



# Environmental Appeal Board

Fourth Floor, 747 Fort Street  
Victoria BC V8W 3E9  
Telephone: (250) 387-3464  
Facsimile: (250) 356-9923

**Mailing Address:**  
PO Box 9425 Stn Prov Govt  
Victoria BC V8W 9V1

Website: [www.eab.gov.bc.ca](http://www.eab.gov.bc.ca)  
Email: [eabinfo@gov.bc.ca](mailto:eabinfo@gov.bc.ca)

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## DECISION NOS. 2017-WAT-003(c) and 2017-WAT-004(c)

In the matter of two appeals under section 105 of the *Water Sustainability Act*,  
S.B.C. 2014, c. 15.

<b>BETWEEN:</b>	Harrison Hydro Project Inc. Fire Creek Project Limited Partnership Lamont Creek Project Limited Partnership Stokke Creek Project Limited Partnership Tipella Creek Project Limited Partnership Upper Stave Project Limited Partnership	<b>APPELLANTS</b>
<b>AND:</b>	Comptroller of Water Rights	<b>RESPONDENT</b>
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Jeffrey Hand, Panel Chair	
<b>DATE:</b>	Conducted by way of written submissions concluding on October 16, 2019	
<b>APPEARING:</b>	For the Appellants: D. Geoffrey Cowper, Q.C., Counsel Tom A. Posyniak, Counsel Kaleigh Milinazzo, Counsel For the Respondent: Meghan Butler, Counsel and Cory Bargaen, Counsel Ben Naylor, Counsel	

## SUPPLEMENTARY REASONS FOR DECISION

[1] On July 26, 2019, I provided my Decision on the merits of these appeals, in which the Appellants had sought the return of \$3,180,949.94 in water rental fees paid to the government for the years 2011 and 2012: see *Harrison Hydro Project Inc., et al v. Comptroller of Water Rights*, (Decision Nos. 2017-WAT-003(b) and 2017-WAT-004(b)). I found that the Respondent did not have the power to retroactively adjust the water rental fees and ordered that the fees collected for those years be returned to the Appellants.

[2] On August 23, 2019, the Appellants applied for an order that the water rental fees should also accrue interest from the date they were paid until they are refunded.

[3] The Notice of Appeal requested interest if the Board found that any sums were owing to the Appellants, but neither the Appellants nor the Respondent

argued the issue of interest in the submissions filed in the appeals. My Decision does not refer to interest.

[4] The Appellants and the Respondent are in agreement that the issue of whether or not interest is to be awarded, and how it is to be calculated, can now be decided by the Board. Apart from the parties' agreement that this issue can now be decided, I am satisfied, based on the Supreme Court of Canada decision in *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848, that I retain jurisdiction to render a decision on the interest issue since it was not raised in the submissions of the parties and, accordingly, was not dealt with my Decision.

## ISSUES

1. Does the Board have jurisdiction to order that interest be paid on the water rental fees to be returned by the government to the Appellants?
2. If so, how is the interest to be calculated?

## ANALYSIS

### 1. Does the Board have jurisdiction to order that interest be paid on the water rental fees to be returned by the government to the Appellants?

[5] Section 50(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, applies to proceedings before the Board and provides:

If the tribunal makes an order for the payment of money as part of its decision, it must set out in the order the principal sum, and if the tribunal has power to award interest and interest is payable, the rate of interest and the date from which it is to be calculated. [Emphasis added]

[6] These appeals were brought pursuant to the *Water Sustainability Act*. Section 105(6) of this Act states:

- (6) On an appeal, the appeal board may
  - (a) send the matter back, with directions, to the comptroller, water manager or engineer who made the order being appealed,
  - (b) confirm, reverse or vary the order being appealed, or
  - (c) make any order that the person whose order is being appealed could have made and that the board considers appropriate in the circumstances. [Emphasis added]

[7] I have not been referred to any legal authority or legislation that provides the Board with a general power to award interest as a matter of course. However, both the Appellants and the Respondent agree that section 105(6)(c) allows the Board to "step into the shoes" of the Respondent and make any order that he could have made that is appropriate in the circumstances, and I agree. Thus, for the purposes of the application now brought by the Appellants, if interest is to accrue, I must consider what powers the Comptroller (the Respondent in these appeals) had

to award interest on the water rental fees required to be returned to the Appellants. If the Comptroller could award interest, then the Board can likewise do so.

[8] The Appellants submit that the *Water Sustainability Fees, Rentals and Charges Tariff Regulation*, B.C. Reg. 37/2016 (the "*Water Regulation*"), authorizes interest to accrue in the circumstances of this appeal. The *Water Regulation* states at section 10(1):

If all or a portion of fees or rentals payable in respect of a licence, use approval or permit remains unpaid on the date the fee or rentals are due, on the day following that date, the comptroller must add to the unpaid amount a penalty equal to the percentage of that amount that is 1% above the prime lending rate, on that date, of the principal banker to the Province.

[9] The Appellants submit that, if the Comptroller is required to charge interest on unpaid water rental fees in an amount equal to the prime lending rate +1%, then that must also mean that the Comptroller is required to pay interest on water rental fees being returned. Further, those fees must necessarily accrue interest based on the prime lending rate +1%.

[10] The Appellants submit that it would be unfair to calculate interest differently depending on whether the Comptroller is receiving a late payment or returning water rental fees that were improperly collected.

[11] In the alternative, the Appellants submit that if the *Water Regulation* does not provide an express grant of legislative authority for the Comptroller to order interest (and in turn the Board), I should find that such a power is implicit for the Board to be able to fulfil its statutory mandate under the *Environmental Management Act* and the *Water Sustainability Act*. They say that the power to award interest is incidental to the fair disposition of the issues between the parties and the circumstances of these appeals. When the Board finds that significant sums are improperly received by the government, then ordering the return of those fees, without interest, would impose an unfair financial burden on the party seeking to overturn an administrative decision.

[12] The Respondent submits that section 10(1) of the *Water Regulation* has no application to this case because it is only concerned with interest accruing on unpaid water rental fees. The Respondent further argues that any requirement to accrue interest, and the manner of its calculation, must be clearly stated in the legislation and that the *Water Regulation* cannot be interpreted to apply to returned fees.

[13] Furthermore, the Respondent notes that there is a specific regulation dealing with fees to be returned by government; i.e., the *Interest on Overdue Accounts Payable Regulation*, B.C. Reg. 215/83 ("*Overdue Accounts Regulation*"), made under the *Financial Administration Act*, R.S.B.C. 1996, c. 138. Section 1(1) of the *Overdue Accounts Regulation* states as follows:

This regulation applies to money owed by the government on its own behalf

- (a) for the provision to it of goods or services or both by any person, or
- (b) as a consequence of an overpayment to it by any person.

*The Panel's findings*

[14] The Comptroller is required under section 10 of the *Water Regulation* to add an amount of money to unpaid water rental fees at a rate equivalent to 1% percent above the prime lending rate. It is noteworthy, in my view, that section 10 does not expressly deal with the accrual of interest on sums that the Comptroller—or specifically the government—might have to return. I also note that the calculation of 1% above prime is specifically called a “penalty” in this section of the Regulation, it is not simply an interest calculation on an unpaid bill. I am not satisfied that section 10 of the *Water Regulation* governs the circumstances of this case where money is to be returned by the government to the Appellants. I find that the *Water Regulation* does not apply in these circumstances.

[15] I have also considered the Appellants’ alternative submission that, if the *Water Regulation* does not provide for the payment of interest, I should find that the Board has implicit power to award interest to the Appellants. The Appellants submit that this implicit power is necessary in order to allow the Board to fully adjudicate all matters that arise between the Appellants and the Respondent. No authority was submitted in support of this proposition.

[16] I find that the Board does not have implicit power to order any party to pay interest. I agree with the Respondent that awarding interest requires an express power to do so. This is supported by the following highlighted words from section 50(1) of the *Administrative Tribunals Act* “... and if the tribunal has power to award interest and interest is payable ...”. The *Administrative Tribunals Act* clearly contemplates that some tribunals have this power and others do not. If the legislature had intended the Board to have power to award interest and to stipulate how the interest was to be calculated, the legislation governing these appeals would have provided that power. It did not do so.

[17] The Respondent submits that if I find that interest should accrue, it should be calculated pursuant to the *Overdue Accounts Regulation*. I agree.

[18] I find that the water rental fees improperly collected by the Comptroller constitute an “overpayment” as that term is used in the *Overdue Accounts Regulation* such that those fees should accrue interest. The Respondent states that he has the authority to apply the *Overdue Accounts Regulation* to overpayments received by government. I agree. As such, pursuant to the Board’s powers under section 105(6)(c) of the *Act*, the Board also has that authority.

**2. How is interest to be calculated?**

[19] The *Overdue Accounts Regulation* says that it applies in the following circumstances:

**Application**

- 1 (1) This regulation applies to money owed by the government on its own behalf
  - (a) for the provision to it of goods or services or both by any person, or

(b) as a consequence of an overpayment to it by any person. [Emphasis added]

[20] As set out above, I have found that the water rental fees constitute an overpayment. Therefore, section 1(1)(b) applies.

[21] Section 1(2) of the *Overdue Accounts Regulation* provides:

(2) Subject to subsections (3) and (4), where the government has received money on account of taxes, royalties, fees or other charges payable under any Act in an amount that was correctly due or accruing due to the government according to the law and in the law and in the circumstances existing at the time the money was collected or paid, but subsequently, according to the law and in the circumstances existing at a later time, the government becomes obliged to refund the money, then the money that shall be refunded shall be treated as an overpayment for the purposes of this regulation, but only from the later of the day

(a) when the government becomes obliged to refund it, or

(b) when the person entitled to the refund has completed any procedures required of him at law to perfect his claim to the refund.

[22] Subsections (3) and (4) provide exceptions on matters wholly unrelated to these appeals.

[23] Section 1(2) would appear to only have application where fees were correctly due and owing and then subsequently, as a result of a change in circumstances or law, must be refunded. I find this provision has no application to the case before me because I found that the water rental fees were not correctly collected according to the law or circumstances; rather, the fees ought never to have been retroactively adjusted. Not having been properly collected in the first instance, section 1(2) does not apply.

[24] Section 4 deals with interest accruing in relation to overpayments. It states:

4 (1) Subject to subsection (2.1), where section 1(1)(b) applies to an account, the government shall pay interest on the money it owes on that account calculated from the later of

(a) October 1, 1980, or

(b) the 61st day after the day the government receives the overpayment.

[25] Subsection 2.1 deals with monies paid pursuant to the *Motor Fuel Tax Act* and has no application to this appeal

[26] Accordingly, I find that section 4 applies to overpayments made by any person and stipulates that interest shall accrue on that overpayment beginning on the 61st day after the government receives the overpayment. According to an affidavit sworn by Marie Curtis, the Manager, Water Revenue, Financial Services Branch, Corporate Services for the Natural Resource Ministries, the government received the fees paid by the Appellants on April 28, 2017.

[27] The *Overdue Accounts Regulation* states the following about the rate of interest:

6 (1) The rate of interest payable for section 4(1) or (2) shall be

[(a)Spent]

(b) during each successive 3 month period, beginning on October 1, January 1, April 1 and July 1 in every year, 2% below the prime lending rate of the principal banker to the Province on the 15th day of the month immediately preceding that 3 month period.

[28] Ms. Curtis calculated the interest owed pursuant to section 6(1)(b) as \$114,875.91, up to and including September 30, 2019. The Appellants agree that, if the *Overdue Accounts Regulation* applies, the method of calculation set out in Ms. Curtis's affidavit is correct, subject only to an adjustment to take into account the interest accruing up until the date that the actual refund is made to the Appellants. This is required by section 5 of the *Overdue Accounts Regulation* which states that interest under sections 3 and 4 stops accruing "on the date payment of the money owed is mailed to the person to whom it is owed, or, if delivered to him without mailing, the date of delivery."

[29] I find that the *Overdue Accounts Regulation* expressly governs the water rental fees that were overpaid by the Appellants and which I have ordered returned to them. The Comptroller has the power to apply that Regulation. The Board, exercising the same powers as the Comptroller, is empowered to require the government to pay interest on the overpayment and calculate interest in accordance with the *Overdue Accounts Regulation*.

**Order**

[30] The principal sum to be returned to the Appellants is \$3,180,949.94.

[31] This principal sum will accrue interest starting June 28, 2017, calculated in accordance with the *Overdue Accounts Regulation*, until the date it is refunded to the Appellants.

[32] Accordingly, this aspect of the remedy sought by the Appellant is granted.

"Jeff Hand"

Jeff Hand, Panel Chair  
Environmental Appeal Board  
November 22, 2019