

**BRITISH COLUMBIA GOVERNMENT**

**Ministry of Forests Lands Natural Resource Operations & Rural Development**

**Private Sewage Business Regulation in B C - The Case for Change**

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**POSITION OF THE SILVER STAR PROPERTY OWNERS ASSOCIATION**

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**March 5, 2018**

## Executive Summary

The private sewage business is currently unregulated in BC from a pricing and business practice perspective. This is a monopolistic business, and the lack of accountability has provided an environment that allows small independently owned operations to exploit their unregulated position. Customers have no avenue through which to seek redress.

Silverhawk Utilities Inc (Silverhawk) which serves the Silver Star Mountain Resort community exclusively, provides an excellent example of what can happen when a monopoly is allowed to operate without any regulatory oversight.

The Provincial Government of BC is the only authority that would have the scope to address this pressing issue. While other approaches have been considered (see below) it is believed that legislative change would be the most effective and transparent route to change how the small independently owned sewage treatment industry in BC as is operated.

Previous governments have dismissed the concerns citing their strong mandate to reduce regulation and provincial government oversight. These reviews did not consider the public interest.

Significantly, the Independent Review of the British Columbia Utilities Commission (BCUC) dated November 14, 2014 recognized the need for private sewage utilities to be effectively regulated.

## Introduction

There are numerous aspects of Silverhawk's business practice that the Silver Star Property Owners Association (SSPOA) members consider questionable, given Silverhawk's monopolistic position.

In 1999 the resort operator at Silver Star Mountain was in financial difficulties and could not pay their debt to Waterworks Technologies Inc. (see <http://www.waterworks.ca/>) for the installation of a major water supply line. Waterworks formed a new sewage utility company called Silverhawk Utilities Inc. The assets of the existing sewage disposal works were transferred from Silver Star Resort to Silverhawk Utilities to satisfy the debt. Silverhawk Utilities have been the sole provider for sewage disposal since.

There is a long history of dissatisfaction from the Silver Star community relating to costs and how this translates into individual property billing. Silverhawk has proven difficult to communicate with to resolve the issues.

The issue is not new, nor is it unique to Silver Star. The Union of BC Municipalities (the "UBCM") publicly called on the provincial government to regulate private sewer utilities in 2005 and again in 2007. The first resolution was submitted with regards to two local privately-owned sewage companies in the Vernon area, Silver Star and Canadian Lakeview Estates (located at the north end of Okanagan Lake). The issue for both of these utilities was the excessive rates being charged. The 2007 resolution originated from the Cowichan Valley Regional District because of

inadequate or aging private sewage facilities being left as empty shell companies with no replacement reserve funds for the regional district to assume.

The Government response to the 2005 UBCM resolution was:

*“The Province will investigate this issue further in the next year, particularly in regard to the prevalence of the problem. The Ministry of Environment will consult with Ministry of Health while conducting this research. The Province will revisit the issue if research findings indicate a need for regulation.”*

The Government response to the 2007 UBCM resolution was:

*“The Ministry of Environment will consult with both the Ministry of Health and local governments while conducting this research. The Province may revisit the issue if research indicates a need for regulation. The MSR is currently under review, and the issues of the transparency and accountability of private sewage systems has been identified for consideration – this is the likely venue for addressing these issues.”*

The SSPOA is unsure if any study of the issue was ever completed. It is believed, there was no political will to address the issue

Customers of other private sewer utilities in BC might be in the same position as Silver Star.

Our attempts to locate other examples have been futile as the Ministry of Environment has no way to differentiate Private (fee for service) from other permit holders.

## Current Position at Silver Star Mountain Resort

- **Excessive Billing Practices**

The, following table compares municipal and private providers. The table reflects a typical water usage of 100 cubic meters at Silver Star, which is low by municipal standards due to the seasonal nature of the resort.

### Comparison of Sewer Rates (RESIDENCE @ 100 m3 / year)

	SILVERSTAR	SUN PEAKS	VERNON	COLDSTREAM	CANADIAN LAKEVIEW	BIG WHITE
BASIC CHARGE	\$796.01 (\$676.61*)	\$225.48	\$200.80	\$225.80	\$1550.00	\$390.00
Metered Usage	\$7.42/CM (\$6.31/CM*)	\$3.10/CM	\$2.45/CM	\$2.51/CM	\$NIL	\$2.00/CM
Annual Cost (100 m3)	\$1538.01 (\$1307.61*)	\$545.48	\$445.80	\$476.80	\$1550.00	\$590.00

\* Denotes 15 % discount if paid on time

Silver Star and Canadian Lakeview are **triple the cost** of both private facilities (Sun Peaks and Big White) and the municipalities of Vernon and Coldstream. A search of various municipal rate schedules indicates the average is in the \$400 to \$500 range.

Sun Peaks and Big White utilities offer other utilities such as water, propane and natural gas which are regulated through the BC Utilities Commission or the Water Comptroller. Perhaps the review process for parts of their business influences management to use the same practices in determining the sewer rates.

- **Inconsistent Tariff Amongst Ratepayers**

Silverhawk charges the same annual fixed fee for residential dwellings and secondary units. Its rationale is that the relevant regional district bylaw requires that each dwelling, including secondary units, must have a water meter installed. In the context of water provision, this allows the water utility to charge on a metered basis. There is no requirement that secondary units within a larger dwelling to require a separate connection to the sewer system and yet the ratepayers are charged for a connection that is not necessary and likely does not exist.

The SSPOA has undertaken an inventory of all Fixed Fee charges in the resort from 2016 invoice year. The results show an inconsistent rate structure amongst Commercial Customers but more importantly that the Residential Ratepayer is disproportionately paying more fees. The SSPOA believes it has comprehensive data at hand to substantiate these assertions.

The result shows that in 2016 the residential ratepayer is paying 57 % of the Fixed Fee and the Commercial ratepayer, produces 63% to 70% of the effluent pays only 43% of the total Fixed Fee. Additionally, the Fixed Fee cost assigned a residential secondary suite at \$796.01 (irrespective of the size) is high when compared to what appears to be the estimated commercial rate for a 2 Bedroom Condo at \$480.00 or a 1 Bedroom Condo at \$360.00.

The SSPOA estimates that the revenues that Silverhawk collected in 2016 are

Residential Fixed Fee (508 units)	\$404,372
Commercial Fixed Fee (condo/ hotel) (562 units)	\$252,524
Commercial (operator & retail)	\$51,937
Total Consumption Fees 90,112 m3 x \$7.42	<u>\$668,631</u>
TOTAL	\$1,377,464
Silverhawk offers a 15% discount for on time payments	
Total after discount	<b>\$1,170,862</b>

Silverhawk processed 122,485 m3 of effluent in 2016. The SSPOA finds it difficult to see an operating budget along with a modest profit reaching in the order of **\$1.2 million dollars per year as illustrated above.**

- **“Capital Upgrade Reimbursement Fund” Funded by Ratepayers**

In 2012 Silverhawk was required by the Ministry of Environment to add a “nutrient removal process”. Funding fell to the ratepayer at Silverhawk’s insistence via a contribution into a

Capital Upgrade Reimbursement Fund (CURF) over three years starting in 2013. The only reference to the budget for this capital improvement is in the 2012 newsletter where it states *“Silverhawk has budgeted in excess of \$800,000 for this latest treatment plant upgrading”*.

Accountability and transparency is non-existent. The SSPOA has requested how these funds, and the resulting expenditures, had been deployed. The SSPOA has received a terse response to its legitimate questions from Silverhawk, providing none of the information originally sought. It was also indicated that the only outcome from asking such questions would be the imposition of fees to cover their costs of such correspondence. From the Silverhawk letter of February 20, 2018:

*“The other point to consider is all the time we spend answering your inquiries and other inquiries is time charged to Silverhawk which then goes into the rates.”*

Silverhawk contracted Waterworks Technologies to undertake the plant upgrade. It is believed that Silverhawk Utilities Inc. is owned, directly or indirectly by Waterworks Technologies. The non-arm's length transaction with no accounting to the ratepayers is of concern.

The SSPOA has undertaken a survey of CURF fees paid by the ratepayers and believe the CURF fee collected over 3 years was between \$1,176,700 and \$1,384,400 depending on how many ratepayers took the 15% discount for prompt payment.

The ratepayer funded an \$1.2 million-dollar capital improvement for the Silverhawk balance sheet with absolutely no transparency or accountability, particularly concerning given the \$800,000 budget for this project.

- **Pillow Count and Connection (and Disconnection) Fees**

Pillow count (or beds) is a common term used in ski resort development. Silverhawk has used this model to determine capacity, and it is believed, to determine commercial fixed rates. This model was unilaterally amended by Silverhawk in 2009. The revised pillow count was, according to Silverhawk, *“developed directly from the average pillows counted per bedroom at a selection of residences and rental properties”*

The SSPOA suggests the pillow count is unrealistic, resulting in a studio suite going from 2 to 4 pillows and a 4-bedroom house going from 9.5 pillows to 14 pillows. Silverhawk has not produced the “study” that supported the change.

The outcome is that subdivisions that had been built (and had the sewer capacity paid for and approved by government in the subdivision approval process) are now being required to pay a surcharge to Silverhawk. Silverhawk was the single arbiter of the assessment, which leads to inconsistent and subjective outcomes.

For new property hook up costs, Silverhawk has established a pillow rate at \$2395.00 per pillow which often results in an assessment of \$20,000 or more. Without this being paid, Regional District of North Okanagan (RDNO) is prohibited from issuing a building permit. This has led to confrontations between owners and Silverhawk, up to and including the sewer connection being dug up.

Silverhawk also uses the threat of disconnection to “encourage” payment of annual assessments, indicating you will “lose capacity” and will have to “repurchase” capacity per the following schedule:

Studio or Suite	4 pillows	\$9,583	
1 Bedroom or Suite	6 pillows	\$14,375	
2 Bedroom or Suite	8 pillows	\$19,167	
3 Bedroom or Suite	10 pillows	\$23,959	
4 Bedroom or suite	14 pillows	\$33,542	
5 bedroom or Suite	16 pillows	\$38,334	plus GST

- **Silverhawk Influence on the Building Permit Process**

RDNO enforces the Silverhawk pillow count regime by withholding building permits until Silverhawk is satisfied. The SSPOA has an example where the occupancy permit was withheld at the direction of Silverhawk. The RDNO does not arbitrate any disputes with Silverhawk.

## Options for an Alternate Approach

The SSPOA has retained Council to consider alternative approaches to addressing the challenges of the Silver Star community. Having reviewed legal and legislative options, the SSPOA has concluded that legislative change is the preferred option. This is because it is a Province wide issue, and formal regulation would address the monopolistic nature of the current business model. Legal options have also been considered.

The following litigation option has been considered:

### **Breach of Common Law Duties Owed by a Public Utility.**

There is precedence in the BC Supreme Court (*Perimeter Transportation Ltd. v. Vancouver International Airport Authority*) that a privately owned monopolistic utility has a duty to ensure that they are not exploiting their monopoly, typically, with regard to equity in pricing models and delivering the same service across its customer base.

It is believed that Silverhawk Utilities Inc. fulfils the characteristics of a public utility as defined in the above case.

Such an action could be filed in BC Provincial Court, BC Supreme Court or to attempt to have it certified as a Class Action. All three of these options come with varying degrees of complexity and cost. Even filing at Provincial Court, which would provide the lowest entry barriers, would prove to be expensive and beyond the reach of a not for profit Owners Association. It is believed that filing at Supreme Court or a Class Action would be completely cost prohibitive.

It should also be remembered that while helpful precedence may be established during litigation, the outcome (if successful) would only benefit the customers of Silverhawk and not address what is believed to be a Province wide issue.

The following Regulatory approaches have also been considered:

### **Regulation under the Utilities Commission Act**

The BCUC currently regulates pricing and business practice for other utilities in the Province. This is a well-established body with appropriate resources, process, policy and experience to regulate the sewage industry. The incremental cost of including another utility under the BCUC would likely be less than establishing a new regulatory body. However, it is recognized that it would take time for BCUC to acquire the appropriate level of industry expertise to effectively regulate.

### **Regulation under the Water Utility Act**

The existing Water Utility Act, via the Utilities Commission Act, establishes the Water Comptroller as the regulator for the provision of fresh water. By amending the definition of a “water utility” in the act to include private sewage processing, the Comptroller would be able to exercise the same tariff and business practice regulation over sewage as is currently overseen for water provision. It is believed that the industry learning curve for the Office of the Comptroller of Water would be less steep than if oversight was provided through BCUC. This also avoids the costs of setting up a new regulatory regime, just for sewage.

A report published in 2014 by a Provincial Government Task Force entitled “Independent Review of British Columbia Utilities Commission” considered whether to move water utility regulation away from the Water Comptroller to the Utilities Commission. This report concluded that, in their view, the existing regime functions adequately and that there is no reason to change it. In that report it is noted that:

*“CEC (Commercial Energy Consumers Association of BC) submits that **both private sector water and sewer utilities** be brought under the auspices of the BCUC to enable quasi-judicial resolution of complaints.”<sup>1</sup>*

(Emphasis added)

**The Water Comptroller providing oversight is the option that the SSPOA would like to explore further with Minister Donaldson due to the simplicity of the legislative change.**

### **What we are asking of you.**

This position paper has been kept deliberately succinct. The SSPOA has extensive data, analysis and first-hand testimony from Silverhawk customers which has led the SSPOA to the above conclusions. This background information can be made available to the Provincial Government.

Representatives of the SSPOA request a meeting with the Honourable Minister Doug Donaldson to discuss the way forward. Further data and analysis can be provided in advance of the meeting. A meeting would provide the context that would give an understanding of the need for action. An initial exploratory meeting would allow the more detailed information to be viewed relative to the overarching need for change. We are willing to do both.

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<sup>1</sup> Page 41 [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/electricity-alternative-energy/electricity/bcuc\\_review\\_final\\_report\\_nov\\_14\\_final.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/electricity-alternative-energy/electricity/bcuc_review_final_report_nov_14_final.pdf)