



Environmental Appeal Board

Citation: *Andre and Karen Audet v. Assistant Water Manager*, 2023 BCEAB 15

Decision No.: EAB-WSA-20-A010(a)

Decision Date: 2023-05-18

Method of Hearing: Conducted by way of written submissions concluding on November 22, 2022

Decision Type: Final Decision

Panel: Jeff Hand, Panel Chair

Appealed Under: *Water Sustainability Act*, SBC 2014, c. 15

Between:

Andre and Karen Audet

Appellants

And:

Assistant Water Manager

Respondent

And:

Strathcona Regional District

Participant

And:

Tim Osler and Brenda Edge

Participants

Appearing on Behalf of the Parties:

For the Appellants: Self-represented

For the Respondent: David Cowie, Counsel
Paul Battin, Counsel

For the Participants: Self-represented (Tim Osler and Brenda Edge)
Josh Krusell, Counsel (Strathcona Regional District)

FINAL DECISION

APPEAL

[1] This appeal concerns an order (the “Order”) made by the Assistant Water Manager dated October 29, 2020, requiring Andre Audet and Karen Audet (the “Audets”) to decommission and remove a dam located on their property. The dam in question diverts the waters of Mayfly Creek.

[2] The Audets say they do not own the dam and that the Water Sustainability Act, SBC 2014, c. 15 (the “Act”) does not apply to them and they should not be required to remove the dam. They say the dam was designed, funded, and constructed by one or more of the Comox Strathcona Regional District¹, the Province of British Columbia, and the Government of Canada for the benefit of those parties which in turn makes them the effective owner(s) of the dam.

[3] The Audets further say that restrictive covenants on the title to their property misrepresented the status of the dam and in any event, the terms of which prevent the Audets from decommissioning the dam.

[4] The Province says the Audets are owners of the dam, as defined in the Act and the Dam Safety Regulation, B.C. Reg 40/2016 (the “Regulation”) and that the Act entitled the Assistant Water Manager to make an order in respect of decommissioning the dam. The Province asks that the Order be confirmed.

[5] The Regional District was granted intervenor status in this appeal. It supports the position of the Province.

BACKGROUND

[6] The Audets own a 20-acre parcel of land located a few miles south of Campbell River (the “Property”). They purchased the Property in 2009.

[7] Mayfly Creek travels through the Property, draining wetlands and eventually reaching the shores of Oyster Bay. Mayfly Creek is a seasonal stream draining a large undeveloped region of low terrain via some natural paths and some artificial ditches. Mayfly Creek offers spawning and rearing habitat for cutthroat trout and coho salmon.

[8] The Property was previously part of a larger parcel of land owned by Macmillan Bloedel.

¹ In 2008, the Comox Strathcona Regional District was split into two successor organizations: the Strathcona Regional District and the Comox Valley Regional District. This appeal concerns the Comox Strathcona Regional District and the Strathcona Regional District. For ease, both are referred to as the “Regional District”.

[9] In or about 1999, the Oyster Bay Stream Keepers Association (“OBSA”), a non-profit environmental stewardship organization, wanted to construct a rock dam on Mayfly Creek in order to enhance the fish habitat by providing for water storage and to address a lack of water in the creek in the summer months, when it would often dry out.

[10] It does not appear that OBSA remains in existence today. There was sparse evidence submitted on this appeal concerning the OBSA or what has historically taken place at the Property, but the Audets have conducted an extensive historical search of available records and have provided anecdotal evidence of what may have occurred.

[11] According to the Audets, since the early 1900s, the area was generally used for logging operations, with access to Oyster Bay for log boom purposes. A retention pond may have been created in the area of the current dam to provide a water source for those logging operations.

[12] OBSA appears to have obtained the approval of Macmillan Bloedel for the construction of the dam. OBSA also engaged with the Federal Department of Fisheries and the Province at this time, who it seems were generally supportive of the initiative to improve the fish habitat through the construction of the dam on Mayfly Creek.

[13] The support for the dam was also forthcoming from the Regional District. Minutes of a meeting of the Board of the Regional District dated July 26, 1999 record that it approved of a grant in aid in the amount of \$3,000 for use by OBSA in the construction of the dam. A grant in aid is provided for in the Municipal Act, section 176(1)(c), which permits the Regional District to provide financial assistance for the purpose of benefiting the community.

[14] While the circumstances concerning funding for this OBSA initiative were not precisely recorded or in evidence before me, the Audets have conducted a search of records obtained through various freedom of information requests and they have obtained some financial records belonging to OBSA. The Audets say that in addition to the \$3,000 grant from the Regional District, funding was also made available from the Province. However, the source of funds and any terms associated with the funding are not well documented. Neither is there much information before me on the design and construction of the dam.

[15] The dam itself consists of a rip-rap rock wall approximately 1.0–2.5 meters high and approximately 10 meters across. Retained water is allowed to flow over the dam through a spillway. Beavers have, from time to time, increased the height of the dam by piling debris. Mr. Audet, who is a professional engineer, estimates that the dam has a storage capacity exceeding 30,000 cubic meters of water. There was no expert evidence tendered in the appeal concerning the dam or the area of retention.

[16] No water license or authorization allowing for the diversion of Mayfly Creek was issued by the Province at the time of its construction, or since.

[17] The Province, through the Ministry of Water Land and Air Protection, registered a restrictive covenant against the Property in March, 2005, the relevant terms of which are:

- 6(a) No building shall be constructed or mobile home located, nor shall there be any removal of vegetation or other changes by the hand of man made, within the covenant area ... without the prior written permission of the Regional Manager of the Ministry of Water, Land, and Air Protection.

...

18. Nothing contained or implied in this covenant shall impair, limit, prejudice, or affect the Transferee's [Province] rights and power in the exercise of their functions pursuant to any public or private statutes ... and all such powers may be exercised in relation to the Lands as if the covenant had not been executed and delivered by the Transferee.

[18] In the early 2000s the land in the vicinity of the dam was slated for residential development and a subdivision of the land was pursued by an entity known as Oyster Bay Investments Ltd., who was the then owner of the Property.

[19] The subdivision was approved by the Regional District in 2008. That approval recognized that Mayfly Creek was an environmentally sensitive area, and a second restrictive covenant was granted by Oyster Bay Investments Ltd. in favour of the Regional District, dated February 8, 2008. The relevant terms of that covenant are:

- 3.1 The Transferor [Land Owner] covenants and agrees to protect, preserve, conserve, maintain and keep the covenant area in its natural or existing state.
- 3.2 [the Transferor] will maintain all natural vegetation of which none will be removed without the written permission of the Transferee.

...

- 5.1 The Transferor grants to the Transferee [Regional District] a statutory right of way ...permitting the Transferee:

...

- c) to enter upon and protect, conserve, maintain, enhance, restore or rehabilitate in the Transferee's sole discretion...if an act of nature or human agency ... destroys, impairs, diminishes, or negatively affects or alters the covenant area.

...

- 11.5 This agreement shall enure to the benefit of the Transferee and shall be binding upon the parties hereto and their respective heirs, executors, successors and assigns.

[20] The Audets purchased the Property in December 2009 and were aware of the restrictive covenants on title.

[21] On November 16, 2012, Mr. Audet wrote to the Province and said that an adjacent land owner had expressed concerns about flooding on their land and the stability of the dam. Mr. Audet said that the retention area behind the dam had accumulated a large amount of sediment over the years and that the water was not well retained but rather was leeching into the ground and finding outlets in various undefined channels. He feared that, in time, the dam could be undermined and fail. He was concerned that the resulting flow of water and sediment could have catastrophic consequences to persons and property.

[22] In February 2019, Mr. Audet prepared a report, entitled, "Report on Mayfly Creek Wetlands" wherein he repeated his concerns about the long-term stability of the dam and requested the Province take steps to address his concerns.

[23] A report prepared by Hardy Bartle, P.Eng., for the Ministry of Forests, Lands, Natural Resource Operations and Rural Development ("FLNRD") dated August 26 2019, concluded that the risk of dam failure in the short term was low. However, the author of the report also observed that without maintenance the dam would indeed, eventually fail.

[24] The report says that OBSA built the dam at a cost of approximately \$10,800 pursuant to a design prepared by OSBA, the details of which are not known to be recorded anywhere. It is also suggested that the works were not entirely successful in retaining stream flows in the summer, as had been intended, and that OBSA made efforts, in as late as 2007, to improve the works by creating berms to channel some water flows, but again the details of this remedial work was imprecise and not well recorded.

[25] The report concludes with a recommendation that consideration be given to lowering or removing the dam entirely, and that an investigation be made to determine the owner of the dam.

[26] On November 26, 2019 the Assistant Water Manger, John Baldwin, wrote to Mr. Audet advising him that the Province considered the Audets to be the owner of the dam.

[27] On June 16, 2020, Mr. Audet wrote to the Acting Regional Dam Safety Officer and repeated his concern over the safety of the dam and his assertion that responsibility for the dam jointly rested with the Federal Government, the Province of British Columbia and the Regional District.

[28] On July 27, 2020 Dave Skarbo, Dam Safety Officer, wrote to Mr. Audet and advised him that when the Audets purchased the land on which the dam was located, they become the dam owner and thereafter were responsible for obtaining a license for the dam, maintaining it, or removing it.

[29] On Oct 29, 2020 Pat Lapcevic, Director of Resource Management, issued the Order under section 93(2) of the Act. The Order (reproduced here as written) required the Audets to:

1. Retain suitably qualified professionals to prepare plans for:
 - a. removal of the unauthorized dam from Mayfly Creek, and

- b. restoration of Mayfly Creek at the location of the dam, including at the outlet to the Mayfly Creek wetland, as close as possible to its original state following removal of the dam.
2. The plans required by this Order must be prepared by suitably qualified professionals and must include:
 - a. a method for draining water stored by Mayfly Creek dam in a safe and controlled manner,
 - b. a method for proper spoil management of any spoils resulting from removal of the Mayfly Creek dam so as to prevent damage to Mayfly Creek and to the Mayfly Creek wetland,
 - c. an environmental protection plan to protect the aquatic environment of Mayfly Creek during removal of the dam and to restore the site of the Mayfly Creek dam, including at the outlet to the Mayfly Creek wetland, as closely as possible to its original state following removal of the dam,
 - d. the name of the suitably qualified person who will supervise the removal of the dam and related site restoration work, and
 - e. a schedule of work required to remove the dam from Mayfly Creek and to restore the site of the Mayfly Creek dam, including at the outlet to the Mayfly Creek wetland, as close as possible to its original state following removal of the dam.
3. Submit the plans required by this Order to this office by no later than **May 31, 2021** for review and acceptance by this office (dam safety officer and habitat officer). Upon acceptance of the submitted plans by a dam safety officer, you will receive leave to commence removal of the dam in writing from the dam safety officer.
4. When submitting the plans required by this Order to this office, you must confirm that written permission for removal of Mayfly Creek dam and for site restoration, including at the outlet of the Mayfly Creek wetland, has been requested and whether that written permission has been obtained from the following covenantees holding restrictive covenants against the land:
 - a. Restrictive Covenant EX026254 (March 11, 2005) registered in favour of the Province of British Columbia (Fish, Wildlife and Habitat Protection).
 - b. Restrictive Covenant and Statutory Right of Way FBO144412 (February 12, 2008) registered in favour of the Comox Strathcona Regional District.
5. Following written acceptance of the plans required by this Order and receipt in writing of leave to commence removal of the Mayfly Creek dam and site

restoration, you must, under the supervision of a suitably qualified professional, remove the Mayfly Creek dam and perform the restoration of the site of the Mayfly Creek dam during the summer of 2021 and, in the case of any instream work, within the applicable Reduced Risk Work Window for Fish and Wildlife for any species in Mayfly Creek for that summer or an extension of the Reduced Risk Work Window, as may be acceptable to this office, but in no case, must dam removal and related site restoration work be completed later than October 30, 2021.

[30] The Audets filed an appeal of the Order on November 26, 2020.

[31] The Board granted a stay of the Order on March 12, 2021 pending determination of this appeal.

[32] The appeal proceeded by way of written submissions.

[33] Pursuant to section of 105(6) of the Act, the Board can:

- (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.

ISSUES

1. Are the Audets the owner of the dam for the purposes of the legislation?
2. Do the restrictive covenants prevent the Audets from decommissioning the dam?
3. Was the Assistant Water Manager entitled to make the Order and are its terms appropriate?

ANALYSIS

1. Are the Audets the owner of the dam for the purposes of the Act?

Position of the Parties

[34] The Audets say that they cannot be an owner because they did not construct the dam and because they do not receive any benefit from its existence. They say that because one or more of the Department of Fisheries, Province of British Columbia, and the Regional District funded and supported the dam construction, those parties should be considered the beneficial owner(s) of the dam.

[35] The Province and Regional District both say that the Audets own the dam by reason of the definitions found in the *Act* and the *Regulation* which define an owner as any of the following persons:

- a person who does not, but should, hold an authorization for the dam, and
- a person who owns the land on which the dam is located.

Board Findings

[36] The *Act* requires that any diversion of water requires an authorization:

6 (1) Subject to this section, a person must not divert water from a stream or an aquifer, or use water diverted from a stream or an aquifer by the person, unless

- (a) the person holds an authorization authorizing the diversion or use,

[37] The *Regulation* defines a dam as any barrier that has the purpose of diverting water from a stream:

"dam" means

- (a) a barrier constructed for the purpose of enabling the storage or diversion of water diverted from a stream or an aquifer, or both

[38] The *Regulation* defines an owner of a dam as including persons who should, but do not, hold an authorization to divert water:

"owner", in relation to a dam, means

- (a) the following persons:
 - (i) a person who is a licensee in relation to a licence for the dam;
 - (ii) a person who must under the Act, but does not, hold a licence for the dam;

[39] The *Regulation* also makes a person an owner if they own the land on which the dam is located:

- (b) if there is no person to whom paragraph (a) applies, the following persons:
 - (i) an owner, as defined in the Act, of the land on which the dam is located;
 - (ii) a person who had the dam constructed;

[40] I find that the dam on Mayfly Creek diverts water from a stream and accordingly that diversion requires authorization under the Act.

[41] I further find that the Audets are owners of the dam because they are persons who should, but do not, hold authorization to divert the waters of Mayfly Creek. There is no other person or entity, other than the Audets, who can be considered a person who ought to hold an authorization to divert water from the Mayfly Creek, as that diversion is continuous and ongoing on the property owned by the Audets, by a dam I have found the Audets to own. The water is used by no one else.

[42] I pause here to note that it is unclear why the previous owners of the Property did not obtain authorization for the dam, but the lack of a previous authorization does not assist the Audets. Had any previous owner obtained an authorization, that authorization would travel with the land, as per section 25 of the Act, and would have become the Audet's authorization in the normal course.

[43] The Audets are also owners of the dam according to the definitions found in the *Regulation*, because they own the land on which the dam is located.

[44] In concluding that the Audets are owners of the dam, I recognize that the Act also defines an owner of the dam as including the party who had it constructed. The Audets say they did not construct, and so they cannot be an owner.

[45] I do not read the Act as saying that persons who do not construct cannot be owners. Those who have a dam constructed are owners but so too is the party who owns the land. These are not mutually exclusive definitions. In this instance there is no controversy that it was OBSA who constructed the dam. However, OBSA is no longer in existence, but that does not detract from the provisions which say Audets are owners by reason of their land ownership.

[46] The Audets submit that one of three levels of government constructed the dam and not OBSA. The evidence before me does not support such a finding. In my view, the contribution of funds does not equate to those entities causing the dam to be built. There is no evidence that the initiative for the dam came from any level of government. Rather, the dam was built at the instance of the OBSA. By analogy, a lender to a construction project would not normally be considered the party who constructed the project simply because they provide funds to the entity that performed the construction. Here, even if levels of government offered financial support to the OBSA for the building of the dam, the OBSA was the entity that had the dam built.

[47] I find that neither the Regional District nor Province had the dam built.

[48] The Audets also argue that the one or more of the three levels of government who were supportive of the OBSA initiative, became the beneficial owner of the dam because it was intended to benefit the public interest in enhancing fish habitat. There is no mention of beneficial ownership under the Act or Regulation. I do not accept that the legislation should be read as imposing ownership on a party who might benefit from the dam if that party did not construct the dam, they do not own the land on which the dam is located, and they do not divert or use the water diverted by the dam. Here, the various levels of government supported OBSA's use of the water retained by the dam to improve fish

habitat, but this does not mean that the levels of government themselves ever intended, or did, use the water.

[49] For the reasons provided above, I find that the Audets are required to have an authorization for the dam and they own the land on which the dam is located and accordingly they are the owners of the dam.

2. Do the restrictive covenants prevent the Audets from decommissioning the dam?

[50] The Audets contend that the restrictive covenants prevent them from altering the dam and surrounding area without first obtaining approval, and in effect those covenants mean they cannot be required to decommission the dam. They believe the covenants make the Regional District the party with exclusive responsibility to maintain the dam. The Audets also say that at the time of their purchase it was reasonable to expect that the only requirement of them was to “do nothing”.

[51] The Regional District covenant requires the Audets to “maintain and preserve” the area in its existing or natural state. That is to maintain the environmentally sensitive area found within the covenant zone. I do not accept the assertion made by the Audets that they are required to “do nothing”. Neither do I accept that the covenant imposes an exclusive obligation on the Regional District to maintain and preserve the area. The covenant says precisely the opposite. The Audets are required to preserve and maintain the area. The Regional District is permitted to enter onto the land to maintain it only if the Audets fail to do so.

[52] The Audets submit that they were somehow misled by the wording of the restrictive covenants to believe they had no responsibility for the dam and/or that they reasonably believed the dam was self sustaining and required no maintenance or preservation.

[53] Firstly, I do not consider the restrictive covenants in any way unclear. The covenants do not suggest the dam is self sustaining or that the Audets are not required to do anything. The Audets must obtain permission to alter the area covered by the covenants, but I note that the two covenant holders are parties to this appeal and they both support the Order for decommissioning. It seems unlikely that their permission will not be forthcoming.

[54] Secondly, the covenants are not relevant to interpreting the provisions of the Act or Regulation. Whether the Assistant Water Manager can impose an order on the Audets cannot be affected by the covenants. His power flows from the legislation and not the covenants. The covenant in favour of the Province expressly states that the covenant cannot and does not impair any power held by the Province to administer or enforce any statute. The powers of the Water Manager under the Act cannot be diminished by the provisions in the restrictive covenant.

[55] I find that the restrictive covenants do not prevent the Audets from decommissioning the dam.

3. Was the Assistant Water Manager entitled to make the Order and are its terms appropriate?

Positions of the Parties

[56] The Audets say the *Act* and *Regulation* does not apply to them because they are not the owners of the dam, they did not construct the dam, nor do they receive any benefit from the dam.

[57] The Province says the Order was authorized by the legislation and the order should be confirmed, with one revision. They say that the Board should amend the order to provide:

- That once an engineer's plan for the decommissioning is accepted by the Water Manager, that the Audets immediately seek permission for the works from the covenant holders and that they complete the works by October 30, 2023.
- Should permission not be forthcoming the Audets are to notify the Water Manager and the Board.

Board Findings

[58] I have already found that the Audets are the owner of the dam.

[59] I have also found that it is irrelevant that the Audets did not originally construct the dam. I have also found that the concept of beneficial ownership does not exist under the *Act* and therefore it is not a relevant consideration.

[60] The Water Manager is given the power under section 93(1)(d) to make orders against persons who are diverting water without authorization:

93 (1) An order under this section may be directed to any person who has a right, permission or obligation under this Act, including, without limitation,

(d) in the case of the diversion or use of water other than under an authorization or change approval, to the person who is diverting or using the water without an authorization or change approval, whether or not an authorization or change approval is required

[61] The Audets own the dam. They are diverting the water and they ought to have an authorization to do so. Section 93 of the *Act* authorizes orders to be made against the Audets in relation to the dam.

[62] Section 93(2)(d) permits the Water Manager, acting as an engineer, to order the decommissioning of the dam:

(2) In addition to the other powers given under this Act, for the purpose of enforcing the provisions of this Act, ... an engineer may do one or more of the following:

(d) order the construction, alteration, installation, replacement, repair, maintenance, improvement, sealing, deactivation, decommissioning or removal of any works;

(3) An order under subsection (2) may be made subject to any terms and conditions the engineer considers advisable.

[63] I find the Water Manager was authorized to order the Audets to decommission the dam.

[64] Section 93(3) provides for the Water Manager, acting as an engineer, to make any order that he or she considers advisable. In this case, requiring the Audets to obtain engineering advice on a decommissioning plan, setting a deadline for completing the work, and for obtaining consent of the covenant holders are reasonable requirements.

[65] I agree that it is appropriate to amend the Order to require the Audets to immediately seek permission for the decommissioning work once an acceptable plan has been submitted to the Water Manager. The amended order will also provide that should permission for the decommissioning not be forthcoming that the Water Manager be advised immediately.

[66] The Order initially gave the Audets one year to complete the works. Since there has been a stay of the order in place pending this appeal, requiring the Audets to complete the works by October 30 2023, as has been suggested by the Province, gives them less than a year to complete the work. I will set the deadline as June 1, 2024, so as to provide a similar amount of time as had been first ordered by the Assistant Water Manager. In granting this deadline, I note that there is insufficient evidence to indicate that the dam is at risk of imminent failure.

[67] In his written submissions, Mr. Audet says the order should be set aside because it is not clear what work is required to decommission the dam and to restore the lands.

[68] In my view there is sufficient clarity in the objectives of the Order to allow engineering professionals to prepare a plan for the decommissioning and restoration. More specific details will come to light through that design process. Lack of specific detail at this stage is not a reason to set aside the Order.

DECISION

[69] In making this decision, the Board has considered all of the parties' submissions, whether or not specifically referred to herein.

[70] For the reasons set out above, the appeal is dismissed, insofar as I deny the remedies requested by the Audets.

[71] The Order, however, will be varied as follows:

- Paragraph 3 of the Order will require the plans for decommissioning to be submitted by Oct 30, 2023.

- Paragraph 4 of the Order will provide that once approval of the works has been granted, the Audets will immediately seek permission to carry out the works from the covenant holders. In the event that permission is not forthcoming the Audets will immediately notify the Water Manager.
- Paragraph 5 of the Order will be varied to refer to completion by June 1, 2024.

“Jeff Hand”

Jeff Hand, Panel Chair
Environmental Appeal Board