Understanding Judge Butler's decision in the case of Western Forest Products versus Sunshine Coast Regional District (SCRD) and the Individual Respondents (October 9, 2007).

Recap

Last June, citizens filed a complaint to the SCRD in its capacity as a local board of health. This complaint alleged that WFP's logging activities in the Chapman Watershed posed health hazards related to the public's drinking water supply. The SCRD initiated an investigation and convened a public hearing. At the end of this process, the SCRD issued an order that curtailed logging on steep slopes and within areas adjacent to streams. Subsequently WFP challenged this order in the BC Supreme Court. Justice Bruce Butler handed down his "Reasons for Judgment" on October 9, 2007. The decision completely quashed the SCRD's local board of health order. The SCCA, on behalf of the individual respondents, has received sufficient funds from the Environmental Dispute Resolution Fund to undertake an appeal of Justice Butler's decision. Notice of Appeal has been given and arguments are now being prepared. A late spring or summer hearing in the BC Court of Appeal is anticipated.

How Could This Have Happened?

Many people were shocked to read Justice Butler's decision and find the order of our local board of health entirely quashed. How could this have happened given the millions of dollars worth of damages caused by previous logging and the wealth of evidence and graphic images of current damages? To understand Justice Butler's decision it is necessary to look at some basic legal concepts. Please bear in mind that our treatment of Justice Butler's decision is oversimplified and not the work of legal scholars. It is intended to help readers more fully appreciate the issues at stake in this case.

The Expertise of the Court

The expertise of any court lies primarily in the area of interpretation of law. The statutes that relate to the SCRD's action and Western's challenge are the *Health Act* and to a lesser extent the *Drinking Water Protection Act* and several forestry statutes, including the *Forest Act* and the *Forest and Range Practices Act*. The BC Supreme Court is required under the *Health Act* to hear appeals of decisions made by local boards of health. In this case the SCRD, acting as a local board of health, found that a health hazard existed and issued an order restricting activities of Western Forest Products to eliminate this heath hazard.

> *"…A health hazard means a condition or thing that does or is likely to endanger the public health, or prevent or hinder the suppression of disease…"*
>
> *-Health Act*

Western exercised their right of appeal and is the "appellant." The SCRD responded and are the "respondents." Individuals, supported by the Sunshine Coast Conservation

Association (and other groups), also responded. Court documents refer to us as the "individual respondents." In this case, it is the actions of the local board of health (the SCRD) that are under review by the court.

One of the basic tasks of the court in this case was to interpret the *Health Act* with regard to the roles and powers of the local board of health, as well as to interpret some key definitions of the *Act*, such as "health hazard." It was also important in this case to shed some light on the roles of other statutory decision makers with similar powers, such as the Medical Health Officer and the Drinking Water Protection Officer. Before we can look at how Justice Butler resolved these issues of law, we need to understand how the court dealt with the problem of not having specialized expertise of its own in the relevant fields of public health, forestry and hydrology.

Deference and Standards of Review

Generally courts defer to credentialed expertise, especially the expertise of an official or decision-making body. The degree of deference offered by the court is reflected in the choice of a "standard of review." Let's look at the issue of deference with regard to three common standards of review. Bear in mind that it is the SCRD's local board of health order that is coming under review by Justice Butler, and that he must determine how much deference is appropriate.

Correctness. If an official or quasi-judicial body has very little expertise, the court may show the minimum level of deference by establishing a standard of review of "simple correctness." This means that if a challenger can prove that a decision was not correct, the court would be justified in overturning that decision. In this situation the court considers that it has as much expertise as the decision maker and does not owe any special deference. This is a low standard of review.

Reasonableness. On the other hand, if the court is of the opinion that a body does have specialized expertise and experience (more than that of the court) it may establish a more deferential standard of review such as "reasonableness." Under this standard a challenger must prove that the official or body was unreasonable—ie, did not have a reasonable explanation for its decision—in which case the court would be justified in overturning that decision. Courts commonly use this standard in reviewing the decisions of quasi-judicial bodies that have some expertise and are set up to deal with areas of specialized regulation.

> *"… a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling."*
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> —citation, paragraph 47, "Reasons for Judgment"

Patently Unreasonable. A third common standard of review is "patently unreasonable." In this standard of review, the court shows a high degree of deference to an official or body that has extensive professional expertise and experience. Under this standard, the

challenger must prove that the decision cannot rationally be supported by the relevant legislation or that the evidence is incapable of supporting the tribunal's findings. This is a very high standard of review usually reserved for situations where an official or tribunal is required by law to make professional decisions of a highly complex nature.

Courts usually determine the standard of review after hearing arguments on the question from the parties involved in the dispute. In this case all three parties and Justice Butler agreed that a standard of review of "correctness" for the questions of statutory interpretation, and "reasonableness" for the ultimate question of whether a health hazard exists were the appropriate standards in this case ("Reasons for Judgment," page 9).

Expertise of the Sunshine Coast Regional District

An important factor in this case relates to the nature of the SCRD's expertise. The directors are responsible for operating a water treatment plan and a water distribution system, and they bear responsibility for a host of legally entrenched obligations that relate to public health. They have a staff of professional people to help and guide them. They are also required by the *Health Act* to be members of the local board of health and investigate complaints from the public. The directors themselves are elected people, not public health professionals. The institution of the regional district is nearly 50 years old and has a long history of managing the water system, investing in infrastructure and coping with water supply and safety issues to standards set by other levels of government. As local elected people they have a level of accountability that is fundamentally different than that of any professional person or vested interest. These are critically important facts in considering how much deference the court owes to the SCRD. The SCRD clearly has far more expertise and accountability for water and public health than the court has. This is why the standard of review of "simple reasonableness" is appropriate. It should also be noted that the obligations of the regional district are far more important than those of any private party.

Another important fact about how regional governments approach water management issues relates to guidance provided by government agencies. In this case, the ideas about source area protection and the importance of a multi-barrier approach to safe drinking water were developed by various government agencies and are established in federal and provincial policy. In acting to protect water courses and riparian (streamside) buffers, the SCRD was attempting to do what the best currently available scientific information (as described in various government publications) clearly outlines as necessary.

The Role of the Local Board of Health

One of the key issues in this case relates to the role of the local board of health, especially with regard to the roles of other statutory decision-makers such as the Drinking Water Protection Officer and the Medical Health Officer. Justice Butler promised to clarify the role of the local board of health but this is not accomplished in the "Reasons for Judgment" (in this writer's lay opinion).

A curious event related to this issue occurred when the office of the Attorney General (AG) gave notice that it intended to participate in the case as an intervener. On September 7, 2007, the AG's office circulated its draft submission to the parties. In this submission

the AG's office clearly outlined its view on the role of the local board of health. Then, on the morning of September 10, the AG's counsel announced that he would not be making a submission to the court. Here is an excerpt from the AG's submission about this issue:

1. *The empowerment of local boards under section 59 of the Health Act is clearly intended to bestow a limited intervention power on officials who, while they may have no particular expertise in health matters, nevertheless have the advantage of close connection to the community and an awareness of local issues and events.*
2. *Such boards may, under the statute, act in a precautionary fashion upon forming a bona fide belief in a serious possibility that a health hazard exists, based on credible evidence.*

Because the AG's counsel declined to make a submission, this opinion did not come before the court as that of an authoritative friend of the court. However, this is basically the position taken by the respondents. The significance of the issue is that a "local" board of health has a history and a connection to the community, and therefore might be in the best possible position to know what is really happening. For example, it might know considerably more about the conflicts of interest and the reliability of local presenters at a public hearing than could a judge who has no connection to the community. The AG's outline of the role of the local board of health is a powerful argument in favour of deference to the experience of locally elected officials.

The Roles of the Medical Health Officer and the Drinking Water Protection Officer

The Medical Health Officer has authority under the *Health Act* to make an order terminating a health hazard. Curiously, he also has the authority to direct or just ask the local board of health to terminate a health hazard. The Drinking Water Protection Officer has the same powers but derives them from a different act—the *Drinking Water Protection Act*. Both officers are trained public health professionals. Views differ widely as to the circumstances under which these authorities can use their powers. In this case, the medical health officer was of the view that he could only issue an order if the public health threat was immediate. He has also expressed the opinion that he lacks expertise to evaluate dangers to public health from logging. The drinking water protection officer also considers himself to be limited to immediate threats. His opinion appears to be that, in the case of a potential future threat, his obligation is to ask the Minister of Health to initiate a drinking water protection plan process. How do the roles of these officers relate to the role of the local board of health?

The Key Questions

The most significant legal question before the court in this case was: did the local board of health have reason to believe that a condition or thing existed that did or was likely to endanger public health? We can restate this question for the situation in the drinking watershed: was it reasonable for the board of health to believe that a condition, caused by logging, existed or could develop that would pose a threat to public health? Considering that the standard of review is "simple reasonableness," the question for Justice Butler to determine was: did the local board of health have a reasonable explanation for its decision that Western's current logging on steep slopes and in riparian areas posed an actual or potential danger to public health?

A major issue on appeal of Justice Butler's decision is this question: did Justice Butler appropriately apply the "simple reasonableness" standard of review? Here is a brief description of how several key areas of evidence and submission were considered in the "Reasons for Judgment."

1. *The approval process*. Justice Butler accepted Western's argument that an extensive approval process took place and that it did consider watershed impacts (page 23). There is no commentary on the fact that the *Forest and Ranges Practices Act* allows all trees along small streams to be cut over and that these trees may be felled into and yarded over these small streams. It is noteworthy that Western argued that a 30-metre-wide ban on streamside logging would completely eliminate the opportunity to log in two cutblocks. The problem for the local board of health was that an important barrier to contamination, one that also functioned to regulate flows, was being removed. Could the members of the board have reasonably ignored this fact?
2. *The testimony of the water treatment employees*. Justice Butler concluded that there was no evidence from the plant employees or records of any water quality problems that could not be addressed by the treatment plant. There is no response to the local board of health's position that intact forest stands and water treatment plants are both important barriers in a multi-barrier system of water protection. The local board of health members were of the opinion that treatment plants are fallible; there had been, in fact, a compelling example of a recent human-error-induced plant failure. Was it unreasonable for the board members to consider this recent failure of the water treatment plant?
3. *Expert methodology*. The local board of health order took the position that the level of field work carried out by various professionals was not sufficient to support the conclusion that logging would not impact watershed function. Justice Butler concluded that the local board of health was unreasonable in questioning the methods of professionals. This is a particularly problematic finding. To cite one example of many: could the local board of health have reasonably ignored the fact that Triton Environmental Consultants Ltd had not conducted any on-the-ground assessments and had grossly failed to determine correct slope steepness?
4. *Hydrologists and the IWMP*. Justice Butler characterized the IWMP as a negotiation process of no relevance to the current situation and found that the local board of health was unreasonable to rely on it, particularly in regard to areas that were identified as unstable in the IWMP final draft. The complainants at the public hearing drew attention to data from the work of three hydrologists that identified and described over 300 landslides caused by logging activity. Areas that had been identified by the IWMP hydrologists as unstable were also submitted in map form. This information was already in the possession of the SCRD, as the SCRD had been a participant in the IWMP process. It appears that Justice Butler did not appreciate that it was raw data that was discussed by the complainants, not draft negotiated outcomes.

5. *History of the watershed*. This dismissal of IWMP data is problematic for members of the local board of health. They had relied on its technically authoritative description of the watershed (created by hydrologists) and on their own experience in financing and building facilities required to deal with the impacts of previous logging-related damages. As this decision currently stands, members of a local board of health have no history and must defer to "experts" even if these experts are known to be wrong. Is it unreasonable for a local board of health to rely on its own data, history and experience while evaluating "expert" submission? There is another aspect to the issue here; experts can advise, but elected people, serving as a local board of health (and in many other forums), must make decisions and be accountable to the electorate for those decisions. Certainly they must consider the opinions of professionals but they can not surrender their decision-making responsibilities to unelected "experts."
6. *Visual evidence*. A major body of evidence before the local board of health involved images of historical damage, as well as current images of logging debris in creeks, roadside siltation, etc. Justice Butler dismissed all visual evidence from complainants as the work of people who have no specialized training in forestry, hydrology, road building, etc. With reference to "simple reasonableness," could the board have reasonably dismissed the visual evidence of the removal of a key barrier to contamination?
7. *More on expert opinion*. Justice Butler specifically cited the presentation of Brian Carson, soil scientist and watershed management expert, in his "Reasons for Judgment." Justice Butler stated that Carson "indicated that it is not possible for a hydrologist to detect any changes to stream flows for a mid-sized storm until more than 25% of the watershed is actually logged. He noted that about 10% of the watershed has been logged." It is interesting that Carson's presentation to the local board of health did not claim that the watershed was 10% logged. Carson stated that the watershed was "10% hydrologically unrecovered" from past logging activity. It appears that Justice Butler may have misapprehended the facts about the condition of the watershed. It is also worth noting that none of

About the Integrated Water Management Plan. *The Chapman/Gray IWMP was a multi-stakeholder, multi-agency planning process that was convened in 1998 to develop a new regime of watershed management. Planning was supported by extensive technical evaluation carried out by qualified professionals. The work of three hydrologists in this process is particularly noteworthy, as their work represents the only comprehensive analysis that has ever been done on the Chapman/Gray watersheds. Their approach was highly systematic and involved a sub-basin by sub-basin inventory of landslides and their causes, amounts of area logged, amounts of unstable area logged and a variety of other factors. The planning aspect of the process dragged on for 10 years with stakeholders working to maintain access to resources and agencies working to protect their mandates. In the end the process failed because the SCRD, with overwhelming public support, refused to sign off on a plan that didn't allow the "purveyor of water" any authority over land uses or industrial practices in the watersheds.*

the "experts" supporting Western's logging plans referred to the IWMP technical work or did anywhere near as comprehensive an evaluation of the condition of the watershed.

Contentious Issues

The other major issue was with respect to the proper statutory interpretation of the Health Act. To put it another way, what test should the local board of health have applied to decide whether to issue its order? The standard applied to these questions is one of correctness.

1. *Scientific uncertainty and prudent avoidance*. Justice Butler concluded that the references in the local board of health's order to scientific uncertainty and prudent avoidance (these are basically the concepts of the "precautionary principle") were an improper attempt to make Western responsible for proving that a health hazard does not exist. Justice Butler determined that the existence of a health hazard must be clearly established. In Justice Butler's view, it was incorrect to expect Western to prove that a heath hazard does not exist.
2. *Definition of a health hazard*. Justice Butler states that the law requires that it be proven that a health hazard exists, and appears to be saying that the *Act* requires the local board of health to find that a harm to public health is actually in existence prior to issuing an order. However, the definition of "health hazard" in the *Act* appears to include a condition or thing that may develop into a threat to public health. Did Justice Butler misinterpret the definition of a health hazard?

An Unresolved Issue

The issue of the relationship between the roles of the local board of health, the Medical Health Officer and the Drinking Water Protection Officer appear to be unresolved in Justice Butler's decision. However, Justice Butler does cite the fact that these officers would not issue an order as a reason for why the local board of health order shouldn't have issued an order. As mentioned earlier, the role of the local board of health is not clarified in the "Reasons for Judgment."

Positives

None of the parties in this case argued that the local board of health didn't have authority under the *Act* to issue an order. So, theoretically, the power of a local board of health to issue orders is intact under Justice Butler's decision. Judge Butler also dismissed Western's argument that the local board of health was biased. The most positive aspect of this decision is that Justice Butler recognized that it is "anomalous" for the purveyor of water (the regional government) not to have authority over land uses that can adversely impact water quality.

Significance of the Case

In reality this case is about a dispute between a public body that carries the obligation to provide safe drinking water and a private party that holds a right to harvest trees. The public body argues that the trees help regulate flows, contribute to slope stability and act as a barrier to contamination. The private party and its professional allies maintain that the removal of trees poses no risk to watershed function or drinking water safety. Who is liable if the harvesting of trees degrades the public's water supply?

The appeal of Justice Butler's decision is the next arena in which we will argue the legal issues described above. The purpose of the appeal is to establish that the public's right to healthy drinking water takes precedence over private, for-profit rights to harvest trees.

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