licence #C104456 has a priority date of August 17, 1983. Mr. Watkinson's point of diversion authorized under his two water licences is upstream of only Ms. Warren's.

[11] The Estate holds several water licences, including two on McGillivray Creek. Those two allow the Estate to divert water from McGillivray Creek from April 1 to September 30 each year. Conditional water licence #C104471 is for irrigation and

has a priority date of February 15, 1983. This water licence allows the Estate's business, Halfway Ranch, to grow hay. Conditional water licence #C125377 is for power generation and has a priority date of August 13, 2009. The point of diversion of the Estate's licences is upstream of Mr. Watkinson's.

[12] The points of diversion used by Mr. Watkinson and the Reuters did not have adequate water pressure to efficiently irrigate. To resolve this problem, in the early-to-mid 1980s, they created a dam/weir further upstream. This dam/weir captures water from McGillivray Creek and from the nearby Laluwissin Creek, on which both the Estate and Mr. Watkinson hold water licences. The Estate's water from the dam/weir is carried by an underground pipeline that runs through Crown land. It is authorized by a permit over Crown land. For several years after building the dam/weir, neither Mr. Watkinson nor the Reuters used their original points of diversion.

[13] McGillivray Creek is recharged, at least in part, by the nearby Olynyk Spring. Olynyk Spring flows into McGillivray Creek downstream from the dam/weir and the points of diversion described in the Estate's licences, but upstream of the points of diversion described in Mr. Watkinson's and Ms. Warren's licences.

[14] In March 1988, conditional water licence #61055 was issued to Mr. Olynyk. That licence authorized Mr. Olynyk to divert up to 500 gallons (2.27305 cubic metres) of water per day from Olynyk Spring. This water was for year-round domestic use. According to the Respondent, that licence was abandoned in June 1989.

[15] Also in March 1988, Mr. Olynyk applied for a licence to divert 500 gallons (2.27305 cubic metres) of water per day water from McGillivray Creek downstream of the dam/weir. He wanted to irrigate one acre of land with that water.

[16] While the Ministry was considering the application, an Engineer under the (then) *Water Act*, R.S.B.C. 1979, c. 479 (the "*Water Act*"), reviewed stream flow data for McGillivray Creek. This data included measurements taken from 1915 to 1926, and during the late 1970s and the 1980s. In a January 24, 1992 report, the Engineer concluded that the water flowing in McGillivray Creek downstream of the dam/weir was likely seepage from the dam/weir and/or groundwater. The Engineer stated there was more water licensed for irrigation use than flowed in the stream at certain times of the year. The Engineer recommended that McGillivray Creek be considered "fully recorded".¹

[17] On January 27, 1992, the Regional Water Manager at the time denied Mr. Olynyk's application for an irrigation licence because there was insufficient water in the Creek to grant a new licence (it was "fully recorded"). In particular, the letter denying the Olynyk's application refers to there being insufficient water in McGillivray Creek from June to September each year. At the time, this decision

¹ According to documents provided by the Respondent, when the Ministry concludes that all (or almost all) the water from a source is used in licences, a Water Allocation Restriction notation is added for that water source in the Ministry's database. This guides future water allocation decisions. One type of Water Allocation Restriction is a "Fully Recorded" notation. This means that, based on information from the last inspection, no further licences should be considered for that water source.

could be appealed to the Comptroller of Water Rights. Mr. Olynyk appealed the Regional Water Manager's decision.

[18] Also in 1992, the Reuters and Mr. Watkinson began using their original points of diversion again, to capture water that appeared to be seeping from the dam/weir and flowing downstream. Both the Estate and Mr. Watkinson principally draw water from the dam/weir, but also draw some water from their original points of diversion.

[19] In November 1993, the Deputy Comptroller of Water Rights (the "Deputy Comptroller") denied Mr. Olynyk's appeal. The Deputy Comptroller calculated that, to irrigate one acre of land in the McGillivray Creek area, Mr. Olynyk needed 7,195 gallons (approximately 32.7 cubic metres) of water per day over a 120-day irrigation period.

[20] The Deputy Comptroller concluded that, while Mr. Olynyk had been able to use water from McGillivray Creek for several years without an authorization, this was related to reduced irrigation by Halfway Ranch and seepage from the dam/weir. The Deputy Comptroller noted that Halfway Ranch was slated to resume full irrigation in 1994, and both Halfway and Foster Bar Ranches were authorized to divert water downstream of the dam/weir to recapture seepage. The Deputy Comptroller stated that, when normal irrigation practices were to resume, there would not be enough water in McGillivray Creek for existing or further irrigation licences.

[21] Mr. Olynyk filed an appeal with the Board against the Deputy Comptroller's decision. When the appeal hearing began on March 28, 1995, Mr. Olynyk indicated that he no longer wanted an irrigation licence. As a result, the Board dismissed his appeal without issuing a decision on the merits of the appeal.

[22] On March 6, 2003, a Water Management Officer issued a letter to Mr. Olynyk following a complaint that he was diverting water from McGillivray Creek without a water licence. The letter stated that McGillivray Creek was fully recorded for all purposes without full backup storage, and any use of water from McGillivray Creek for any purpose was unauthorized and may be a violation of the (then) *Water Act*.

[23] As discussed above, the Licence was issued in 2020. It authorizes the Olynyks to divert four cubic metres water from McGillivray Creek for "lawn, fairway, and garden" purposes, from April 1 to September 30 each year. The point of diversion for the Licence is upstream from the Reuters' original point of diversion, but downstream from the dam/weir.

Application for the Licence

[24] In April 2019, the Olynyks applied for a licence to divert and use two cubic metres of water per day from McGillivray Creek, from April to September each year. This was to water a lawn and fruit trees on the Olynyks' property, an industrial purpose under Schedule A of the *Water Sustainability Regulation*.

[25] The Estate and Ms. Warren objected to the Olynyks' application. The Estate's objection summarizes the history of water scarcity in the region and the locals' concerns, as far back as 1986, that the Olynyks would apply for a water licence.

The Estate described the procedural history following Mr. Olynyk's 1988 application for a water licence. The Estate's objection also discusses:

- Mr. Olynyk's unauthorized installation, in 1988, of an above-ground water pipeline, along the same route over Crown land as the Estate's pipeline leading to the dam/weir;
- Mr. Olynyk attempting, in 2019, to bury his pipeline on the easement for the Estate's pipeline, without authorization, with the result that he had to remove his pipeline (at least for a time);
- concerns about the quality and location of the Olynyks' pipeline, including the steepness of the land;
- whether the Olynyks intend to use the water for the purposes they described, or to water pasture land he has enclosed, both on his land and Crown land; and
- the risk that a leak or rupture of the Olynyks' pipeline could de-stabilize the slope and damage the Estate's pipeline.

[26] Ms. Warren's objection states that she did not consent to Mr. Olynyk crossing her private property with licensed works.

[27] On September 16, 2019, Shane Stockwell, a Water Authorizations Officer with the Ministry's Cascade Natural Resource District, completed a Water Licence Technical Report (the "Technical Report"). The Technical Report relates to the Olynyks' application.

[28] The Executive Summary in the Technical Report states, in part:

...

The applicant had requested two cubic metres per day, but using the BC Agriculture Water Tool it was determined, through different scenarios of grass, nectarine, and walnut tree water uses, that approximately four cubic metres per day would be required to water the lawn and the fruit trees.

McGillivray Creek is a Fully Recorded system, but ... this notation was based on data collection at the uppermost point of diversion (dam) only.

Data was collected on McGillivray Creek in three locations during the growing season of 2019: One at the dam, which is the uppermost point of diversion (POD) for all users; one at the lowest POD, used for domestic use; and one in between the uppermost POD and the lowest POD (about midway between the two), specifically where the applicant has proposed to install his intake. It has been determined that water use by the applicant at the middle location proposed by the applicant will not interfere with the other users.

...

... It was also communicated that since 2019 was a very wet year (locals said the wettest in 50 plus years) that we would term the licence for five years, collecting flow measuring data from the applicant during that term to determine if there is indeed enough water for the applicant's use as well as any other impacts to other users.

...

The Licence

[29] Based on the information available to him, the Respondent concluded that McGillivray Creek was fully recorded at the dam/weir, but water was available for licensing downstream of the dam/weir due to groundwater contribution and tributary flow into McGillivray Creek including from Olynyk Spring. The Respondent concluded that flows downstream of the dam/weir were sufficient to grant the Licence.

[30] As noted previously, the Licence authorizes the diversion of four cubic metres of water per day, from April 1 to September 30 of each year. The point of diversion authorized in the Licence is downstream of the dam/weir, and a short distance upstream of the Reuters' original point of diversion and where Olynyk Spring flows into McGillivray Creek. The Licence has a precedence date of April 5, 2019.

[31] The works authorized by the Licence consist of a diversion structure, screened intake, pipe, and sprinklers. Of the conditions included in the Licence, three are at issue in these appeals.

[32] Condition I) in the Licence requires that a cumulative flow measuring device be installed to the satisfaction of an Engineer under the *Act* at the source, and flow records of the diversion be provided to the Engineer.

[33] Condition n) in the Licence requires the Olynyks to: submit plans from a registered professional engineer for all works to be constructed; ensure that a registered professional engineer supervises the construction of all works; submit the plans to an Engineer under the *Act*; and, obtain written leave from an Engineer under the *Act* prior to commencing construction of any works.

[34] Condition o) states that the Licence expires on December 31, 2025, and "the licensee may apply ... to amend this licence to extend its term."

[35] The cover letter issued with the Licence states, in part:

A Permit over Crown Land (PCL) has been issued with this licence to provide authorization for the placement of works described by your water licence on Crown land. ...

Given that McGillivray Creek is Fully Recorded, as well as concerns from objectors to this application on the history between neighbors and water use, it has been determined that you will require a Qualified Registered Professional to design and supervise the installation of your works. Notice must be given by the Qualified Registered Professional to this office and to those whose land and/or works would be affected, **prior to the installation of your works.**

...

... Your works appear to cross or otherwise affect privately owned land. Water licences do not authorize entry on privately owned land for the construction of works, or flooding. Prior to construction of works, permission of the affected landowner must be obtained or an easement expropriated. For your

protection, permission should be in writing and registered with the appropriate Land Title Office.

[emphasis in original]

[36] The cover letter also notes that, in the event of a water shortage, the quantity of water allocated by the Licence may not be available, and the Olynyks might be instructed to cease diverting water.

Appeals of the Licence

[37] Both the Olynyks and the Estate appealed the Licence to the Board.

[38] The Estate argues that the past decision of the Deputy Comptroller denying Mr. Olynyk a water licence still stands. The Estate also says the Licence should not have been granted because there is not enough water in McGillivray Creek for the Licence. The Estate is also concerned that the Olynyks' water intake is upstream from the Estate's, meaning the Olynyks will divert water first, even though the Estate's licence predates the Licence and should have a higher priority. The Estate is also concerned that the Olynyks' illegally installed pipeline has been diverting water from McGillivray Creek and posing a substantial risk to the Estate's authorized water intake and pipeline. The Estate also submits that increased water metering and monitoring should be required if the Licence is upheld.

[39] The Olynyks dispute three conditions in the Licence and one requirement stated in the cover letter that accompanied the Licence:

1. the requirement to install a cumulative flow meter in condition l) of the Licence;
2. the requirement in condition n) of the Licence that they must hire and submit plans of a registered professional engineer, and that the registered professional engineer must supervises any works carried out under the Licence;
3. the requirement that any construction that may impact other private property requires written permission of the owners of that property; and,
4. the December 2025 expiry date, with the option to apply for an amendment to extend the Licence, in condition o) of the Licence.

[40] The Board offered Ms. Warren limited participatory rights in these appeals. In response, she provided a very brief letter but made no submissions. As such, Ms. Warren has not been designated as a participant in these appeals.

[41] The Board offered Mr. Watkinson the opportunity to participate in the appeals, but he did not participate.

Events after the appeals were filed

[42] On January 14, 2021, the Ministry issued an order to Mr. Olynyk under section 93(2)(b) of the Act, after receiving reports that he was clearing Crown land and preparing to build works without supplying plans from an engineer as required by condition n) in the Licence.

[43] On March 25, 2021, the Estate applied to the Board for a stay of the Licence pending the Board's decision on the merits of the appeals.

[44] On April 30, 2021, the Board denied the Estate's application for a stay of the Licence (Decision Nos. EAB-WSA-20-A009(a) and EAB-WSA-20-A012(a)). However, the Board's understanding is that the stop work order remained in place until at least May 21, 2021, pending the Olynyks' compliance with condition n). The Respondent's appeal submissions dated May 21, 2021, state that the Ministry was still assessing the Olynyks' preliminary design under condition n) of the Licence.

ISSUES

[45] The appeals raise the following issues:

1. Should the Licence be reversed because:
 - a. the issue was decided when Mr. Olynyk's application for a similar water licence was denied in 1992;
 - b. there is insufficient water in McGillivray Creek to support the water diversion and use authorized in the Licence, given the priority of existing licences; or
 - c. Mr. Olynyk has a history of non-compliance with legal and regulatory requirements associated with water rights and may divert more water than is authorized in the Licence.
2. If the Licence is not reversed, should the Licence be amended by:
 - a. Removing the requirements in condition l), as requested by the Olynyks;
 - b. removing the requirements in condition n), as requested by the Olynyks;
 - c. removing the expiry date and the option to apply for an extension in condition o), as requested by the Olynyks; and/or
 - d. adding requirements that the Olynyks must hire a bonded and trusted contractor, must meet certain maintenance and operational requirements, and obtain certain insurance coverage, as requested by the Estate.

[46] I acknowledge that the Olynyks also objected to statements in the cover letter accompanying the Licence, that any construction of works that may impact other private property requires written permission of the owners of that property. I find that those statements were intended to notify the Olynyks that a water licence does not grant a legal right to construct water works on someone else's private land. Section 32 of the *Act* and Division 3 of the *Water Sustainability Regulation* provide a process for licensees to expropriate land reasonably required for the construction, maintenance, improvement or operation of works authorized under a water licence. Any expropriation proceedings must be pursued through the BC Supreme Court.

[47] As such, I find that those statements in the cover letter are an advisory notice intended to alert the Olynyks to legal requirements that exist separately from the rights granted, and conditions imposed, in the Licence. Those requirements were not imposed by the Respondent and are not conditions in the

Licence. As such, the Board has no authority to reverse or vary those requirements when deciding the appeals of the Licence. Furthermore, the Estate provided a copy of notice issued on behalf of the Olynyks by a lawyer, stating that the Olynyks intend to acquire an easement on Ms. Warren's land for their water works. For these reasons, I will not further consider this ground of appeal.

DISCUSSION AND ANALYSIS

[48] The submissions of the appellants (both the Estate and the Olynyks) are lengthy and speak to the long and difficult relationships relating to water rights on McGillivray Creek. The submissions include, at various points, attacks on character and allegations of misconduct that are not helpful or necessary for me to address in deciding these appeals. The submissions also go into detail about the relationships between the respective appellants and other water users in the area. These details are likewise not helpful or necessary for me to decide to the appeals. My reasons do not reference much of this material. I have read the submissions in their entirety and have, in the interests of brevity, focused on the most crucial elements of the submissions.

1. Should the Licence be reversed?

Summary of the Estate's submissions

[49] The Estate submits that the Olynyks' past application for an irrigation licence was denied by the Regional Water Manager, the Deputy Comptroller, and the Board, and those decisions still stand. The Regional Water Manager and the Deputy Comptroller concluded that there is insufficient water in McGillivray Creek for further irrigation licensing. The Estate maintains that the doctrines of *res judicata*, issue estoppel, and abuse of process bar the application for, and grant of, the Licence.

[50] According to the Estate, the doctrine of *res judicata* bars parties from having cases re-decided that have been finally decided in a prior proceeding. In particular, the doctrine of issue estoppel prevents Mr. Olynyk from raising an issue that was decided in the decisions that denied his past application for a licence on McGillivray Creek. Additionally, the doctrine of abuse of process by re-litigation prevents Mr. Olynyk from advancing applications and claims that would have the effect of undermining the integrity of the administrative decision-making process on the prior licence application.

[51] In addition, the Estate submits that there is insufficient data over a long enough time frame to prove that enough water is available to warrant issuing the Licence. This was confirmed by past decisions of the Regional Water Manager and the Deputy Comptroller. The Estate says that the recent measurements relied on in the Technical Report are not an accurate representation of water availability, given that 2019 was a much wetter than normal water year as stated in the Technical Report, and few measurements were taken in 2020.

[52] Specifically, the Estate submits that 2019 was the wettest year by far compared to the previous five years having significant rainfall events in four out of the six months, based on data compiled from Environment Canada's Lytton

Reference Climate Station. The 2020 flow measurements in the Technical Report were made on April 9 and 22, and May 14, 2020. The Reuters started irrigation around April 20 that year and the Watkinsons had not started irrigating by then, so not all water was being utilized during April 2020. Further, the Estate says the spring freshet generally occurs around May 14, so measurements from that date may not represent the general state of affairs from April to September each year. No additional measurements were made in 2020, and a water shortage started in July 2020.

[53] In support of their submissions, the Estate also refers to historical documents. First is a memorandum dated June 20, 1989, from Neil Morrison, P.Eng., Acting Head of Water Supply and Drainage Section, to Ron B. Smith, P.Eng., Water Allocation Section Head of the Southern Interior Region. This memorandum discusses flow measurements at various points downstream of the dam/weir in 1989. Mr. Morrison stated that "one year of records would not be adequate to justify issuing a licence or constructing works".

[54] Second is a memorandum to file dated April 17, 1989, by Bill Franz, Engineering Technician, stating that licensing in the Kamloops Region is based on a 1 in 5 year drought. He also stated that 1985 was considered to be a 1 in 5 year drought, and that the first priority licences of the Reuters and Watkinsons were not satisfied in the months of July and August in 1985. The Estate notes that, in contrast, 2019 was a very wet year and certainly not a 1 in 5 year drought.

[55] Third is a 1992 Engineer's report prepared by Robert Petrie about the Olynyks' 1988 licence application. The report "deemed valid" the objections by the Reuters, Mr. Watkinson, and his wife (Pearl Watkinson) that they were not receiving their licensed quantities of water. The Estate submits that this conclusion was based on several years of irrigation records, and the 1980 Laluwissin-McGillivray Hydrology study by E. Weiss. Mr. Petrie also mentions that the Laluwissin-McGillivray 1985 Stream Measuring Program showed that the water rights in the first priority licences of the Reuters and Watkinsons were not fully used from July 11 to September 4 of that year, and the water rights in Mr. Watkinson's second priority licence could not be used.

[56] Fourth is an October 1993 report prepared by J.A. Truscott, titled "McGillivray Creek Availability Study". Mr. Truscott concludes that the data he reviewed "illustrates that McGillivray Creek is over-recorded for further licensing during the June through September portion of the irrigation season." This report states that it is based on data from 1915 through 1926 at the Water Survey of Canada Station 'McGillivray Creek near Lillooet', which was located above all diversions.

[57] The Estate also refers to a Ministry policy titled "Refusal of Water Licence Applications on Over-subscribed Sources" (effective June 1, 2009, and including amendments up to December 1, 2013), in which section 4, titled "Procedures", states:

Where previous reports, local data and office knowledge clearly document that a source is oversubscribed a decision to refuse future applications may

be made without any technical assessment of the source of proposed water use.²

[58] The Estate maintains that the volume of documentation on Mr. Olynyk's previous licence applications should have indicated that McGillivray Creek was oversubscribed. The Estate questions why a technical assessment was even considered. If there is water available in McGillivray Creek, the Estate argues that the existing holders of water licences that give water rights for McGillivray Creek should have priority access to that available water.

[59] In response to the claim that there is water available below the dam/weir and above the original diversion points, the Estate submits that this water is probably a combination of seepage from the dam/weir and additional groundwater entering the stream bed. Before 1983, this flow was split between Halfway Ranch (the Reuters) and Foster Bar Ranch (the Watkinsons) at their original diversion points, and the licensed water demand was not met. The Estate claims that it gets even less water at its new point of diversion. Therefore, at critical irrigation times in late June, July, August, and September, it is useful to "pick up" the seepage and groundwater at their original points of diversion. In 2020, both ranches operated at reduced sprinkler capacity in August, according to the Estate. The Estate says that, given climate change, this situation is going to get worse.

[60] The Estate also argues that it was improper that the Olynyks should be able to divert water from McGillivray Creek upstream of the Estate's point of diversion. The Estate argues that it has a priority on water use from McGillivray Creek because its licence pre-dated the Licence. Allowing the Licence to divert water upstream of the Estate's point of diversion means that, in the likely event that there is not enough water available, the Estate will be affected more than the Olynyks, despite the priority the Estate should have.

[61] The Estate submits that the Olynyks had no water licence on McGillivray Creek until the Licence was issued on November 4, 2020. Mr. Olynyk installed his above-ground waterline many years ago without authorization and without consulting the Reuters. The Estate notes that Mr. Olynyk was warned in a March 6, 2003 letter from a Water Management Officer that his diversion of water without a licence was unauthorized.

[62] In conclusion, the Estate submits that the Licence should not have been issued to the Olynyks given the history of water shortages and disputes on McGillivray Creek, the prior decisions denying the Olynyks a water licence, and Mr. Olynyk's history of illegally diverting water from McGillivray Creek. The Estate maintains that it is not right to "reward" Mr. Olynyk for such conduct by granting him a water licence.

[63] Additionally, the Estate argues the Olynyks should not be given a water licence because Mr. Olynyk bought his property knowing it had no surface water

² The policy defines "Over-subscribed" to mean "...fully recorded for all purposes, with a history of frequent water shortages and/or regulation." The policy also defines "Fully Recorded" to mean that, "...based on the information available at the time of the last inspection, no further licences should be considered on this stream."

access, and he does not need to divert water from McGillivray Creek because he has a well that produces over 65 cubic metres of water per day.

[64] The Estate also argues that the Olynyks should not be given a water licence (or at least not to the extent they were provided with water rights) because of Mr. Olynyk's historical conduct, beyond the fact that he diverted water from McGillivray Creek without authorization. The Estate says that Mr. Olynyk repeatedly trespassed on Halfway Ranch in September 2005 and September 2019. The Estate asserts Mr. Olynyk was hunting while trespassing in September 2005. The Estate also says that Mr. Olynyk trespassed on Ms. Warren's land. Further, the Estate says that, after Mr. Olynyk abandoned his appeal of the decision to deny him a licence to divert water from Olynyk Spring, he installed a two-inch pipe to divert water from there. His application for a water licence had been for a one-inch pipe. Accordingly, the Estate argues the Olynyks are unlikely to accurately measure and regulate their water usage as required in the Licence. The Estate says the Olynyks are likely to take more water than is authorized. The Estate argues Mr. Olynyk's historical conduct is reason to deny him a water licence, or if one is granted, to require a flow meter.

Summary of Olynyks' submissions

[65] The Olynyks say that their historical use of water from McGillivray Creek resulted from an agreement between the Olynyks, Mr. and Mrs. Reuter (now deceased), and the Deputy Comptroller. The Olynyks assert this agreement remains in place, and will do so for as long as the Olynyks own their property.

[66] The Olynyks submit that it is incorrect to consider McGillivray Creek to be fully recorded, because it has unrecorded water during freshet which can last for days, and the Creek drainage system has areas where the water disappears and resurfaces. Based on over 30 years of observations, the Olynyks say there was only one "lean" year for licensees on the Creek, except Halfway Ranch (the Reuters) which obtains most of its water from Laluwissin Creek. The Olynyks submit that over 90% of the water for the Estate's hay field comes from Laluwissin Creek, and the Estate should develop a reservoir on their property to store unused water from that source so it can increase its hay yield. Irrigation water from McGillivray Creek is not the only way the Estate can sustain their hay field.

[67] The Olynyks maintain that they have had beneficial use of the water "for years" and that McGillivray Creek should be considered "fully licensed" instead of "fully recorded".

Summary of the Respondent's submissions

[68] The Respondent submits that the principles of *res judicata*, issue estoppel and abuse of process do not apply in this case. The Respondent notes that the Board has considered the application of those principles in the past (*Alpha Manufacturing Inc., et al., v. Assistant Regional Waste Manager*, 99-WAS-30, February 3, 2000 [Alpha], at paras. 52 to 57; *Unifor Local 2301, Toews and Stannus v. Director, Environmental Management Act*, 2014-EMA-003(d), 004(d) & 005(d), June 25, 2018 [Toews], at paras. 115 to 119). The Respondent says that, based on the tests applied in the Board's past decisions, those principles do not apply in this case because the Board did not decide the merits of Mr. Olynyk's previous appeal. Rather, the Board dismissed the appeal at the outset of the appeal

hearing, after Mr. Olynyk indicated that he no longer wished to seek the remedy he had requested, namely, a water licence for irrigation.

[69] In addition, the Respondent submits that those principles do not preclude further licence applications or licences on a water source, particularly where a different point of diversion is involved and new information establishes that water is available for licensing at that point of diversion, as in the present case. The Respondent submits that the Olynyks' 1988 application for an irrigation licence, which was the subject of decisions by the Regional Water Manager, the Deputy Comptroller, and the Board, involved different points of diversion and different water purposes and quantities than the Licence. The point of diversion authorized in the Licence is downstream of the dam/weir at a point where inflows and groundwater contribution to McGillivray Creek make water available for licensing.

[70] Regarding the Olynyks' contention of an agreement with the Deputy Comptroller, granting them the right to divert water from McGillivray Creek, The Respondent says that a search within Ministry records has revealed no documents that corroborate such an agreement. The Respondent says such an agreement would have run contrary to the *Water Act*, which was the relevant and applicable law in force at the time.

[71] Regarding the water available in McGillivray Creek, the Respondent submits that the Licence will not materially affect the Estate's prior licensed rights, given that the Olynyks' point of diversion is downstream of the dam/weir which had been the Reuters' main source of water since the 1980's, and is currently the Estate's main source of water.

[72] The Respondent maintains that given the inflows and groundwater contribution to McGillivray Creek below the dam/weir, and the limited quantity of water to be used under the Licence, the Licence should not affect any limited use at the Reuters' original point of diversion.

[73] Regarding historical documents noting insufficient water for new licences on McGillivray Creek, the Respondent submits that very limited data had been collected at the Licence's point of diversion when those documents were prepared. The Respondent reviewed the best available information, which indicated that water would be available for the Licence. Significant to that conclusion was that the Reuters' and Mr. Watkinson's original points of diversion, downstream from the Licence's point of diversion, are no longer being put to full use. Also, as noted in the Technical Report, there has been, and continues to be, sufficient water to satisfy both the Olynyks' intended water use and the rights of other licensees on McGillivray Creek who divert water for irrigation at the dam/weir.

[74] Further, the other licensees' continued ability to use their original points of diversion should not be materially affected by the Licence, as Olynyk Spring flows into McGillivray Creek downstream of the Licence's point of diversion. Olynyk Spring feeds directly into, and comes to the surface within, McGillivray Creek just below the Reuters' original point of diversion, and above the points of diversion used by Ms. Warren and the Watkinsons. In the circumstances, the Respondent maintains that there is unrecorded water available for licensing at the point of diversion authorized in the Licence.

[75] With respect to the argument that the Licence should not have been granted because McGillivray Creek is fully recorded, the Respondent notes that the Ministry document titled, "What is a Water Allocation Restriction" states that a 'fully recorded' notation is a management tool used to alert Ministry staff of potential concerns when considering water allocation decisions. The Board has previously recognized that a fully recorded notation provides guidance to Ministry decision-makers, but does not bind them (e.g., *Peter and Joan Sanders v. Assistant Regional Water Manager*, Decision No. 2009-WAT-002(a), April 5, 2011 [Sanders], at paras. 36 to 38; *Rodney Gerald Retzlaff v. Assistant Water Manager*, Decision No. 2016-WAT-011(a), November 10, 2017 [Retzlaff], at para. 66). Ministry decision-makers must still consider individual licence applications on their merits.

[76] The Respondent says that the fully recorded notation in relation to McGillivray Creek only provided guidance, and the Creek is not actually fully recorded at the Licence's point of diversion based on streamflow measurements. The Respondent notes that the Ministry has revised its notation for McGillivray Creek to recognize that the Licence was granted at its point of diversion.

[77] In any event, the Respondent submits that the water rights of other licensees on McGillivray Creek are protected because their licences have earlier precedence dates than the Licence. Under the Act, the priority of use between licensees on the same stream or on a hydraulically connected stream is based on the precedence date of each licence. In times of water shortage, licensees with more recent priority dates may be required to cease diverting and using water so that more senior licensees may exercise their rights, pursuant to section 22 of the Act. Moreover, the Respondent submits that Licence conditions n) and o) are intended to protect the other McGillivray Creek licensees.

Summary of the Estate's final reply submissions

[78] In reply to the Olynyks' submissions, the Estate submits that creeks are not licensed according to freshet when flows are the highest, but rather, according to when flows are lowest and whether at those times the licensees receive their licensed amounts. The Estate agrees that, during freshet, McGillivray Creek has more water flowing in it than it can use for irrigation, and water flows downstream into the Fraser River. However, the Estate notes that hydrological studies done by R.D Lewis and Associates Ltd. in 1979, and by E. Weiss in 1980, determined that no suitable storage site exists in the McGillivray Creek drainage. Therefore, licensees do not have the capacity to store water during freshet for beneficial use. The Estate maintains that McGillivray Creek is fully recorded, and no licence should be issued with a point of diversion above the original points of diversion. The Estate also notes that the Olynyks have a groundwater well on their property that supplies most of their water.

[79] The Estate objects to the Olynyks' assertion that Halfway Ranch obtains 90 percent of its water from Laluwissin Creek. The Estate maintains that it has water licences for 238.95 acres from both Laluwissin and McGillivray Creeks. Their McGillivray Creek licence accounts for 69.71 acres, while the remainder comes from Laluwissin Creek. Furthermore, although this is the acreage to be irrigated "on paper", the Estate would never actually irrigate 238.95 acres because there would not be sufficient water for the duration of the licensed irrigation period from April 1

to September 30. The Estate says that it is currently irrigating approximately 195 acres.

[80] Further, contrary to the Olynyks' submissions, the Estate says that many of the past 30 years have been "lean", including 1994, 1995 and 1996. The Estate submits that the Olynyks cannot know whether the Estate is having a "lean" year, because the Olynyks do not know what the Estate is irrigating, what it should or could be irrigating, or what management practices the Estate uses to stretch its water supply.

[81] The Estate emphasize that the Olynyks installed their water line in 1988 without authority, and Mr. Olynyk has tried to bury the Olynyks water line without authorization. The Estate provided a copy of a June 30, 1988 letter to Mr. Olynyk from a lawyer on behalf of Astrid Reuter, stating that Mr. Olynyk was laying a pipe to divert water from McGillivray Creek without authority, that Mrs. Reuter objected to this, and that his works were in contravention of the (then) *Water Act*.

[82] The Estate also says that there is no corroboration of the Olynyks' statement about a verbal agreement granting the Olynyks water rights. The Estate says such an agreement would have been unknown to Mr. Watkinson, who would have been affected by the agreement, and that water rights cannot be granted by such secretive agreements.

Summary of the Olynyks' final reply submissions

[83] In reply to the other parties' submissions, the Olynyks submit that there has always been enough water for Olynyks' land.³

The Panel's findings

- a. *Should the Licence be reversed because the issue was decided when Mr. Olynyk's application for a similar water licence was denied in 1992?*

[84] The Estate argues that, because Mr. Olynyk's application for a similar water licence was denied in 1992, the common law doctrines of *res judicata*, issue estoppel, and abuse of process apply. In *Toews*, the Board considered *res judicata* and issue estoppel, and the Board's powers under the *Administrative Tribunals Act* (the "ATA"). Certain sections of the ATA, including section 31, apply to the Board.⁴ As discussed below, some of the Board's powers under section 31 of the ATA serve similar purposes to the doctrines of *res judicata* and issue estoppel.

³ The Olynyks also argued that the Respondent or the Board should consider revoking the Reuters' "supplementary" and "second domestic" licences on McGillivray Creek for non-use, as all their water comes from Laluwissin Creek. As the Reuters' licences are not under appeal, however, I will not consider this argument in further detail. There are provisions under the *Act* that address licensees who do not make full beneficial use of their water rights contained in licences. That is not the issue before me.

⁴ Section 105(4) of the *Act* states that Division 1 of Part 8 of the *Environmental Management Act* applies to an appeal under the *Act*. Division 1 of Part 8 contains section 93.1, which provides that, other than some specific exceptions, Part 4 of the ATA applies to the Board. Section 31 of the ATA is found in Part 4 and is not exempted under section 93.1 of the *Environmental Management Act*.

[85] As discussed in *Toews*, the common law gives the Board the power to manage its procedures, consistent with the principles of procedural fairness. This includes being able to apply the doctrines of *res judicata* and issue estoppel to prevent the re-hearing of matters that the Board has conclusively decided.

[86] As the Board explained in *Toews* at para. 116, the principle underlying the doctrine of *res judicata* is that, subject to certain exceptions, a final decision of a court or tribunal must be treated as conclusive and may not be attacked in subsequent proceedings. Issue estoppel is a branch of *res judicata*. It prevents the re-litigation of an issue that was decided in a prior appeal, where the decision in that proceeding was final and where the parties (or their privies) to both proceedings are the same. In *Alpha*, the Board found that the doctrine of issue estoppel prevented it from reconsidering an issue that the Board had decided in an earlier appeal involving the same parties or their privies. In *Alpha*, the Board relied on the common law doctrine of issue estoppel because the ATA did not exist yet.

[87] By the time *Toews* was decided, section 31 of the ATA applied to the Board. Under section 31(1)(c) of the ATA, the Board may summarily dismiss all or part of an appeal if the Board determines that the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process. In *Toews* at para. 110, the Board discussed the test for abuse of process under section 31(1)(c) of the ATA:

Based on ... the Board's common law powers to manage its own procedures in accordance with the principles of procedural fairness, the Panel finds that the Board may take a flexible approach when considering an application under section 31(1)(c) of the *Administrative Tribunals Act*. When deciding whether allowing the ground for appeal to proceed to a full hearing on the merits would amount to an abuse of the appeal process, the Board may consider factors such as whether the matter has been "fully aired in previous proceedings" as stated in *Unifor 2*, or whether allowing the ground to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice" as stated in *CUPE*.

[underlining added]

[88] Further, under section 31(1)(g) of the ATA, the Board may summarily dismiss all or part of an appeal if the Board determines that the substance of the appeal has been appropriately dealt with in another proceeding. In paras. 118 and 119 of *Toews*, the Board noted that in contrast to the requirements of issue estoppel, section 31(1)(g) of the ATA does not state that the parties or their privies must have been the same in both proceedings.

[89] Turning to the present appeals, I note that the Board did not make a decision on the merits of Mr. Olynyk's appeal of the Deputy Comptroller's decision refusing his application for an irrigation licence. The Board dismissed the appeal without hearing evidence or deciding the issue of whether there was sufficient water in McGillivray Creek to grant an irrigation licence to the Mr. Olynyk. Although the Deputy Comptroller and the Regional Water Manager had decided that there was insufficient water in the Creek to issue an irrigation licence to Mr. Olynyk, the Board is not bound by those decisions. Moreover, I find that the issue in Mr. Olynyk's past appeal to the Board (and in the past decisions of the Regional Water Manager and Deputy Comptroller) is not the same as in the present appeal. The Licence is for a

much lower quantity of water (four cubic metres of water per day, and 732 cubic metres in total) than would have been needed to fulfill the irrigation demand sought in his 1988 application (approximately 32.7 cubic metres of water per day, and 3,922.47 cubic metres in total). Also, new information has become available regarding the water supply at the Licence's point of diversion. Based on the same legal principles that informed the Board's decisions in *Alpha* and *Toews*, I find that neither the doctrines of *res judicata* and issue estoppel, nor section 31(1)(g) of the ATA, apply in this case.

[90] I also find that the present appeals do not give rise to an abuse of process for the purposes of section 31(1)(c) of the ATA, given that the Board did not hear evidence or consider the issue of water availability in McGillivray Creek in the previous appeal, and given the factual differences noted above between the Licence and the 1988 application for an irrigation licence. The water availability issue in the present appeals, and the associated relevant facts, were not "fully aired" in either the past appeal to the Board or the decision-making processes of the Regional Water Manager and the Deputy Comptroller. I conclude that it does not violate such principles as judicial economy, consistency, finality, or the integrity of the administration of justice to decide the issue in the present appeals regarding whether there is sufficient water in McGillivray Creek to grant the Licence.

[91] For these reasons, I conclude that neither the doctrines of *res judicata* and issue estoppel, nor the Board's powers under sections 31(1)(c) and (g) of the ATA, apply in the present case, and even if one of the foregoing did apply, it would not result in reversing the Licence. I find that the Licence should not be reversed because ~~the issue was decided~~ Mr. Olynyk's application for a similar water licence was denied in 1992. Consequently, this ground of the Estate's appeal is dismissed.

b. Should the Licence be reversed because there is insufficient water in McGillivray Creek to support the water diversion and use authorized in the Licence, given the priority of existing licences?

[92] At the outset, I wish to address the Olynyks' argument that their use of water is already approved as a result of an oral agreement between themselves, the Reuters, and the Deputy Comptroller. If this happened, it would have been exceedingly unusual and it runs counter to the whole water licencing scheme that existed under the *Water Act* and now exists under the *Act*.

[93] The Olynyks' say that the agreement was based on an understanding that a water licence would have been permanent, and the point of this agreement was to avoid such a thing. Water licencing, under both the *Water Act* and the *Act*, includes provisions for water licences without expiry and those with expiry dates. In short, a water licence does not need to be permanent and this runs counter to the whole rationale for the agreement described by the Olynyks.

[94] As a result, it is not clear to me that any arrangement between the Deputy Comptroller and the Olynyks involved a mutual understanding of the key provisions of the agreement. The terms of such an agreement are, accordingly, unclear to me.

[95] In any event, under section 5 of the *Act*, water rights are vested with the government, except where private rights are established by authorizations. The same vesting was described in section 2 of the *Water Act*.

[96] Under the *Act*, authorizations may come in the form of use approvals granted under section 10, drilling authorizations granted under section 62, and licences granted under sections 9 or 19. . Use approvals can only be for up to 24 months, so cannot reflect the permanent water rights contemplated by the Olynyks. Drilling approvals are required to drill or alter a well, install a well pump, or conduct a flow test. As the Olynyks' asserted right to divert water from McGillivray Creek is none of those things, drilling approvals are irrelevant to this consideration. The only authorization that could give the rights the Olynyks assert they have under the *Act* is a licence.

[97] Under the *Water Act*, authorizations came in the form of licences granted under section 5 and written approvals for short-term use granted under section 8. As such, the only authorization that could give the Olynyks the right to divert water from McGillivray Creek that they say they have would be a licence granted under section 5. The important common feature of licences under both the *Act* and the *Water Act* is that they were and are issued in writing. The rights that the Olynyks claim to have could not have been and cannot be granted in a verbal agreement.

[98] As a result, even if the Olynyks and the Deputy Comptroller made any such agreement or arrangement, it cannot give the rights they say that have. The Olynyks cannot divert water from McGillivray Creek based on any such agreement. The Licence is the authorization by which the Olynyks have a right to divert water from McGillivray Creek.

[99] Next, I wish to reiterate the relative location of the various points of diversion at issue in these appeals. The Estate's and Mr. Watkinson's dam/weir is the furthest upstream of these diversion points on McGillivray Creek. The Olynyk's point of diversion authorized under the Licence is the next one downstream. A short distance further downstream is the Estate's original point of diversion, now used to recapture water that it says escapes the dam/weir. Downstream from there, Olynyk Spring flows into McGillivray Creek. Further downstream is the original point of diversion in Mr. Watkinson's licence, now to recapture water that he reportedly believes escapes the dam/weir. Ms. Warren's point of diversion is the furthest downstream. If there are unknown aquifers recharging McGillivray Creek, it is unknown where the point(s) of recharge is/are.

[100] With respect to the Estate's argument that the Licence should not have been granted because McGillivray Creek is fully recorded, I note that according to Ministry policy, a "fully recorded" notation provides advisory guidance to decision-makers, based on information available when the notation was made, that the water source is at its capacity for licensed water use, and new licences should not be issued on that water source. However, I note that according to the Ministry policy cited by the Estate, a water licence may be considered for issuance on a fully recorded stream if circumstances change. The Ministry policy cited by the Estate states in section 3, titled "Reasons for Policy":

... Once a water source has been determined to be fully recorded, additional technical assessment of subsequent water licence applications, on the source for that purpose, is not warranted, unless there is reason to believe circumstances may have changed.

[underlining added]

[101] In addition, I agree with the Board's findings in previous decisions that there may be circumstances when a licence can be issued on a fully recorded stream without harming stream habitat or the rights of downstream licensees, if the new licence is for a relatively small amount of water, and water will be diverted and used only when the stream flow is sufficient to support the licensed water use.

[102] For example, in *Sanders*, the Board held that it was not bound by a Ministry policy that new licences may only be issued on fully recorded streams if the water use is supported by storing water during freshet for later use. Based on the evidence in that case, the Board concluded that there was sufficient flow in the stream to support a licence for a relatively small amount of irrigation water for a limited period of time (6 acre feet of water between May 1 and June 30 annually). The Board determined that withdrawing that amount of water at that time would have no negative impacts on fisheries or downstream licensees. However, the Board ordered that, as a condition of the licence, the licensee had to install a stream gauge and record the volume of water they used.

[103] I find that the question of whether there is sufficient water to support both the pre-existing licensed water uses on McGillivray Creek and the water use authorized in the Licence generally depends on: the timing of licensed water demand, both in terms of when the Olynyks seek to divert and use water, and when the pre-existing licences on McGillivray Creek authorize diverting and using water; and, the available water supply in McGillivray Creek, which varies seasonally during any year, from year to year, and at different points along the Creek.

[104] The Licence (and most of the other licences authorizing the diversion of water from McGillivray Creek) allow the diversion of water from April 1 to September 30 each year. It is for this period of time that the availability of water in McGillivray Creek is an issue, for the purposes of these appeals. This period includes both the approximate time of Spring freshet and the time from approximately late June through September when the evidence indicates that the pre-existing licensees may experience water shortages for irrigation.

[105] The Olynyks maintain that McGillivray Creek has unrecorded water during freshet which can last "for days", but they did not specify when or how long this occurs. The Estate acknowledges that during freshet, there is more water flowing in McGillivray Creek than the pre-existing licensees can use, and they do not store water during freshet, which results in some water flowing downstream to the Fraser River. The Estate says that May 14 is within the time period when freshet occurs, but did not say how long freshet typically lasts. In any event, based on all parties' submissions and evidence, there appears to be no question that the water supply in McGillivray Creek is sufficient to satisfy both the use authorized under the Licence and the licensed use of the Estate and other pre-existing licensees during at least the months of April and May.

[106] According to the evidence, the water supply in McGillivray Creek typically becomes more limited during late June through September, to the point that it is insufficient for the Estate to meet their irrigation needs. As a result, my analysis will focus on the availability of water within that annual timeframe.

[107] I have also noted that the water supply in McGillivray Creek varies at different points of diversion along the Creek. The evidence shows that since the

mid-1980's, water has been observed flowing in the Creek downstream of the dam/weir, even in drought years such as 1985. This water was initially thought to originate from spillage or leakage at the dam/weir, which led the Reuters and Watkinsons to be concerned that water meant for their licences was 'escaping' downstream. However, the flows downstream of the dam/weir are now believed to be due to contributions from Olynyk Spring and groundwater from an unknown aquifer feeding into McGillivray Creek below the dam/weir, which means that this water naturally feeds into McGillivray Creek downstream of the dam/weir.

[108] For example, the May 26, 1989 memorandum prepared by Ron B. Smith, Water Allocation Section Head, states in part:

The licensees have indicated there is some difficulty with the [dam/weir] structure's ability to capture and deliver the licenced quantity. The licensees have indicated that with the structure spilling no water, substantial/considerable flow resurfaces a short distance downstream of the structure and is lost to the current (conveyencing) delivery system.

The 1985 Laluwissin - McGillivray Stream Measuring Program showed the first right quantities of the two licensees were not being satisfied. The licensees noted flows were present downstream of the diversion structure throughout 1985 which was noted as a 1 in 5 drought by Victoria.

[emphasis added]

[109] Similarly, the January 1992 Engineer's report on Mr. Olynyk's application for an irrigation licence states in part:

It has been acknowledged by the existing licensees that flows do occur below the [dam/weir] due to seepage and/or spillage recharge and/or groundwater movement. The situation has been and remains a concern of the existing licensees:

...

- Kamloops office personnel have also noted downstream flows without visible spillage occurring at the [dam/weir].

[110] The Technical Report notes on page 4 that flow data was collected on McGillivray Creek in 1985 and 1989 at the dam/weir, except for two flow measurements at or just below the Olynyks' (then unauthorized) point of diversion in 1989. The refusal of Mr. Olynyk's licence in 1988 was based on flow measurements at the dam/weir, not those flow measurements taken downstream of the Olynyks' point of diversion.

[111] Two memoranda dated December 5, 1989, prepared by R. Reid, an Engineer with the Water Allocation Section, provide stream flow data recorded in McGillivray Creek on April 25 and July 11, 1989. The memorandum showing the July 11, 1989 data states:

On first attempting to evaluate flows downstream of intake it appeared as if flows were reasonably steady. On returning to the intake at 12:13 p.m. it was noticed that there was no spill and the trickle of flow from the creek banks downstream of the spillway was diminishing gradually - this suggests

recharge of the creek bed. At 3:30 p.m. seepage was still noticed downstream of the intake and flows further downstream had diminished.

It appears that spillage at the intake during irrigation line changing recharges the creek bed and banks. This recharge water then can provide sufficient return flow to maintain adequate downstream flows. ...

[112] Thus, the author of the 1989 memoranda believed that spillage at the dam/weir upstream provided the groundwater that he observed seeping out downstream and recharging the water flow in McGillivray Creek.

[113] On page 7, the Technical Report discusses the 1989 data, stating:

... On April 25, 1989 the flow taken at the dam overspill was 0.04460 cubic metres per second compared to the 0.03356 cubic metres per second at the [Olynyks'] unauthorized POD - a difference or loss of 0.01104 cubic metres per second at the unauthorized POD. Two flow measurements taken on July 11, 1989, showed 0.00100 cubic metres per second (at 13:21hrs) and 0.00167 cubic metres per second (at 15:50hrs), as compared to 0.01699 m³/s (at 10:30hrs during irrigation changing) and no flow (at 12:13hrs with irrigation on) - a combined difference or gain of 0.00134 m³/s as this would be a time lag recharge during the irrigation changing in the mornings (and again in the evenings). ...

[114] However, the Technical Report states that the seepage which was attributed to spillage at the dam/weir is now believed to be from unknown aquifers. On page 4, the Technical Report reviews information on stream flow at the Licence's point of diversion based on both historic and 2019 information about stream flow, and concludes as follows:

... After 26 years of licence holders using their PODs below the applicant's proposed POD, and with data collected in 2019, the available data at this point in time suggests that there will be no negative effect on these users. 2019 flow measurements show that there is more water below the applicant's POD, but it is possible this may be due to the high flow year. There is also a large presence of horsetail up and down McGillivray Creek which indicates ground seepage water and is a possible indicator of many aquifers feeding baseflows into McGillivray Creek in many locations during low precipitation months, not impacting the PODs below the applicant's POD. It was once thought that the water at this point was seepage from the upper point of diversion/dam structure and that it would soon seal off, but data suggests that this water is most likely from unknown aquifers in and around the dam area which lie to the edges of the McGillivray Creek valley.

[underlining added]

[115] The Technical Report also notes on page 4 that Mr. Watkinson stated on July 30, 2019, that there always has been more water at the Olynyks' unauthorized point of diversion in the years since amending the pre-existing licences to use their original points of diversion, and he has experienced no effect on his use.

[116] Appendix A in the Technical Report contains a table showing the average stream flow (in cubic metres per second) at three locations on McGillivray Creek during April 2020 and May through October 2019:

Location	April 2020	May 2019	June 2019	July 2019	August 2019	September 2019	October 2019
Above Dam	0.039	0.143	0.103	0.266	0.087	0.059	0.057
Application	0.037	0.052	0.043	0.228	0.024	0.036	0.062
PD66217	0.039	0.075	0.050	0.236	0.021	0.038	0.066

[117] The three locations are: above the dam/weir; the point of diversion specified in the Olynyks' application (and now authorized in the Licence); and the point of diversion authorized in Ms. Warren's licence. The average flow indicated in the Table for each month was determined based on measurements taken by Mr. Stockwell on at least one day, and up to three days, in those months.

[118] The information consistently acknowledges what the Olynyks have observed: that downstream of the dam/weir, McGillivray Creek comprises areas that are effectively dry at times, and areas in which waterflow is re-established by groundwater recharge. The 1989 memorandum indicates that the recharge likely stems from spillage during irrigation line changing and/or seepage at or near the dam/weir structure. The Technical Report recognizes that theory, but concludes that the recharge is from groundwater, including Olynyk Spring and unknown aquifers.

[119] I find the Technical Report to be the most persuasive explanation of the variable quantities of water available at different points on McGillivray Creek. The Technical Report offers sound analysis and is based on a more thorough basis of evidence and observation than was available at the time of the 1989 memorandum. I therefore conclude that, downstream of the dam/weir structure, McGillivray Creek is recharged by Olynyk Spring, and also perhaps by some aquifer(s). This means that, even if there is insufficient water to satisfy all licences at the dam/weir, there may be water available for other licence holders, further downstream.

[120] The Technical Report supports that, given the recharge of McGillivray Creek by Olynyk Spring (and possibly by one or more aquifers), there is enough water to support the Licence. A table found on page 6 of the Technical Report indicates that the Licence would account for 0.00005 cubic metres per second of demand on the stream flow, above and beyond the 0.06857 cubic metres per second already authorized to be diverted under existing licences of McGillivray Creek. Reading that together with the table at Appendix A of the Technical Report (reproduced above), I conclude that there was adequate water at the point of diversion authorized in the Licence, at least when measurements were taken between May 2019 and April 2020. I note that the water diversion authorized by the Licence would account for less than 1% of the flow measured in McGillivray Creek at the point of diversion, for all measurements taken during that period.

[121] Significantly, the Technical Report also states on page 4:

... the data showed that the difference in discharge at the dam was less than the discharge at the [Licence's] POD after the demand of all licences was fulfilled at the dam. Another point is that [Olynyks' application for a licence for 500 gallons/2.27305 cubic metres of water per day] on Olynyk Spring was granted, and at that time it produced 16.353 cubic metres per day. This spring feeds directly into McGillivray Creek between the applicant and the old PODs of the other users. This suggests that there would be no change in flow

at the lower PODs if the POD was switched from Olynyk Spring to McGillivray Creek.

[122] This further supports that Olynyk Spring (to say nothing of any undefined aquifers) recharges McGillivray Creek downstream of the dam/weir and the original point of diversion for the Reuters. The recharge from Olynyk Spring (measured at 16.353 cubic metres per day in or around 1988)⁵ far exceeds the four cubic metres per day that can be diverted from McGillivray Creek under the Licence.

[123] The Estate says that the 2019 and 2020 measurements are not representative of the amount of water typically available, given that 2019 was a very wet year and that the May 14, 2020 measurement was taken during freshet. On page 7, the Technical Report acknowledges that 2019 was a "high flow year", and that based on information from "local users and reviewing past flow data, there usually is not enough water at the dam on McGillivray Creek to fulfill the [pre-existing] licences."

[124] I agree with the Estate that the 2019 and 2020 measurements are not representative of the amount of water typically available, given that 2019 was a very wet year and the May 14, 2020 measurement was taken during spring freshet. On the other hand, based on all of the evidence including the historical documents, I agree with the conclusion in the Technical Report that there seems to be enough water to satisfy the Olynyks' unlicensed water use and what is authorized under the Licence. In the 26 years that have passed since 1993, the Reuters (and now the Estate) and Mr. Watkinson have been using their original points of diversion and the Olynyks have been diverting water upstream from them, it appears that there has been sufficient water. For greater certainty, and to allow more information to be gathered, the Licence includes an expiry date of December 31, 2025. This ensures that more flow data can be obtained and the actual flow rates in the Creek at the point of diversion can be confirmed over a longer period of time.

[125] I also find that the summer water shortages experienced by the Reuters and the Estate are primarily due to insufficient water supply at the dam/weir, their main point of diversion, which is upstream of the Olynyks' now-licensed point of diversion. The Olynyk's unlicensed water use appears to have had little impact on the pre-existing licensees' water use. This is as predicted in the Technical Report. I lend additional weight to the Technical Report because the experience of the various licence-holders is consistent with that prediction.

[126] Even if there are occasional water shortages on McGillivray Creek, that is not fatal to the Olynyks' application. In *Retzlaff*, the Board found that occasional water shortages on a water source do not necessarily preclude the issuance of a new licence, especially if the new licence is for a small amount of water and there will be no adverse effects on the environment.

[127] In *Retzlaff*, the Board found that the quantity of water granted under the licence was insignificant relative to the demand of an irrigation licence and the flow in the stream, and would have no measurable impact on the appellant's ability to

⁵ This figure was referenced in the Technical Report.

meet his irrigation needs. I find that the circumstances in the present case are similar to those in *Retzlaff*.

[128] As noted on page 6 of the Technical Report (and summarized previously), the water demands associated with the Licence are for 0.00005 cubic metres per second, while the existing demand is for 0.06857 cubic metres per second. The Licence represents an increase in demand on water flow in McGillivray Creek by roughly 0.073%. This represents an insignificant increase, as described in *Retzlaff*.

[129] In addition, the Technical Report states on page 8 that environmental flow needs are not a concern, as this Creek usually does not flow into fish habitat and frogs were not found in this area. The evidence does not support a finding that there are any adverse environmental effects that would result from the water diversion authorized under the Licence.

[130] Additionally, the ground water recharge from Olynyk Spring was not accounted for in granting the licences to the Reuters, Mr. Watkinson, and Ms. Warren, and more than makes up for the increased water demand required by the Licence for all points of diversion downstream of Olynyk Spring. This further supports granting and confirming the Licence.

[131] I appreciate the Estate's concern that the Olynyk's point of diversion is upstream of their original point of diversion (and that of Mr. Watkinson); however, those points of diversion are no longer used as the principal point of water for the Estate or Mr. Watkinson. Both the Estate and Mr. Watkinson chiefly draw water from the dam/weir, upstream of the point of diversion authorized in the Licence. This addresses, in large part, the concern about the Olynyk's point of diversion being upstream of the Estate's.

[132] Additionally, the licences held by the Estate (and Ms. Warren and the Watkinsons) on McGillivray Creek have earlier precedence dates than the Licence. Therefore, based on section 22(1) of the *Act*, the Estate (and Ms. Warren and the Watkinsons) have priority as water users over the Olynyks in the event of a water shortage in the Creek. I note that under section 22 of the *Act*, licensed water uses are assigned a ranking or priority primarily based, first, on a licence's date of precedence (section 22(1)), and, second, based on the type of water use (sections 22(5) and (7)) if two or more licences have the same precedence date.

[133] Engineers appointed under the *Act* can enforce the priority of water rights, including by making orders and taking action "... with respect to the diversion, rate of diversion, time of diversion, carriage, distribution and use ... of water".⁶ Any remaining concern about the priority of the water licences on McGillivray Creek can be dealt with through the enforcement of priority by an engineer.⁷

⁶ See Section 93(2)(i) of the *Act*. See also section 22(10) of the *Act*, which contemplates engineers taking action "... to enforce the precedence of rights to divert or use water from a stream or aquifer", other than a base amount of up to 250 litres per day, for use as drinking water, in food preparation and sanitation, and for providing water to animals or poultry that are kept for household use or as pets.

⁷ Water rights granted under licences may also be restricted when an order declaring a significant water shortage is made with respect to a stream, under section 22(9) of the *Act*. In such a case, the critical environmental flow threshold takes precedence over the rights under any licence on the stream or a hydraulically connected aquifer.

[134] The Estate has also questioned whether the Olynyks need the four cubic metres of water per day that the Licence authorizes to be diverted from McGillivray Creek. The Estate argues that the Olynyks do not need to divert water from McGillivray Creek because they have access to over 65 cubic metres of water from a well. The well water is for "domestic purpose only", according to the Technical Report, while the water in the Licence is for "lawn, fairway, and garden" purposes.

[135] Section 2 of the Act defines "domestic purpose" as a purpose for diverting water from a stream or aquifer, as water use "... for household purposes". Such purposes include drinking water, food preparation, sanitation, fire prevention, providing water to animals or poultry kept for household use or as pets, and for irrigation of a garden not exceeding 1,000 m², that adjoins and is occupied with a dwelling.

[136] The Licence is not for a "domestic purpose". It is to water lawn, fairways, and gardens, which the Olynyks have indicated includes fruit trees. Under the terms of the Licence, the Olynyks could water more than 1,000 m² of garden. They may also water their lawn and/or fairway. They may also water a garden that does not adjoin their home. They may use water for "lawn, fairway, and garden" purposes in a number of ways that extend upon and are consistent with their use of groundwater for "domestic use", which I read to be the same as "domestic purpose".

[137] In any event, the Licence has been granted and, accordingly, the Estate bears the burden of proof if it wishes to establish that the Olynyks do not need the water rights contained in the Licence. The Estate has failed to do so, given the variety of legitimate explanations for the Olynyks' use of the water rights contained in the Licence.

[138] I recognize that the Estate argues that existing licence-holders should have the first opportunity to access additional water, discovered in McGillivray Creek since the Reuters, Mr. Wilkinson, and Ms. Warren obtained their water rights in the creek. The Estate did not reference any legal authority for that proposition. The Act does not provide for such rights to existing water rights users. I am aware of none and, as a result, I do not find this argument to be persuasive.

[139] I recognize that the Olynyks have questioned whether the Estate is making the most efficient and effective use of their licensed supply of water, and whether the Estate still uses the original point of diversion or the rights contained in its licences. I do not need to address these concerns to resolve the appeals. The Board's role in deciding the appeals of the Licence is not to investigate other licensees' use of water under other licences. Whether the Estate makes efficient or effective use of their licensed water supply is not a matter for the Board to decide in these appeals. I also do not need to address this argument from the Olynyks because, even at the Estate's current rates of usage, I have concluded that there is adequate water in McGillivray Creek to support the Licence.

c. *Should the Licence be reversed because Mr. Olynyk has a history of non-compliance with legal and regulatory requirements associated with water rights and may divert more water than is authorized in the Licence?*

[140] The Estate has argued that the Olynyks should not be rewarded with the Licence after they have been illegally diverting and using water from McGillivray

Creek for many years. The Olynyks' notice of appeal and submissions appear to confirm that they have been diverting and using water from McGillivray Creek since 1988. For example, the Olynyks' notice of appeal states that Mr. Olynyk "designed and installed the existing water works which have been in use since 1988" and the Olynyks "have beneficially used the water for 30 years." The evidence also confirms that before the Licence was granted, the Olynyks briefly held a licence to divert water from McGillivray Creek for domestic use in 1988, but they abandoned that licence a few months after it was granted.

[141] I note that under section 6(3)(a) of the *Act* (and section 42(2) of the former *Water Act*), a person is not prohibited from diverting and using unrecorded water for "domestic purpose", which was described previously. It does not authorize the use of water, even if it is unrecorded, for irrigation or industrial uses.

[142] The Olynyks have not said how they used any water they diverted from McGillivray Creek without a licence. However, even if they used this water for domestic purposes, the Ministry's opinion was that there was no unrecorded water available in any part of McGillivray Creek. As such, the Olynyks' historical use of water from McGillivray Creek was contrary to the *Act*. Yet, the Ministry apparently took little action in response to complaints regarding the Olynyks' unauthorized diversion and use of water, other than to issue a warning letter in 2003.

[143] Despite what may or may not have occurred in the past, I wish to be clear that the decision to issue the Licence (and a decision by the Board not to reverse the Licence) does not condone any illegal diversion and use of water by the Olynyks that may have occurred. The Ministry's enforcement powers under the *Act* are separate from, and not connected to, the power to consider an application for a water licence. Part 2 of the *Act* and section 2 of the *Water Sustainability Regulation* address water licensing, but none of those provisions specify that unauthorized water use in the past is a factor to be considered when evaluating an application for a water licence. While there may be circumstances where an applicant for a water licence's conduct has been so egregious that a licence may be denied, I do not consider the Olynyks' conduct to warrant reversing the Licence. In reaching this conclusion, I have weighed the Olynyks' history of non-compliance (and its effects) against the effect of denial of the Licence.

[144] While no parties provided any authorities for me in how I should address this argument, I found the reasons of the British Columbia Court of Appeal in *House of Sga'nism v. Canada (Attorney General)*, 2007 BCCA 483 [*House of Sga'nism*] to be helpful.⁸ That case involved an appeal from a judge's decision to dismiss a case when a party to that case partly complied with an order from that court. The Court of Appeal noted that a sanction should be proportional to the degree of non-compliance that gives rise to the sanction. The decision-maker must give sufficient consideration to all relevant considerations and alternative resolutions to the non-compliance (or partial compliance). The decision-maker should avoid unduly severe or draconian sanctions.

⁸ This case was publicly available when all parties made submissions with respect to the appeals.

[145] I have considered the Olynyks' history of non-compliance and its effects. This includes:

- that this non-compliance has not significantly affected the water rights of others in the area;
- the seasonal nature of water scarcity in McGillivray Creek;
- the fact that unaccounted-for groundwater recharge exceeds the water reportedly diverted by the Olynyks; and
- Mr. Olynyk's reasoning that there is enough water in the creek, particularly where surface water re-emerges in the creek bed, after the surface water is caught by the dam/weir, consistent with the previously-unaccounted for groundwater recharge described above.

[146] After weighing these factors, I conclude that the Olynyks' history of non-compliance is relatively mild. This is the case whether the pipe the Olynyks used to divert water was one inch wide or larger. The pipe diameter, even if larger than the size referenced in Mr. Olynyk's application for a water licence in 1988, is not a significant factor in my decision making, weighed against the factors listed above.

[147] I have also considered the impact of the Licence being denied. This is a serious and draconian sanction, given the mild history of non-compliance and the availability of lesser sanctions, including terms and conditions being imposed on the Licence. I therefore consider that reversing the Licence is an inappropriately severe response to the Olynyks' history of non-compliance.

[148] Regarding the Estate's allegation that Mr. Olynyk may divert more water than he is allowed to under the Licence, given his past behaviour, I find that the conditions in the Licence, discussed below, will allow the Ministry to check on how much water he uses. If he uses more than the Licence allows, the Ministry has the authority to take enforcement action.

[149] Mr. Olynyk's reported history of trespassing is even less relevant to the issue of the Licence. This reported history, whether to deal with the pipeline diverting water from McGillivray Creek or to hunt (or any other reason), does not change my assessment of the inappropriate severity of denying the Olynyks' application for the Licence.

[150] In conclusion, based on the evidence, I find that the Licence should not be reversed based on the Estate's claim that the issue was decided when Mr. Olynyk's application for a similar water licence was denied in 1992. I find that the relevant facts regarding the Licence and Mr. Olynyk's past licence application are different, and new information is available that was unavailable when his past application was denied. I find that there is sufficient water in McGillivray Creek to support the water diversion and use authorized in the Licence, given the priority of existing licences. I also find that the Licence should not be reversed because Mr. Olynyk has a history of non-compliance with legal and regulatory requirements associated with water rights, and the Estate alleges that he may divert more water than is authorized in the Licence. I therefore conclude that the Licence should not be reversed.

2. Should the Licence be amended?

Summary of Olynyks' submissions

[151] The Olynyks submit that the conditions in the Licence requiring a professional engineer to design and supervise the installation of the licensed works, and setting the Licence's expiry date at December 31, 2025, are not warranted.

[152] The Olynyks say that the works were installed in 1988. They described the technical specifications of the pipeline and say that the diversion structure requires little maintenance other than monitoring. During the past 30 years, the design and installation of the works have never been questioned by the "Water Branch", including after a field inspection done by water engineer on September 14, 1993.

[153] The Olynyks submit that this design and installation should remain the same, and no engineer is needed for design or construction. At the same time, however, the Olynyks also say they intend to bury the pipeline in the area where they have been granted a permit over Crown land, in a trench that will be 14-inches wide and four feet deep. Bedding material for the pipe will consist of loam and sifted material, and the topping will consist of sifted material. In either case, the Olynyks argue that Mr. Olynyk has the requisite experience to design and install the works himself. Neither the existing diversion works nor Mr. Olynyks' plans for buried works include use of a cumulative flow measuring device.

[154] Further, the Olynyks argue that the expense associated with having a registered professional design and supervise the installation of the works would be excessive, given the expiry date for the Licence. The Olynyks note that it is only the Estate that has raised an issue with the design of the diversion works.

[155] Regarding an allegation that the water pipeline ruptured in October 1996 and a "waterfall" was reported by Ms. Warren, the Olynyks claim that Mr. Winfried Reuter and another person deliberately sabotaged the Olynyks' water line on numerous occasions, and reports were made to the Water Branch and the police.

[156] The Olynyks argue, given their 30 years of beneficial water use and the agreement they say they made with the Deputy Comptroller, there is no need to have an expiry date with an option to renew the Licence.

[157] The Olynyks also argue that the five-year term of the Licence is inconsistent with practice across the province, which they say is to grant water licences without expiry dates.

[158] In support of their submissions, the Olynyks provided photographs of an access road in the area of the easement where the parties' water pipelines are located, and a video of the easement area. The Olynyks have also asserted that some aspects of the Estate's practices in the past have caused undue environmental damage.

Summary of the Estate's submissions

[159] The Estate requests that, if the Board upholds the decision granting the Licence, the conditions of the Licence should be upheld and enforced to protect the Estate's infrastructure and rights. In particular, the Board should uphold: clause n) which requires that a professional engineer submit plans for the works to the

Ministry for approval, and supervise the construction of the works; and, clause I) which requires the installation of a cumulative flow measuring device.

[160] In addition, the Estate requests that the Licence be amended to require the Olynyks to:

- use a bonded contractor to install the works, so that if any damage to the Estate's infrastructure occurs it will be repaired by the contractor, and that the contractor has insurance to adequately cover the damage; and
- obtain an insurance policy with a minimum coverage amount of \$5 million for the duration of the Licence term, including during the installation of diversion works, with the Estate as a named insured.

[161] The Estate submits that the Olynyks' waterline was laid on the area of the Estate's permit over Crown land which traverses a very steep slope. The Estate explains that their 8-inch "PVC" (i.e., polyvinyl chloride) pipeline is lawfully buried on this area, and it carries water to their property for domestic and irrigation purposes year-round. The Estate says it has (as the Reuters had been) always been concerned with the location and poor quality of Mr. Olynyk's pipeline. In particular, the pipeline is held together in spots with baler twine, and it has many joints, sometimes in 40 to 80 feet intervals—in one instance two joints are within four feet with plastic barbed fittings clamped with hose clamps.

[162] The Estate maintains that a rupture of the Olynyks' pipeline could result in a leak that increases instability of the steep (70 to 95 percent) slope where the Estate's pipeline is buried. If such a leak went unnoticed, the resulting washout of the area and the Estate's buried pipeline poses a potentially catastrophic financial and environmental risk to the Estate. In such steep terrain, it is possible for such a washout to be so severe that it cannot be filled or repaired, which would be the end of the Estate's year-round, frost-free domestic water supply. A viaduct would have to be constructed to convey irrigation water.

[163] In addition, the Estate is concerned by the Olynyks' plan to bury the Olynyks' pipeline in the area of the Estate's permit over Crown land, as they will need to use an excavator which could seriously damage the Estate's buried pipeline. The Estate explains that the exact location of its pipeline, which was buried in 1985, is unknown. The Estate maintains that it is unnecessary for the Olynyks to bury their pipeline given that the Licence only authorizes water diversion and use from April 1 to September 30 (when freezing is unlikely). However, if the pipeline is to be buried, then ground-penetrating radar should be used to locate the Estate's pipeline, and the Olynyks should have to install their line at least two metres away from the Estate's pipeline to reduce the risk of rocks being pushed onto or against the Estate's water line during excavations.

[164] The Estate's also submits that a smaller diameter pipe, such as 3/4 to 1-inch, would be sufficient to convey 4 cubic metres of water per day, and would pose a lower risk if it ruptured. The Estate also suggests that 1000-foot lengths of "poly" pipe can be purchased and set to minimize the number of connections, and any connections should be made of high quality stainless steel or brass fittings.

[165] In support of those submissions, the Estate provided photographs of the Olynyks' pipeline, and the steep slope in the area where the pipelines are located.

The Estate also provided a photograph from of a March 16, 2021 article in *North Shore News* which shows a buried sewer line that became suspended after a landslide in North Vancouver. According to the article, it will take "six months to a year" to commission a new line and millions of dollars to repair. The Estate submits that this is the kind of damage it is afraid of, except that their PVC line will break rather than become suspended in the air if the slope washes out.

[166] Finally, the Estate submits that the requirement in clause l) to install a flow measuring device should be upheld and enforced to ensure that the Olynyks only divert the quantity of water that they are licensed to use, which will protect the Estate's (and other downstream licensees') water rights. The Estate also maintains that Mr. Olynyks' past unauthorized water use, and the lack of Ministry enforcement, justifies the requirement to install a flow meter.

Summary of the Respondent's submissions

[167] The Respondent submits that the Licence's conditions, and its 5-year term to December 31, 2025, are reasonable given the concerns expressed by the Estate and Ms. Warren, and that there has been some history of water leakage from previous works. The Respondent maintains that the conditions will ensure that the licensed works are properly designed, installed, and operated, and should prevent damage to the other licensees' licensed works or property. Also, limiting the Licence term to five years allows time for further data collection to confirm water availability over the longer term.

[168] The Respondent notes that in accordance with the Act, a water licence specifies both rights and obligations. For example, a licensee is obliged to make continued beneficial use of water in the manner and for the purpose licensed. Included within the concept of beneficial use are expectations that works be properly engineered, constructed, and able to function efficiently and effectively. As required under the Licence, and also under certain other licenses on McGillivray Creek, such as the Estate's licences #104471 and #125377, this may extend to requirements to measure, and/or use a meter, and/or record the quantity of water diverted and used under a licence. The Respondent notes that in situations where water availability is potentially constrained, the issuance of water licences has still been upheld by the Board subject to requirements in the licence to measure or meter water (e.g., *Sanders*).

[169] Regarding liability for a water licensee causing any damage to licensed works or property, the Respondent notes that, absent a joint works order under section 36 of the Act, a licensee is responsible for any damage from construction, operation, and use of their works on the land or other property of another person, as described in section 29⁹ of the Act.

[170] With respect to clause (n) of the Licence, the Respondent states that the Ministry recently received a preliminary engineering design for irrigation system improvements from Mr. Olynyk, dated April 26, 2021, prepared by AC Eagle

⁹ Section 29(4) of the Act states that a person who holds an authorization, including a licence, "is liable to owners of land or premises for damage or loss resulting from the construction, maintenance, use, operation or failure of the person's works."

Engineering Services Ltd. (signed and sealed by Darrell K. Avani, P.Eng.). This preliminary design describes key elements of the Olynyk's existing irrigation system, as well as proposed improvements to the existing irrigation system to irrigate the Olynyks' yard and garden during the summer months. Irrigation system improvements, as described in the preliminary design, are to include a flow meter and additional shut-off valves, and will require site visits to complete more detailed design work and for installation. The preliminary design is still being assessed by the Ministry, and it is expected that certain details will need to be clarified.

[171] With respect to the Estate's requests related to system requirements, such as pipe diameter, materials used, shut-off valves, etc., the Respondent submits that these are up to the Olynyks' professional engineer to assess and recommend based on engineering expertise, and must be considered acceptable to a Ministry Engineer before the Olynyks' can commence construction, as described in clause n) of the Licence.

[172] The Respondent maintains that some of the requirements requested by the Estate may be "exceptional" in the circumstances, given that a limited quantity of water is licensed under the Licence, only seasonal diversion and use is authorized (April 1 to September 30), and any pipeline would be seasonally disconnected. The Respondent says that amending the Licence to include requirements for the licensees to only use a bonded contractor and to put in place third party liability insurance coverage of \$5 million would be particularly exceptional.

Summary of the Olynyks' final reply submissions

[173] In reply, the Olynyks submit that the current permit over Crown land area is 16 feet wide, and as such it can accommodate two or more 8-inch water lines if necessary, and allows 12 feet for an excavator to work even if a line is buried four feet from the outside edge.

Summary of the Estate's final reply submissions

[174] In reply, the Estate submits that the Olynyks' submissions imply that they do not plan to install a new waterline when they bury their waterline. The Estate says that "No one in their right mind would bury a line with so many joints" but if one is going to go to the expense of burying a waterline, they should at least put in a new line and minimize the joints. The Estate submits that this is one more reason why a registered professional engineer is required for the design and the installation of the Olynyks' works. The Estate also lists a number of site-specific and technical concerns surrounding the burial of the Olynyks' waterline, including that the location of the Estate's line is unknown and the soil in the area makes excavation around their line particularly hazardous to the line.

[175] The Estate wants to include, in the condition that a registered professional design and supervise the installation of the Olynyks' works, that the Estate needs to approve the registered professional in question.

[176] The Estate reiterates that it is unclear why, with a seasonal licence, the Olynyks seek to bury their water line. The Estate submits that it appears that the Olynyks want to bury their water line below the frost level so they have the potential to use it year round.

[177] Although the Olynyks say they drained their waterline in September of each year, the Estate submits that the many cracked, broken, and even shattered remnants of pipe laying in several places on the permit over Crown land area show that the line was not drained properly. The Estate maintains that the only way the line would sustain such damage is for water to be left inside over winter and for it to freeze and break.

[178] Regarding the Olynyks' claim that the water line rupture in October 1996 was caused by Winfried Reuter and another person tampering with the Olynyks' line, the Estate says this is absurd. The Estate maintains that it would not be in either their or the other person's interest to have the Olynyks' water line leaking on the area of the permit over Crown land. The Estate also submits that the Olynyks have provided no evidence or documentation to support this claim.

[179] In conclusion, the Estate submits that clauses n) and l) in the Licence, and two new clauses that the Estate requests (that Olynyks hire a bonded contractor to install their works, and that Olynyks carry \$5 million in insurance for the duration of the installation and the Licence term) are essential to protect the Estate's irrigation infrastructure and investment. Irrigation is the largest capital expense in their farming operation next to the land purchase, and is crucial to providing an income. The Estate says that the profit margins in farming are small enough and the risks are high, and it does not need added uncertainty and worry.

The Panel's findings

[180] I have already concluded that the Olynyks right to divert water from McGillivray Creek stems from the Licence and not any oral agreement with the Deputy Comptroller. I turn to consider the terms and conditions of that authorization.

[181] The first clause I first consider, with respect to the Licence, is clause n), which requires that a registered professional engineer:

- sign and seal the designs for the diversion works, and
- supervise the construction of the works.

[182] Clause n) also requires that the Olynyks submit the plans, design criteria, operational criteria, and a construction schedule to an engineer appointed under the Act for approval, before starting construction. Construction must not begin until an engineer appointed under the Act has provided written leave to do so.

[183] I am not satisfied that Mr. Olynyk has the required expertise to properly design the diversion works. Clearly, he has designed and installed a system that has provided the Olynyks with water; however, the Olynyks intend to bury their works and this creates additional risks. There are risks associated with installation, such as potentially damaging other buried assets, like the Estate's works. There are also increased risks associated with operation, such as the risk of potentially slope-destabilizing leaks going undetected. In this case, I consider it reasonable that a professional engineer at least sign and seal the designs for the works.

[184] Further, even based on the existing pipeline, the Estate provided photographs showing damaged pipes and repairs to the Olynyks' waterline. As the Respondent noted, there seems to be a history of some water leakage. Even if

there is not, however, the Olynyks have provided insufficient information to allow me to conclude that Mr. Olynyk has the requisite expertise to avoid undue risk of water leakage from his waterline. I consider the input of a registered professional engineer to be appropriate.

[185] Even if Ministry (or previous authorities) have not questioned the design and installation of the existing waterline, that is not persuasive to me. Assessment and enforcement of water rights in the area has been infrequent and, as I have explained, the level of risk associated with a leak is not acceptable, given the concerns around slope stability in the area. While the Olynyks referenced a September 14, 1993 inspection report, this document was not provided in its entirety. The context and conclusions that may appear in the inspection report are unknown to me. For these reasons, I do not find the Olynyks' submissions related to that document to be persuasive.

[186] Having a professional engineer and a water engineer appointed under the *Act* approve the plans for the diversion works should adequately allay some of the Estate's concerns as well. If the Olynyks' waterline is to be buried, the professional engineer will likely determine where the Estate's waterline lies and devise a way to safely bury the Olynyks' line without undue risk to the Estate's line. The Olynyks' waterline can be designed to have an appropriate diameter and an appropriate number and type of joints along its length in the view of someone with appropriate professional expertise, as the Respondent noted. The registered engineer will be able to determine if any or all of the existing waterline can be used, either in place or buried, or if a new waterline will need to be installed. Site-specific concerns regarding the soil type, grade, and other factors can be accounted for in the professional engineer's design (or approval of a design). Lastly, the engineer appointed under the *Act* will review operational requirements for the waterline, an area of concern for the Estate.

[187] Provided that these risks are addressed in the design of the Olynyks' waterline, and provided that they secure the necessary access rights to do so, I see insufficient reason why they should not be allowed to bury the waterline. I do not agree with the Estate's suggestion that this indicates an intention to use the waterline year-round. I consider the Estate's argument on this point to be speculative, and not supported by sufficient evidence to warrant a finding against the Olynyks. This argument is also inconsistent with the Estate's contention that the Olynyks have access to enough groundwater to suit their needs. This is particularly so where year-round access would assist the Olynyks to water lawns, fairways, and gardens, because that is what the system will be designed to do. I am not satisfied that the Olynyks would want to do this on a year-round basis and, according to the Estate, the Olynyks have enough water to meet their other needs, because of their well.

[188] While the Olynyks argue that it is not worth the expense of having a registered professional engineer approve plans for the diversion works and supervise installation, according to the Respondent's submissions they have already completed the first step. Evidently, the expense was not a bar to them proceeding with the Licence as is. Even if they had not, however, I consider there to be significant risks associated with the upgrading of the existing waterline or the installation of a new one. I consider that a professional engineer's involvement, as

set out in clause n), is reasonable given the magnitude of these risks and the concerns about current and prospective water shortages. This is particularly so given the evolving understanding of the hydrology and hydrogeology related to McGillivray Creek.

[189] While the Estate wants to have the authority to approve the registered professional engineer involved in this process, I see insufficient reason to grant that request. The professional engineer's work will already be subject to independent review by an engineer appointed under the *Act*. The Estate has not established that it (or those acting on its behalf) has any expertise or experience that would add value to this process. Given the strained relationship between the Olynyks and the Estate, I do not think having one licensee in such a position of authority over another licensee to be prudent, advisable, or appropriate. The Ministry will retain an appropriate degree of oversight for all licensees, within the terms set by their respective licences.

[190] I share some concerns with the Estate about the Olynyks' attitude toward their water rights. I am concerned that they may take more than their share, based on their history of non-compliance with the *Act* and their insistence that they have water rights that they do not have. This concern will be addressed by the requirements of condition n) on the Licence.

[191] Lastly, I recognize that the Olynyks argued Mr. Stockwell's email from April 21, 2020 supports that a registered professional engineer need not approve of the design of the diversion works or oversee its installation. In that email, Mr. Stockwell advised only one of three options needed to be met, in terms of diversion works design. This was in the context of addressing routing options because the Olynyks had no right to Ms. Warren's land (through which the works are to pass). Those three options (going around Ms. Warren's land, through it via easement or right to land, or go through it via expropriation) do not speak to other aspects of design, including whether approval and oversight from a registered professional engineer is necessary or advisable. As such, I am not persuaded by the Olynyks' argument on this point.

[192] In conclusion, for the reasons described above, I confirm that clause n) should be retained in the Licence.

[193] I turn to clause l), which requires that a cumulative flow measuring device must be installed to the satisfaction of an engineer appointed under the *Act*, and that flow records for the diversion must be provided to an engineer appointed under the *Act*.

[194] As the Respondent noted, flow meters are a common requirement in areas where the water supply is subject to a high demand and licensees experience water shortages. This is reportedly the case for McGillivray Creek, at least for a portion of each year. Given the evolving understanding of the recharge of McGillivray Creek, the seasonal strain on water availability in the region, the high demand for water from McGillivray Creek, and the threat of worsening water scarcity as a result of a warming climate, I consider clause l) to be a reasonable and appropriate condition to place on the Licence.

[195] Lastly, I turn to clause o) of the Licence, which sets an expiry date of December 31, 2025 for the Licence.

[196] The Olynyks consider such a short term for the Licence to be inconsistent with broader practice, but have not provided further detail. It is important to consider the specific circumstances of this case, including the seasonal water demands on McGillivray Creek, the lack of abundant surface water in the area at that time, and factors related to the various licensees. What is appropriate in one context within British Columbia may not be appropriate in another.

[197] McGillivray Creek is a water source under significant demand from existent licences. While it seems that there is excess capacity at the point of diversion specified in the Licence, the understanding of the recharge of McGillivray Creek is evolving. I consider it prudent and appropriate, that the Licence have a relatively short term, while further information can be gathered.

[198] I recognize that the Olynyks have already been diverting water from McGillivray Creek and that they see no issues with them doing so; however, the circumstances surrounding the diversion of water are changing. The Olynyks works will likely be upgraded or replaced. Better flow data will be gathered. All licensees diverting water from McGillivray Creek will now be aware of the Olynyks' diversion of water, including the volumes they are permitted to divert and at what times of year.

[199] Furthermore, the Estate may continue to have suspicions about the Olynyks' conduct, and whether they comply with the terms and conditions contained in the Licence. The Ministry may wish to assess this point. Given, in particular, the Olynyks' unauthorized installation of diversion works and diversion of water historically, the degree to which the Olynyks comply with the requirements and limitations imposed by the Licence is a factor to consider in setting the applicable term for the Licence.

[200] For the reasons discussed above, I consider that clause o) is a reasonable and appropriate term and condition of the Licence.

[201] I turn to consider the additional terms and conditions the Estate wants me to include in the Licence. The Estate asks that the Olynyks be required to use a bonded contractor to install the works, and to carry liability insurance throughout the term of the Licence, including while the diversion works are upgraded or installed.

[202] I appreciate that the Estate faces some risk with the work that is to be done to the Olynyks' diversion works. That said, the risks are mitigated, at least in large part, by requiring the plans to be approved by a registered professional engineer and an engineer appointed under the Act.

[203] Furthermore, while I understand that the Estate could face serious repercussions from any damage to their waterline, the Estate has not established why these circumstances are so unusual as to justify the exceptional requirements it seeks. In particular, the Estate has not established why it should benefit from having a bonded contractor install or upgrade the Olynyks' diversion works and/or requiring the Olynyks to carry liability insurance for the term of the Licence, including during the installation or upgrading of diversion works. The Estate bears the burden of demonstrating that the liability imposed on the Olynyks under the Act is insufficient in the circumstances of this case, and it has not done so, particularly given the requirements that a registered professional engineer and an engineer

appointed under the *Act* will be approving the plans, and a registered professional engineer will supervise the installation of diversion works or the upgrading of the existing works. For the reasons described above, I do not consider it reasonable or appropriate to add additional terms and conditions on the Licence, as requested by the Estate. I have also confirmed that clauses n), l), and o) of the Licence should remain in place, as they are. I therefore conclude that the Licence should not be amended.

DECISION

[204] In reaching my decision on these appeals, I have read and considered all the submissions of the parties even if not specifically referenced in my findings.

[205] For the reasons provided above, I find that the Licence should not be reversed or amended. I dismiss the appeals of both the Olynyks and the Estate, and I confirm the decision under appeal.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

July 30, 2021