

DECISION NO. 2009-WAT-009(a)

In the matter of an appeal under section 92 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN: Earl Tourangeau **APPELLANT**

AND: Assistant Regional Water Manager **RESPONDENT**

AND: Dan Moorhead **THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Panel Chair

DATE: Conducted by way of written submissions
concluding on August 6, 2009

APPEARING: For the Appellant: Earl Tourangeau
For the Respondent: W.S. Klopp
For the Third Party: Dan Moorhead

APPEAL

[1] Earl Tourangeau appeals a March 26, 2009 decision of W.S. Klopp, Assistant Regional Water Manager, Cariboo Region, Ministry of Environment, refusing to cancel a water licence held by Dan Moorhead, the Third Party to this appeal.

[2] The Environmental Appeal Board has the authority to hear this appeal under section 93 of the *Environmental Management Act* and section 92 of the *Water Act* (the "Act"). Section 92(8) of the *Act* provides that the Board may

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

[3] The Appellant asks that the Board cancel the Third Party's water licence so that he will have "first right" to the water.

[4] This appeal was conducted by way of written submissions.

BACKGROUND

[5] The water source at issue in this case is Otto's Spring. It is located on the Appellant's property in Quesnel, BC.

The Appellant and the Third Party both hold conditional water licences on Otto's Spring allowing them each to use 500 gallons of water per day for domestic purposes. "Domestic purposes" is defined in section 1 of the *Water Act* as:

"domestic purpose" means the use of water for household requirements, sanitation and fire prevention, the watering of domestic animals and poultry and the irrigation of a garden not exceeding 1 012 m² adjoining and occupied with a dwelling house;

[6] The Third Party's licence (C057650) is the oldest licence, with a precedence date of June 18, 1980. It was originally issued to Ada Shoebridge, a previous owner of the property and grandmother to the Third Party.

[7] The Appellant's licence (C060127) was issued in 1984 to Ethel Wellband, who previously owned the Appellant's property. It has a precedence date of July 14, 1982, which makes it second in line for the water from the spring.

[8] The Appellant purchased his property in May 2002 without any knowledge of the Third Party's licence. He states that there was no easement or right-of-way shown on the land title documents and no one advised him of another water licence with priority rights. Further, the Appellant states that he was assured by the realtor that he had first water rights to the water on the property.

[9] When the Appellant and his wife moved into their house on the property, they found the water system in disrepair. It was clear to them that the system had not been used for some time. They made the repairs and cleaned out the tank. Shortly after doing so, the Third Party attended their property and advised them that he had "first right" to the water in Otto's Spring. He also advised that he hadn't been using the water due to a problem with his waterline at or near the location where his line crosses some oil and gas pipelines, which run between his property and the Appellant's property.

[10] The Board was not told how long the Third Party has been living on his property or how often he used the water from Otto's Spring prior to this problem with his line. What is clear is that he has not used the water since at least the fall of 2001.

[11] Both the Appellant and the Third Party have other sources of water. The Appellant has another spring on his property (the upper spring) Welland Spring. He has put in a series of interconnecting pipes with shut off valves so that he and his wife can access either Otto's Spring or the upper spring, depending on which one has more water. The Third Party has a well on his property.

[12] Sometime in 2008, the Third Party attended the Respondent's office to discuss his water licences on Otto's Spring¹. He advised the Respondent that his licensed works were not working and that he was trying to reach an agreement with the oil and gas pipeline companies concerning restoration of his works. The Respondent advised that he should continue to contact the involved landowners and right-of-way personnel.

[13] The Respondent's office was also contacted by the Appellant. As a result of that contact, the Appellant swore a declaration before a notary public on September 16, 2008, stating as follows:

Dan Moorhead [the Third Party] has not used the water from Otto's Spring for more than 5 years and under the Water Act he should lose his 1st rights to the spring.

[14] The Appellant provided this declaration to the Respondent and asked him to cancel the Third Party's licence.

[15] Section 23(2) of the *Water Act* allows a regional manager or comptroller to suspend or cancel a licence if the licensee fails to make beneficial use of the water for three years. It states:

Suspension and cancellation of rights and licences

23(2) The rights of a licensee under a licence are subject to suspension for any time by the comptroller or a regional water manager, and a licence and all rights under it are subject to cancellation in whole or in part by the comptroller or a regional water manager for any of the following:

(a) failure by the licensee for 3 successive years to make beneficial use of the water for the purpose and in the manner authorized under the licence;

...

[16] In or around the same time that the Appellant was swearing his declaration, the Third Party's waterline was being excavated and reconnected.

[17] Although the line was reconnected, this did not change the nature of the Appellant's concern with the Third Party's priority licence and his failure to use the water for so many years. The Appellant believes that it is unfair for the Third Party to have "first right" to the water.

[18] In response to the Appellant's request for first right to the water, the Respondent asked both the Appellant and the Third Party to provide a "Beneficial Use Declaration", which they did. The Third Party's declaration is dated December

¹ The Third Party holds another domestic water licence for Otto's Spring (C101897) with a date of precedence of May 31, 1990, which is later in priority than the Appellant's licence and is not at issue in this appeal. The Third Party has applied to the Respondent to have this licence abandoned.

10, 2008. He states in his declaration that the last time he diverted or used water from Otto's Spring was on or about September 28, 2008, when he tested the waterline. In an attached note, the Third Party further explains:

We haven't used the water from Otto's Spring in about the past five years, due to replacement of several sections of pipe. The final major break to repair was approximately 80 meters of pipe across the pipeline (Spectra) right of way.

Our last hurdle [sic] was to coordinate with the pipeline (Spectra) and my work schedule. My work takes me away from home for long periods of time, so finding a window of opportunity when both parties could come to do it finally happened in September of 2008.

[19] In his decision dated March 26, 2009, the Respondent refused to cancel the Third Party's licence. He advised the Appellant that he could not "remove the first rights from Dan Moorhead and to transfer the first rights to yourself." He also stated that Mr. Moorhead shall have first access to the water from Otto's Spring and any arrangements as to the maintenance of the works should be made between the two parties. He provided some information about a joint works agreement for consideration by the parties.

[20] In his submissions to the Board, the Respondent clarified that his decision was a refusal to cancel the licence, not simply a refusal to change who has "first rights", i.e., the dates of precedence.

[21] The Third Party and the Appellant tested the new line, but other than that testing, the Third Party has not installed the intake to the spring, and has not used the water. The Appellant has advised the Third Party that the Third Party does not have a legal right-of-way or easement for his line on the Appellant's property and does not have permission from the Appellant for the waterline.

ISSUES

The issues to be decided in this appeal are as follows:

1. Whether there is any authority under the *Water Act* to change the precedence of a licence.
2. Whether the Third Party's licence should be cancelled pursuant to section 23(2) of the *Water Act* for failure to make beneficial use of the water.

DISCUSSION AND ANALYSIS

1. Whether there is any authority under the *Water Act* to change the precedence of a licence.

[22] The Appellant has asked the Respondent and the Board to give him "first right" to the water in Otto's Spring. The Respondent advised the Appellant in his decision that he could not change the precedence date of the licences. The Panel agrees.

[23] According to section 13 of the *Act*, when a licence is issued it must specify the date of precedence of the licence. Section 6 provides that the exercise of every right held under a licence is subject to, among other things, "the rights of all licensees whose rights have precedence." Thus, the date of precedence of a licence, or the priority of a licence, is an important aspect of the licensing regime. It is also something that is not easily changed.

[24] The Panel has reviewed the legislation and notes that there is no authority in the *Act* for a regional manager to amend a licence to change the precedence date of a licence. There is a list of the amendments that may be made to a licence, but changing the date of precedence is not one of them. Unless there is an error in the precedence date which the regional manager has the power to correct, there is no specific or general authority that would otherwise allow this change.

[25] Thus, if a licence is not abandoned, the only realistic option to change who has "first rights" to water, is to cancel the licence with priority rights.

2. Whether the Third Party's licence should be cancelled pursuant to section 23(2) of the *Water Act* for failure to make beneficial use of the water.

The Third Party's submission

[26] As stated earlier, the Third Party has not made beneficial use of his water for a number of years. In his submissions to the Panel, the Third Party provided more detailed reasons for this.

[27] The Third Party states that he started having problems with his waterline late in the summer of 2001. He narrowed down the main problem to the oil and gas pipeline crossing where he observed water flowing on the hillside towards what is now the Appellant's property, but no water was flowing on the other side of the pipeline crossing. The Third Party removed his waterline intake to prevent it from draining the spring. He was then called to work and could not finish the waterline.

[28] The Third Party explained that most of his waterline was buried 4 to 5 feet deep but, over the years, the oil and gas companies with pipelines beside his property have increased the amount of fill over his line making it impossible to excavate the water lines by hand digging.

[29] The Third Party called Duke Energy in the spring of 2002 asking for permission to repair his waterline. In a letter dated May 30, 2002, which was provided to the Panel, Duke Energy advised the Third Party that he could repair his waterline, but that he had to place his line under the pipelines. This came as an unwelcome surprise to the Third Party as the top of the oil and gas pipelines are buried 9 feet below the surface. The Third Party states that he was not prepared to do this excavation himself, particular in the vicinity of pressured lines of 6450 kpa.

[30] The Third Party continued talking to Duke Energy, then Spectra Energy hoping that he could make arrangements with the company to have its employees excavate down to his waterline. The number and nature of those discussions are not in evidence. The Panel was only told that it was hard for the Third Party to arrange the repairs as he works in construction and is away from home for long periods of time.

[31] Approximately 5 years later, in 2007, the Third Party discussed the situation again with Spectra Energy as he thought his waterline could be repaired that year. However, "at the last minute, the excavator was pulled to another job."

[32] It was not until September of 2008 that he received written permission from Spectra Energy to install his waterline over the company's pipes. Around that time, he also spoke with a Spectra Energy representative who was scheduling some work in the vicinity of his waterline and the Third Party was able to arrange for them to perform the excavation and installation of his waterline.

[33] The Third Party supplied the parts and equipment and Spectra Energy installed the line while he was at work. One end of the pipe was left open for testing to see if any water was coming through. The Third Party called the Appellant to see if he could check his waterline. Together, they put the Third Party's waterline intake into the spring and found that it worked. The Third Party then pulled the intake out of the water as he needed to put his line together and cover it up.

[34] At that time, the Appellant advised the Third Party that there was no easement for the waterline. The Third Party recalls checking into this in 1982 with his grandmother and was told by water branch officials that they had a 22 foot right of way over the Appellant's land. They also received a letter dated March 7, 1983, from the previous owner of the Appellant's property, giving them authority to cross that property in order to maintain the waterline. This letter was also provided to the Panel.

[35] The Third Party wants to retain his licence but is concerned because the area around the spring is now pasture for the Appellant's livestock. The Third Party is concerned that livestock walk through the spring water.

The Respondent's submission

[36] The Respondent asks that the Board uphold his decision not to cancel the Third Party's water license C057650. He states that, after considering the information provided to him by the parties, he decided to give the Third Party additional time to restore his licensed works and refused to cancel the licence. The Respondent states that the Third Party's material showed that he was making an effort to deal with the owners of the oil and gas pipelines. Consequently, the Respondent exercised his authority under section 18(1)(c) of the *Act* to extend the time for the Third Party to make beneficial use of the water. Section 18(1)(c) states:

Amendment and substitution of licence or approval

18 (1) Subject to subsection (1.1), on notice to all persons whose rights would be injuriously affected, and after consideration of any objections filed and after notifying the objectors of his or her decision, the comptroller or the regional water manager may amend a licence to do any of the following:

...

(c) extend the time set for making beneficial use of the water;

...

[37] The Respondent explains that, rather than cancelling a licence, his general preference is to use section 18(1)(c) to grant a licensee more time to make beneficial use of the water.

[38] The Respondent did not comment on the Appellant's claim that the Third Party has no easement or right-of-way for his waterline on the Appellant's property. He did, however, provide information on a licensee's right to expropriate land that is reasonably required for the construction, maintenance and operation of works authorized under a licence (such as a waterline).

The Appellant's submission

[39] The Appellant characterizes this issue as "cut and dry". He states that the Third Party has not used the water for at least 7 years by his calculation (from 2001 to 2008 when the line was reconnected). The Appellant points out that the Third Party has never offered to maintain the works or pay for any of the maintenance and repairs to the system, and has never obtained an easement for his waterline on the Appellant's property. Moreover, the Appellant submits that the Third Party does not need the water from Otto's Spring as he has another source of water.

[40] Although the Appellant also has another source of water, he switches back and forth between Otto's Spring and the upper spring depending on the available supply in each source. He states that Otto's Spring is not a reliable or continual source of water from below ground. The holding tank seems to hold water from seasonal runoff. The Appellant states that there is an abundance of water overflowing in the spring but, as the summer progresses, the water level decreases significantly. He now uses the water from Otto's Spring mostly for watering livestock and their garden, or when the upper spring becomes too muddy.

[41] The Appellant also submits that he has a greater need for the water than the Third Party. He states that, over the past 7 years, he has been developing his land for berries and livestock. As these activities grow and expand, the Appellant will need more of the water from Otto's Spring for these purposes.

[42] The Appellant also argues that the Third Party's licence lowers the value of his property, but the Panel notes that the licence existed at the time the Appellant purchased the property so there should be no difference to the price on that basis alone.

[43] Regarding the Third Party's explanation for his lack of beneficial use, the Appellant submits that it simply does not justify his failure to fix his line and use the water for so many years. The Appellant suggests that neither the cost of fixing the line, nor the Third Party's work schedule, are proper justifications for such a lengthy lack of use.

[44] Although the Appellant appreciates that the Respondent has the authority to grant extensions to a licensee to make beneficial use, he points out that the *Act* uses 3 years as a threshold, whereas the Third Party has been allowed over twice that amount. He states:

Mr. Moorhead has had more than 7 years to complete his works and has not done so. It is simple as that. To grant him more time would be a travesty of justice.

The Panel's Findings

[45] The Panel finds that the Third Party, through no fault of his own, lost access to his licensed water on Otto's Spring. The activities of the oil and gas companies around their oil and gas lines appear to have caused the break down in the use of the Third Party's waterline during the summer of 2001. The Third Party received permission from those companies in 2002 to re-establish his waterline beneath the oil and gas lines. However, due to the depth of those lines, the excavation necessary to re-establish his waterline was not possible at that time.

[46] The Third Party attempted to repair his waterline in 2007 with the assistance of the oil and gas companies but that effort failed. He then did manage to get the line repaired in September 2008 with the assistance of the oil and gas companies. This included the Third Party supplying the pipe, hand tools and other supplies necessary for the job. He then tested his line in September 2008. The Panel finds that the Third Party has not made beneficial use of his water licence on Otto's Spring for at least 7 years due to circumstances that were beyond his control.

[47] Further, the Third Party's continued non-use of his water licence appears to arise from a property dispute between himself and the Appellant concerning a right of way or easement over the Appellant's land.

[48] The Respondent, Assistant Regional Water Manager, has determined that the Third Party has exercised due diligence in his efforts to re-establish his waterline. The Panel agrees. Under such circumstances the Respondent has the authority under section 18(1)(c) of the *Water Act* to extend the period of non-beneficial use of a water licence. In this case he has done so.

[49] The Panel also finds that the issue of the Appellant's increasing need for the use of the water for watering livestock and berry crops is not a relevant consideration for cancelling another person's legitimately held licence under the *Water Act*. An increased need for water should be addressed through a further application for a water licence on Otto's Spring. Such an application should be directed to the Respondent. Similarly, the fact that the Appellant may have been misled by his real estate agent about other water licences on Otto's Spring at the time he purchased the subject property is an irrelevant consideration when it comes to cancelling some else's licence. That is a matter that should be addressed with the real estate agent and should not in any way prejudice another person's legitimately held water rights.

[50] It also appears that it was only after the Third Party managed to re-connect his waterline and establish that it was in working order in September 2008 that the Appellant made an application to have the licence cancelled for non-beneficial use. The Appellant had been aware of the Third Party's licence with priority over the Appellant's since at least 2002 when the Third Party advised him of that fact. However, the Appellant took no steps to rectify the situation until in or around the time that the Third Party had taken the time, and incurred the expense, of repairing his waterline.

[51] Under these circumstances, the Panel is satisfied that the Respondent acted reasonably in exercising his authority to extend the time for the Third Party to make beneficial use of his water licence.

[52] The Panel notes that the Third Party does not have legal access to Otto's Spring through a right-of-way or an easement over the Appellant's land at this time. Although the previous owner of the Appellant's property permitted access for the purpose of maintaining the waterline, this does not bind the present owner. Thus, the presence of the line through the Appellant's property and maintenance of the line is a matter to be negotiated between the Appellant and the Third Party. If they cannot reach an agreement, the *Water Act* provides for a procedure under which their respective rights regarding expropriation and compensation are determined, so that the licensee can construct, maintain, improve or operate any works authorized by the license and the affected land owner can be adequately compensated (see section 27 of the *Act*).

[53] The Panel finds that the absence of a right-of-way or easement over the Appellant's land, or the absence of a joint works agreement between the parties, is not a ground for the Respondent, or the Board, to cancel the Third Party's water licence at this time. Similarly, the Appellant's claim that the Third Party has not offered to assist in the repair and maintenance of the system is an issue to be worked out by the parties, it is not the basis to cancel the Third Party's licence. The negotiations and/or legal applications should be allowed to proceed while the current licences are in place. The *status quo* should not be disturbed while those negotiations or proceedings are on-going.

[54] For all of these reasons the Board finds that the Third Party's licence should not be cancelled.

[55] The Board recommends that the Appellant and the Third Party work together to resolve their differences and consider such options as increasing the holding capacity of the holding tank to ensure that there is an adequate volume of water available to both parties for future use. Should such an option be considered by the parties, it should be discussed with the Respondent as an additional licence for storage may be required on Otto's Spring.

DECISION

In making this decision, the Panel has considered all of the relevant documents and oral evidence, whether or not specifically reiterated herein.

For the reasons stated herein, the Respondent's March 26, 2009 decision is confirmed and the appeal is dismissed.

'Alan Andison'

Alan Andison, Chair
Environmental Appeal Board

August 19, 2009