

CANADA / JUDGMENT

British Columbia (Assistant Water Manager) v. Chisholm

2020 BCSC 545

COURT

Supreme Court of British Columbia

DECIDED

7 April 2020

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2020 BCSC 545 British Columbia (Assistant Water Manager) v. Chisholm

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

British Columbia (Assistant Water Manager) v. Chisholm,

2020 BCSC 545

Date: 20200407

Docket: S184056

Registry: Victoria

In the matter of Environmental Appeal Board decision No. 2016-WAT-010(a)

And in the matter of the Judicial Review Procedure Act, RSBC 1996, c. 241

And in the matter of Water Sustainability Act, SBC 2014, c. 15

Between:

The Assistant Water Manager, Water Sustainability Act

Petitioner

And:

Linda Chisholm, Jackie William Chisholm, Donald Lancaster,

and Environmental Appeal Board

Respondents

Before: The Honourable Madam Justice J. A. Power

On judicial review from: An order of the Environmental Appeal Board,
dated July 16, 2018 (Decision No. 2016-WAT-010(a)).

Reasons for Judgment

Counsel for the Petitioner:

K. Chewka and K. Wolfe

Counsel for the Respondents

Linda Chisholm and

Jackie William Chisholm:

S. Hern, Q.C.

Counsel for the Respondent

Environmental Appeal Board:

R. Gage

Place and Dates of Hearing:

Victoria, B.C.

March 28 and 29, 2019

April 15, 2019

Written Submissions:

January 10, 15 and 17, 2020

Place and Date of Judgment:

Victoria, B.C.

April 7, 2020

INTRODUCTION

- [1] The petitioner, the Assistant Water Manager, Water Sustainability Act, seeks judicial review of a July 16, 2018 decision of the Environmental Appeal Board (the "Board"). The respondents on this judicial review, Linda and Jackie Chisholm, were the successful parties before the Board.
- [2] The decision of the Board related to the Chisholms' appeal of the Assistant Water Manager's decision denying their request to amend their conditional water licence relating to their ranch in Cranbrook, British Columbia.

- [3] After a hearing de novo, which proceeded over six days in Cranbrook in July 2017, the Board found that the Assistant Water Manager had the authority to grant the Chisholms' requests in their amendment application. The Board found that the requests for amendment were reasonable and ought to be granted. The Board returned the matter to the Assistant Water Manager with directions.
- [4] The Assistant Water Manager seeks judicial review and argues that the Board erred in two ways:
- 1) By misapprehending the evidence regarding the historical evolution of the relevant water licences and associated watershed. It is argued that this led to an unreasonable interpretation of the scope of the Assistant Water Manager's authority under section 26 of the Water Sustainability Act, S.B.C. 2014, c. 15.
 - 2) In ordering the Assistant Water Manager to amend the licence, the Board was statutorily required to consider environmental flow needs. The failure to do so renders the decision unreasonable.
- [5] As the successful party before the Board, the Chisholms argue that the Board's decision should not be disturbed and that the petition for review should be dismissed with costs.
- [6] I am not persuaded that the Board erred in either of the ways that the petitioner alleges. In the result, the petition is dismissed. My reasons are as follows.

BACKGROUND

- [7] The only parties that argued the judicial review were the Assistant Water Manager as petitioner, and the respondent landowners Linda and Jackie Chisholm. The Board, as is custom in these cases, was represented for the limited purpose of outlining the law on the applicable standard of review and the roles of the Assistant Water Manager, the Board and the court on judicial review. The Board took no position on the merits of the judicial review. The respondent, Donald Lancaster, a neighbouring landowner, did not file a response nor did he appear on the judicial review.
- [8] The judicial review was argued before the December 19, 2019 release of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("Vavilov"). At my request the parties and the Board made written submissions after the release of that decision.

PRELIMINARY ISSUE: ADMISSIBILITY OF THOMAS CUMMINGS' AFFIDAVIT

- [9] As part of its response, the Chisholms objected to the admissibility of portions of the affidavit of the Assistant Water Manager, Thomas William Cummings, which was filed as a new affidavit on the judicial review.

- [10] The petitioner initially argued that the impugned portions of the affidavit were necessary in order to give context to the judicial review and to summarize and condense the relevant material in a neutral way.
- [11] The petitioner emphasized the general rule on a judicial review that admitting extrinsic evidence that was not before the tribunal is improper, as it usurps the role of the statutory decision maker. The petitioner cited the following cases for this general rule: *Albu v. The University of British Columbia*, 2015 BCCA 41 at para. 36; *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272 at paras. 19-23; *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353; and *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 ("Kinexus") at para. 17.
- [12] The petitioner emphasized the "general background information" narrow exception to this general rule, and argued that the impugned portions of the affidavit fell within this narrow exception. This exception was explained by the Court in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 ("Air Canada"):
- [41] With respect to "general background information", *Delios v. Canada (Attorney General)*, 2015 FCA 117, cited by the chambers judge, provides considerable guidance. In that case, Stratas J.A. endorsed the practice of admitting "general background" affidavits. He was, however, careful to limit the scope of such affidavits:
- [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy - that is the role of the memorandum of fact and law - it is admissible as an exception to the general rule.
- [42] Such affidavits have long been accepted in judicial review proceedings, and, particularly where the record is voluminous, help make the tribunal process more accessible to the court and to the parties. Such affidavits do not, however, supplement the record; rather they serve to summarize or condense it in a neutral manner.
- [43] In the case before us, the fresh evidence that the judge allowed to be admitted was not proper evidence on a judicial review. The affidavits did not serve to cast light on the proceedings before the tribunal, nor did they deal with information that was known to or acted upon by the WCAT. They did not fall within the narrow category of "general background information". Rather, these affidavits were an attempt to shore up the record by placing information before the court that the tribunal did not have the opportunity to consider.

- [13] After hearing the Chisholms' submissions on the admissibility of the impugned portions of the affidavit, the petitioner took the alternate position that this Court could ignore the substance of the impugned portions, but should consider the background documents before the Board relating to each impugned portion, including certain portions of Mr. Cummings' evidence before the Board.
- [14] I accept that the intended purpose of the petitioner's counsel in filing the affidavit was to assist the Court in understanding the evidence before the Board by providing general background information. However, I am persuaded by the Chisholms that the affidavit does stray into argument on the essential issues that were before the Board. Many of the impugned portions of the affidavit were argumentative statements that were neither neutral nor uncontroversial. The facts were outlined in a fashion that favoured the petitioner's rendition of the facts and crossed into the bounds of written argument, more appropriate for a memorandum of fact and law rather than a neutral background affidavit.
- [15] Accordingly, I have concluded that I will exclude the impugned portions of the affidavit. I have listed the impugned portions that I have excluded in a chart below. With respect to the impugned portions of the affidavit that I have excluded, during the petitioner's submissions, I took note of the background documents that were before the Board that the petitioner argued related to each impugned portion of the affidavit. I have reviewed these background documents.

Excluded Portions of Thomas Cummings' Affidavit

Paragraph Number

Excluded Portion

2

The second, third, and fourth sentences.

3

The second, third, and fourth sentences.

4

The portion of the second sentence, which reads: "including a detailed review of several relevant and impacted water files, the preparation of a technical report summarizing the available information, as well as meetings with, and receipt of further submissions from the Chisholms,"

11

The second and third sentences.

19

The second and third sentences.

20

The whole paragraph.

39

The word "key" in the first sentence of the paragraph.

40

The third sentence.

41

The second sentence.

46

The portion of the first sentence, which reads: "connecting the two watersheds."

Subheading A prior to Paragraph 48

The word "key" in the heading "Key Event #1: ".

54

The second and third sentences.

56

The second sentence.

58

The second sentence.

59

The whole paragraph.

Subheading B prior to Paragraph 60

The word "key" in the heading "Key Event #2: ".

62

The portion of the second sentence, which reads: "which indicate that only the maps associated with both licences were to be amended, to properly depict the authorized works as being located on Crown land, and therefore requiring a PCL."

63

The third, fourth, and fifth sentences.

67

The portion of the third sentence, which reads: "presumably because of the previously-authorized diversion ditch that connected Thos Creek to Cameron Creek, which was abandoned by Mr. Totten in the late 1970s."

68

The portion of the first sentence, which read "as I confirmed for myself during a site visit on May 30, 2017 (after the Decision was made), there is no water flowing past POD 'W.'" The second and third sentences.

69

The second sentence.

70

The first and second sentence, and last portion of the third sentence, which reads: "consistent with my observations."

72

The second sentence.

[16] In my view, it is unfortunate that counsel for the petitioner proceeded by filing the petitioner's own affidavit, since it was his decision that was appealed to the Board. As part of the hearing before the Board, the Chisholms made submissions regarding bias, lack of objectivity and similar allegations against the petitioner and Ministry staff. The Board conducted the appeal as a new, oral hearing over six days and stated that any bias, lack of objectivity or prejudicial steps had been cured by the new hearing. In addition, the Board also noted that, based on the evidence before it, the Chisholms' allegations were not proven. Given the contentious history leading to the Board decision, it would have been desirable for the parties to agree on the materials placed before the Court, or to place the materials before the Court through a neutral third party affidavit, since the argument surrounding admissibility of the affidavit consumed a considerable amount of court time.

THE BOARD'S DECISION

[17] The evidentiary record before the Board is complex in part because it spans over a century since the time of the original water grant in 1904 to a prior owner of the Chisholms' property. The Board noted at para. 8 of its decision that "During the hearing of the appeal, the parties submitted binders of documents, maps and sketches to establish the locations of applied for and authorized water rights relevant to this appeal." To assist with understanding the evidence and the decision, the Board added Schedule "A" to the decision which depicts the history of the relevant licences, maps and sketches that relate to the applicable water rights applications and authorizations. The petitioner has not pointed out any error in the facts as outlined by the Board or in the documents outlined in Schedule "A."

- [18] As noted in the Board decision, the Chisholms own C5 Ranch in Cranbrook, which they have owned since 2001. In describing the current water rights attached to the property, the Board noted:
- [11] Four conditional water licences ("CL") are appurtenant to the Property:
- a. The subject Licence, which authorizes the diversion of 57 acre feet per annum from Cameron Creek to irrigate 22.9 acres. (The authorized works and Licence conditions are set out, in detail, below.)
 - b. CL67999, which authorizes the diversion of 76 acre feet per annum from Thos Creek to irrigate 30.3 acres. The authorized works are a pipe and irrigation system servicing Lot A.
 - c. CL63154, which authorizes the diversion of 200 acre feet per annum from Cameron Creek to irrigate 80 acres. The authorized works are a diversion structure on Cameron Creek and rediversion structure on Thos Creek; pipe and irrigation system servicing Lot A.
 - d. CL132172, which authorizes the diversion 4.546 m3 per day from Totten Spring for stockwatering. The authorized works are diversion structure, pipe and troughs servicing Lot 12246.
- [12] Each licence has a map attached showing the stream on which the water right is authorized, the POD for the water right, and appurtenant property lot numbers.
- [19] The Board set out the history with respect to the water rights attached to the property, commencing at para. 13:
- [13] The water rights in the Licence were originally granted on January 5, 1904 as a Grant of Water Rights. That grant provided the following description of Cameron Creek: "a creek which rises west of Lot 331 and sinks on the Cassynayook [sic] Indian Reserve" (the "Reserve") [A.1 - Schedule A].
- [14] The Licence was issued on May 9, 1988 to Lawrence Michael Belway, who sold the Property to the Appellants. The Licence authorizes the licensee to divert and use water as follows:
- (a) The stream on which the rights are granted is Cameron Creek, with a re-diversion of water from Thos Creek.
 - (b) The points of diversion and rediversion are located as shown on the attached plan.
 - (c) The date from which this licence shall have precedence is 5th January, 1904.
 - (d) The purpose for which this licence is issued is irrigation.
 - (e) The maximum quantity of water which may be diverted is 57.0 acre feet per annum.
 - (f) The period of the year during which the water may be used is 1st April to 30th September.

- (g) The land upon which the water is to be used and to which this licence is appurtenant is Lot A of Lot 331, Kootenay District, Plan 15185, of which 22.9 acres may be irrigated.
 - (h) The works authorized to be constructed are diversion structures, pipe and sprinkler system, which shall be located approximated as shown on the attached plan.
 - (i) The construction of the said works has been completed and the water is being used. The licensee shall continue to make a regular beneficial use of the water in the manner authorized herein.
 - (j) This licence is issued in substitution of Conditional Water Licence 48458.
- [15] The Licence map indicates a POD "W" on "Cameron Creek" (PD23413) and a point of re-diversion "X" on Thos Creek (PD23402) [A.15- Schedule A].
- [20] The Board set out the history with respect to the Chisholms' amendment application commencing at para. 16:
- [16] The Appellants describe their ranch as mostly agricultural land reserve, with all the irrigated portion lying within that reserve. The Appellants raise approximately 130 cattle, which are fed hay grown on just over 20 acres in the northwest quadrant of their Property.
- [17] They stated that their northwest field, in Sublot 13, was originally partly irrigated by flood irrigation; however, it was later irrigated using a pond, pump house and other infrastructure located next to the stream running through Sublot 13 and near the northwest hay field. Mrs. Chisholm testified that, based on her research, a previous owner (Mr. Dearden) put that infrastructure in place in the mid-1960s.
- [18] The Appellants irrigated the northwest field using that infrastructure until they were stopped by the Ministry in 2014. They stated that, in 2014, there was a lack of water for irrigation in the area, and especially from the stream servicing the pond and pump house. This led to disputes with upstream water licensees and users, including Mr. Lancaster.
- [19] In May 2015, after field inspections, the Ministry advised the Appellants that their pond, pump house and other infrastructure were not authorized by any of their licences. The Ministry also advised that they did not have any precedence rights over upstream licensees on that stream.
- [20] The Appellants testified that it would not be economically viable for them to truck in hay to feed the cattle they raise, and that they considered alternatives to the pond and pump house irrigation system. For example, they considered using the irrigation pipe serviced by their other licences, CL67999 and CL63154. However, they determined that the pressure and volume carried by that pipe would not be sufficient to cover the northwest field in addition to the area it serves currently.

- [21] They also considered constructing new works to the northwest field from their other licensed sources. However, as the northwest field is approximately 1.2 kilometres away from their other licensed PODs, the Appellants stated that it would be costly to build new works. Further, it would place a barrier (a pipeline or ditch) across parts of the Property that are used for other purposes.
- [22] The Appellants researched the history of their licences and the historic water use on the Property. They obtained copies of Ministry records and discussed the licensing history with Ministry staff. Based on this research, the Appellants concluded that the Licence was incorrect. They, therefore, applied to the Ministry for an amendment to the Licence.
- [23] On May 5, 2015, the Appellants submitted a Water Licence Amendment and Change of Works application (the "Application"). In the Application, the source for the Licence is cited as Cameron Creek. The Appellants described what they wanted, and why, as follows:

This license shows no works but there is a holding pond, pump, pump house, pipes and sprinkler system. I have been here for 14 years and the previous owner for approximately 16 years and the works have always been there. There were changes made years ago that we just became aware of. We are wanting to get everything put as it should be so that we don't encounter any future issues. The license has been in effect since 1904 and as far as I am aware there has always been works on this license but not listed correctly.

- [24] In the Application, the Appellants also indicated that no new works are required, and no other lands would be physically affected by the works.
- [25] The Application described the land where the water is used as "22.9 AC of SL 12 13 14 of L331 KOOTENAY DIST PLAN X40 EXC CPR R/W (PLAN 524RI) & HWY 3 (PLAN R178)." The details regarding the purpose on record for the Licence is shown as:

Purpose: irrigation

Quantity: 70,308.36 m³/yr

Irrigated area: 9.267 ha.

- [26] In the Application, the Appellants did not state the exact changes to the Licence that they wanted. Based on the evidence submitted at the hearing, including the Appellants' submissions to the Respondent made prior to the Decision, the Panel finds that, when they applied to "get everything put as it should be", they were applying for the following amendments to the Licence:
1. Restore the location of POD "W" (PD23413) authorized by the Licence on Cameron Creek to the correct location on what they refer to as "lower" Cameron Creek on Sublot 13, with corresponding corrections to the Licence map, and maintain the priority date of January 5, 1904.

2. Recognize the pond, pump, pump house, pipes and sprinkler system as existing works, which the Appellants were using on that part of "lower" Cameron Creek running through Sublot 13.
- [27] The Panel notes that, in their submissions and evidence, the Appellants referred to the stream running through Sublot 13 as "lower" Cameron Creek. As the Panel discusses later in this decision, "lower" Cameron Creek is, in fact, the downstream portion of the stream historically called "Cameron Creek". To avoid confusion, the Panel will not use the adjective "lower"; rather, it will just refer to Cameron Creek. The Respondent now refers to this stream as "Heldon Brook".
- [21] The Board described the background to the petitioner's decision commencing at para. 28. As the Board noted, the petitioner met with the Chisholms and their agent prior to making his decision and invited further written submissions. The Chisholms maintained that historical mapping errors and renaming of streams had led to their water rights on Cameron Creek being usurped.
- [22] At para. 31, the Board summarized the petitioner's reasons for refusing the Chisholms' amendment application as follows:
- [31] The Respondent wrote that he was refusing the Application for the following reasons:
- The re-naming and re-mapping of sources and points of diversion took place in conjunction with water licence amendments in approximately 1988; the source locations were confirmed in an Environmental Appeal of an application on Heldon Brook in 1993. The status of Conditional Water Licence 68000 is current [emphasis in original] and there is no error to correct under Section 26(1)(e) of the Water Sustainability Act. [Footnote omitted.]
 - The old channel between the historical points of diversion (PD 23411) and the authorized points of diversion (PD23413 and PD23402) is not discernible. The historical point of diversion, which you have requested to use via this change of works amendment application, is now on a different source, Heldon Brook. The authorization of works to divert a new quantity of water on a source requires an application for new water rights; amending a licence to a different source is not permitted under Section 26(1)(d) of the Water Sustainability Act, which allows for the authorization of additional or other works than those previously authorized.
- [23] The Board summarized the grounds for the appeal at para. 33:
- [33] In their Notice of Appeal, the Appellants cited several grounds for appeal. The Panel has summarized the Appellants' position from those grounds, from their pre-hearing Statement of Points, and from their opening and closing statements at the hearing, as follows:

1. The Respondent erred by refusing to acknowledge and correct stream naming and mapping errors made throughout the history of the Licence, and by failing to properly apply the Act contrary to his responsibilities as a statutory decision-maker. The Respondent failed to acknowledge that the naming and mapping errors inadvertently usurped the Appellants' historic water rights.
2. The Respondent also erred by considering their Application as an attempt to seek new or additional water rights by prescription. They are not seeking new or additional water rights, just an amendment to the Licence that restores the POD to its original, longstanding source.
3. The Respondent relied on the outcome of an appeal on a neighboring licence application, without advising them that he was considering this as evidence.

[24] Ultimately, the Board summarized the sole issue before it as follows:

[45] The sole issue in this appeal is whether the Decision is reasonable in the circumstances; that is, whether the Respondent reasonably determined that he does not have the authority to move the Licence POD to POD "A" as it is shown on pre-1977 licence maps, that there is no error to correct in the Licence, and that he does not have the authority to authorize the existing works on Sublot 13.

[25] I pause to note that the Board owed no deference to the Assistant Water Manager's decision as the appeal before the Board was conducted as a hearing de novo.

[26] The Board summarized the agreed upon facts, as well as other issues that were not in dispute at the hearing commencing at para. 65:

History of the Licence from 1904

[65] On January 5, 1904, the first water right in the history of the Licence was issued as licence number 115 to Thomas and Colin Cameron for "one hundred inches of water out of Cameron Cr and [illegible] which rises west of Lot 331 and sinks on the Cassynayook [sic] Indian Reserve". The POD is a single point of diversion "at a point near the west line of said Lot 331" and the authorized works are a ditch and flume to be constructed over the grantee's lands [A.1 - Schedule A].

[66] On June 10, 1913, Determination and Order No. 944 was issued to Thomas Cameron granting rights to take up to 700 acre feet from Cameron Creek. The order stipulates that the amount taken from Cameron Creek is to be reduced by the amount allotted from Thos Creek under certain circumstances [A.2 - Schedule A].

[67] On May 12, 1914, CL C374 was issued to Mr. Cameron, giving effect to Order No. 944. The source is named Cameron Creek and the POD is described as a single point of diversion "A". The authorized works are described as a ditch completed and located approximately as shown in an exhibit to Order 944, and new works necessary for the distribution of water to all parts of irrigable lands set out in clause 2(g) of Order 944. The accompanying map

identifies Cameron Creek and Thos Creek and locates POD "A" on Cameron Creek on the western boundary of Sublot 13 [A.3 - Schedule A].

- [68] On May 14, 1914, Order 946 was issued for the diversion of water from Thos Creek to Cameron Creek and the construction of a ditch from Thos Creek to Cameron Creek. The sketch with this order shows that Cameron Creek is not connected naturally to Thos Creek; in fact, they diverge from each other on Sublot 13 [A.4 - Schedule A].
- [69] On July 8, 1925, licence F4860 was issued to Thomas Cameron in substitution of CL C374 (issued in 1914). The precedence date is January 5, 1904. The source is named "Cameron Creek, Tributary of Kootenay River". The licence grants 57 acre feet per annum to irrigate 22.9 acres on Sublot 13 of Lot 331. The POD is described as a single point of diversion "A" shown at the western boundary of Sublot 13 [A.5 - Schedule A]. The authorized works are a ditch to divert and carry water. This licence map shows Cameron Creek and Thos Creek as separate streams. Thos Creek has a separate tributary flowing from the west.
- [70] In about 1960, Murray B. Dearden and his family became the owners of the Property and other lots. In about 1965, Mr. Dearden installed an intake pond and pump house on Cameron Creek about 300 metres downstream from POD "A". These are the works that were later used by the Appellants for irrigation of the northwest field until 2014.
- [71] In about 1970, Robert J. Totten purchased the Property and other lots from Mr. Dearden. Mr. Totten later sold some of that property to Mr. Urban and to Mr. Lancaster.
- [72] On April 1, 1975, Mr. Totten applied for additional water in the form of a new water right and a new licence to divert and use water out of "Thos Cr & Centre Creek" which flows "East" and discharges "into the Ground" [A.6 - Schedule A]. He requested the point of diversion to be "located at 550 from the S.W. corner of L. 12246". The quantity of water to be diverted or stored would be 200 acre feet. The water was to be used for irrigation on Sublots 13 and 14 of Lot 331. Mr. Totten attached a sketch with his application, which shows part of Cameron Creek and shows Thos Creek with the tributary described in paragraph 69 above. He referred to this tributary as "Centre Creek" [A.7 Schedule A]. He described the proposed new works as a "dugout & gravity feed irrigation by aluminum pipe to field, then sprinkler irrigation".
- [73] The dugout required a permit over Crown land because it was outside of the Property. In his application for this permit, Mr. Totten used a different sketch and described the source as "Thos and unnamed Centre Creeks" [A.8 & A.8.1- Schedule A]. The sketch for the permit over Crown land and for the water licence both show Centre Creek and Thos Creek near the southern boundary of Lot 12246. The size of Lot 12246 relative to the other lots is different on the two sketches. Mr. Totten made a note on his application for a permit over Crown land that: "This drawing is as close as I can make it".

[74] A memorandum authored by the Regional Engineer at the time, T.H. Oxland, described internal Ministry discussions about Mr. Totten's licences F4860 and F4861, as well as his request to divert and redivert 200 acre feet from a tributary to Thos Creek. That request was given Ministry file number 0328465. The Ministry's records indicate that Ministry staff decided that it was not possible to make Cameron Creek licence F4860 supplementary to licence F4861 because there was not enough water to meet the demand of 76 acre feet. Also, the memorandum noted that:

It was agreed, since Mr. Totten, has control of all licences on the creek, and, since his application 0328465 is an attempt to completely record the creek that he would be asked to file T/As [transfers of appurtenancy] for both F4860 and F4861. The recommendations for the T/As would be for new conditional licences, one for Cameron for 57 ac. ft. and one on Thos for 76 ac. ft.

[75] In the same Ministry records, there is an "Engineer's Report on a Water Application" prepared by A.D. Zackodnik, dated July 3, 1975. That report indicates that there was an on the ground inspection for 0328465. It names the source as "Cameron Creek with a point of rediversion on Thos Creek" and under "Trib. to" the report states "sinks on the Cassimayook [sic] Indian Reserve". The report describes the "appurtenant land" as "Part of Sublot 12, Sublot 13 and Sublot 14 of District Lot 331", and the "works being constructed" as "diversion structure and pipeline. Joint works with FL. 6788, 4861 and FL 4860".

[76] Mr. Zackodnik recommended that the application be granted for irrigation for 200 acre feet, for 80 acres; the period would be from April 1 - September 30.

[77] In correspondence to Mr. Totten dated July 15, 1975, H.D. DeBeck, then Comptroller of Water Rights, confirmed that Mr. Totten's application would result in a licence being issued. He enclosed Transfer of Appurtenancy application forms to be signed. He wrote that: "When processed these forms will result in two new licences bearing the same priority date as Final Water Licences 4860 and 4861."

[78] Mr. Totten submitted two applications for transfer of appurtenancy dated December 5, 1975:

- One for F4860 on "Cameron Creek" requesting a transfer of 57 acre-feet to "sublot 12, sublot 13, sublot 14 of D.L. 331, Kty Dist, Plan X40" instead of "part of sublot 13 of D.L. 331, Group 1, Kty District"; and,
- One for F4861 on "Thos Creek" requesting a transfer of 76 acre-feet to "sublot 12, sublot 13, sublot 14 of D.L. 331, Kty Dist, Plan X40" instead of "part of sublot 13 and sublot 14 of D.L. 331, Kty District Plan X40", and additionally requested new works, namely "diversion structure & pipeline".

[79] In April 1977, Mr. DeBeck informed Mr. Totten that his applications for transfer of appurtenancy were investigated and new licences would be issued. A map was attached to the letter [A.9 - Schedule A]. This map shows Cameron Creek in Block A, a POD "A" on Cameron Creek in Sublot 13 and notes a diversion structure on Cameron Creek.

- [80] On July 4, 1977, CL48458 was issued to Mr. Totten (substituting licence F4860) for 57 acre feet of water per annum. The precedence date is January 5, 1904. The source is named "Cameron Creek". The authorized works are described as diversion structures and pipe, located approximately as shown in Water Rights Map No. 1401 dated July 4, 1977. The licence map has "L" located on Cameron Creek and "N" on Thos Creek [A.10 - Schedule A]. Water Rights Map 1401 is the Ministry's official record of all water rights issued by the province and is held by the Comptroller of Water Rights.
- [81] Sometime after 1977, Lawrence Belway purchased the Property from Mr. Totten. Mr. Belway used the irrigation infrastructure on the Property, including the pond and pump house installed by Mr. Dearden in the 1960s that are located on Cameron Creek, the part flowing through Sublot 13.
- [82] On January 23, 1984, Mr. Belway applied for the apportionment of CL48458. In May 1985, Mr. Belway was advised by the Ministry that, to complete the requested amendment of CL48458, he would need to apply for a transfer of appurtenancy. Instead, on June 13, 1985, Mr. Belway requested that CL48458 be amended to confirm the use of water on "Lot A of District Lot 331, Kootenay District plan 15851", noting there were "no new works to be done".
- [83] In a memorandum dated November 26, 1987, Ministry employee E.A. Shaw wrote to the Regional Water Manager, advising that there were errors in the maps attached to Mr. Belway's licences. He included a new map that he had drawn.
- [84] In all of the earlier maps referred to above, Cameron Creek is shown flowing west to east through Block A. In this new map from Mr. Shaw, Cameron Creek is shown flowing from the southwest to the northeast, starting south and west of Lot 12246, and slightly intersecting the southeast corner of Block A. On Mr. Shaw's map, Thos Creek is shown in a location near where it was indicated in earlier licence maps [A.13 - Schedule A].
- [85] At about the same time, the Ministry was considering a water licence application from Mr. Lancaster. In the same November 26, 1987 memorandum, Mr. Shaw wrote that the "spring that Mr. Lancaster currently draws water from will be renamed and the creek Mr. Belway diverts into Thos will be named Cameron Creek. I do not believe the relocation of the creeks should affect our decision on Mr. Lancaster's application (4000621)" [Emphasis added]. Mr. Lancaster was, at that time, drawing water from Cameron Creek.
- [86] In a memorandum dated November 26, 1987, the Regional Water Manager recommended that the maps for CL48458 and CL48459 be replaced with the new map prepared by Mr. Shaw [A.14 - Schedule A].
- [87] On May 9, 1988, Mr. Belway was provided with the replacement for CL48458; that is, the Licence. The source is named "Cameron Creek with a re-diversion of water from Thos Creek". The POD is identified as "W" (PD23413) on Cameron Creek, and the point of rediversion from Thos Creek is identified as "X" (PD23402) [A.15 - Schedule A]. The authorized works are diversion structures, pipe and sprinkler system, located approximately

as shown on Water Map No. 1401 dated May 9, 1998. The Licence has a new map similar to Mr. Shaw's November 26, 1987 drawing. The precedence date is January 5, 1904.

History of Licence 67999 on Thos Creek from 1906

- [88] On July 6, 1906, Licence 169 was issued to Thomas and Colin Cameron for 30 inches of water. The source is described as "Two unnamed creeks rising on Block 4591 and sinking on Lot 331" [A.20 - Schedule A]. The POD is described as a single POD, "about 200 yards west of the west boundary of said Lot 331." The authorized works are "a dam, ditches and flumes to be constructed over Crown Lands."
- [89] On May 14, 1914, Determination and Order No. 946 was issued to Thomas Cameron, granting rights to take up to 700 acre feet from Thos Creek to irrigate 280 acres on parts of Sublots 13 and 14. The order stipulates that the amount taken from Thos Creek is to be reduced by the amount allotted from Cameron Creek under order 944 in certain circumstances.
- [90] The POD on the map attached as Exhibit A to the order is a single POD at Intake "B", shown west of the western boundary of Sublot 13 of Lot 331 [A.4 - Schedule A]. The authorized works are described as a ditch, completed and located approximately as shown in Exhibit A of Order 946, and new works necessary for the distribution of water to all parts of irrigable lands set out in clause 2(g) of Order 946.
- [91] On May 15, 1914, CL406 was issued to Mr. Cameron, giving effect to Order 946. This licence is supplementary to CL374 for Cameron Creek.
- [92] On July 8, 1925, licence F4861 was issued to Thomas Cameron in substitution of CL406 for 76 acre feet per annum. The source is named as Thos Creek. The PODs are described on the attached map as "B", shown west of the western boundary of Sublot 13 of Lot 331, and re-diversion "A", shown east of the western boundary of Sublot 13 of Lot 331. The authorized works are "dam and ditches", located approximately as shown in Exhibit A of the licence [A.5b - Schedule A].
- [93] On July 4, 1977, CL48459 was issued to Mr. Totten in substitution of licence F4861 for 76 acre feet per annum. The source is named as Thos Creek. The POD is described as a single point of diversion "N" (PD23402) and the authorized works are "diversion structure and pipe", located approximately as shown on Water Rights Map No. 1401 dated July 4, 1977. The map for CL48459 shows Cameron Creek flowing through Block A, through Sublot 13 and to the Reserve [A.11 - Schedule A].
- [94] On May 9, 1988, CL67999 was issued to Mr. Belway in substitution of CL48459 for 76 acre feet per annum. The source is Thos Creek. The POD is described as a single point of diversion (labelled "X" on the map) and the authorized works are "diversion structure, pipe and sprinkler system" located approximately as shown on Water Rights Map No. 1401 dated May 9, 1988. This licence has a new map [A.21 - Schedule A].

Mr. Lancaster's Licences

- [95] In October 6, 1921, Edward Hill was granted CL5803 on Cameron Creek with a precedence date of August 5, 1921. The final water licence 6788 was issued on March 15, 1929 to divert 8 acre feet at POD "C" from Cameron Creek, as shown on the attached map [A.22 - Schedule A].
- [96] On July 25, 1977, Mr. Lancaster, a succeeding holder of licence 6788, applied to have the licence apportioned. The other lots to which this licence was appurtenant were owned by Mr. Totten. The application was re-submitted with a date of April 7, 1981. That application referred to licence 6788 on Cameron Creek. The sketch accompanying the Ministry's report on the application is at A.23 of Schedule A to this decision. The report recommended that the apportionment be granted.
- [97] Donald and Helen Lancaster received CL56718 on May 3, 1982. This licence granted them water rights on Cameron Creek [A.12 - Schedule A] and was issued in substitution of licence 6788. The map with the licence shows Cameron Creek flowing from the west through Sublot 13 and to the Reserve.
- [98] In about 1984-1986, Mr. Lancaster applied for new water rights on Cameron Creek. The Ministry denied that application because there was insufficient flow due to the water rights precedent in the Licence. Mr. Lancaster submitted this application before the Ministry re-located Cameron Creek on its maps in 1987. Mr. Lancaster appealed the denial to the Comptroller of Water Rights.
- [99] In the Ministry's "Appeals Unit Report" dated November 30, 1993, Ministry staff recommended granting Mr. Lancaster a water licence for irrigation purposes in the quantity of 12.5 acre feet per annum to irrigate an area of 5 acres from April 1 to September 30th. That report states: "Source: Heldon Brook Trib. To: Cameron Creek." In a decision dated December 21, 1993, the Comptroller of Water Rights allowed Mr. Lancaster's appeal and issued CL104244 for "Heldon Brook", with a priority date of March 29, 1984 [A.17 - Schedule A].
- [27] The Board then went on to summarize the parties' respective positions at paras. 100-124. For this purpose, I will not set those arguments out, but I note that the petitioner's arguments as summarized by the Board are nearly identical to those made on this judicial review.

THE ROLE OF THIS COURT AND THE STANDARD OF REVIEW

- [28] The parties are in agreement that this Court has a narrow supervisory role in reviewing the decision of the Board. As argued by counsel for the Board, this Court is not to re-evaluate or re-weigh the evidence, interfere with the tribunal's evidentiary and fact-finding functions, or substitute its decision for that of the Board. The Court in *Kinexus* emphasized the fact a court on judicial review is not an appellate court:

- [131] The court on judicial review does not sit as an appellate court. It does not re-try the matters decided by the tribunal. It is not the court's role to review the wisdom of the tribunal's decision. The court cannot re-weigh the evidence, make findings of credibility or substitute its view of the merits for that of the tribunal. The court's role is limited to determining whether the tribunal has acted, and made its decision, within its statutory authority or jurisdiction: *Ross v. British Columbia (Human Rights Tribunal)* (1 May 2009), Vancouver L042211 (B.C.S.C.); *Tse v. British Columbia (Council of Human Rights)*, [1991] B.C.J. No. 275 (QL) (S.C.).
- [29] At the hearing, the parties agreed that the applicable standard of review is reasonableness. As indicated, after the December 19, 2019 release of the Supreme Court of Canada's decision in *Vavilov* and upon my request, the parties and the Board made written submissions with respect to the impact of *Vavilov* on the applicable standard of review and how that standard of review is applied.
- [30] The parties and the Board all agree that in light of *Vavilov* the applicable standard of review is still reasonableness. I agree with this conclusion. The Court in *Vavilov* clearly articulated that reasonableness is the presumptive standard of review for all cases (para. 10). The only time a reviewing court should deviate from the presumption is where deviation is required by either clear legislative intent or by the rule of law (para. 10). As there is neither clear legislative intent nor rule of law considerations that would require me to deviate from the presumptive standard of reasonableness, I agree with the parties and the Board that the applicable standard of review is reasonableness.
- [31] In applying the reasonableness standard of review to this case, I emphasize the following principles from *Vavilov*, which were set out by the parties and the Board in their written submissions:
- 1) The reasonableness review remains a robust form of review and is not a rubber stamping process: *Vavilov* at para. 13.
 - 2) I must not assess the decision of the Board against a standard of perfection. The reasons of the Board need not include all of the arguments or details I would have preferred and this on its own is an insufficient basis for me to set aside the decision: *Vavilov* at para. 91, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 ("*Newfoundland Nurses*") at para. 16.
 - 3) I must not engage in a "line-by-line treasure hunt for error": *Vavilov* at para. 102 citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para. 54.
 - 4) I must be cognizant of the fact that I cannot expect the Board to make an explicit finding on every constituent element, no matter how subordinate: *Vavilov* at para. 128, citing *Newfoundland Nurses* at para. 16.

- 5) Prior to setting aside a decision based on an alleged fundamental gap in reasoning, I must:
- i) Read the reasons wholly and contextually in order to understand the basis on which the decision was made: Vavilov at para. 97.
 - ii) Consider the reasons in conjunction with the record to determine if the line of reasoning can be inferred. Portions of the record to review include evidence before the decision maker and the submissions of the parties: Vavilov at paras. 94, 103.
 - iii) Seek to "connect the dots on the page where the lines, and the direction they are headed may be readily drawn": Vavilov at para. 97, quoting from *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para. 11.
- 6) If after reading the reasons in light of the record with sensitivity to the institutional setting and I still conclude there is a fundamental gap in the reasons, I cannot disregard that flaw and come to my own justification for the outcome: Vavilov at para. 96.
- [32] I also wish to highlight the following excerpts from Vavilov, where the Court emphasized that the approach to judicial review is concerned with both outcome and process:
- [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to review, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker -- including both the rationale for the decision and the outcome to which it led -- was unreasonable.
- [86] Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

- [99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness -- justification, transparency and intelligibility -- and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
- [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[Emphasis in original.]

- [33] These are the principles that I must consider as I conduct my analysis.

ANALYSIS

The Misapprehension of Evidence

- [34] The petitioner argues that the Board misapprehended the historical evolution of the relevant water licences and associated watershed, leading to an unreasonable interpretation of the scope of the Assistant Water Manager's authority under s. 26 of the Water Sustainability Act.
- [35] As noted by counsel for the Chisholms, the difficulty with the way the petitioner proceeded with this alleged error is that it was unclear, even after a three-day hearing, what portions of the Board's reasons were said to be unreasonable and what evidence the Board allegedly overlooked.
- [36] As I noted during the petitioner's argument, the argument proceeded for a full day before the petitioner even addressed the decision of the Board. I agree with the Chisholms that the petitioner proceeded as if this Court had *de novo* jurisdiction to re-hear this matter, which all of the parties agree it does not.
- [37] Upon hearing the petitioner's reply, it became clearer that the petitioner is dissatisfied with the Board's lack of making an explicit finding with respect to whether or not POD "A" moved on the ground from its historical location to some other location post-1975. This was confirmed by the petitioner's subsequent written submissions. The petitioner argues this lack of an explicit finding on whether POD "A" moved on the ground from its historical location to some other location post-1975 renders the decision unreasonable. Further, the

petitioner mentioned throughout argument at the hearing that another alleged error is the Board's failure to make a finding on whether Mr. Totten, a previous land owner of the property, intended to abandon POD "A" in favour of a POD on the Tributary.

[38] After accurately setting out the historical development of the licences, the evidence, the agreed facts and the parties' positions, which I note the petitioner does not dispute, the Board in its decision:

- 1) Explained that it had reviewed all of the evidence, but was not repeating all of it in its decision (paras. 48 and 151).
- 2) Stated that it gave the most weight to the licences with their respective maps, other maps and sketches in the Ministry records (para. 125). Specifically the Board indicated: "The Panel finds that the licences with their respective maps, as well as other maps and sketches in the Ministry's records, provide the most compelling evidence. The Panel has, therefore, given the most evidentiary weight to those documents."
- 3) Determined that the petitioner has the authority to correct licences regardless of when errors were made on them (paras. 128-129, 144).
- 4) Determined that the maps relied on by the Ministry were not accurate (paras. 145-146).
- 5) Held that from 1904 to the present, the owners of the property have held a licence on Cameron Creek, which always flowed through the northwest fields in Lot 13 to the Indian Reserve beyond, and that has not changed with the renaming from Cameron Creek to Heldon Brook, or the relocating of Cameron Creek on its maps in 1987 (paras. 132-134, 137-138).
- 6) Determined that it was not granting the equivalent of a new licence, because it was simply correcting a series of administrative errors and restoring the historical usage of water (paras. 138, 148).
- 7) Determined that there has been a continuous grant of a water right on Cameron Creek (para. 141).

[39] I accept the argument of the Chisholms that necessarily implicit in these findings is the following:

POD "A" did not physically move. Rather, it was erroneously mapped.

Mr. Totten did not intend to abandon POD "A" in favour of a POD on the Tributary, nor was POD "A" abandoned.

- [40] In reading the Board's reasons wholly and contextually and considering the reasons in conjunction with the record, which I note was not complete before me, I conclude there is not a fundamental gap in the Board's reasons. It is clear the Board found POD "A" was erroneously mapped and therefore did not physically move. I am guided by the Court's direction in Vavilov that I may connect these two dots, as the lines between these two points can be readily drawn.
- [41] With respect to the latter finding, in reviewing the Board's reasons in conjunction with the record, I accept that the Board applied their common sense and determined that in applying for additional water, Mr. Totten did not intend to give up his existing water source. In looking at the portion of the record that is before me, there was no direct evidence before the Board that indicated Mr. Totten intended to give up his existing water source.
- [42] The Board was fully alive to these issues in the manner in which it structured its decision and the parties' positions.
- [43] It follows therefore, that I do not accept the petitioner's argument that the Board failed to grapple with material evidence. The Board heard and accurately summarized the petitioner's position. It ended up interpreting the evidence in a manner consistent with the Chisholms' position. The Board was entitled to do so.
- [44] The petitioner relies on, for example, *Scherby v. British Columbia (Public Safety and Solicitor General)*, (27 March 2018), Victoria 17-4282 (B.C.S.C.) ("*Scherby*"). In *Scherby*, the petitioners applied under the Coroners Act, S.B.C. 2007, c. 15, requesting the Minister of Public Safety and Solicitor General order a coroner to hold an inquest into their son's death. In their application, the petitioners relied on the report of a medical expert that disagreed with the findings of the coroner. The Deputy Solicitor General denied the petitioners' request via letter and in that denial letter did not mention the medical expert's report. The petitioners sought judicial review of the Deputy Solicitor General's decision. Justice Steeves determined the fact the letter did not reference or discuss the medical report, which he considered a highly relevant matter, was an error. The Deputy Solicitor General's decision was set aside and remitted to the Minister to reconsider the medical report.
- [45] In my view, that case is distinguishable from the matter before this Court. There, the administrative decision maker failed to deal with the essential issue before him. In the case before me, which has a much more complex factual background than *Scherby*, the Board clearly understood the competing positions and clearly stated that after reviewing all of the evidence, the maps and documentary records were given the most weight.
- [46] I conclude that the Board clearly understood and addressed the evidence, the competing positions and the issues before it. In a well reasoned and comprehensive decision, the Board found against the petitioner. I cannot find any point in the decision where the Board misapprehended the evidence. The Board's decision was reasonable in both outcome and process.

The Board's Interpretation of Section 26(1) of the Water Sustainability Act

[47] The petitioner argued that the Board's interpretation of s. 26(1) of the Water Sustainability Act was unreasonable.

[48] Section 26(1) reads:

26 (1) On application by the holder in accordance with section 12 [application and decision maker initiative procedures], or on his or her own initiative, the comptroller or a water manager may amend an authorization and a permit issued in relation to the authorization, and the comptroller, a water manager or an engineer may amend a change approval and a permit issued in relation to the change approval, to do any of the following:

- (a) extend the time set for beginning construction of works;
- (b) extend the time set for completion of works;
- (c) extend the time set for making beneficial use of water;
- (d) authorize additional or other works than those previously authorized;
- (e) correct an error in the authorization, change approval or related permit;
- (f) remove a provision of the authorization, change approval or related permit that is inconsistent with this Act;
- (g) authorize the use of water for a water use purpose other than a water use purpose specified in the authorization;
- (h) extend the term of the authorization, change approval or related permit;
- (i) increase or reduce the quantity of water authorized to be diverted if it appears to have been erroneously estimated.

[49] The petitioner's argument is based upon three premises. First, POD "A" physically moved on the ground and therefore required an application for new water rights. Second, there was no error to correct under s. 26(1)(e) of the Water Sustainability Act. Third, the Assistant Water Manager did not have jurisdiction under s. 26(1)(d) to amend the licence to authorize additional works as the Chisholms' amendment application involved requesting additional works on a different water source than the water source they were entitled to under their licence.

[50] However, as outlined, I accept that the Board found that there was an error to correct in the licences and maps and POD "A" did not physically move, rather it was erroneously mapped. I accept that it follows as found by the Board that there was an error to correct under s. 26(1)(e) and the Assistant Water Manager had the authority to correct that error. I also accept that the Board found the Assistant Water Manager had the jurisdiction under s. 26(1)(d) to authorize additional works on the water source where POD "A" was historically located and has always been located. These were reasonable findings.

- [51] Accordingly, I find that the Board's interpretation of s. 26(1) was reasonable and does not rest on a misapprehension of the evidence. There was clearly an error to correct under s. 26(1)(e) of the Water Sustainability Act that the Assistant Water Manager had the discretion to rectify. The Assistant Water Manager clearly also had jurisdiction under s. 26(1)(d) to authorize additional works on the water source where POD "A" has always been located. I conclude that the Board's findings that the Assistant Water Manager had jurisdiction under s. 26(1) of the Water Sustainability Act were reasonable.

Environmental Flow Needs

- [52] The petitioner argued that in ordering the Assistant Water Manager to amend the licence, the Board was statutorily required to consider environmental flow needs and the failure of the Board to do so renders the decision unreasonable. I note paras. 42-44 of the Board's decision are relevant to this issue:
- [42] During the appeal hearing, the parties submitted evidence regarding the estimated water supply for and/or demand in that stream based on the present licensed allocations, and whether there would be sufficient flow for a diversion where the pond, pump and pump house are located on the Property.
- [43] The Respondent argued that the flow or estimates of flow in the stream are not relevant to the issue of the extent of the Respondent's authority to correct errors under section 26(1)(e) of the Act. At the end of the hearing, the Appellants stated that they agreed with the Respondent that flow estimates are not relevant to this issue.
- [44] Therefore, based on the parties' submissions at the end of the hearing, the Panel will not consider the evidence or arguments submitted on this point. This includes the testimony and report of the Respondent's witness who the Panel qualified to give expert opinion evidence in certain areas of hydrology. The Panel also will not consider the Ministry's Environmental Flow Needs policy, which was referred to during the hearing.
- [53] I agree with the Chisholms that the above paragraphs appear to be an acknowledgment by the petitioner that, if the Chisholms were correct, and the appropriate remedy was a correction to the maps, there was no need to conduct an environmental flow analysis. Accordingly, an environmental flow analysis was not conducted. The Board was entitled to rely on the petitioner's concession. In this vein I note the Court's comment in Vavilov that "[o]pposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue" (para. 94). This appears to be exactly what happened here.
- [54] In any event, the entirety of the record, including the transcript detailing the exchange between the parties and the Board with respect to this concession is not before me. If the petitioner seeks to argue that the concession was not as described, the petitioner was required to establish this on the evidence before the Court.

- [55] In the alternative, I accept that an environmental flow analysis was not required and accordingly, the Board's failure to conduct an environmental flow analysis was reasonable. As the Board found POD "A" did not physically move, but was merely erroneously mapped, the Board restored the registration of a water licence to reflect the location where it has always been since 1904. I agree with the Chisholms. The restoration of the 1904 POD would not have any impact on the environment as there was no change to its historical use. There was no additional draw of water or change in use being sought, and thus by implication an environmental flow analysis was not necessary.
- [56] Further, s. 16(d) of the Water Sustainability Regulation, B.C. Reg. 36/2016, specifically provides that a decision maker need not consider the environmental flow needs of a stream under a s. 26 application unless granting the application would result in a change in the point of diversion, an increase in the rate of diversion, or a change in the timing of water use. The Board was not required to consider the environmental flow needs as granting the amendment application would merely fix an error on the maps. It would not change the point of diversion, increase the rate of diversion, or change the timing of water use.
- [57] For similar reasons, I reject the petitioner's argument that the Board required the Assistant Water Manager to authorize a de facto new licence on a different water source with the 1904 priority date, and in doing so contradicted the first in time, first in right ("FITFIR") scheme. The Board found that POD "A" did not physically move, but was merely erroneously mapped. By correcting this error, the Board did not require the Assistant Water Manager to authorize a de facto new licence with a 1904 priority date. The Board found that it was correcting a series of administrative errors and restoring the historical usage of water at Cameron Creek that had existed since the priority date of 1904 (paras. 138 and 148 of the Board's decision).

CONCLUSION

- [58] In summary, on the totality of the record before me, which was less than the totality of the evidence before the Board, I am not persuaded by the petitioner that the decision was unreasonable.
- [59] Although I have done my best with the record I was provided, I am troubled by the fact that the entire record was not before me. I am of the view that this makes it difficult to review the decision in conjunction with the record as contemplated by the Court in Vavilov. Nonetheless I conclude that the decision was reasonable in both outcome and process and is entitled to deference.
- [60] The petition is dismissed. As the successful party, the Chisholms are entitled to their costs at Scale B.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power

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