

CANADA / JUDGMENT

Baird v. Salle

2008 BCSC 1232

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1232 Baird v. Salle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Baird v. Salle,

2008 BCSC 1232

Date: 20080911

Docket: 36415

Registry: Kamloops

Between:

Thomas Clinton Baird and Carolyn Anne Baird

Plaintiffs

And

Edward Salle, Doreen Salle,

David Peterson, Karen Peterson,

Winbury Mortgage Corp. and Upton Capital Corp.

Defendants

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Plaintiffs

D. Stratmoen

Counsel for the Defendants

D.A. Carroll

Date and Place of Trial/Hearing:

June 20, 2008

Kamloops, B.C.

INTRODUCTION

- [1] The plaintiffs, husband and wife, are the present owners of the east half and the west half of District Lot 3094 in the Kamloops District Yale Division. Posby Lake is located on these properties. The plaintiffs say that they own the lake bottom as well as the surrounding lands. The defendants dispute the plaintiffs' claim to the lake bottom in their statement of defence. However, before me the defendants stated for the purpose of this application at least, that they accept the plaintiffs do own the lake bottom. I will assume, for the purpose of this application, that they do. Notice has not been given to the Province of British Columbia, nor have they been made a party. This decision is not a determination of any claims that the Province may have to the lake bottom.
- [2] The defendants and the plaintiffs hold various water licenses in relation to Posby Lake. Some of these water licenses pre-date the Crown grants and substitute licenses have been issued for some of the original licenses. The previous owner of the east half and west half of Lot 3094 and previous holders of various water licenses removed a beaver dam that contributed to the size of Posby Lake, and replaced it with an earthen dam, spillway and other works to control and regulate the flow of water from the lake. This occurred in the summer of 1946.
- [3] A water users group was incorporated on February 1, 1946 pursuant to the Water Act. The plaintiffs became a part of that group when they acquired their property and various water licenses. The plaintiffs permitted free and uninterrupted access to the dam and the lake by the water license group prior to the spring of 1998. Subsequent to that, for reasons not germane to my decision, problems developed between the plaintiffs and the defendants with regard to the exercise of rights under the water licenses.
- [4] This resulted in applications to the Comptroller of Water Rights and the Environmental Appeal Board (the "EAB") pursuant to the Water Act. In addition, the plaintiffs commenced this proceeding, filing the original statement of claim on September 9, 2004, and an amended statement of claim on October 14, 2005.
- [5] The plaintiffs allege that the defendants are required to pay them reasonable compensation for exercising rights under the Water Act, and should take steps to expropriate the lands under the lake, the earthen dam and spillway, and any roads necessary for access to the works. There is a dispute between the parties whether expropriation proceedings have been

commenced, although they have not been proceeded with if they have. There is also a dispute between the parties about whether the consent of the Lieutenant Governor in Council is necessary for the expropriation to proceed.

[6] The plaintiffs claim damages from the defendants on the basis of having caused a nuisance and for trespass upon the plaintiffs' lands, including the trespass caused by entering upon the properties as well as storing water and the use of the dam upon the properties.

[7] The plaintiffs, in their amended statement of claim, sought:

- injunctive relief;
- a declaration the defendants are prohibited from exercising their rights under the water licenses without paying reasonable compensation, both past and future;
- an order setting the quantum of compensation.

[8] The plaintiffs seek:

- an order prohibiting the defendants from using the property for the storage of water;
- a declaration that the defendants' actions constitute trespass, conversion and/or nuisance;
- that the defendants cease these activities and pay reasonable compensation or damages.

[9] The defendants, in their amended statement of defence, allege that the dam and associated works were created with the knowledge, consent and participation of the person who owned the property at the time, and that compensation was paid to their predecessor. The defendants also argue that the plaintiffs received the land with full knowledge of those circumstances and the existence of the dam. They also argue that the plaintiffs have benefited and continue to benefit from the dam and related works.

[10] The defendants allege that they commenced expropriation proceedings on or before July 12, 2001, but the plaintiffs refused compensation and denied the jurisdiction of the Expropriation Compensation Board.

[11] The defendants also rely on their water licenses and the rights under those water licenses for access to the properties and the works.

[12] The defendants refer to the proceedings before the Comptroller of Water Rights and the EAB pursuant to the Water Act and state that the matter is *res judicata*. They deny the plaintiffs have suffered any damage.

[13] The defendants, in their counterclaim, recite the history of the properties and the water licenses, and allege that the plaintiffs have wrongly interfered with the defendants' use of the water from the lake. They say the plaintiffs have wrongfully blocked access to the property which is authorized by the water licenses.

- [14] The defendants refer to their notices of expropriation filed in the Land Titles Office and say that the plaintiffs' reply disputed the jurisdiction of the EAB because the defendants had failed to obtain consent of the Lieutenant Governor in Council authorizing the construction of the dam.
- [15] The defendants plead proprietary estoppel precluding the plaintiffs from seeking compensation.
- [16] The defendants also argue that the original Crown grants preclude the plaintiffs from seeking compensation.
- [17] In the alternative, if expropriation is necessary, the defendants say they do not require the consent of the Lieutenant Governor in Council because the dam and lake existed prior to the enactment of the present s. 27(4) of the Water Act. They also raise additional issues with regard to compensation, including who owns the dam, spillway and associated works, and allege that the plaintiffs have suffered no loss or damages as a result of the existence of the works and the lake.
- [18] The defendants seek a declaration that they are not required to expropriate, or alternatively, do not require the approval of the Lieutenant Governor in Council. They deny they are required to pay any compensation, or say they are entitled to set off against any compensation, any damages which they may have suffered. They also seek a declaration they are entitled to use the dam, spillway and related works and to store water in Posby Lake in priority to an aquaculture license issued under the Fisheries Act to the plaintiffs. They also seek an order that they are entitled access to the dam on the road which they say had been used up to 1997.
- [19] The plaintiffs' statement of defence to the counterclaim refers to the aquaculture license being acquired in July of 2001. They deny causing any damages or wrongfully blocking any road. The plaintiffs allege that the defendants have failed to pursue the expropriation proceedings or any notices they gave.
- [20] The plaintiffs also take issue with the meaning of the original Crown grants and the effect of any water licenses referred to on those grants. The plaintiffs insist that the consent of the Lieutenant Governor in Council is required for expropriation pursuant to s. 27(4) of the Water Act. They also assert their claim to ownership of the dam, spillway and associated works, or at least the lands on which they are located.

THIS APPLICATION

- [21] The defendants, Salle, Winbury Mortgage Corp. and Upton Capital Corp. have applied by notice of motion for declarations that:
- they are not required to expropriate any part of the plaintiffs' land in order to exercise their rights under their water licenses,

- they are entitled to use and operate the dam, spillway and associated works, and to store water at Posby Lake pursuant to their licenses;
- they are entitled to enter into, upon, over and across the plaintiffs' land to exercise the works as permitted by their licenses, including the use of a road on the plaintiffs' land which they had used prior to 1997;
- If they are entitled or required to expropriate, no approval of the Lieutenant Governor in Council is required.

[22] They specifically seek an order dismissing the plaintiffs' claim for a declaration that the defendants are:

- a) prohibited from exercising their rights under the water licenses without paying reasonable compensation, both past and future;
- b) prohibiting the defendants from using the plaintiffs' property for the purpose of storing water;
- c) that the actions of the defendants constitute a trespass, conversion and/or nuisance, and that the defendants cease the same and pay reasonable compensation or damages;
- d) damages, both general and special in respect of these defendants.

[23] The motion was brought as a summary trial application and does not dispose of all of the issues between the parties. However, the plaintiffs and the defendants are both anxious to proceed in this fashion.

ISSUES

[24] The following issues arise:

1. The interpretation of the original Crown grants; in particular, the effect of the notations on the grants referring to a number of existing water licenses. Was the reference to these licenses merely notification to the recipient of the Crown grants, or were the rights under the water licenses reservations from the Crown grants?
2. What is the effect of substituted licenses being issued or in place of some of the original water licenses?
3. Is there a trespass by the defendants?
4. Must the defendants expropriate?
5. If so, is the consent of the Lieutenant Governor in Council required?

SOME ADDITIONAL BACKGROUND WOULD BE USEFUL

[25] This has been taken from the decision of the EAB November 10, 2003, found at tab 11 of the chambers record. The reference to "Appellants" is a reference to the plaintiffs in the present proceedings. The history begins at page 2 under the heading "Background":

Nelson Creek is located near Barriere, B.C., which is about 60 km north of Kamloops, in the North Thompson River valley. Posby Lake and Salle Lake are used as reservoirs for water diverted from Nelson Creek. Water levels in the reservoirs are regulated by a dam and associated water works on each reservoir. Water from Nelson Creek flows downstream to Salle Lake. When water is released from the dam on Salle Lake, it flows some distance down Nelson Creek before reaching Posby Lake. When water is released from the dam on Posby Lake, it again flows some distance down Nelson Creek before discharging into the North Thompson River.

Posby Lake is located on land that is owned by the Appellants, and is legally described as the East ½ and West ½ of District Lot 3094, Kamloops Division, Yale District. Nelson Creek flows out from Posby Lake through District Lot 3095, Kamloops Division, Yale District, which is owned by the Appellants and Memorie Baird.

The Appellants and the Third Parties are involved in ranching, and rely on Nelson Creek to supply water to their homes and to irrigate crops. The Third Parties in this appeal hold water licences on Salle Lake, Posby Lake, and/or Nelson Creek that permit them to divert and use water for storage, domestic, and irrigation purposes. The Appellants hold water licences on Posby Lake and Nelson Creek only.

There is a long history of shared use of the water in Nelson Creek and Posby Lake. The development of Nelson Creek as a supply of irrigation water began in 1914 with the issuance of diversion licences. Initially, water in Posby Lake was stored behind a beaver dam, and the flow of water was controlled with a head gate.

In 1945, 7 landowners signed an agreement to share the cost of building a larger dam on Posby Lake. These landowners petitioned the Comptroller of Water Rights to incorporate a water users' community to construct, operate and maintain a water storage structure on Posby Lake.

On February 1, 1946, the Chinook Cove Water Users Community ("CCWUC") was incorporated under the Act to supply water from Nelson Creek to 6 land holdings. Also in 1946, the beaver dam was replaced with an earth-fill dam that increased the volume of water storage in Posby Lake.

Between 1945 and 1946, 6 additional water licences were issued for diversion of water from Nelson Creek with storage in Posby Lake.

In 1991 and 1997, respectively, the Appellants became the registered owners of the East ½ and West ½ of District Lot 3094. They acquired the properties from Thomas Scott Baird and Memorie Baird, the father and mother of the Appellant Thomas Baird. Scott and Memorie Baird had acquired the property from W.A. Salle.

When they acquired the East ½ of District Lot 3094, the Appellants also acquired two water licences that are appurtenant to the East ½ of District Lot 3094: conditional water licence ("CWL") 111502 and final water licence ("FWL") 111193.

- CWL 111502 authorizes the Appellants to store water in Posby Lake between October 1 and June 15, and use 500 gallons of water per day from Posby Lake for domestic purposes throughout the year. CWL 111502 has a priority date of January 17, 1992.
- FWL 111193 authorizes them to store water in Posby Lake and use 18.0 acre-feet of water per annum for irrigation purposes. FWL 111193 has a priority date of November 30, 1945.

The Appellants also hold three water licences that are appurtenant to District Lot 3095: CWL 43311, CWL 116606 (which replaced FWL 005443), and FWL 7607. Together, those licences authorize storage in Posby Lake and use of water from Nelson Creek for domestic and irrigation purposes.

In addition, the Appellants hold an aquaculture licence under the Fisheries Act, R.S.B.C. 1996, c. 149, which permits them to grow or cultivate fish on Posby Lake for commercial purposes.

In 1997, the Appellants applied for a water licence for conservation purposes, but a decision on that application had not been made when these appeals were heard. Therefore, the Appellants do not have rights to use water for aquaculture operations, or for "industrial" or "conservation" purposes as defined in the Act.

The Appellants' use of the East ½ and West ½ of District Lot 3094 is subject to the terms of the original Crown grants for those parcels, which were issued on March 3, 1938, and March 6, 1944, respectively. Crown grants are legal instruments by which Crown lands are transferred to a purchaser. Each Crown grant sets out the terms and conditions of the grant, and may contain restrictions, exceptions or reservations that may encumber the title to the land. The Crown grants for both the East ½ and West ½ of District Lot 3094 are subject to rights of the holders of certain pre-existing water licences. The exceptions in the Crown grants generally allow the holders of the licences, and their heirs, to divert and use water from Posby Lake, and to access the associated water works that are located on the East ½ and West ½ of District Lot 3094. The licences listed in the Crown grants, and the language of the exceptions in the Crown grants, are discussed in greater detail later in this decision.

Between 1992 and 1996, the Appellants became increasingly concerned about the manner in which the Posby Lake and Salle Lake dams were being operated and maintained by the CCWUC. The Appellants claimed that the reservoirs and dams were being inadequately maintained, and were being operated in a manner that caused damage to their property. The Appellants were also concerned that other licensees were accessing and using the Appellants' property in trespass, and that the other licensees had not secured easements over the Appellants' property.

On or about October 1997, the Appellants resigned from the CCWUC

Between 1997 and 1999, the Appellants wrote several letters to what was then the Water Management Branch of the Ministry of Environment, Lands and Parks (the "Ministry"), now called Land and Water B.C. Inc., about their concerns with the Posby and Salle Lake reservoirs. In a letter dated March 23, 1999, the Appellants requested that the Comptroller of Water Rights cancel the certificate incorporating the CCWUC on the basis that the incorporation was invalid.

[26] The plaintiffs and defendants were involved in a number of applications and hearings before the Deputy Comptroller of Water Rights and the Comptroller, as well as the appeal before the EAB. The CCWUC certificate of incorporation was cancelled, orders were made for the joint use of the works under the storage license on Posby Lake, Salle Lake and Nelson Creek and a water bailiff was appointed to regulate diversion of water from Nelson Creek. The orders were appealed to the EAB resulting in their decision. The EAB also dealt with appeals from directions given by the engineer for the implementation of the Comptroller's orders.

[27] The plaintiffs (appellants before the EAB) appealed the order for the joint use of the works on Posby Lake on a number of grounds, including that:

- the release of water from the Salle Lake reservoir by the other licensees was in trespass of the plaintiffs' property, and that the other licensees required easements;
- the other licensees had not applied under s. 27(4) of the Water Act to expropriate the land that had been flooded, or failed to diligently proceed with that expropriation;
- the operation of the works on Posby Lake caused harm to the appellants and their property.

[28] In general, the complaints were that the decisions and directions from the engineers allowed an unlawful use of the plaintiffs' property by the defendants.

[29] The EAB stated that some of the issues they had to determine were:

1. whether the Comptroller's order for the joint use of the dam and reservoir on Posby Lake unlawfully permits other licensees to access and use the plaintiffs' property;
2. whether the other licensees have failed to diligently prosecute the expropriation proceedings as required under s. 27(6) of the Water Act.

[30] The parties agree that the decision of the EAB is not binding upon me, but the defendants argue that I should consider it persuasive particularly with regard to the issue of what weight, if any, should be given to the fact that some of the original licenses were substituted for other licenses. The defendants argue that the EAB that made the decision would be particularly knowledgeable about the Water Act and the procedures regarding water licenses. The defendants argue that I should recognize the expertise that they have in that area which is not necessarily possessed by a judge of the Supreme Court of British Columbia.

THE EFFECT OF THE ORIGINAL CROWN GRANTS

[31] The east half and the west half of District Lot 3094 is subject to water licenses which existed before the creation of the Crown grants, and some licenses which were created subsequent to the Crown grants. The Crown grants relating to the east half was made March 3, 1938 and the west half on March 6, 1944. The question is whether the Crown grants only give notice to the grantee of the existence of the prior water licenses and the rights of those licensees, or whether those licenses and rights were excepted from the Crown grant. Both Crown grants, on their face, contain the normal provisions dealing with the Crown right to resume part of the lands for roads etcetera up to an amount of 1/20th of the whole, and the reservation of the right to enter for the purposes of taking minerals, coal, petroleum or natural gas, subject to paying compensation for the entry. Both Crown grants also state:

provided also that it shall be lawful for any person duly authorized in that behalf by us, our heirs and successors to take and occupy such water privileges and to have and enjoy such rights of carrying water over through or under any parts of the hereditaments hereby granted, as may be reasonably required for mining or agriculture purposes in the vicinity of the said hereditaments paying therefore a reasonable compensation to the aforesaid Ernest Salle, his heirs and assigns.

[32] The reference is the same on the Crown grant for the west half, except the grantee is Frank Vavra.

[33] The face of both grants also states at the bottom:

For further proviso refer to back hereof.

[34] The back of the grant of the east half contains the following words:

Provided nevertheless that it shall at all times be lawful for and this Grant is made subject to the right of Hans Struz, Senior, his heirs and assigns, licensee under Final Water Licence numbered 7605, dated the 18th day of August, 1930; Charles Carlstrom, his heirs and assigns, licensee under Final Water Licence numbered 7606, dated the 18th day of August, 1930; Ernst Salle, his heirs and assigns, licensee under Final Water Licence numbered 7607, dated the 18th day of August, 1930; Peter A. Johnson & Steve Mulvihill, their heirs and assigns, licensee under Final Water Licence numbered 7608, dated the 18th day of August, 1930 and the Estate of Charles Carlstrom, Deceased, its successors and assigns, licensee under Final Water Licence numbered 9127, dated the 12th day of February, 1935, to maintain pipe lines, ditches, flumes, and works within the boundaries of the said lands hereby granted necessary for the proper direction, storage, conveyance and use of the water acquired under said licences and for the proper carrying out of the objects of the said licences and to enter into and upon the said lands at any and all times for the purpose of maintaining and repairing the same during the existence of the licences.

[35] The Crown grant for the west half of Lot 3094 has the following words on the back of the grant:

PROVIDED also that it shall be lawful at all times during the currency of Final Water Licences 7605, 7606, 7607, and 7608, dated August 18th, 1930, Final Water Licence 9127 dated February 12th, 1935, and Final Water Licence 11780, dated January 15th, 1943, for the licensees there under to enter upon the lands hereby granted and to maintain, repair and operate thereon and therein the works authorized under the said Final Water Licences.

- [36] The defendants have produced a number of documents from the government files, including those that relate to initial attempts at homesteading this property and applications for Crown grants. Throughout that material, it is evident that the government was always concerned about the importance of water to the surrounding land owners and the preservation of those interests. The original water licenses preceded the Crown grants and were being used on an ongoing basis.
- [37] The plaintiffs' position is that the references on the back of the Crown grants do no more than notify the grantee of the existence of the licenses and are not exceptions to the grant, as argued by the defendants. The plaintiffs argue that if the government had intended to deprive them of their interest in the property without compensation, they should have specifically said so. The defendants reply simply that the plaintiffs have not been deprived of anything because they never received the lands unencumbered by these licenses.
- [38] The defendants argue that in construing the Crown grants, I should apply the principle that nothing is passed except that which was conveyed by express words, and that the surrounding circumstances should be looked at to interpret those words if necessary. (*Ward (Re)*, [1874] B.C.J. No. 2, 1 B.C.R. (Pt. 1) 114 (BCSC) and *Re Land Registry Act (1913)*, 13 D.L.R. 790 (BCSC)).
- [39] The defendants refer to the decision *Monashee Enterprises Ltd. v. British Columbia (Minister of Recreation and Conservation)*, [1981] B.C.J. No. 652, 124 D.L.R. (3d) 372 (BCCA) to illustrate the distinction between a reservation or exception from a grant and a reservation of a right to resume at a later date at ¶16:

16 *The Attorney-General for New South Wales v. Dickson and Others* [1904] A.C. 273 distinguished between a reservation or exception from a grant and a reservation of a right to resume at a later date land that was granted. That approach was carried forward in *McGrath v. Williams* (1912) 12 N.S.W. 477 where the Chief Judge in Equity dealt with an issue similar to the issue that is raised by this appeal. The headnote is accurate:

The plaintiff claimed to be owner in fee simple of a piece of land fronting on the north the Shoalhaven River, which is tidal. The land in question was granted by the Crown in 1843 to the plaintiff's predecessors in title. The grant was subject to certain reservations, including a reservation of "all land within one hundred feet of high water mark on the sea coast, and on every creek, harbour and inlet of the sea." The plaintiff sought to bring the land down to high-water mark on the Shoalhaven River, under the Real Property Act, claiming that the hundred feet reservation had been eroded away. The Crown objected to the plaintiff's application on the ground that the reservation in the grant enabled the Crown at any time to take possession of a

hundred feet from the existing high-water mark at the time of such taking of possession. Held, that the reservation operated by way of exception from the grant, and that consequently the hundred feet must be measured from high-water mark as at the date of the grant.

This is how the Chief Judge in Equity reasoned:

Reservations include two classes - (a) where the reservation is an exception which operates at the time, and consequently the excepted land does not pass by the grant; and (b) where the reservation is in fact a reservation of a right to resume a part of the land granted. To quote the language of the privy Council in *Cooper v. Stuart* (14 A.C. 286, at 290): "It is obvious that such a provision does not take effect immediately; it looks to the future, and possibly to a remote future. It might never come into operation, and when put in force it takes effect in defeasance of the estate previously granted, but not as an exception." In that case, there was a grant of 1400 acres reserving any quantity of land, not exceeding 10 acres, in any part of the grant, as might be required for public purposes. In the case of the *Attorney-General for New South Wales v. Dickson* ([1904] A.C. 273, at p.277), there was a Crown grant of land reserving to the Crown: "All such part of the said piece or parcel of land as may be within 100 feet of high-water mark on the sea coast, or in any creek, harbour, or inlet." The privy Council say, at p.277: "The effect of this last reservation is not open to any serious controversy. If the strip in question belonged to the Crown at the date of the grant, the strip was excepted from the grant. The word 'reserving' would operate as an exception." The last case is an instance of class (a); *Cooper v. Stuart* (supra) is an instance of class (b); and the whole question is within which class does the reservation in question fall. ... Reservation (3) seems to me to fall within the same class, and to be an exception out of the thing granted. There is not a suggestion in the grant that the reservation is to operate in the future by way of defeasance; on the contrary, the grant treats the reservation as one which apparently is to take effect immediately, i.e., to operate by way of exception. If so, the hundred feet must be measured from high-water mark as at the date of the deed.

[40] In the present case, the grants make it clear that those rights, referred to on the back of the grants, are in existence. The EAB dealt with this issue as follows:

In addition, the Comptroller submits that section 23 indicates that the East ½ and West ½ of District Lot 3094 remain subject to the priority of the water licences listed in the Crown grants, including rights associated with water use, and confers authority to set out additional exceptions and reservations in a Crown grant. Section 50 of that Act states:

Exceptions and reservations

50 (1) A disposition of Crown land under this or another Act

(a) excepts and reserves the following interest, rights, privileges and titles:

- (iii) a right in any person authorized by the government to take and occupy water privileges and to have and enjoy the rights of carrying water over, through or under any part of the land granted, as may be reasonably required for mining or agricultural purposes in the vicinity of land, paying a reasonable compensation to the grantee, the grantee's successors and assigns;
- (4) A disposition of Crown land may, by express words, except or reserve to the government rights and privileges more extensive than those referred to in subsection (1).

The Comptroller maintains that section 40 of the Land Act does not apply to this case, because the Crown grants for the East ½ and West ½ of District Lot 3094 specifically preserve the licensees' rights to access and use the land for the purposes contemplated by the licences listed in the grants.

With regard to the question of the ownership of the bed of Posby Lake, the Comptroller submits that further information is needed to conclusively determine its ownership, but the Board need not determine that issue for the purposes of these appeals. The Comptroller submits that the ownership of the lake bed is an issue between the government and the Appellants, and is distinct from the issue of the continued applications of the exceptions in the Crown grants. The Comptroller maintains that the Crown grants allow for continued rights to use and access Posby Lake, regardless of whether the lake bed was granted.

David and Karen Peterson submit that the Appellants had full knowledge of the works and licences when they purchased the properties. They also advise that the licensees are attempting to secure registered easements over the Appellants' property.

Edward and Donna Salle note that Scott and Memorie Baird purchased District Lot 3094 from W.A. Salle in 1949, and that Scott Baird was a trustee and member of the CCWUC for approximately 40 years, over which time he made no complaints of damage or trespass by other licensees. Mr. and Mrs. Salle submit that soon after Thomas Baird acquired District Lot 3094, he applied to the Ministry for all of the water rights on Posby Lake, for the purpose of raising fish. The Salles submit that, ever since that application was denied, the Appellants have been attempting to have the other water licences cancelled. They submit that working relations on the water system have been strained by Mr. Baird's accusations of trespass and damages, and any attempts to co-operate with the Appellants have been met with rejection.

The Panel has considered the statutory provisions cited by the parties. The Panel notes that section 23(2) of the Land Title Act states that the exceptions of a Crown grant remain in effect on the issuance of a certificate of title. In addition, section 50(1)(a)(iii) of the Land Act provides that a disposition of Crown land under that Act (the grants in this case were issued under the Land Act) "excepts and reserves a right in any person authorized by the government to take and occupy water privilege and to have and enjoy the rights of carrying water over, through or under any part of the land granted, as may be reasonably required for agricultural purposes in the vicinity of the land." In addition, section 50(4) of the Land Act provides that a disposition of Crown land may "by express words, except or reserve to the government rights and privileges more extensive than those referred to in subsection (1)."

Based on those statutory provisions, the Panel finds that the Crown grants for the East ½ and West ½ of District Lot 3094 expressly preserve the rights of those persons holding the licences listed in the grants, and any licences issued in replacement or substitution for those licences, to access and use that land for the purposes contemplated by the licences. The Panel finds that this case is distinguishable from Berscheid, because the Crown grants contain express exceptions protecting the rights of the holders of specified water licences to access and use the land. There is no indication that the land in Berscheid was subject to a Crown grant that reserved such rights for water licence holders. The Panel also finds that section 40 of the Land Act is not applicable to this case, because section 50 of that Act and section 23 of the Land Title Act preserve the rights described in the exceptions to the Crown grants for the East ½ and West ½ of the District Lot 3094.

Next, the Panel has considered the extent of the rights expressed in the exceptions to the Crown grants, and in the licences themselves, and whether the Third Parties' current access to and use of the East ½ and West ½ of the District Lot 3094 is consistent with the exceptions and the licences.

The extent of the Third Parties' rights to access and use the East ½ and West ½ District Lot 3094 depends on the language in the Crown grant exceptions, whether they hold licences that are subject to the exceptions, the types of uses and works that are authorized in the licences, and what is reasonably required to maintain, repair and operate those works.

The Crown grant for the East ½ of District Lot 3094 is subject to the rights of the holders of 5 FWLs: 7605, 7606, 7607, 7608, and 9127. Specifically, one of the exceptions in that grant states:

PROVIDED nevertheless that it shall at all time be lawful for [the holders of the above-noted water licences, and their heirs and assigns], to maintain pipelines, ditches, flumes and works within the boundaries of the said lands hereby granted necessary for the proper direction, storage, conveyance and use of the water acquired under the said licences and for the proper carrying out of the objects of the said licences and to enter into and upon the said lands at any and all times for the purpose of maintaining and repairing the same during the existence of the licences.

Similarly, the Crown grant for the West ½ of District Lot 3094 was made subject to the rights of the holders of 6 FWLs: 7605, 7606, 7607, 7608, 9127, and 11780, as follows:

PROVIDED also that it shall be lawful at all times during the currency of [the above-noted water licences] for the licensees thereunder to enter upon the lands hereby granted and to maintain, repair and operate thereon and therein the works authorized under the said Final Water Licences.

The Panel interprets these exceptions as preserving the rights described in those water licences, and preserving the rights of the holders of those licences to enter onto the East ½ and West ½ of District Lot 3094 for the purpose of operating, maintaining, and repairing all licenced water works on the property.

The FWLs referenced in the 2 Crown grants are either held by the Appellants and Memorie Baird (7607), or the Third Parties Winbury Mortgage Corp. and Upton Capital Corp. (7606 and 9127) and Edward and /or Donna Salle (7605, 7608 and 11780). Thus, as the holders of these licences, the Panel finds that these Third Parties have a right to store water in Posby Lake, to use water for the purposes described in their respective licenses, and to access the East ½ and West ½ of District Lot 3094 for the purposes of operating, maintaining, and repairing the licenses works described in the licenses; namely, the dam and associated diversion structures, pipes, etc.

In addition, both Crown grants contain a further exception, which states as follows:

PROVIDED also that it shall be lawful for any person duly authorized [by the Crown] to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through, or under any parts of the hereditaments in the vicinity of said hereditaments, paying therefore a reasonable compensation to the aforesaid [landowner], his heirs and assigns;

The Panel notes that the wording of this exception is virtually identical to the language in section 50(1)(a)(iii) of the Land Act. The Panel interprets this exception as preserving the Crown's rights, under section 12 of the Act, to issue water licences after the date of the Crown grants, which allow the diversion, use, storage, and carriage of water over or under the East ½ and West ½ of District Lot 3094, as may be reasonably required for mining or agricultural purposes in the vicinity of the property. Therefore, this exception applies to all of the other wate licences on Posby Lake that were issued after the respective dates of the grants. Specifically, it applies to several licences that were originally issued in 1945 and 1946 after the original beaver dam and diversion works, and the licences that have been issued in substitution for or replacement of those licences. Specifically, a licence held by Winbury Mortgage Corp. and Upton Captial Corp (CWL 11920), licences held by Edward and/or Donna Salle (FWL 21092, 21094 and 21096), licences held by David and Karen Peterson (CWL 111877, 112802 and 112854), and licences held by the Appellants (FWL 111193 and CWL 111502).

[41] I find the defendants' arguments and the reasoning of the EAB persuasive. I find that the pre-existing licenses and the licenses which superseded them are exceptions to the original grant, and the defendants may exercise their rights under those licenses without the payment of compensation to the plaintiffs.

[42] The materials filed on this application include an engineer's report relating to Final Water License 5442 for Nelson Creek. The report refers to the Beaver Dam which was in place backing up storage in Posby Lake. It also refers to a head gate which had been installed and the fact that because the beavers buried the head gate, the dam was cut each year rather than trying to uncover the head gate. The engineer's report also confirms that the surface area of the lake was 29.6 acres. The report contained a scale map of Posby Lake.

[43] A survey of Posby Lake as of December 10 or 20, 2005 shows the total area of the lake is 32.9 acres. It might be useful if both were to the same scale and could be overlaid to show any changes. If in fact there is an increase in the size of the lake as a result of the actions of the water license holders and that exceeds their rights under the water licenses, they may be in a position of having to pay some form of compensation.

THE EFFECT OF SUBSTITUTED LICENSES

[44] The plaintiffs argue that whatever effect the original licenses had on the Crown grant, or any rights that they may have had were lost when those licenses were substituted for other water licenses. In other words, the holders of the substituted licenses do not enjoy the same privileges that the original licenses did. The plaintiffs argue that, as owners of the property, they are no longer limited by any rights that might have been reserved to the original water licenses when substituted water licenses were issued.

[45] I have already referred to the Crown grants and the specific licenses referred to on those Crown grants. The substitute licenses are as follows:

Original Final License 7605 superseded by Conditional Water License 118983 - November 19, 2003;

Original Final License 5441 superseded by Conditional Water License 118930 - November 19, 2003;

Original Final License 7606 superseded by Conditional Water License 18532 which was superseded by Final License 112533 - January 19, 1998, and also Conditional Water License 111923;

Original Final License 9127 which was superseded by Final License 18529 and 18530 which were superseded by Conditional Water License 111922 - December 8, 1997;

Original Final License 11780 which was superseded in part by Conditional Water License 118927 - November 19, 2003;

Original Final License 11779 which was superseded by Conditional Water License 118927;

Original Final License 7608 which was superseded by Conditional Water License 118981 - November 19, 2003;

Original Final License 5444 which was superseded by Conditional Water License 118922 - November 19, 2003;

Original Final License 7604 issued September 3, 1926 is current;

Original Final License 9127 was superseded by Conditional Water License 111922 - December 8, 1997;

Original Final License 7606 was superseded by Final License 112533 - January 19, 1998.

[46] The parties did obtain information from the water rights branch dealing with the various substitutions and the reasons for those substitutions. It is apparent from that information that the substitutions were largely the result of initiatives of the water rights branch themselves and were of a technical nature. In some occasions, they arose because of a subdivision resulting in an amendment of a diversion license and, therefore, requiring a change to the storage license. There were no substantial changes to the storage licenses or the amount of water allowed to be stored or priority dates. The defendants argue that the substitutions were not intended and did not affect the rights that pertained to the licenses themselves, or any priorities between licenses or in relation to the Crown grant. They point out there is no definition of a substituted license in the Water Act. They did refer to ss. 18, 23 and 24 as the ways in which a license may be altered. They also referred to the definition section for the following definitions:

"conditional licence" means a licence that authorizes the construction of works or the diversion and use of water before the issue of a final licence;

"final licence" means a licence that authorizes the diversion and use of water, and does not authorize the construction of additional works or an extension of the use of water;

[47] The defendants point out that s. 18 of the Water Act deals with amendments and substitution of licenses, s. 23 was suspension and cancellation, and s. 24 abandonment. I agree that s. 18 is the section that we are concerned with. Section 18 allows amendment of licenses by the Comptroller for a number of reasons, and states that if no person's right will be injuriously affected the Comptroller, or the regional water manager may dispense with notice generally required under subsection (1). (18(1.1.)). Section 18(2) provides:

(2) If the Comptroller or the regional water manager considers that an amendment to a licence under subsection (1) would substantially change that licence, the Comptroller or the regional water manager may issue in substitution for it another licence on the conditions he or she considers advisable.

[48] The material from the water rights branch, however, does not show a substantial change to the original licenses. The documents show that the changes were related to subdivisions, in some cases updating the wording of the licenses themselves, or changes in ownership of land and impact on the diversion licenses. The amounts of water to be stored and the priority dates all remained the same. These are the real core of the licenses.

[49] It is quite apparent that these substitutions or changes were administrative matters, rather than substantial matters that go to the core rights of the water license holders. Therefore, I am satisfied that the defendants are correct when they argue that the substitution water licenses did not result in the loss of any rights vis à vis the water license holders and the present owners of District Lot 3094.

[50] I note that at page 20 of the EAB's decision, they refer to s. 50(1)(a)(iii) of the Land Act as preserving the Crown's right under s. 12 of the Act to issue water licenses after the date of the Crown grants. They stated this exception applies to:

all of the other water licences on Posby Lake that were issued after the respective dates of the grants. Specifically, it applies to several licences that were originally issued in 1945 and 1946, after the original beaver dam on Posby Lake was replaced with the current dam and diversion works, and the licences that have been issued in substitution for or replacement of those licences.

[51] It is clear that post-Crown grant licensees must pay reasonable compensation, and the appropriate manner of determining that would be the procedure laid out in the Water Act itself. The EAB's decision is to the effect that the holders of the original water licenses and substitution licenses are not required to pay compensation for the exercise of their rights, but the holders of any licenses issued subsequent to the Crown grants would be required to do so. I agree with those conclusions.

IS THERE TRESPASS BY THE DEFENDANTS?

[52] The defendants have the rights provided by their licenses, but must not exceed those rights. In other words, their entry upon or access to the property is limited to the purposes of the licenses. If they exceed those, or are unreasonable exercising their rights, then their actions may amount to trespass. I am not able to say from the material before me whether that has occurred.

MUST THE DEFENDANTS EXPROPRIATE?

[53] Based on my conclusions about the effect of the original Crown grants, it is not necessary for the defendants to expropriate in order to exercise their rights.

[54] As I mentioned earlier, if the flooding exceeds that authorized by the licenses at the time of the Crown grants, then expropriation of that additional flooded lands may be required.

[55] It is my opinion that no expropriation or compensation is necessary regarding the works that replaced the beaver dam. The evidence is that this was done jointly by all of the land owners and license holders at the time with an agreement to share costs. The plaintiffs, being the subsequent holders of the land and beneficiaries of that agreement and the works for some time, cannot now resile from that position.

IS THE CONSENT OF THE LIEUTENANT GOVERNOR IN COUNCIL REQUIRED?

[56] If I am wrong in my conclusion that the defendants are not required to expropriate, the question arises as to whether or not they require the consent of the Lieutenant Governor in Council to do so. Section 27 of the Water Act covers the procedure for expropriation. It provides as follows:

27(1) In this section and in sections 28 to 30, "land" includes an estate or interest in or easement over land.

- (2) A licensee has the right to expropriate any land reasonably required for the construction, maintenance, improvement or operation of works authorized under his or her licence.
 - (3) In addition to the right under subsection (2), the holder of a licence that authorizes the diversion of water for domestic purpose or waterworks purpose has the right to expropriate any land the control of which by the licensee would help to prevent pollution of the water authorized to be diverted.
 - (4) In addition to the rights under subsections (2) and (3) and with the consent of the Lieutenant Governor in Council, the holder of a licence that authorizes the construction of a dam has the right to expropriate any land that would be flooded if the dam were constructed and utilized to the maximum height authorized.
 - (5) The owner of land expropriated under this section must be compensated for it by the licensee, and the procedure to be followed in expropriating land and the method of determining the compensation is the prescribed procedure and method.
 - (6) If expropriation proceedings relate to land on or in which there are works authorized under a licence, an owner or other person must not interfere with the works or prevent the licensee from maintaining, operating, using or improving them so long as the licensee diligently prosecutes the expropriation proceedings.
- [57] The defendants argue that there was no such requirement at the time the beaver dam was replaced with the earthen dam with the cooperation of all of the land owners in 1946. They argue, therefore, that they do not require the consent of the Lieutenant Governor in Council even if they are required to expropriate at this time.
- [58] The parties have given notice to the Lieutenant Governor in Council at my request. I was concerned that the Lieutenant Governor in Council be aware of the argument before me about whether consent was necessary to expropriate. The Lieutenant Governor in Council responded through its lawyer by letter. The Lieutenant Governor in Council takes the position that s. 27 of the Water Act would require expropriation of lands in relation to flooding for the utilization of a dam to the maximum height authorized under a license. However, that is only if that access or use is not otherwise authorized, such as an exception authorizing such access and use in the original Crown grant for the land concerned. The position of the Lieutenant Governor in Council is that the consent of the Lieutenant Governor in Council would not be required to expropriate an easement for access to and use of land in relation to the license works and related flooding if the continued use is as contemplated by the provisos and exceptions in the Crown grant. The Lieutenant Governor in Council points out that the amendment requiring consent to expropriate came into effect March 28, 1945. If the flooding foot print currently is the same or less than that on the ground as of the date of the legislative amendment, then no consent under s. 27(4) would be required. I accept that submission.

- [59] The position of the Lieutenant Governor in Council is that if a water license is issued after the original grants authorized additional works which required expropriation, then the consent of the Lieutenant Governor in Council would be required as contemplated by s. 27 of the Water Act. In other words, if the flooding were greater than that in place at the time of the Crown grants.
- [60] As a last note, the Lieutenant Governor in Council points out that if the replacement for the beaver dam did not increase the flooding foot print beyond that which occurred when the requirement for consent for expropriation was created (March 28, 1945), then no consent of the Lieutenant Governor in Council would be required. This refers to water licenses that were issued after the Crown grants. I accept the Lieutenant Governor in Council's submissions as being correct. Therefore, I find that if any expropriation were required arising from the original grants, no consent is required. If any expropriation is required arising from subsequent water licenses which increase the foot print of the lake or use for access after March 28, 1945, then consent would be required.

THE ORDERS

- [61] Based on the above, the defendants are entitled to a declaration that:

- they are not required to expropriate any part of the plaintiffs' lands in order to exercise their rights under the water licenses that pre-existed the Crown grants;
- they are entitled to use and operate the dam spillway and associated works, and to store water at Posby Lake pursuant to their licenses;
- they are entitled to enter into, upon, or and across the plaintiffs' lands to exercise the works as permitted by their licenses, including the use of the road on the plaintiffs' lands which they used prior to 1997.

- [62] The plaintiffs' claim for a declaration that the defendants are:

- a) prohibited from exercising their rights under the water licenses without reasonable compensation, both past and future, is dismissed;
- b) prohibiting the defendants from using the plaintiffs' property for the purpose of storing water is dismissed, so long as that storage is pursuant to the licenses which pre-existed the grants;
- c) that the actions of the defendants constitute a trespass conversion and/or nuisance, and that the defendants cease the same and pay reasonable compensation or damages is dismissed, so long as though actions were limited to and authorized by the pre-existing Crown grants.

- [63] I have not dismissed the claim for damages, both general and special in relation to these defendants, because there may be or continue to be other issues regarding the actions of these defendants pursuant to other water licenses or in excess of the water licenses that pre-existed the Crown grant. These defendants and others hold other water licenses that were

subsequent to the Crown grants. I have not dealt with any issues with regard to those licenses. Nor does this decision deal with any compensation that might be payable to the plaintiffs in the event that the present flooding of their lands exceed that originally authorized by the licenses.

[64] This application dealt only with a part of the issues raised in this proceeding. It is unusual to proceed in litigation by stages, but both parties were anxious to have these matters resolved; perhaps hoping that it will lead to an ultimate resolution. Therefore, I am making no order at this time with regard to costs.

"R.E. Powers J."

POWERS J.

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