Chapter Seven: The Summer of '07

The regional district makes headlines and history by acting as a local board of health, but BC's Supreme Court overturns many of its orders

Sunshine Coasters were shocked on the morning of April 11, 2007, to read on the front page of the *Vancouver Sun* that a development company wanted to build an "instant resort municipality" on private lands within their drinking watersheds. Columbia National Investments Ltd was proposing "affordable housing" in the Chapman Creek watershed and a 36-hole golf course at Dakota Ridge in the Wilson Creek watershed. CNI officials claimed that the Sunshine Coast Regional District's backcountry ski trails at Dakota Ridge qualified the area for instant municipality status under the newly amended *Mountain Resort Municipalities Act*. They also claimed that it didn't matter if the SCRD went along with them or not, because negotiations with the province were progressing rapidly and the regional district could easily be bypassed. A joint venture to build a new highway to Port Mellon and Squamish was also under provincial consideration, they claimed. In short, all the earmarks of another "done deal" were in place, or so company representatives would have had people believe.

In reality, the province had given no assurances whatsoever to CNI. The land in question was "private managed forest land," a tax status that cannot be used for non forestry-related purposes. If CNI were to give up its forest land status, the SCRD would have the right to control land use and CNI would have to comply with regional bylaws. The reality of the situation was that CNI was creating a 200-

hectare continuous clearcut almost entirely in the Wilson Creek watershed and shipping 50-year-old trees to the nearest pulp mill. Local skiers and hikers began flooding into the Dakota Ridge area to see what all the fuss was about. In June one small group of residents, who would later become known locally as the Concerned Citizens, noticed that a new logging road was being built from the Wilson Forest Service Road into the upper flanks of the Chapman Creek watershed. This road had nothing to do with CNI's activities. An alarm was spread through email lists, and on June 11 the Concerned Citizens erected a barricade and began turning back forestry crews and machinery. The fuse was now lit: a cascade of events would find its way into the media, the legislature and the courts, spreading around BC to rattle logging companies, public health officials and ministries. As with most major controversies, this one has deep historical roots.

The New Deregulated Forestry Regime

CNI was just one of several companies with logging rights in the watersheds. The Sechelt Community Forest had committed to not logging there during its five-year probationary period. The stands belonging to BC Timber Sales were far too young to log. That left Western Forest Products Inc as the builder of the new logging road. WFP held an antique form of tenure known as a "timber licence" that had originally belonged to logging giant MacMillan Bloedel. The licence, mostly logged out by 1970, covered that part of the Chapman Creek watershed where some of the largest and most problematic landslides had occurred. About 150 hectares of mostly marginal timber remained in this holding, and the ministry of forests wanted the licence wrapped up. So it set an important deadline—April 2008—after which WFP would be required to pay stumpage on any timber left standing.

Over the years, the SCRD and various citizens' groups had kept up a correspondence with the various owners of this parcel of land—usually in the form of responses to proposed forest development plans
—objecting to any further logging in this part of the watershed. The proposed development plans allowed the SCRD and the public to see where logging was being considered. Unfortunately, after the BC government thoroughly deregulated the forest industry in 2003 with its new *Forest and Range Practices Act,* all the prescriptive regulations of the Forest Practices Code were replaced by a "results-based code." Logging companies today only need to show how they intend to achieve the "goals and objectives of the province," after which they are essentially allowed to operate freely. BC's current "goal and objective" for managing community drinking watersheds is "to not impact water coming from a water treatment plant, unless this unduly restricts the flow of timber from Crown lands." In the summer of 2007 the SCRD and the public had no legal means to hold a logging company accountable for damaging a drinking watershed. They had no right to be informed about logging plans, no right to consultation and no right to be compensated if damage should occur. This was not a situation, it turned out, that the public felt it could willingly tolerate.

Discussions, Negotiations and Studies

The Concerned Citizens' blockade gathered strength throughout June. Many people showed up to offer support and to view the threatened forests. A jam-packed public information meeting was held at Roberts Creek Hall on June 20. Sechelt First Nation members chose the National Day of Action for Aboriginal Peoples (June 29) to hang a

banner in the watershed stating that they are the rightful owners of Chapman Creek and are opposed to watershed logging.

Residents of all ages and from all walks of life were increasingly demanding action from the SCRD. In a move that was seen by some as sabre-rattling, the regional district passed a motion to investigate the establishment of a $1-million litigation fund. Director Barry Janyk said that the fund's purpose was to ensure "that the [watershed] battle is fought fairly." The SCRD engaged in talks with the ministry of forests, WFP and the local medical health and drinking water protection officers. It soon became apparent that the drinking water protection officer had no authority to act under the circumstances. Paul Martiquet, the medical health officer, insisted that there be an independent evaluation of any immediate threats to the drinking water supply, and WFP and the SCRD decided to bring Triton Environmental Consultants in on very short notice to conduct a study. WFP agreed to postpone logging until the study's results were in.

The Triton report was presented to the SCRD by Dr Tom Watson on June 28. "The proposed harvesting," he reported, "is not considered an imminent threat to drinking water quality, and cumulative effects are considered to be negligible." Watson explained that he had flown over the proposed blocks in a helicopter with WFP staff, found the cutblocks to be relatively flat (slopes of only 4.5 to 11 degrees), with no year-round streams or landslide potential. He had checked ministry of forests compliance and enforcement records and private certification audits and found no violations. He concluded, therefore, that competent professionals were in charge and that there were no grounds for alarm.

As it turned out, Hans Penner of the Concerned Citizens had a much better grasp of ground conditions in the cutblocks than Watson

did. Penner actually went to the cutblocks, measured slopes and inspected road construction. He found missing and crushed culverts, documented two flat blocks that were criss-crossed with streams carrying fresh meltwater to the Chapman main stem and noted that one cutblock had very steep slopes of up to 59 degrees! WFP's own engineering department eventually confirmed that Penner's figures were correct. After Triton's presentation, a feeling began to spread throughout the community that its water concerns were being green-washed by industry-sympathetic professionals. The Concerned Citizens refused to take their blockade down.

Complaint to the Local Board of Health

The regional district and the Concerned Citizens weren't the only parties casting about for solutions; the Sunshine Coast Conservation Association was also experiencing an intense demand for action from its members and from the public. The SCCA began looking for legal advice; Andrew Gage at West Coast Environmental Law responded. He believed that regional districts, acting as local boards of health, had authority under the *Health Act* to respond to potential health hazards. On June 22 a complaint from 12 individuals—including Concerned Citizens and SCCA members—alleging that WFP's logging activities were a health hazard, was sent to the SCRD. Three days later a report was also delivered emphasizing the district's legal obligations and the scope of the alleged hazard. Section 58 of the *Health Act* requires a local board of health to undertake an investigation of the causes of any complaint made under Section 57 of the act.

The SCRD convened as a local board of health on July 12, 2007. Directors considered advice from legal staff, who agreed with the SCCA that an investigation was mandatory. Although the district could

easily have undertaken a superficial in-house investigation and dismissed the complaint, it wisely decided to hold an open public hearing. All parties deeming their interests to be affected would be allowed to speak. July 23 was set as the first day of the hearing.

WFP felt that its right to log was entirely vindicated by the Triton report and demanded that protestors dismantle their blockade. The Concerned Citizens weren't budging so WFP started collecting names and pictures of individuals at the blockade and threatening to sue them. In the first week of July a chill ran through the community as WFP served blockaders with notice that lawsuits and a motion seeking an injunction against the blockade were pending. A watershed defence fund, initiated on July 14, raised $35,000 in less than a month.

The case came up in the Supreme Court of BC on July 9. Justice Stephen Kelleher presided. Five individuals—soon to be known as the "Watershed Five"—were named in the injunction application, and "persons unknown" were also cited. The case, held over to allow time to organize a defence, was heard on July 16 and 17. WFP argued exhaustively that they had a legal right to log: they had practised due diligence and the Triton report exonerated their efforts. The defense attacked the report, arguing that the lands in question were protected as a watershed reserve under Section 12 of the *Land Act* and that any logging approvals were invalid. Such an argument, WFP countered, could only be addressed in a judicial review. The SCRD's counsel did not take a position for or against the injunction application but asked the court not to give an order that would interfere with the district's powers under the *Health Act*. The decision came down on July 19; an injunction was granted without prejudice to the SCRD's *Health Act* obligations. The concerned citizens took down their blockade, but things didn't settle down at all.

The Local Board of Health Convenes

The SCCA had two priorities for the upcoming public hearing. The first was to ensure that the board of health had a clear understanding of the watershed's history and functions, and of how the proposed logging would generate a health hazard. The second priority was to develop a deep understanding of the board's powers, obligations and liabilities under the *Health Act*. With the financial assistance of West Coast Environmental Law, the SCCA was able to retain Victoria lawyer Robin Gage, an experienced legal researcher and litigator who had previously lead the SCCA through two successful Supreme Court cases. Gage's research showed that a local board of health had a right to issue a stop-work order if it "had reason to believe that a health hazard exists." Her research also clearly showed that a local board of health could not be sued for doing its job as a quasi-judicial body. Gage's paper was circulated to SCRD directors and to the public in the week prior to the public hearing.

Monday, July 23, was a momentous day: WFP resumed logging and the local board of health hearings opened at the SCRD offices in Wilson Creek. The SCCA, up first, presented a visual description of the watershed from top to bottom: old growth forests, vast tracks of cut-over land, collapsing roads and still active landslides. The work of expert hydrologists who had evaluated the watershed for the 1990s IWMP process was highlighted, as was the scientific fact that forests filter and regulate water flows, and are the first and most important barrier to contamination. The special role of upper elevation forests, which intercept snow and moderate the rate of melting, was discussed. It was pointed out that WFP cutblocks were located precisely in areas subject all winter to intermittent rain and snow events. The SCCA

explained how WFP was removing forest cover right to the banks of small year-round creeks and could, if it wished, fell trees into those creeks and yard logs through them. The presentation concluded that harvesting constituted a hazard to public health because watershed functions would be damaged and deleterious substances likely be delivered into Chapman Creek. It recommended that the SCRD eliminate this health hazard by imposing a stop-work order.

Dr Tom Watson then gave a presentation reiterating the positions stated in his Triton report to the SCRD. Hans Penner followed and focused on Watson's use of incorrect information about slope and land stability. Penner also related how Watson's opinions had affected the injunction application at the Supreme Court and had shown up in correspondence with the province's chief medical health officer. The hearing was adjourned until August 8.

Meanwhile, events in the watershed were beginning to spiral out of control. "Persons unknown" began to confront fallers directly—an incredibly dangerous thing to do. On July 31 three people were arrested on the logging road near the cutblocks. None, as it turned out, were actually violating the injunction. Unfortunately, videographer "Digital" Debbi Lucyk was one of the arrestees. Her YouTube internet postings were bringing the Chapman conflict to a very broad audience. Lucyk continued documenting the conflict throughout the summer but had to stay out of the watershed.

Protestors at the SCRD offices were demanding a stop-work order. People were entering the watershed after working hours to collect images of muddy road construction and debris-choked streams. Something had to give—and before someone got hurt. On August 3, the SCRD met for an emergency in-camera meeting. Talks were initiated with WFP, and by the end of the day the logging company had

agreed to cease operations until the hearings were completed. Next day a massive, joyous demonstration erupted at the Chapman Creek bridge on Highway 101. More than 500 protestors lined both sides of the highway waving signs, chanting and snarling traffic in both directions. From here on in, regional and, often, national media would pay careful attention to Chapman watershed events.

The Dispute Goes Back to the Supreme Court

On August 8 the public hearing reconvened. The record of all the presentations, both opposed to and in favor of logging, would grow to more than 700 pages. The local board of health had one key question to answer. Did it "have reason to believe" that a health hazard existed in the Chapman watershed as a result of WFP's activities? The evidence before the board showed that past logging had massively degraded the watershed and that the proposed logging would also have a degrading influence. Images were presented showing riparian buffer zones being eliminated, creeks loading up with slash, and sediments pouring off newly constructed logging roads into Chapman tributaries. On August 11, the board issued an order restricting WFP's road-building activities, and prohibiting logging on slopes steeper than 22.5 degrees and within 30 metres of a watercourse.

WFP moved quickly to appeal the order in the Supreme Court of BC. The company also applied to stay the health board's order pending the hearing of a full appeal. The application to stay the order came up in court on August 20 and 21. The original signers of the complaint were there as "individual respondents," represented by Robin Gage and John Conroy (who had defended the Watershed Five during the injunction application). Complex arguments were heard about the role of the board of health, the meanings of sections of the *Health Act* and

the standards of review that should apply. WFP argued that the SCRD was biased, citing statements by SCRD directors that they wanted to protect the watershed as proof. When director Janyk's comment about trying to ensure fairness by establishing a litigation fund was read out as an example of bias, everyone—even Justice Butler—laughed.

The law seemed to favour the board of health on jurisdictional issues. It soon became apparent, however, that the wording of the board's order had been flawed. It had stated that no health hazards were identified in the flat blocks, then gone on to prohibit logging next to watercourses. The word "watercourse" was not defined. WFP argued that the right to regulate was only valid when a health hazard had been identified; therefore, in the case of the flat blocks, the board had no authority to issue an order. WFP also argued that there were so many watercourses in the flat blocks that the requirement for a 30-metre buffer zone effectively ruled out any logging at all. The court's decision came down two days later; the prohibitions against road building and logging adjacent to watercourses were overturned but the ban on steep slope logging was maintained. It was a draw. Digital Debbi caught the action outside the courthouse, where BC's major media were all in attendance. The following week WFP operations went into overdrive, and the trees were soon coming down.

The full appeal hearing took place between September 10 and 14. Robin Gage argued for the individual respondents; Chris Murdy and James Yardley were there for the SCRD. Again, the fundamentals of law were debated, as well as every imaginable esoteric legal issue. The decision came relatively quickly, on October 9. Justice Bruce Butler completely overturned the local board of health's order. The only positive note was Butler's comment that something was amiss when the regional district, as the purveyor of water, did not have authority

over land uses in its drinking watershed. Justice Butler also turfed WFP's argument about bias.

The respondents were shocked when they read Butler's reasons for judgment. He found that the board, in decided whether or not it had "reason to believe that a health hazard exists," should not have accepted data from IWMP hydrologists about watershed conditions, logging-related damages and locations of unstable land, as this information was "the product of a negotiation." He cited the Triton report as proof that there was no health hazard and said that the board was unreasonable in discarding Triton's work and ignoring the opinion of "independent geo-scientist" Brian Carson. He went on to quote Carson saying that only 10 percent of the watershed had been logged (Carson never said this; about 75 percent of the watershed outside Tetrahedron Provincial Park has been logged). As for the many images of slash-filled creeks, it was unreasonable, said Butler, for the board of health to accept this as evidence because the people who made these images lacked technical credentials in the practice of forestry. Justice Butler's reasons for judgment never defined the role of the local board of health, yet cited the refusal of the drinking water protection and medical health officers to issue an order as a sufficient reason for the local board of health to have also refused. More significantly, many in the legal community felt that the definition of a "health hazard" in the *Health Act* had been misinterpreted in the decision. So what now?

A Magnificent Failure to Achieve the Impossible

The public was certainly curious about how the legal process could have reached conclusions it did. Some facts, however, were readily apparent at the end of the summer of '07. A community had stood its

ground in the face overwhelmingly dominant private interests. People had empowered themselves. The SCRD had taken a principled stand on behalf of the public and defended its actions in every way it could. Some trees are still standing today on steep slopes in WFP's cutblock. While WFP succeeded in completing most of its logging, it also spent about three dollars on legal costs for every dollar it made from the sale of logs—a not-so-subtle reality that may give pause to other industrial efforts. The province got a black eye and less than $100,000 in stumpage. Water purveyors and citizens all over the province started thinking that they needed to gain control over their watersheds, as well. Were watershed advocates disheartened and ready to throw in the towel? Not likely. On October 29, 2007, the individual respondents gave notice that they would appeal the court's decision.