Province of British Columbia

Environmental Appeal Board

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APPEAL N0. 99-WAT-31(b)

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

BETWEEN:	Earl Devlin	**APPELLANT**
AND:	Engineer under the Water Act	**RESPONDENT**
AND:	Duncan Devlin	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Cindy Derkaz, Panel Chair	
DATE:	May 16, 2000	
PLACE:	Campbell River, B.C.	
APPEARING:	For the Appellant: Earl Devlin	
	For the Respondent: George Bryden	

APPEAL

This is an appeal of the June 3, 1999 Engineer's Order (the "Order") made by George Bryden, an Engineer under the *Water Act*, requiring Earl Devlin to drain impounded water and to completely remove two earthen dams located on District Lot 1578, Sayward District ("Lot 1578") near Campbell River, B.C.

Duncan Devlin, the Third Party, is the owner of property immediately downstream from Lot 1578. He filed a written submission but did not appear at the hearing.

The Environmental Appeal Board has the authority to hear this appeal under section 11 of the *Environment Management Act* and section 40 of the *Water Act* (the "*Act*"). On an appeal, the Board, or a panel of it, may send the matter back to the engineer, with directions, or confirm, reverse or vary the order being appealed. The Board may also make any order that the person whose order is appealed could have made, and that the Board considers appropriate in the circumstances.

Earl Devlin asks that the Order be cancelled. He wants the water and the dams to remain in place.

BACKGROUND

Earl Devlin and Judy Devlin are the registered owners of Lot 1578, which is approximately 15 acres, mostly cleared, with a house and shop located on the property. There are two ravines that channel water through the property. The Order relates to dams located in one of these ravines.

The source of the water flowing into the subject ravine is on adjacent Crown land. Seasonal water seepage rises on Crown land approximately 500 feet from the south boundary of Lot 1578. This water constitutes a "stream" as defined in the *Water Act*. It flows in a northeasterly direction through Lot 1578, then through a corner of Duncan Devlin's property to the north, re-enters Crown land and eventually flows into Snowden Creek. The stream usually dries up in the summer.

The stream is unnamed and, prior to this matter, did not appear on maps used by the Water Management Branch, Ministry of Environment, Lands and Parks ("MELP"). There is no fish habitat in the immediate area of Lot 1578; however, the stream eventually joins fish-bearing watercourses.

Two earthen berms (also referred to in this decision as "dams") were placed in the stream. One berm, located along the property line between Lot 1578 and Duncan Devlin's property, replaces a berm which had been there for about 40 years until it was either washed out or removed in October, 1998. The new berm is approximately 6 feet high and creates a pond roughly 30 feet wide and 50 feet long. The other berm is about 50 feet upstream and is approximately 10 feet high. It creates a pond roughly 45 feet wide and 60 feet long. These structures meet the definition of "works" in section 1 of the *Water Act*, which provides as follows:

> "works" means
>
> (a) anything capable of or used for
>
> (i) diverting, storing, measuring, conserving, conveying, retarding, confining or using water,
>
> ...
>
> (iii) collecting, conveying or disposing of sewage or garbage or preventing or extinguishing fires,
>
> ...
>
> (c) obstructions placed in or removed from streams or the banks or beds of streams, ...

In addition to the ponds, there are four 25-foot deep wells alongside the stream, which stay full of water all year. There is also a berm downstream, on Duncan Devlin's property, which Mr. Bryden has ordered to be removed.

On April 26, 1999, Arnis Dambergs, a Water Resource Specialist with MELP, investigated the works. As a result of this investigation, Mr. Bryden issued an order on May 3, 1999, requiring Mr. Devlin to drain the impounded water and remove the works by May 21, 1999. This order was delivered to Mr. Devlin by Mr. Dambergs and Conservation Officer Dan Dwyer on May 14, 1999.

Mr. Devlin retained the services of AGRA Earth and Environmental Ltd. ("AGRA") to provide a professional opinion of the works. Steve Scotton, P. Eng., a senior geotechnical engineer with AGRA, viewed the works on May 19, 1999, and wrote a letter dated May 20, 1999 (the "AGRA letter"). The AGRA letter sets out Mr. Scotton's opinion that "[a]lthough unfinished, the two earthen dams were not judged to represent an immediate danger to life or property." It also states that a "letter report providing Observations, discussion and conclusions regarding the geotechnical assessment of the subject earthen dams is being prepared." However, no further report was presented as evidence at the hearing.

Mr. Devlin sent the AGRA letter to Mr. Bryden on May 28, 1999. Mr. Bryden did not change his mind about the need to remove the works; however, he felt that the compliance date of May 21, 1999 may not have provided sufficient time. He issued the Order containing the same provisions as the May 3 order, with the exception that the time for compliance was extended to Friday, July 30, 1999. Relevant portions of the Order are reproduced below:

> **WHEREAS** a person commits an offence under Section 41(1) of the Water Act who:
>
> (g) places maintains or makes use of an obstruction in the channel of a stream without authority;
>
> (k) constructs, maintains, operates or uses works without authority;
>
> (s) makes changes in and about a stream without lawful authority;
>
> **WHEREAS** I, George Bryden, Engineer under the Water Act, am empowered; under Section 39(1) of the Water Act to:
>
> (d) order the repair, alteration, improvement, removal of or addition to any works;
>
> (i) order the release of stored or impounded water that he considers a danger to life or property;
>
> (k) order a person to remove from a stream any substance or thing that he or she has put or permitted to get into the stream.
>
> **I HEREBY ORDER** Earle [sic] Gordon Devlin to:
>
> 1. Drain the water impounded by the two dams, on or about District Lot 1578, Sayward District, at a rate not to exceed the carrying capacity of the receiving stream, and;

2. Immediately upon the completion of draining the impounded water, completely remove the two earthen dam structures, and;

3. During the draining and dam removal, ensure that no sediment, silt, debris, material or other substance is allowed to enter the stream or flow from the work site, and;

4. The draining and dam removal shall be completed on or before Friday, July 30, 1999.

Mr. Devlin appealed the Order to the Board on June 21, 1999, and applied for a stay of the Order. On July 28, 1999, the Board denied Mr. Devlin's application for a stay. Despite the Order and the Board's refusal to issue a stay, Mr. Devlin did some additional work on the berms in the fall of 1999.

Mr. Devlin does not have, and has not applied for, a licence under the *Act* either to construct the works or to use water from the stream.

ISSUES

Mr. Devlin's main submissions can be summarized as follows:

1. MELP employees had no authority to enter Lot 1578 without obtaining a search warrant and, therefore, evidence has been illegally obtained and cannot be considered by this Panel.

2. The stream is "unrecorded water" which can be used for fire fighting without a water licence. The works should remain in place to store water because there is a considerable risk of fire on Lot 1578.

3. The works have been properly constructed and do not pose any danger to life and property.

The Panel has chosen to deal with these submissions under the following issues:

1. Whether the evidence obtained without a search warrant by the MELP employees can be considered by this Panel.

2. Whether Mr. Devlin is entitled to use the unrecorded water without a water licence.

3. Whether the works should be removed considering all the circumstances.

Mr. Devlin raised other concerns in his Statement of Points that were either not pursued at the hearing or are dealt with in the discussion and analysis of the primary issues.

RELEVANT LEGISLATION

The following sections of the *Act* are relevant to the issues raised in this appeal.

Vesting water in government

2 (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except only in so far as private rights have been established under licences issued or approvals given under this or a former Act.

Right of access to land and premises by authorized persons

32 (1) The comptroller, deputy comptroller and every *engineer, officer* and water bailiff … has, so far as is necessary in the discharge of his or her duties or the exercise of his or her rights, at all times a free right of entry and exit on, in and over any land and premises. [emphasis added]

"Officer" is defined in section 1 of the *Act* to mean:

(a) a person or class of persons employed by the government and designated in writing by the comptroller as an officer, or

(b) a person designated as a conservation officer under section 9(1) of the *Environment Management Act*;

Right to use unrecorded water

42 (1) It is not an offence for a person to divert water from a stream for extinguishing a fire, but any flow so diverted must be promptly restored to its original channel when the fire is extinguished.

(2) It is not an offence for a person to divert unrecorded water for domestic purpose or for prospecting for mineral, but in a prosecution under this Act the person diverting the water must prove that the water is unrecorded.

"Unrecorded water" and "domestic purpose" are defined in section 1 of the *Act* as:

"unrecorded water" means water the right to the use of which is not held under a licence or under a special or private Act;

"domestic purpose" means the use of water for household requirements, sanitation and fire prevention, …

DISCUSSION AND ANALYSIS

1. Whether the evidence obtained without a search warrant by the MELP employees can be considered by this Panel.

The Panel heard evidence that, after MELP received a complaint about the works, Mr. Dambergs attended the property with conservation officer Pat Browne-Clayton on April 26, 1999. Mr. Dambergs testified that he also viewed the works on May 14 and July 15, 1999 and January 14, 2000. Photographs taken of the works on each of these days were tendered in evidence.

Mr. Bryden testified that he went to Lot 1578 on July 15, 1999, to observe the works.

In addition to attending the property on May 14 and July 15 with the other MELP employees, Mr. Dwyer testified that he went to Lot 1578 on August 3, September 11 and November 7, 1999, to check for compliance with the Order.

Mr. Devlin submitted that Mr. Bryden, Mr. Dambergs and Mr. Dwyer came onto Lot 1578 without permission, and that these intrusions were a breach of section 8 of the *Canadian Charter of Rights and Freedoms* that states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

In his Statement of Points, Mr. Devlin referred the Panel to a number of Supreme Court of Canada cases as authority for the proposition that the entry onto his property without a search warrant is an "unreasonable search" which must result in exclusion from the hearing of the photographs and evidence obtained. The Panel notes that Mr. Devlin did not satisfy the requirement to give notice to the Attorney General of Canada and the Attorney General of British Columbia pursuant to section 8(2) of the *Constitutional Questions Act*, R.S.B.C. 1996, c. 68.

Mr. Bryden referred the Panel to section 32 of the *Act* which gives every engineer and officer, so far as is necessary in the discharge of his duties, at all times a free right of entry on any land. Mr. Dambergs testified that he is an "officer" under the *Act*. Mr. Dwyer testified that he is a conservation officer appointed under the *Environment Management Act*, which also makes him an "officer" under the *Act*. Mr. Bryden is an "engineer" under the *Act*.

The Panel finds that Mr. Bryden, as an engineer, and Mr. Dambergs and Mr. Dwyer as officers, were discharging their duties under the *Act* when they went onto Lot 1578 on the dates noted above: they were examining unauthorized works within a stream channel which were being used to impound water vested in the government under section 2(1) of the *Act*.

The Panel notes that most of the cases referred to in Mr. Devlin's Statement of Points relate to entry upon private property where there was no lawful authority under statute. The Panel finds that the MELP employees had lawful authority for entry onto Lot 1578 under section 32 of the *Act*.

Hunter v. *Southam Inc.*, [1984] 2 S.C.R. 145, was the only case cited where a search was carried out under the authority of a statute. In that case, the Court found that the search and seizure powers set out in the *Combines Investigations Act* violated section 8 of the *Charter* because of the intrusive nature of the search and the lack of prior authorization for the search by a judicial officer. The Court held that prior authorization, where feasible, is a precondition for a valid search and seizure. However, the Panel finds that this case is not on point.

In *Hunter* v. *Southam*, the search was in the context of a criminal or quasi-criminal investigation. The Panel finds that the act of inspecting lands outside of a residence for administrative or regulatory purposes does not constitute a "search" within the

meaning of the *Charter*. This finding is consistent with a line of cases that makes a distinction between searches in the course of a criminal investigation and administrative or regulatory searches or inspections (For example, see *R.* v. *Bichel* (1986), 4 B.C.L.R. (2d) 132 (B.C.C.A.); *International Escort Services Inc.* v. *Vancouver (City)*, [1997] B.C.J. No. 2475 (B.C.S.C.)). Further, within the context of the *Water Act* legislation, it would be unreasonable to require, as a precondition for administrative inspection of Crown property (i.e. the water in the stream), that there be a prior authorization in the nature of a search warrant.

Finally, this Panel finds that the taking of a photograph does not constitute either a search or a seizure (*R*. v*. Mik*, [1995] O.J. No 4076 (C.J., Prov. Div.)).

For the reasons above, the Panel finds that it may consider the evidence and photographs put before it by all of the MELP employees who testified at the hearing. The Panel further notes that, in addition to the observations and photographs tendered in evidence by the MELP employees, Mr. Devlin himself submitted photographs and gave detailed evidence about the stream and the works.

2. Whether Mr. Devlin is entitled to use the unrecorded water without a water licence.

Mr. Devlin testified that he and a friend went to the MELP offices in Campbell River and spoke with Mr. Dambergs. They determined that the water in the stream was "unrecorded water" under the *Act*. The stream did not appear on any map they viewed at the office.

Mr. Devlin referred the Panel to the following statement in an information pamphlet produced by MELP entitled "Water Rights in British Columbia":

> It is not an offence to use unrecorded water for domestic needs, mineral prospecting or firefighting.

Mr. Devlin submitted that he should be allowed to leave the works in place because Lot 1578 is in a forested area that is used for recreation. He testified that there is no fire department servicing this area and he is extremely concerned about fire hazards. He noted that a large number of tires are piled on the Duncan Devlin property along the boundary of Lot 1578. In 1999, there was a fire on Lot 1578 that he said was deliberately set.

The Panel notes that the above referenced excerpt from the pamphlet paraphrases section 42 of the *Act*. The Panel also notes that the immediately preceding sentence in the pamphlet is:

> With a few exceptions, it is illegal to take surface water from a stream *without first obtaining a water licence* or an approval. [emphasis added]

Mr. Devlin submitted that because the stream was not mapped and not licensed, it is not regulated by the *Act*. He did not present any legal authority for this proposition.

Mr. Bryden confirmed that the water in the stream is "unrecorded" within the definition of the *Act*, which means that it has not been licensed. He stated that Mr. Devlin must obtain a water licence to construct the works and use the water.

Section 42 of the *Act* is headed "Right to Use Unrecorded Water." The Panels notes that section 11 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 states:

Reference aids

11 Head notes and references after the end of a section or other division do not form part of the enactment, but must be construed as being inserted for convenience of reference only.

Therefore, the wording of section 42 of the *Act* must be examined to see if Mr. Devlin has the right to use the stream for fire protection.

Subsection 42(1) states that it is not an offence to divert water to extinguish a fire, but any flow diverted for that purpose must be restored to its original channel when the fire is extinguished. The Panel finds that this section contemplates the use of the water to fight a fire in progress, but not the impoundment and storage of water on an on-going basis for fire prevention. Section 42(2) states that it is not an offence to divert unrecorded water for domestic purpose. The Panel notes that the definition of "domestic purpose" includes the use of water for fire prevention. The Panel finds that, while it is not an *offence* under the *Act* to divert unrecorded water for domestic purpose, section 42 does not create any *right* to use the water or to construct any works. Further, even if this section implicitly allows a person to "divert" unrecorded water for fire prevention purposes without a licence, it clearly does not permit "storage" of the water.

Section 2 of the *Act* is clear that the right to the use of all water of any kind in a stream vests in the government. In order to obtain a "right" to divert and use water and construct and maintain works, a person must acquire a licence under the *Act*. Therefore, although Mr. Devlin's concern about fire may be legitimate, and under section 42(1) of the *Act* it is not an offence to use the water to fight a fire in progress, it is clear that he cannot construct works and store water without a licence.

3. Whether the works should be removed considering all the circumstances.

Mr. Devlin testified that construction of the works had been done in accordance with the recommendations of the AGRA engineer. He referred the Panel to a MELP publication entitled "Inspection and Maintenance of Dams: Dam Safety Guidelines." He asserted that the works exceed all construction standards for this type of dam and do not present any danger to life or property. He stated that Mr. Bryden has refused to inspect the completed works.

In answer to a question from the Panel, Mr. Devlin stated that he had not had a professional engineer do an inspection report on the completed works.

Mr. Devlin argued that the Order was based upon observations of a construction project in progress. He asked the Panel to order Mr. Bryden to inspect the completed works. He pointed out that the works stood up in the heavy rains during November and December 1999. He also stated that if he had known that he required a water licence, he would have applied for one. He said that, on the contrary, all information that he received, including legal advice, was that he did not need a water licence for unrecorded water.

Mr. Dambergs testified that on the April 26, 1999, the earthen berms appeared to be in very poor condition and subject to failure. He noted a tension crack in the crest of the upstream berm near the outlet pipes. One outlet pipe was covered by a plastic bucket and another was partly covered by dirt on the upstream side. The outlet pipe on the downstream side discharged into earth fill that tends to scour the earth away. Mr. Dambergs advised Mr. Devlin that he should drain the impounded water and that he would need to obtain a water licence in order to construct the works and use the water.

Mr. Dambergs testified that on May 14, 1999, he noted cracks in the crests of both berms. Half of a corrugated steel culvert had been placed on the crest of each berm to act as a spillway and could be subject to washout. Construction was generally “sloppy”, with loosely tied cables providing no support and rot evident in some of the wood. On July 15, 1999, when he again viewed the works, there were tension cracks evident in both berms. A tarp had been placed on the face of the upstream berm that could block water flow.

Mr. Dambergs testified that if either berm failed there would be a sudden release of water into the stream and a downstream surge. There would be significant turbidity, and silt would settle into the stream bed. This could have a negative effect on fish habitat downstream. Furthermore, land could be flooded and any building nearby could be damaged. There is a potential of danger to life if a person was working on a downstream dam when an upstream dam failed.

Mr. Bryden submitted that the works are unauthorized and must be removed. He is not prepared to view the completed works and will not authorize the berms at this stage. Before any dams are approved, plans must be submitted with an engineer’s certificate and the dams must be constructed in accordance with the engineered design.

Mr. Bryden further submitted that Mr. Devlin has been repeatedly advised that he must obtain a water licence. In spite of the Order and this Board’s refusal to issue a stay, Mr. Devlin willfully disregarded the advice of the MELP employees, refused to obtain a water licence and continued construction of the works.

The Panel finds that under section 39(1)(d) and (k) of the *Act* (as cited in the Order), Mr. Bryden has the power to order removal of the works. These powers are independent of any consideration of whether the stored or impounded water is a danger to life and property. However, Mr. Bryden further considered that he had grounds to order the release of stored or impounded water under section 39(1)(i) because it represented a danger to life and property.

The Panel finds that the works should be removed because they are unauthorized. However, the Panel also accepts Mr. Dambergs' and Mr. Bryden's assessment that the works are of inferior construction quality and could be subject to failure. The Panel notes that the opinion in the AGRA letter that the berms did not represent an immediate danger to life and property is partly based on the fact that there is a large dam downstream (Duncan Devlin's berm). The letter states:

> It is expected that the large dam is known to the Engineer under the Water Act, and that it has been approved, licenced (sic) or otherwise evaluated pursuant to the Water Act. Provided this large dam has acceptable stability, it represents additional protection to life or property.

This is a false assumption and, had the engineer for AGRA checked with MELP, he would have determined that the Duncan Devlin berm has neither been licensed nor approved under the *Act*. In fact, there is also an order requiring the removal of Duncan Devlin's dam. Implicit in the AGRA letter is that dams must be licensed under the *Act*. Earl Devlin chose to ignore this.

DECISION

In making this decision the Panel has carefully considered all the relevant documents, evidence and submissions made at the hearing, whether or not they have been specifically reiterated here.

For the reasons set out above, the Panel has decided to uphold the Order requiring Mr. Devlin to drain the impounded water and remove the works. Mr. Bryden requested that, if the Order is upheld, the time for compliance be between July 1 and September 1, 2000, during which time work done in the stream will have the least impact on fish habitat. This is a reasonable time frame. Accordingly, the Panel orders that paragraph number "4" of the Order be amended to read "The draining and dam removal shall be completed between July 1 and September 1, 2000."

The appeal is dismissed.

Cindy Derkaz, Panel Chair
Environmental Appeal Board

June 12, 2000