



Province of
British Columbia

Environmental Appeal Board

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DECISION NOS. 2004-WAT-003(b) and 2004-WAT-004(b)

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

BETWEEN: Joanne McClusky
Terry and Joyce Mulligan **APPELLANTS**

AND: Assistant Regional Water Manager **RESPONDENT**

AND: Daniel Point Projects Ltd.
Sunshine Coast Regional District **THIRD PARTIES**

AND: Ralph James
Peter J. Nelson **PARTICIPANTS**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair
David H. Searle, Q.C., Member
Robert Gerath, Member

DATE: January 10 to 14 and January 17, 2005

PLACE: Vancouver BC

APPEARING: For the Appellants: Randy Christiansen, Counsel
Joanne McClusky, Counsel
For the Respondent: Alec Drysdale
For the Third Parties: Daniel Point Projects Ltd. Leslie Jones
Sunshine Coast Regional District James Yardley, Counsel
For the Participant: Peter J. Nelson Peter J. Nelson
Rick Brummer

APPEALS

On March 8, 2004, Alec Drysdale, Assistant Regional Water Manager (the "Regional Manager"), Land and Water British Columbia Inc. ("Land and Water B.C.")¹, issued two separate decisions authorizing the transfers of appurtenancy of two conditional

¹ Effective June 16, 2005, Land and Water B.C. became a part of the Ministry of Environment

water licences ("CWLs"). Appurtenancy refers to the attachment of a water licence to specific lands.

As part of the transfers, CWL 119342 and CWL 119338 were issued to the Sunshine Coast Regional District (the "Regional District") in substitution for CWL 62623 and CWL 17526, respectively, which were previously held by Garden Bay Waterworks District². Together, CWLs 119342 and 119338 authorize the diversion of a maximum of 11,315,000 gallons per year of water from Hotel Lake, located near Pender Harbour, British Columbia. The water may be used for the purpose of waterworks.

On March 31, 2004, Joanne McClusky and Terry and Joyce Mulligan appealed the Regional Manager's decisions on behalf of the Area "A" Quality Water Association ("AAQWA"). The Appellants also requested a stay of the decisions, pending a decision on the merits of the appeals.

This decision addresses the appeals on the merits, as the application for a stay was conducted by written submissions and the Panel's determination to deny the stay was made June 16, 2004 (Decision Nos. 2004-WAT-003(a) and 2004-WAT-004(a)).

The Environmental Appeal Board has the authority to hear these appeals under section 93 of the *Environmental Management Act* and section 92 of the *Water Act*. Section 92(8) of the *Water Act* provides that on an appeal the Board may:

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

The Appellants ask the Board to reverse the transfers and cancel the issuance of CWL 119342 and CWL 119338.

BACKGROUND

The Regional District supplies water to many local homes and other users through the Regional District's waterworks system. It holds several water licences permitting the diversion of water from Hotel Lake for the purpose of supplying the waterworks system. The Regional District holds CWL 119333, which it held prior to the transfer of CWLs 119342 and 119338. CWL 119333 authorizes the diversion of 10,950,000 gallons per year of water from Hotel Lake for waterworks purposes.

² The Appellants take the position that only one of the licences (the predecessor to CWL 119342) was registered in the name of Garden Bay Waterworks District. However, this point was not fully argued and the Board is not prepared to make a finding on the validity of the earlier transfer to Garden Bay Waterworks District.

In addition, the Regional District now holds CWLs 119342 and 119338, which are the subject of the present appeals. CWL 119342 authorizes the diversion of 4,015,000 gallons per year of water from Hotel Lake during the year, and has a precedence date of March 24, 1972. CWL 119338 authorizes the diversion of 7,300,000 gallons per year of water from Hotel Lake during the year, and has a precedence date of March 15, 1946. The authorized diversion works are described in both licences as "diversion structure, pump, pipe, tanks and distribution system." The licences state that the construction of the works has been completed, and the water is being beneficially used. The licences also state that the land upon which the water is to be used, and to which the licences are appurtenant, is "all the lands within the boundaries of" the Regional District. Of particular relevance to these appeals is the inclusion in both licences of Clause (e) which states:

- (e) This licence does not authorize the diversion and use of water at any time when the water level of Hotel Lake falls below the minimum level established by an engineer under the *Water Act*.

To date, no minimum level for Hotel Lake has been established by an engineer under the *Water Act*.

In its submissions on the stay applications, the Regional District advised that the existing demand for water by users of its waterworks system exceeds the maximum amount that is authorized under CWL 119333. Specifically, the Regional District stated that existing users of its water supply system consume approximately 13,500,000 gallons per year, which exceeds the licenced volume by over 1,500,000 gallons. Moreover, the Regional District projects that demand for water from its system will increase in the future, due to in-fill developments on existing properties, as well as new developments contemplated in the Regional District's Official Community Plan.

In particular, the Third Party, Daniel Point Projects Ltd. (the "Developer"), owns land within the Regional District's boundaries. A portion of those lands have been sold and some houses have been built; the remaining development on the Daniel Point lands is comprised of between 60-65 bare lots that will be offered for sale in the next few years. In its submissions on the stay applications, the Developer stated that it must satisfy the Regional District that the new lots will have a water supply. It proposes to supply the properties with water from the Regional District's water supply system.

Before the Regional District obtained the transferred licences, it applied for a new water licence. Specifically, on May 15, 2003, the Regional District applied for a licence that would authorize the diversion of an additional 14,000,000 gallons of water per year from Hotel Lake.

Land and Water B.C. referred the Regional District's licence application to existing licensees on Hotel Lake, and consulted with local residents and community associations about the proposed licence. Many licensees and local residents expressed strong opposition to the proposed new licence.

In his consideration of the Regional District's application, the Regional Manager also considered several reports prepared by Jacques Whitford Environmental Limited

and Hugh H. Harris & Associates Inc., Consulting Engineers, on behalf of the Developer, which discussed the potential effects of the proposed licence.

In a letter dated November 19, 2003, the Regional Manager advised the Regional District that more detailed hydrological studies would be required "to substantiate the availability of water in Hotel Lake, and the impact of further withdrawal of water from the lake" before the new licence could be issued. He also advised that the application would be "parked" pending the completion of a more comprehensive study.

On February 6, 2004, the Regional District and the Garden Bay Waterworks District jointly applied to transfer the appurtenancy of the licences that are the subject of these appeals. It should be noted that, in its submissions on the stay applications, the Regional District advised that it has resolved to withdraw its application for a new licence if the appeals are dismissed.

The Regional Manager has the authority to transfer the appurtenancy of a licence under section 19 of the *Water Act*, as follows:

Transfer of appurtenancy

- 19** (1) On the application of the holder of a licence, approval or permit and on compliance by the holder and by the proposed transferee with the comptroller's or the regional water manager's directions as to giving notice, the comptroller or the regional water manager, on the terms he or she considers proper, may
- (a) transfer all or part of the rights and obligations granted and imposed under the licence, approval or permit from the holder to the proposed transferee, and
 - (b) issue a new licence, approval or permit to the transferee or transferor, or both, and determine the appurtenancy of the licence, approval or permit.
- ...
- (3) Despite subsection (1), if satisfied that no person's rights will be injuriously affected, the comptroller or the regional water manager may dispense with providing directions as to giving notice under subsection (1).

The Regional Manager did not require the existing licensees on Hotel Lake to be notified of the applications to transfer the appurtenancy of the licences.

On February 27, 2004, Brian Croft, a property owner and a water licence holder on Hotel Lake, sent a letter to Glen Davidson, Manager of Water Licensing and Dam Safety with Land and Water B.C., concerning the proposed transfers. Mr. Croft stated that he had recently learned of the application to transfer the "dormant and unused" licences to the Regional District, and that he objected to the transfers. He questioned why Land and Water B.C. had not advised licensees of the proposed transfers, and he requested that the licences held by the Garden Bay Waterworks District be "revoked" for non-use.

In a reply dated March 5, 2004, Mr. Davidson stated that applications for transfers of licences are "not generally referred to other licensees" because a transfer "does not allocate additional quantity of water." He also stated that Land and Water B.C. staff "have not come across any evidence to suggest that the Garden Bay Waterworks District's (Hotel Lake) water licences were never used."

On March 8, 2004, the Regional Manager issued his decisions authorizing the transfers of appurtenancy, and issuing CWLs 119342 and 119338 in substitution for CWLs 62623 and 17526, respectively. His decisions resulted in no changes to the maximum quantities of water that may be diverted from Hotel Lake under those licences, and he subsequently incorporated Clause (e) into the new licences.

On March 31, 2004, Joanne McClusky filed a Notice of Appeal of the Regional Manager's decisions with the Board. She advised that she was appealing on behalf of the AAQWA, and she attached a list of the names and addresses of the members of the AAQWA. That list states that the AAQWA consists of owners of waterfront property on Hotel Lake, and licenced and unlicenced water users drawing water directly from Hotel Lake. Many, but not all, of the people on that list have signed next to their names to indicate that they authorized Ms. McClusky to act on their behalf regarding the stay applications and the appeals of the Regional Manager's decisions. Her Notice of Appeal was also accompanied by a letter requesting a stay of the decisions.

In a letter dated April 5, 2004, Ms. McClusky advised the Board that she and Terry and Joyce Mulligan would be the "official appellants" representing the other appellants.

Ms. McClusky also advised that she owns land on Hotel Lake, and that the Mulligans own land on Hotel Lake and draw water from the lake as unlicenced water users.

The Regional District, as licensee, and the Developer, as the primary recipient of the water covered by the two transferred licences, accepted Third Party status in the appeals.

By a letter dated April 6, 2004, the Board asked the Regional Manager to provide addresses for any individuals who may be "objectors" as defined in the *Water Act*. In response, on April 22, 2004, the Regional Manager provided a list of 10 water licensees on Hotel Lake.

By a letter dated April 26, 2004, the Board invited those 10 licensees to participate in the appeals as Participants. Of those contacted, Ralph James and Peter Nelson accepted Participant status. However, Mr. James did not provide submissions or attend the appeal hearing.

The Appellants main arguments are as follows:

- The licences should have been cancelled or suspended for lack of beneficial use and, therefore, should not have been transferred.
- The transfers are defective because the Regional Manager did not require the Regional District to give notice of the proposed transfer, in breach of procedural fairness and in violation of section 19 of the *Water Act*.

- The transfers will negatively impact the quantity and quality of the water in Hotel Lake, and will have a corresponding negative impact on fish and fish habitat in and around the area, all of which cannot be cured by Clause (e) in the licences.

The Appellants maintain that, in the circumstances, the transfers should not have been allowed and the Board should reverse those decisions.

The Regional Manager and the Regional District ask the Board to confirm the transfers. They state that the issue of beneficial use and cancellation of the original licences is irrelevant and is, in any event, beyond the jurisdiction of the Board on these appeals. Furthermore, they maintain that the transfers do not change the quantity or use of the water as authorized by the original licences. Finally, they argue that Clause (e) of the licences protects the lake and should be a full answer to the Appellants concerns.

It should also be noted that, during the hearing of the appeals, the Regional District questioned the Appellants' standing to appeal the Regional Manager's decisions.

The Developer adopts and relies upon the legal arguments advanced by the Regional Manager and the Regional District and states that the transfers should be confirmed.

The Participants suggest an alternate remedy of delaying the decision until reports are done by Regional District in reply to a new licence application.

ISSUES

1. Whether the Appellants have standing to appeal the Regional Manager's decisions transferring the licences.
2. Whether the original licences should have been cancelled or suspended for non-use (lack of beneficial use) and, therefore, the transfers should not have occurred.
3. Whether the transfers of appurtenances lacked procedural fairness because of lack of notice.
4. Whether all or part of the rights and obligations granted and imposed under the licences should be transferred in the circumstances.

During closing arguments, the Regional District made an application for an order of requiring the Appellants to pay all or part of the Regional District's costs in connection with the appeal pursuant to section 95(2)(a) of the *Environmental Management Act*. This application will be considered at the conclusion of this decision.

RELEVANT LEGISLATION

The legislation will be set out as needed in the decision.

DISCUSSION AND ANALYSIS

1. Whether the Appellants have standing to appeal the Regional Manager's decisions transferring the licences.

As stated above, counsel for the Regional District challenged the standing of the Appellants to appeal the transfer decisions.

The Panel has considered the merits of that submission.

Section 92(1) of the *Water Act* sets out the categories of people with standing to appeal a decision to the Board. It states:

- 92** (1) ... an order of the comptroller, the regional water manger or an engineer may be appealed to the appeal board by
- (a) the person who is subject to the order,
 - (b) an owner whose land is or is likely to be physically affected by the order, or
 - (c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

[emphasis added]

Joanne McClusky testified that she owns waterfront property on Hotel Lake but does not draw water from Hotel Lake. When asked how the transfer of the water licences might affect her, she expressed concerns about dewatering of the littoral areas causing a collapse of the banks. She indicated that she has noticed lake levels are down. She further indicated that she uses Hotel Lake in several ways; she boats, she swims and she fishes in the lake. Using her own words, she says that she "plays in the lake."

Mr. Mulligan testified that he has a cottage on waterfront property on Hotel Lake, which he uses frequently throughout the year. He is an unlicensed water user of the lake, using the water for domestic purposes. He also has a rowboat and dock. Although he does not fish, he does swim in the lake. His property is located at the outflow of Hotel Lake, at the source of Hotel Lake Creek.

The Appellants maintain that the transferred licences will result in an increase in lake level drawdown by as much as 8 inches, which would have an impact on properties in the shallow areas of the lake and those with fixed docks, such as Mr. Mulligan's.

The Regional District acknowledges that the Appellants are property owners on Hotel Lake. However, it points out that the Appellants did not provide any evidence that their properties would be "physically affected" by the decisions, nor do they hold licences to withdraw water from the lake. The Regional District notes that Ms. McClusky obtains her water from a waterworks system, while the Mulligans have been unlicensed users since the 1970s. It submits that, in neither case are there any enforceable rights that have been, or will be, lost by the decisions under appeal.

The Regional District notes that the only remaining provision that may provide the Appellants with standing to appeal is that of a "riparian owner who considers that

their rights are or will be prejudiced by the order". The Regional District submits that neither Appellant has standing because "riparian" does not apply to lakes. In support of its position, it references a previous Board decision (*Columbia Power Corporation v. Comptroller of Water Rights* (Decision No. 2003-WAT-003(a), March 19, 2003) (unreported)). It also refers to the definition of "riparian owner" found in the 4th edition of Black's Law Dictionary. The 4th edition definition of "riparian owner" includes the following statement:

The term is sometimes used as relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water not having the character of a watercourse. But this is not accurate. The proper word to be employed in such connections is "littoral".

The Panel has reviewed the previous Board decision and finds that the real issue addressed by the Board in that case was the meaning of "owner" in the context of the words "riparian owner". Within its analysis of the issue, the Board concluded that the common law definition should be used for "riparian". However, as the watercourse involved was a river, the Board did not consider the question of whether lakefront property is riparian land for the purposes of the *Act*, and that Board decision is not of assistance in the present case.

In relation to the Black's Law Dictionary definition, the Panel notes that the definition of riparian owner provided by the Regional District is not the definition found in a more recent version of the dictionary. In the 8th edition of Black's Law Dictionary, "riparian land" is defined as:

1. Land that includes part of the bed of a watercourse or lake.
2. Land that borders on a public watercourse or public lake whose bed is owned by the public. (p. 893)

It defines "riparian" as:

Of, relating to, or located on the bank of a river or stream (or occasionally another body of water, such as a lake) (p. 1352)

There are a number of other related definitions in Black's Law Dictionary, none of which exclude land bordering on lakes from being riparian in nature and having associated riparian rights. The Panel also notes that this 8th edition definition is consistent with the provisions and intent of the *Water Act*, which specifically includes "lake" within the definition of "stream". Therefore, the Panel finds that, in the context of the *Water Act*, "riparian" applies to lakes.

The question then is, whether the Appellants, as riparian owners, "consider that their rights are or will be prejudiced by the order" [emphasis added].

The Regional District submits that many of the Appellants' concerns relate to matters that are beyond the scope of consideration under section 19 of the *Water Act*. For example, Ms. McClusky identified issues related to quality of life, aesthetics, environmental issues and personal recreation (see *Peterson and Mill Bay Waterworks v. Regional Water Manager et al.* (Decision No. 97-WAT-06(c), May 7, 1998) (unreported)). Mr. Mulligan identified issues related to growth management and personal recreation. In addition, many of their concerns related to fisheries and habitat concerns, none of which are related to either the riparian lands of the

Appellants or their riparian rights (*Columbia Power Corporation v. Comptroller of Water Rights*, supra) and *Selkirk Land and Cattle Corporation v. Assistant Regional Water Manager* (Decision No. 2000-WAT-003, October 31, 2000) (unreported)).

Ultimately, the Regional District submits that the Appellants' interests are more akin to those of a public interest group, and that such interests do not meet the test for standing under the *Water Act*.

The Appellants submit that the core issues in the appeal are what the injurious affects of the decisions will be, and that this issue has yet to be judicially or administratively determined. They submit that they have valid interests: Mr. Mulligan uses the lake for bathing and other domestic purposes; Ms. McClusky uses the lake for recreational purposes. Both of these are common uses for riparian owners.

It is trite law to say that the Environmental Appeal Board is a creature of statute and, as such, must live within the four corners of both the legislation that establish it and the various Acts that empower it. In this particular case, for the Panel to have jurisdiction over these appeals, the Appellants must fall within the class of persons set out in section 92 of the *Act*; i.e., those given standing to appeal.

Based upon the evidence before it, the Panel finds that the Appellants are riparian owners who "consider that their rights are or will be prejudiced by the order." They are waterfront owners of lots on Hotel Lake who clearly use the waters of Hotel Lake. In addition, the Panel is satisfied that the Appellants' waterfront properties may be physically affected by a change in water levels resulting from the transfers and use of the water under the licences. Accordingly, the Appellants have standing to bring these appeals.

2. Whether the original licences should have been cancelled or suspended for non-use (lack of beneficial use) and, therefore, the transfers should not have occurred.

The Appellants submit that the rights under the licences were not being used since the early to mid 1980's and, therefore, should have been cancelled for lack of beneficial use. The Appellants argue that the transfer of senior priority rights, where those rights have not been beneficially used for long periods of time, prejudices existing licensees who have beneficially used water on a continuous basis.

Bob Herath testified on behalf of the Regional Manager. Mr. Herath is a Land and Water Licensed Officer with Land and Water B.C., and holds a Masters of Science degree in Hydrology. He emphasized that, at the time of the transfer of the two licences in question, the Garden Bay Waterworks District's licences were in good standing. The Regional District had retained them for future use or in the case of an emergency. He indicated that this was not an unusual use for a municipal water system. Mr. Herath further advised that Land and Water B.C. never received a request for the licences to be cancelled for lack of beneficial use after 1996, because he stated that there was beneficial use until 1996.

The Regional District states that the issue of beneficial use and cancellation of the original licences is irrelevant to these appeals and, ultimately beyond the jurisdiction of the Board on these appeals. It notes that the evidence of two of the

Appellants' witnesses, Ms. Whittaker and Mr. Harrison, appeared to relate to this issue and that neither witness, in any event, had sufficient knowledge or certainty in their evidence to establish a lack of beneficial use.

The Panel agrees that whether or not the Garden Bay Waterworks District's licences could have been or should have been suspended or cancelled for failure to make beneficial use of the water is not something that is properly before the Panel. The appeals are against the transfers of appurtenancy of the licences.

3. Whether the transfers of appurtenances lacked procedural fairness because of lack of notice.

The Appellants submit that the decisions to transfer the licences were flawed and lacking in procedural fairness because the Regional Manager failed to provide proper notice to the Appellants under section 19 of the *Water Act*, or give them an opportunity to make submission before he approved the transfers. For convenience, section 19 of the *Act* states:

Transfer of appurtenancy

- 19** (1) On the application of the holder of a licence, approval or permit and on compliance by the holder and by the proposed transferee with the comptroller's or the regional water manager's directions as to giving notice, the comptroller or the regional water manager, on the terms he or she considers proper, may
- (a) transfer all or part of the rights and obligations granted and imposed under the licence, approval or permit from the holder to the proposed transferee, and
 - (b) issue a new licence, approval or permit to the transferee or transferor, or both, and determine the appurtenancy of the licence, approval or permit.
- ...
- (3) Despite subsection (1), if satisfied that no person's rights will be injuriously affected, the comptroller or the regional water manager may dispense with providing directions as to giving notice under subsection (1).

The Regional Manager's witness, Bob Herath, spent some time explaining the procedural differences between applications for new licences as opposed to an application for the transfer of an appurtenancy.

First, in respect of new licences, Mr. Herath explained that one first checks the completeness of the application. He indicated that there is a conformity check done. There is an advertisement in the local newspaper and copies of the application are sent to other agencies, including the Department of Fisheries and Oceans, Ministry of Water, Land and Air Protection [now the Ministry of Environment] and the Ministry of Forests [now the Ministry of Forests and Range]. Thirty days is given to those agencies to respond, and 45 days is given to First Nations. The file is assigned to an official to review all responses and to contact those who have not responded. An Engineer's Report is then prepared making

recommendations to the Section Manager. If the recommendation is for the issuance of a new licence, then the licence itself is prepared and goes to the Regional Manager. In respect of new licences, priority is based on the date of application.

Mr. Herath then turned to applications for the transfer of appurtenancy of existing water licences. He explained that these applications are also checked for completeness and to ensure that encumbrances are identified. Mr. Herath explained that section 19(3) of the *Water Act* does not require notification of the public if the Comptroller or the regional water manager concludes that "no personal rights will be injuriously affected."

Mr. Herath also briefly discussed the Regional District's initial application for a new licence. He stated that this application was supported by reports of professionals, specifically Hugh Harris and Jacques Whitford. He pointed out that his agency wanted to find a science-based solution and, accordingly, held an information meeting. However, in the end, Land and Water B.C. concluded that more detailed studies were required, so the new application was "parked".

Mr. Herath also referred to a public meeting held on January 13, 2004, where a consensus for development of a Master Water Plan for the Regional District was decided. At that same meeting, there was a discussion of the process that would be used to arrive at this Master Water Plan.

On the question as to why concerned citizens were not notified of the transfer of the two licences, Mr. Herath responded that, since these were existing licences, no persons rights would be "injuriously affected".

The Regional Manager argues that Land and Water B.C. considered this matter with the seriousness it deserved. He submits that there was no need for notification, as no person's rights would be injuriously affected "especially with the inclusion of the special Clause (e) in the licenses" which requires a further study to set the minimum water levels in the lake.

The Regional District submits that the Regional Manager complied with section 19 of the *Water Act*. The Regional District points out that nothing in section 19, or the *Water Act* generally, obligated the Regional Manager to provide notice to the Appellants or anyone else in this case. The only requirement was for Garden Bay Waterworks District (the holder of the licence being transferred) and/or the proposed transferee (the Regional District) to comply with any direction that might be issued by the Regional Manager for giving notice of the application. In this case, the Regional Manager did not direct anyone to provide notification of the application or pending decisions. Therefore, there is no breach of notice provisions or procedural fairness. In any event, the Regional District notes that the appeal was heard as a hearing *de novo*. Therefore, if the Regional Manager made any errors of procedure, the hearing of the appeals will cure those errors.

The Panel agrees that, in these circumstances, there was no need for the Comptroller or the Regional Manager to require notice of the requested transfers. The Panel finds that any lack of notice that might have resulted in procedural unfairness has been cured by the full and fair hearing before this Panel.

Accordingly, that argument fails.

4. Whether all or part of the rights and obligations granted and imposed under the licences should be transferred in the circumstances.

The Appellants' evidence

The Appellants submit that even though the existing licences were not cancelled for lack of beneficial use, this does not mean that an application for transfer of those rights must be granted. They note that the transferred water rights have been dormant for long periods of time and reviving them will significantly increase water withdrawals from Hotel Lake. Although the decision to allow the transfer may not increase the *theoretical* maximum amount of water removed from Hotel Lake by the licensees, it will increase the *actual* amount of water withdrawn by licensees by up to 70%.

The Appellants argue that the transfers should be set aside on the following grounds:

- a) There will be a substantial increase in actual water use;
- b) It is reasonably likely that there will be reduced water available, particularly during the summer and fall;
- c) The increase in actual water use will impact water quality;
- d) The increased actual use will increase the lake level drawdown, with attendant consequences;
- e) There will be decreased outflow from the lake which will affect fish and the downstream environment; and
- f) The increased use may impact groundwater users.

In addition, they argue that Clause (e) of the licences, which prohibits the diversion and use of the water at any time when the lake level falls below a minimum level established by an engineer, provides little or no actual protection.

In support, the Appellants called a number of witnesses.

Their first witness was Joseph Harrison, a retired teacher and 30-year resident of Pender Harbour, who introduced a map of the area. He identified and described the various lakes in the area, how they are inter-connected and identified Hotel Lake as a headwater lake. He identified the various licenced and unlicenced water users on the lake and expressed personal concern about water quality. He also expressed concern that Hotel Lake has reached its maximum for water use licences. Mr. Harrison offered no scientific evidence in support of his concerns.

The second witness for the Appellant was Dr. Michael Jackson, who resides in Pender Harbour, having moved there recently. Dr. Jackson was qualified as an expert witness, entitled to give opinion evidence on aquatic production in littoral zones of lakes generally. He advised that he had done no work at all on Hotel Lake. Speaking in general terms, however, Dr. Jackson explained that the littoral zone of a lake is the marginal area of a lake where sunlight reaches the bottom, thereby aiding plant growth. In order to offer any comment about Hotel Lake, Dr. Jackson indicated that it would have to be mapped, sampled for water quality and for fish food. In the absence of the above, he indicated that he could not offer any opinion

specifically on Hotel Lake. He confirmed, however, that septic systems have a big impact on such water bodies.

Dr. Jackson commented on Clause (e) of the licences in relation to setting the appropriate minimum lake level for Hotel Lake. He stated that the minimum level would likely be different at different times of the year.

The third witness called by the Appellants was Dr. Brian Guy, a professional hydrologist and President of Summit Environmental Consultants Ltd. He was qualified by the Panel to give opinion evidence on his water balance analysis of Hotel Lake, which is found in Tables 5 and 6 to his expert report, dated March 14, 2004. Dr. Guy pointed out that his work is mainly in respect of surface waters as opposed to ground water. He further pointed out that his principle area of expertise is hydrology and water balance analysis. He testified that in August, 2004, he visited Hotel Lake and that he also reviewed the two reports relied upon by the Regional District, namely: a Preliminary Report, Hydrology of Hotel Lake at Pender Harbour Area, Sunshine Coast, B.C. dated May 30, 2002, prepared by Hugh G. Harris and Associates Inc., and a report titled Application for Authorization Under the Fisheries Act: Hotel Lake Water Supply, dated April 2003, prepared by Jacques Whitford Consulting Engineers.

Speaking specifically of Mr. Harris' report, Dr. Guy stated that while correct principles were employed, there was a very significant error in that report, which assumed no seepage out of the lake bottom.

Dr. Guy referred to Table 5 of his report and explained that, in his view, seepage loss from Hotel Lake is very significant. Dr. Guy indicated that approximately 3 metres of water enter the lake each year. He explained that a water balance considers inputs and outputs. Obviously, inputs and outputs must balance. According to Table 5, the inputs to Hotel Lake are direct precipitation onto the lake of 1344 mm and runoff into the lake of 600 mm. According to Dr. Guy, the outputs are 155 mm of surface flow (most of which takes place from January to May with none from July through October), pumping from the lake for water use at 273 mm, and seepage of 1,772 mm, which is calculated by taking the volume of inputs less the known outputs, with the assumption that the rest has to be accounted for as seepage. That calculation is the area of greatest uncertainty. However, since inputs must balance outputs, a considerable flow of water must be attributed to seepage, and seepage has a profound effect upon groundwater. Dr. Guy's evidence was that approximately 60% of the outflow from Hotel Lake is via seepage, through the bottom of the lake.

The purpose of Table 6 of Dr. Guy's report is to demonstrate the effect of the two licences in question, which he calculates to be 465 mm of pumped water. Dr. Guy calculated that those two licences would reduce the surface outflow from 155 mm to 140 mm, and reduce seepage from 1,772 mm to 1,595 mm. In Dr. Guy's opinion, since the outflow between June and September is now zero, the effect of output under the transferred licences would be to extend the dry surface outflow period by two weeks. By that he means that it would start one week earlier and last one week longer. The effect that would have on groundwater flows is unknown.

Dr. Guy also reviewed the water quality data for the years 1994 – 2003. His data is found at Table 8 of his report. He concludes that, at times, the phosphorus in the lake exceeds aquatic life and drinking water standards, and he suggests that a decrease in the volume of water in the lake would increase phosphorus concentrations. The levels of phosphorus, in part, result from inflow to the lake from septic systems located around Hotel Lake.

Dr. Guy noted that the reports that he reviewed are not a sound basis for decision-making because seepage was not considered, and seepage losses could have a downstream impact if flows are reduced. He further stated that water use information is incomplete and that further water balance work is required to more accurately determine the loss to the lake from seepage. He also stated that impacts on the water balance of the lake are likely to occur as a result of the approval of the two transferred licences. Dr. Guy concluded with three recommendations. The first is to understand the actual water use, from both licenced and non-licenced users. The second is to do a proper water balance analysis as he admitted that his work should not be regarded as the final word. The third recommendation is to undertake adequate monitoring.

Under cross-examination, Dr. Guy advised that he was not familiar with Clause (e), that he wrote his report before he visited the lake and that he has no knowledge about septic systems around the lake, their numbers or whether they work properly. He stated that, in his view, his numbers were reasonably accurate though not precise. He admitted that seepage is the least accurate calculation with a plus or minus 50% margin of error, and admitted that what he did was a quick analysis based on other people's work, over a couple of weeks. He also agreed that the hydrological status of Hotel Lake is not well understood and that his calculation of "seepage" is really just a residual number. He also stated that there is much work that he did not do regarding aquifers, groundwater, and sewage.

On re-direct examination by the Appellants, Dr. Guy indicated that he visited the lake after he wrote his report, and that his visit gave him comfort on what he had said, and no cause to change what he had written. He provided margins of error for his water balance analysis, which in his view were well within the limits of tolerance.

Dr. John Field also testified for the Appellants. He is an aquatic biologist, who the Panel qualified as an expert in that field. Dr. Field indicated that he studies fish food and stream velocity and that he has been a salmon enhancement volunteer in Pender Harbour since 1984. He indicated that coho fry over winter for a year in fresh water before migrating to tidal water, therefore, fresh water habitat is very important. With respect to the lake system in question, he confirmed that Hotel Lake, as the headwater lake, flows via Hotel Lake Creek into Mixal Lake, which then flows via Mixal Creek into Sakinaw Lake. Sakinaw Lake then flows via Sakinaw Creek into Agememnon Channel (the ocean). Also entering Mixal Creek are flows of water from Katherine Lake and Garden Bay Lake. It is the Mixal Creek area that is important salmon rearing habitat.

Dr. Field advised that salmon enter Sakinaw Lake via Sakinaw Creek from Agememnon Channel in mid-November to January. These spawning salmon are large coho, between 5 – 7 kilograms. They spawn in Mixal Creek, Katherine Lake

Creek, Lower Garden Bay Creek and sometimes, though infrequently, in Hotel Lake Creek. The coho lay eggs in the gravel of these creeks. The eggs incubate and emerge as fry in late March and move to the larger lakes for about 18 months, then leave Sakinaw Lake for the ocean. The two main factors that affect rearing habitat are the gravel substrata and sufficient water. He said that additional water enhances salmon spawning because fish use oxygen and shallow water has limited oxygen. He said that a further extraction of water from Hotel Lake, in his opinion, could impair the spawning habitat in Mixal Creek.

As to what fish actually reside in Hotel Lake, he indicated that peamouth chub, a minnow-like fish, reside in Hotel Lake. He stated that Mixal Creek is the area of critical coho spawning habitat, and acknowledged that inflow to Mixal Creek is not just from Hotel Lake via Hotel Lake Creek but also from Garden Bay Lake and Katherine Lake. There was no evidence as to the volumes of inflow to Mixal Creek from these separate bodies of water.

With respect to the evidence of Dr. Field, it is clear that he is not a hydrologist and that, as an aquatic biologist, his focus of concern was Mixal Creek, the area of critical coho spawning habitat. While he could not say what contribution the flow from Hotel Lake made to the Mixal Creek area, his concern was that the diminishment of any flow could affect the coho salmon spawning habitat.

The next witness for the Appellant was Terry Mulligan, one of the named Appellants. His property is located at the outflow of Hotel Lake, on Hotel Lake Creek. Mr. Mulligan testified that he uses the creek bed as the driveway to his cottage. He indicated that, in the fall of the year, there is sometimes 4 inches of water over this portion of the creek and that, for brief periods in the fall, he observes peamouth chub spawning in that area. During these times, Mr. Mulligan does not drive his car through the streambed.

Mr. Mulligan stated that his concern regarding the licence transfers is for the volume of water in the lake. He is worried that his driveway could become a mudflat, while admitting that flows, including seepage into Hotel Lake Creek, exist only from November to May when the lake is at its highest. He advised that he started monitoring lake levels in October of 2001. He has also permitted the Department of Fisheries and Oceans to place instrumentation on his property. He indicated that in a normal year the lake has a range from high to low level of some 22 inches.

Mr. Mulligan's lake elevation measurements were submitted in the form of a graph with various comments inserted. He testified that he composed the graph from diary entries of lake levels taken either by himself or his son-in-law, which are then transposed in graph form with various comments noted in the margin. He takes these measurements from a pin that he has placed in a cedar log, using a yardstick to measure the water level from the pin to the surface of the water.

The last witness for the Appellant was Ron LeBlanc, who has lived at Garden Bay Lake for 18 years. He is a builder, aqua-culturalist, owner of a shellfish processing plant and a developer. He owns a 45-acre parcel of land approximately 25 feet in elevation above Mixal Lake, between Hotel Lake and Mixal Lake. He also owns Clearwater Utilities, which supplies water from aquifers to 25 homes. He plans

further development for 50 – 75 homes in total. Mr. LeBlanc stated that he has water quality concerns regarding the surface water found in Hotel Lake.

Therefore, in 1995 and 1996, Mr. LeBlanc drilled 3 water wells to bedrock aquifers 200 feet below ground. The wells are intended to supply domestic water. However, water in 1 of the wells developed arsenic levels that exceed drinking water standards. He believes that too much water is withdrawn from Hotel Lake which, in his opinion, results in lack of recharge in the bedrock aquifer and generation of excess arsenic. Mr. LeBlanc advised that he sought professional advice on this matter, but provided no expert opinion in support of that advice.

The Respondent's evidence

The Regional Manager argues that the original licences were issued on the basis that there was sufficient water in Hotel Lake to meet the licenced demand. He submits that there has been no new or scientific evidence to suggest otherwise. Furthermore, the inclusion of Clause (e) in one of the original licences was to facilitate further studies that might become necessary in the event that water availability became a real problem.

In addition, the Regional Manager submits that the Regional District will not be pumping out an extra 11,000,000 gallons of water from Hotel Lake with immediate effect. The short term use of water under the transferred licences would likely be limited to the extra amounts the Regional District is now pumping on their already existing water licence, and only the Phase 1 needs of the Daniel Point development. He notes that it will be several years before Daniel Point will be fully developed which gives ample time to carry out the necessary studies expected by Clause (e) to define and refine the minimum water levels addressing the concerns expressed by the Appellants.

The Regional Manager called three witnesses. Mr. Herath testified as to Clause (e) of the licences. He stated that a further study is required to set the water level limits and that this study is to be conducted by the Regional District.

His next witness was Mohammed Alam. Mr. Alam joined the B.C. Government in 1967 and, in 1974, joined the predecessor to Land and Water B.C., retiring in 2003 as a Scientific Technical Officer. Since then, he has been retained to do some contract work specifically in respect of these matters. Originally, however, he was hired as a Technical Officer under the *Water Act* and between 1976 and 2003, he exclusively worked on Regional District matters.

Mr. Alam wrote the report recommending approval of the transfer of the licences in question. He did this because, using his words "Hotel Lake was not fully recorded". Mr. Alam believes, however, that it is now fully recorded. He explained the use of those words to mean that if a lake is not fully recorded, then additional licences might be issued. However, if a lake is fully recorded, then no further licences will be issued because it will have reached its maximum water use potential.

The Regional Manager's final witness was Michael Currie, who was qualified as an expert in hydrology and water management, limited however to surface waters and excluding biology, fisheries and groundwater.

Mr. Currie provided comments to the Regional District on the terms of reference that they proposed for the hydrological water balance study for Hotel Lake. He also advised that the range between high and low water in Hotel Lake is approximately 21 inches. Mr. Currie stated that there was a need for a hydrologist and a biologist to monitor lake levels, Hotel Creek discharges and water demands so as to develop a reservoir operating curve. In his opinion, data should be collected over at least one annual water cycle. The resulting water level curve could be used by a water manager to control Hotel Lake's drawdown in consideration of water supply requirements and a need to maintain a minimum lake level as specified in Clause (e). He confirmed that a water balance for Hotel Lake does not exist.

Mr. Currie advised that, generally speaking, he agrees with Dr. Guy's conclusions and recommendations.

Neither the Third Parties nor the Participants called any witnesses.

Panel's Analysis

Upon review of the evidence, it is apparent that the conclusions reached by most of the Appellants' witnesses in relation to water quality and fish habitat rely upon assumptions that require further study in order to determine whether the assumptions will bear out in fact. The only evidence on the impact to fish and fish habitat was that of Dr. Michael Jackson and Dr. John Field. Dr. Jackson testified in relation to the impact of water levels and quality on the littoral zone; specifically, the impacts include loss of spawning lake, loss of fish food and loss of habitat for the prey. He understands that Hotel Lake contains cutthroat trout, stickleback and peamouth chub. However, Dr. Jackson could not provide an opinion on the littoral zone of Hotel Lake as he would first need to determine how fish are using the zone, and water quality data would be useful. Without that information, he could not provide an opinion.

The fishery of concern, as expressed by Dr. Field, relates to coho salmon spawning in Mixal Creek. Dr. Field is not a hydrologist, he is an aquatic biologist whose focus of concern was Mixal Creek, the area of critical coho spawning habitat. While he could not say what contribution the flow from Hotel Lake made to the Mixal Creek area, his concern was that the diminishment of any flow could affect the coho salmon spawning habitat. In addition, there was a lack of evidence on the issue of seepage from Hotel Lake and, hence, a lack of evidence about groundwater transport to Mixal Creek from Hotel Lake. Consequently, the Panel was left with a great deal of uncertainty as to the impact of stream flow from Hotel Lake to Mixal Creek.

There is little evidence of coho salmon spawning in Hotel Lake Creek. Indeed, the evidence is that, while there may be ground water going to Mixal Creek from Hotel Lake Creek into Mixal Lake, the evidence from Dr. Guy's report is that there is from 15 to 30 mm of flow in Hotel Lake Creek from December to April/May in an average year, but none or nearly none from June to November.

There is also an undefined quantity of water entering Mixal Creek from Katherine Lake and Garden Bay Lake. As a result, there is great uncertainty about the affect on the water in Mixal Creek flowing from Hotel Lake Creek to Mixal Creek through

Mixal Lake. Put simply, on the evidence, Hotel Lake Creek water is remote from Mixal Creek, leading to much uncertainty on the fishery issue.

While the impact to fish and fish values can be relevant to a decision made under the *Water Act*, the Panel finds that there is insufficient evidence to conclude that the transfer of the licences on Hotel Lake will or will likely have an impact on fish or fish habitat for spawning coho salmon. However, this may not be the case for resident species of fish that are found in the lake itself. In particular, the peamouth chub relies on minimum water levels in the lake that give it access to Hotel Lake Creek during the spawning period.

Further, there is insufficient evidence on how water quality will or will likely be impacted by the transfers. While there was evidence of periodic problems with phosphorus and algae blooms in the lake and with arsenic levels in a bedrock aquifer, the impact of the transfers on these matters is a matter of pure speculation at this time.

On the question of the impact of the transfers to water levels and seepage, it is clear that lake levels prior to the transfer are not representative of the lake levels that will be experienced after water is diverted as a result of the transfers. There is no dispute that the previous licensee was not using all of the water authorized for diversion under the licences. The Appellants argue that this factor should weigh heavily in favour of quashing the transfers.

The Panel notes that section 19(1) includes the following statement: "... the comptroller or the regional water manager, on the terms he or she considers proper, may

- (a) transfer all or part of the rights and obligations granted and imposed under the licence, approval or permit from the holder to the proposed transferee, ...

The language in subsection 19(1)(a) suggests that "transfer" does not necessarily mean a transfer of *all* the existing rights; the decision maker has the discretion to transfer all, part, or none of the rights. The Appellants submit that the Regional Manager is required to exercise this discretion reasonably. The Panel agrees. The Panel is of the view that discretion must be exercised reasonably, in accordance with the principles and policies underlying the *Water Act* and its regulation. The questions then are what factors are relevant to this exercise of discretion and/or under what circumstances should a transfer be allowed.

The Respondent identified a number of factors most relevant to the approval process of these applications:

- Status of the Licence. Were the existing licences in good standing at the time of the transfer of appurtenancy application?
- Water Availability. Is there any new conclusive or definitive scientific evidence to suggest that the volume of water allocated in the original licence is no longer available? Are there provisions in the original licence to address future shortages?
- Specific Objections to the transfer application. What are the objections and do they have technical merit?

- Notification. Are there people whose rights may be injuriously affected by the transfer?
- Expected Pattern of Water Use. When will the water be used and how will it be used?

The Panel agrees that these factors are relevant considerations. However, in this case, it appears that the maximum volumes of water authorized under the licences have not been diverted from the lake for a number of years. While this is not, in and of itself, reason to refuse the transfers, it is a reason to take the opportunity to reassess the available water, and the impacts that may be created by transferring *all* of the rights under the licences. Although actual water use by licensees (as opposed to the maximum licenced amount) is not generally accepted as an appropriate consideration when issuing new licences on the same stream, the Panel finds that it is a relevant consideration when considering a transfer, since things may have changed since the licence was initially issued.

The Panel appreciates that this is a priority-based allocation system. However, the Panel is of the view that ignoring the historical use of the licence could lead to water shortages and to the over-allocation of water on a stream. In general, an application to transfer rights provides an opportunity to review the licencing scheme on a stream when determining whether it is appropriate to transfer all or part of the licenced rights.

As noted above, when considering actual use of the licences in this case, it is clear that the previous licensee did not divert and use the entire licenced volume. The Appellants' witness, Dr. Guy, expressed strong concerns with respect to the amount of water that will be diverted and used under the transfers, particularly in relation to seepage.

The value of Dr. Guy's evidence is that it highlights the need for more study in order to determine the impact of the transfers. Even the Regional Manager's witness, Mr. Currie, agrees. The Regional District and the Regional Manager argue, however, that further study is already required by Clause (e).

For convenience, Clause (e) states:

This license does not authorize the diversion and use of water at any time when the level of Hotel Lake falls below the minimum level established by an engineer under the Water Act.

The Regional District submits that the Panel should accept that Clause (e) addresses the Appellants' concerns about the impact of the transfers on Hotel Lake. It notes that Clause (e) restricts the Regional District's authority to divert and use water when the lake level falls below an established minimum. The Regional District is initiating a water balance study of Hotel Lake and a master plan for Regional District Area "A". As noted by Mike Currie, these studies will provide information that will allow the determination of a water level to comply with Clause (e). Mr. Currie also stated that determining the specifics of any minimum lake levels will be a complex process, the nature of which remains uncertain.

The Regional Manager states that the imposition of Clause (e) was a responsible and appropriate decision by Land and Water B.C. He states that this clause

recognizes that there is a point, in the removal of large volumes of water, where a negative impact will occur. The clause requires that an appropriate level of research be conducted to determine the appropriate water level, or levels, to ensure that this damage does not occur. The Regional Manager believes that, through the work coming out of Clause (e), the hydrology, fisheries and recreational concerns raised by the Appellants will be addressed. With the information obtained through the relevant work, water removal from Hotel Lake can be managed in a sustainable manner.

The Regional Manager states that Land and Water B.C. is assisting the Regional District in the preparation of Terms of Reference for the Regional District's consideration. Land and Water B.C. has already submitted a draft of the Terms of Reference for the Regional District's consideration and has also provided a list of consultants that could be considered in selecting a party or parties to undertake the intended study.

The Regional Manager confirms the view of Dr. Jackson that what constitutes an appropriate level may be different depending on the season. The Regional Manager states:

There is enough data at this time to create preliminary levels for 2005 in the short term. By carrying out research this dry season, which begins approximately in April, a more refined level, or levels, could be in place by the end of 2005 for use in 2006. Additional research, as needed, can be defined at the conclusion of the preliminary work. This timing is reasonable in view of the pattern of short-term water use under the transferred water licences.

The Regional Manager also states that once the work associated with Clause (e) has been completed, Land and Water B.C., through its powers defined by the *Water Act*, will be able to enforce the minimum water level or levels as necessary. It can also make changes to the existing water licences. These may include changes to the water quantity as well as the way in which water is removed (e.g., annually or daily maximums).

The Regional Manager submits that it is premature to define conditions on these licences until the work associated with Clause (e) is completed. He states that Land and Water B.C. must be able to maintain the final control and decision on how Clause (e) is to be completed. Furthermore, if a person or an organization fails to comply with an order under the *Water Act*, those designated under the *Act* are empowered, including the Regional Water Manager, to take corrective steps as deemed necessary.

In making his decision to transfer the licences, the Regional Manager believed Clause (e) to be one of the most important safeguards. He submits that making a decision on minimum levels under Clause (e) will be a reasonable solution to the objections in question.

The Appellants argue that, given the priority dates associated with the transferred licences, "the brunt of water shortages will be borne by junior licence holders, unlicensed users, riparian owners and the environment." They maintain that "this

will occur despite the passage of decades where little or no beneficial use was made of the underlying water rights" in the original licences.

Finally, the Appellants submit that the past record of Land and Water B.C. (and its predecessor agencies) raises doubt about whether Clause (e) will ever be implemented. They state:

This clause was originally inserted into the Whittaker Licence (which has a priority date of 1972 and was issued in 1978) but no action has been taken to this date. Further, LWBC has not taken any enforcement action against the SCRD's [the Regional District's] other licenses violations, such as over pumping. Given this record, the Appellants respectfully submit that LWBC's current assurances must be viewed critically.

The Panel notes that the transferred licences allow the diversion and use of a total of 11,315,000 gallons of water per year. This is a large quantity of water. Although this volume was previously allocated under the original licences, the total volume was not diverted. In addition, since the original licences were issued, there have been subsequent licences issued on Hotel Creek. The evidence of Mr. Alam is that the lake is now fully recorded, meaning that no further licences will be issued because it has reached its maximum water use potential.

It is also clear that all of the witnesses with technical expertise, both for the Appellants and the Respondent, agree on one thing: more study is needed. The difference appears to be that the Regional Manager and the Regional District believe that the studies, and the setting of minimum levels, can be done later and the Panel should confirm the transfers. If, as a result of those studies, changes are required to the transferred licences, or other licences, they submit that those changes may be made at a later date. Conversely, the Appellants believe that the transfers should not be allowed until the studies are done.

There is no dispute that the Regional District currently needs additional water. The Regional District is already diverting over 1,000,000 gallons per year more than it is allocated under CWL 119333. In addition, it anticipates future demands for water due to various developments, including the Developer's. However, it is acknowledged by both the Regional Manager and the Developer that this future need is some years away.

Addressing its expectations of future water needs/use by the development, the Developer states, in its closing submissions, that it will have 60 to 65 building lots (bare land lots) available to be sold. However, it expects that it will take 2 to 3 years before all of those lots are available for sale. Once for sale, it is unknown how many years it will take to sell all of the lots. The Developer points out that earlier phases of the development (79 lots) took approximately 9 years to sell and, although all of the lots have now been sold, only 22 of the lots now have completed or near completed homes. The Developer states:

... it would be a guess at best to say when this development would be fully built out - however we can say that in a good year, at most our development sees approximately 4 to 5 homes built each year - which

in a very simple calculation - suggests that it could be approximately 12 years before all of the new lots were built on.

The Panel finds that management of the water resource is one of the main purposes and/or functions of the *Water Act*. In the Panel's view, prudent water management practice dictates a cautious approach in this case, given the quantity of water at issue, the undisputed need for further study and the need to establish a minimum water level for Hotel Lake. Given that the immediate need by the Regional District is only a small portion of the volume of water allocated under the licences, and, once allocated, people rely upon there being that water available, the Panel has decided to vary the decisions under appeal by allowing only a partial transfer of the rights under the licences at this time.

Thus, the Panel varies the Regional Manager's decisions to allow part of the rights associated with the subject licences to be transferred and sends the decisions back to the Regional Manager to be amended according to the directions provided below.

DECISIONS

The Panel has carefully considered all the evidence before it, whether or not specifically reiterated here.

In all of the circumstances, the Panel agrees with the Regional Manager that there is justification for transferring at least part of the licences, but disagrees that all of the water rights under the licences should be transferred at this time.

In view of the fact that there is a great deal of relevant information, by way of necessary studies, that is either not yet available or, if available, not before the Panel, the Panel has decided to send the matters back to the Regional Manager, with the following directions:

- (1) The Regional Manager shall limit the amount of water to be withdrawn from Hotel Lake, under the licences, to the reasonable current and immediately foreseeable (until completion of the plans and studies referred to below) water needs of the Regional District, pending the completion by the Regional District of:
 - (a) a master water plan,
 - (b) a water balance for Hotel Lake, and
 - (c) such studies as are required so that water levels may be set pursuant to Clause (e) of the licenses.

Depending upon what the Regional Manager determines these water needs are, only the rights under one licence, or part of one licence, may require transferring.

- (2) The Regional Manager shall ensure that hydrological impacts on Hotel Lake are taken into consideration in setting the minimum lake levels under Clause (e) and in setting the licence volumes.

- (3) The Regional Manager shall consider the economic impacts on development in the Regional District when considering the volume of water that should be transferred under the licences.
- (4) The Regional Manager shall set reasonable time limits upon the Regional District to undertake and complete those matters set out in 1(a) to (c), above, and shall require regular progress reports at such intervals as the Regional Manager may determine appropriate.
- (5) The Panel recommends that, when setting the minimum water levels pursuant to Clause (e), the protection of fish and fish habitat within Hotel Lake should be taken into consideration.
- (6) The Regional Manager shall also require the Regional District to make available to the public the master water plan, the water balance, the studies and progress reports, all within the time limits set out in (4), above.

Therefore, the Panel finds that only part of the water rights authorized under the subject CWLs should be transferred at this time. The balance of the water rights under the CWLs will remain with the Garden Bay Waterworks District until these studies are completed and the transfer of those remaining rights can be assessed with the benefit of the new information.

Accordingly, the appeals are allowed in part.

APPLICATION FOR COSTS

As noted earlier in the decision, the Regional District made an application for an order requiring the Appellants to pay all or part of the Regional District's costs in connection with the appeal pursuant to section 95(2)(a) of the *Environmental Management Act*.

They submit that the appeals are premature in that the parties should have been left to work out their concerns. In their view, the appeals are frivolous. They submit that the Appellants lack standing to appeal; their rights are either non-existent or are, at best, marginal. The Regional District submits that the Appellants' interests are more in the nature of a public interest group and that there are cases where courts have awarded costs against public interest groups.

The Regional District submits that the Appellants' interests are not covered by the *Water Act* and they are trying to "stretch the *Act* where it is not supposed to go".

The Appellants respond that there is no basis for awarding costs. They submit that the appeals are not premature as it is the only time that they could appeal. Furthermore, if the procedure under section 19 of the *Act* had been followed, the Appellants would have had the ability to comment. As this was not done, they were "forced to get their procedural rights" by appealing. They also note that the Board has already found that the Appellants raised serious issues to be tried in the context of their application for a stay.

The Board has not adopted a policy that follows the civil court practice of "loser pays the winner's costs." Instead, the Board's policy is to award costs in special

circumstances that are outlined in the Environmental Appeal Board Procedure Manual on page 40, and include:

- (a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;
- (b) where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;
- (c) where a party, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing";
- (d) where a party unreasonably delays the proceeding;
- (e) where a party's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party; and
- (f) where a party has continued to deal with issues which the Board has advised are irrelevant.

A panel of the Board is not bound to order costs when one of the above-mentioned examples occurs, nor does the panel have to find that one of the examples must have occurred to order costs.

The Panel finds that no special circumstances have arisen that would attract or result in an order for costs to any party. Further, the Panel is satisfied that the appeal has been brought for proper reasons and is neither frivolous nor vexatious.

Accordingly, the application is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

"David H. Searle"

David H. Searle, Q.C., Member
Environmental Appeal Board

"Robert Gerath"

Robert Gerath, Member
Environmental Appeal Board

August 9, 2005



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DECISION NOS. 2004-WAT-003(b) and 2004-WAT-004(b) CORRIGENDUM

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

BETWEEN: Joanne McClusky **APPELLANTS**
Terry and Joyce Mulligan

AND: Assistant Regional Water Manager **RESPONDENT**

AND: Daniel Point Projects Ltd. **THIRD PARTIES**
Sunshine Coast Regional District

AND: Ralph James **PARTICIPANTS**
Peter J. Nelson

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair
David H. Searle, Q.C., Member
Robert Gerath, Member

DATE: January 10 to 14 and January 17, 2005

PLACE: Vancouver, BC

APPEARING: For the Appellants: Randy Christiansen, Counsel
Joanne McClusky, Counsel
For the Respondent: Alec Drysdale
For the Third Parties: Daniel Point Projects Ltd. Leslie Jones
Sunshine Coast Regional District James Yardley, Counsel
For the Participant: Peter J. Nelson Peter J. Nelson
Rick Brummer

APPEALS - CORRIGENDUM

Paragraph (1)(a) on page 22 of the decision dated August 9, 2005, is amended by adding the words "the scope of which is satisfactory to the Regional Manager" so that the paragraph now reads as follows:

(1)(a) a master water plan, the scope of which is satisfactory to the Regional Manager,

The remainder of the decision is affirmed.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

March 23, 2006