IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Western Forest Products Inc. v. Sunshine Coast Regional District,*** 2007 BCSC 1508

Date: 20071009
Docket: S075474
Registry: Vancouver

Re: In the Matter of the *Health Act*, R.S.B.C. 1996, C. 179, as amended, Section 102; and Rule 49 of the Rules of Court

Between:

Western Forest Products Inc.

Appellant

And:

Sunshine Coast Regional District, acting as a Local Board of Health, Daniel Bouman, Brad Benson, George Smith, Hans Penner, John Keates and Ron Neilson

Respondents

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Appellant	Daniel Webster, Q.C. Daniel Bennett Gwendoline Allison
Counsel for the Respondent, Sunshine Coast Regional District	James Yardley Christopher S. Murdy
Counsel for the Respondents, Daniel Bouman, Brad Benson, George Smith, Hans Penner, John Keates and Ron Neilson	Robin J. Gage
Date and Place of Hearing:	September 10-13, 2007 Vancouver, B.C.

[1] The Appellant, Western Forest Products Inc. ("Western"), appeals from an order (the "Order") of the Sunshine Coast Regional District (the "SCRD") acting as the Local Board of Health (the "LBH"). The Order was made on August 11, 2007 following a five-day hearing held as an investigation pursuant to s. 58 of the ***Health Act***, R.S.B.C. 1996, c. 179 (the "***Act***"). The investigation proceeded following receipt of complaints from the individual respondents (the "Complainants"). The LBH concluded that it had reason to believe that a health hazard existed as a result of Western's forestry activities. The Order required Western to stop certain of the forestry activities. This appeal was brought pursuant to s. 102 of the ***Act*** which provides that this court "may, on good cause shown, vary or rescind the order made."

[2] The background to this matter is set out in some detail in the Reasons for Judgment in ***Western Forest Products Inc. v. Sunshine Coast Regional District***, 2007 BCSC 1283, that I delivered on August 23, 2007 following a two-day hearing at which Western sought a stay of the Order. I will not repeat that background information here. In summary, Western seeks to carry out timber harvesting operations on four cut blocks in the Chapman Creek Watershed (the "Watershed") which provides 90% of the drinking water for the residents of the SCRD. The timber harvesting, if it proceeds, will be carried out pursuant to a Timber Licence, Road Permit and Cutting Permit issued to Western by the Ministry of Forests and Range. The Order contains provisions that would prevent the timber harvesting on steep slopes in the Watershed (cut blocks WC-043 and WC-043P) and would curtail harvesting on gentler slopes (cut blocks WC-021 and WC-023).

Position of the Parties

[3] Western says that there are four grounds where it can show "good cause" to rescind the order. These are:

a) The LBH mis-instructed itself as to the legal standard by which a "health hazard" may be found.

b) The Order is wholly unreasonable on the merits as there was no credible expert evidence showing that Western's forestry activities created a health hazard.

c) The Order exceeds the jurisdiction of the LBH as it does more than "terminate the health hazard".

d) A reasonable person would apprehend that the LBH was biased. The SCRD has indicated in the past its opposition to logging in the Watershed and it has placed itself in the impermissible position of judging its own cause.

[4] The SCRD and the Complainants take issue with each of these contentions and say that the appeal should be dismissed. They say:

a) The LBH applied the proper interpretation of the provisions of the ***Act*** dealing with the LBH's jurisdiction to find existence of a health hazard.

b) On the merits, there was evidence before the LBH such that it was reasonable for it to conclude that it had reason to believe that

Western's activities had created or would create a condition likely to endanger the public health.

c) The Order, when read reasonably and as a whole, does nothing more than what was required to terminate the health hazard.

d) The appropriate legal test for bias in this case is the "capable of persuasion" test. That is easily met here by reference to the Order itself which permits some timber harvesting in the Watershed even though the SCRD had expressed opposition to any such activity.

The Legislation

[5] The relevant provisions of the ***Act*** include:

1 In this Act:

...

"health hazard" means

(a) a condition or thing that does or is likely to

(i) endanger the public health, or

(ii) prevent or hinder the prevention or suppression of disease...

57 Information of any health hazard or unsanitary condition under this Act within the jurisdiction of a local board may be given to the local board by

(a) any person aggrieved by the hazard or condition,

(b) any 2 inhabitant householders,

(c) any officer of the local board, …

58 (1) If information has been given to a local board under section 57, the local board must investigate the cause of the complaint.

(2) For the purposes of this section, the local board or any 2 of its members

(a) may hear the testimony of all persons who come before it to testify about the matter, and

(b) have the same authority as a justice to require and compel the attendance of witnesses and the giving of evidence.

59 (1) Subject to subsection (1.1), a local board may make an order under this section if any of the following apply:

…

(b) the local board has reason to believe that a health hazard exists;

(c) the medical health officer advises the local board that a health hazard exists.

...

(1.2) If authorized under this section, the local board may, as applicable,

(a) order the owner or occupier of the land or premises on which the health hazard exists or from which the health hazard arises to terminate the health hazard in accordance with the order,

(1.3) An order under this section

(a) must be served on the owner or occupier to whom it is directed, and

(b) must set out the reasons why it was made, what the owner or occupier is required to do and the time within which this must be done.

61 (1) A health officer, medical health officer or public health inspector may enter on or into any property and conduct an inspection for the purpose of determining

(a) whether a health hazard exists, or

(b) whether this Act and the regulations are being complied with.

63 (1) If, after an inspection under section 61, the health officer, medical health officer or public health inspector has reason to believe that

> (a) a health hazard exists,
>
> (b) there is a significant risk of an imminent health hazard, or
>
> (c) the place that was the subject of inspection or the owner or occupier of it is in contravention of this Act or the regulations,
>
> the health officer, medical health officer or public health inspector may issue an order under this section.
>
> 102 (1) If a local board, health officer, medical health officer or public health inspector issues an order, the person against whom the order is made, or any one aggrieved by it, may, within 10 days from the date that person is served with a copy of the order in writing, appeal from the order to the Supreme Court.
>
> (2) The Supreme Court may, on good cause shown, vary or rescind the order made.

Issues

[6] A. What is the appropriate standard or standards of review for consideration of the questions raised on this appeal?

B. Did the LBH properly instruct itself as to the legal standard by which it could find a "health hazard"?

C. Should the Order be rescinded or varied because the LBH's conclusion that it had reason to believe that a health hazard existed as a result of Western's forestry activities is unreasonable?

D. What is the appropriate test for consideration of bias for a regional district sitting as a local board of health under the ***Act***? Should the Order be rescinded as a consequence of bias on the part of the LBH?

Issue A – Standard of Review

[7] All parties agreed that with regard to issue B, the appropriate standard of review is correctness. The parties also agreed that with regard to issue C, above, the appropriate standard of review is reasonableness *simpliciter*. Nevertheless, I am required to carry out the analysis using the pragmatic and functional approach to determine the appropriate standard of review: ***Speckling v. British Columbia (Workers' Compensation Board)***, 2005 BCCA 80, 46 B.C.L.R. (4th) 77.

[8] The four factors to be considered under the pragmatic and functional approach are: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the statute in question and the provisions at issue; and (4) the nature of the question: ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 26. Here, these factors must be considered separately for issue B and issue C.

[9] Applying the first factor, there is no privative clause in the statute. Rather, s. 102 of the ***Act*** provides a right of appeal to this court, which may vary or rescind the order "on good cause shown". This suggests a relatively broad right of appeal. Accordingly, with regard to both issue B and issue C, this factor points to a less deferential review.

[10] Unlike many administrative tribunals, the regional district sitting as a local board of health possesses relative expertise neither in health issues nor in legal issues. As noted by Mr. Justice Josephson in ***Mousa v. Simon Fraser Health***

Region, 2000 CarswellBC 1900 (S.C.) (WLeC) at para. 14 of the Appendix to the reasons:

> …a local board, being composed of elected municipal councillors, is not likely to have the qualifications and environmental health expertise of a public health inspector.

Accordingly, with regard to both issue B and issue C, the consideration of relative expertise points to a less deferential review.

[11] With respect to the third factor, a statutory purpose that is concerned with protecting the public "will demand greater deference from a reviewing court": ***Dr. Q***, *supra*, at para. 31. The ***Act*** is a protective statute whose objectives include the protection of the public from health hazards. Section 59(1)(a) empowers the LBH to make an order if it "has reason to believe that a health hazard exists." This suggests a level of discretion in the adjudication of the complaint before it, which implies that deference should be given to the decision of the LBH. On balance, with regard to both issue B and issue C, this factor suggests a more deferential review.

[12] Issue B is a question of "pure law". Accordingly, the fourth factor, the nature of the question, points towards a more searching review. On the other hand, issue C involves a fact-intensive question of mixed fact and law. Such an issue calls for a more deferential review: ***Dr. Q***, *supra*, at para. 34.

[13] Considering these factors and applying them to the two principal issues on appeal, I agree with the parties that the appropriate standard of review for issue B is

correctness. With regard to issue C, the appropriate standard of review is reasonableness *simpliciter*.

Issue B – Did the LBH properly instruct itself as to the legal standard by which it could find a "health hazard"?

[14] A "health hazard" as defined in the ***Act*** is a condition or thing that endangers or is likely to endanger the public health. Pursuant to s. 59(1)(b), the LBH must meet the "reason to believe" evidentiary standard. This means that the LBH must have sufficient credible information to give rise to a *bona fide* belief that a health hazard exists: ***Symbol Technologies Canada ULC v. Barcode Systems Inc.***, 2004 FCA 339, [2005] 2 F.C.R. 254.

[15] In accordance with s. 59(1.3)(b), the LBH provided reasons for the issuance of the Order. The reasons do not clearly set out the legal standard applied by the LBH in its consideration of the language contained in s. 59 of the ***Act***. However, in paragraph 8 of the reasons the LBH states: "In the face of uncertainty about the scientific basis of a significant threat to health or safety, principles of prudent avoidance may justify taking steps to protect public safety." Western argues that this language implies that the LBH was prepared to issue an order without having sufficient credible information that would give rise to a *bona fide* belief that a health hazard exists. Rather, it appears that the LBH was prepared to issue an order where there was merely some risk of the existence of a health hazard.

[16] Pursuant to s. 59(1)(b) of the ***Act***, a local board may make an order to terminate the health hazard if "the local board has reason to believe that a health hazard exists". As noted above, a health hazard is a "condition that does or is likely

to endanger the public health". Under the ***Act***, the LBH shares jurisdiction over health hazards with other officials. Section 63(1) reads as follows:

> If, after an inspection under section 61, the health officer, medical health officer or public health inspector has reason to believe that
>
> (a) a health hazard exists,
>
> (b) there is a significant risk of an imminent health hazard, or...
>
> the health officer, medical health officer or public health inspector may issue an order under this section.

[17] A similar provision exists in the ***Drinking Water Protection Act***, S.B.C. 2001, c. 9. Section 25(1) gives a drinking water officer the power to make an order, where he or she has reason to believe that a drinking water health hazard exists or that there is a significant risk of an imminent drinking water health hazard.

[18] Western argues that in order to give meaning to the language contained in s. 63(1)(b) of the ***Act*** (and in s. 25(1)(b) of the ***Drinking Water Protection Act***), there must be a difference between the situations where a health hazard exists and where there is a significant risk of an imminent health hazard. While a health officer, medical health officer, public health inspector and drinking water officer are given the power to make an order in both situations, a local board of health only has the jurisdiction to make an order where it has reason to believe a health hazard exists. Western says that the phrase "a significant risk of an imminent health hazard" must describe a set of circumstances where there is something less than the existence of a health hazard.

[19] The respondents focus on the language in the definition of "health hazard". That definition refers to "a condition or thing that does or is likely to endanger the public health". They say that the inclusion of the phrase "likely to" must mean that a health hazard includes situations where there is a risk of such a condition or thing, and not just where there is the actual occurrence of such an event. They say that the word "likely" has a primary meaning of "more probable than not", but that it also has a recognized secondary meaning of "a real possibility": ***S.(B.) v. British Columbia (Director of Child, Family and Community Service)*** (1998), 48 B.C.L.R. (3d) 106 (C.A.) at para. 31.

[20] The respondents argue that the word must be given that secondary meaning here. If that definition of "likely" is adopted, then the LBH could have found the existence of a health hazard even though there was much less than a 51% chance of it occurring. The respondents say that such an interpretation of the ***Act*** is entirely appropriate given that ss. 57-59 deal with the protection of the public from health hazards. Local boards of health must be able to deal with potential health hazards where there is only a risk of them occurring. This interpretation would give to the LBH the ability to act with "prudent avoidance" in the face of a potential health hazard.

[21] The difficulty with the respondents' argument is that it would render the language in s. 63(1)(b) meaningless. If their interpretation was adopted, then the jurisdiction of a health officer, medical health officer or public health inspector to make an order would be the same under s. 63(1)(a) as it is under s. 63(1)(b).

[22] Contrary to the respondents' arguments, adopting the interpretation put forward by Western would not negatively impact the ability of public authorities to deal with potential health hazards. Those public officials with medical or public health expertise have the ability to intervene and issue orders, where there is a risk of an imminent health hazard, *i.e.* where there is a potential health hazard. The local board of health, however, only has jurisdiction when the situation has reached that level where the health hazard actually "exists". This makes sense in the context of the legislation because the local board of health does not have medical or public health expertise.

[23] While the reasons issued by the LBH do not clearly specify how it interpreted s. 59(1)(b), I must conclude that it did not apply the correct interpretation. The reasons of the LBH make it clear that it utilized the concept of "prudent avoidance" to find the existence of a health hazard. Further, in paragraph 13 of its reasons it was critical of the consultants' reports (presumably both its own consultants as well as those put forward by Western) because "[d]isclaimers posted at the end of every study did not give the Local Board of Health the certainty it requires to determine that the hazard does not exist." The LBH was putting the onus on Western to establish that a health hazard did not exist. The Order was made because Western was unable to establish "with some certainty", in other words, that it was "likely", that a health hazard did not exist. The LBH, without justification in the language of the ***Act***, has effectively reversed the onus by requiring Western to prove the non-existence of a health hazard.

[24] While the LBH did not apply the correct legal test, that does not end the enquiry. The correct interpretation of the ***Act*** is a starting point for the LBH's consideration of whether it had reason to believe a health hazard existed. However, it is only one element of that analysis. As noted by Mr. Justice Iacobucci in ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20, [2003] 1 S.C.R. 247, it is not necessary that every element of the reasoning must independently stand up to review. Rather, the question is whether the reasons as a whole provide tenable support for the decision. Mr. Justice Iacobucci emphasized at para. 56 that "a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole."

[25] It is still possible that the decision of the LBH was reasonable as the LBH may have been able to arrive at the same decision if it had applied the proper interpretation of the ***Act***. I must look at the reasons as a whole in the context of the evidence to determine if those reasons are tenable as support for the decision.

Issue C – Should the Order be rescinded or varied because the LBH's conclusion that it had reason to believe that a health hazard existed as a result of Western's forestry activities is unreasonable?

[26] Western underwent a lengthy approval process in order to obtain the authorization from the Minister of Forests to commence timber harvesting operations in the Watershed. Residents of the regional district were aware that harvesting would begin in the summer of 2007. A number of individuals formed a blockade of the logging road leading to the four cut blocks. Western then brought an application for an injunction to this court. Mr. Justice Kelleher granted the injunction on July 19,

2007: ***Western Forest Products Inc. v. Hans Penner and others*** (19 July 2007), Vancouver S074556 (B.C.S.C.).

[27] Some of the defendants in that case and other individuals then made the complaint to the LBH pursuant to s. 57 of the ***Act***. The LBH conducted an investigation pursuant to s. 58 of the ***Act***, during which it heard five days of testimony from the Complainants, employees of the regional district, witnesses called by Western, and consultants. There was no cross-examination of the witnesses.

[28] The relevant portions of the reasons issued by the LBH include the following:

> 5. Source protection is one of the barriers in the SCRD's multi-barrier water system. A Source Assessment conducted in 2006 on the Watershed rated the hazard to drinking water from Forestry Activities as high. Forestry Activities on steep slopes in the Watershed have been shown to have an adverse impact on the quality of raw water in the Watershed. In particular, Forestry Activities on steep, unstable terrain with soils which are sensitive to disturbance contribute to drainage alteration, increased turbidity and sediment and changes in levels of organic carbons and ph.
>
> ...
>
> 7. The approval processes for Cutting Permit No. B and Road Permit R07354 have not considered or taken into account the impacts of the activities authorized by those permits on public health.
>
> ...
>
> 9. The evidence presented in support of the complaint did not sufficiently demonstrate that a health hazard exists, as defined by the *Health Act*, on the more gentle slopes of WC-021 and WC-023…. In regard to the extremely steep slopes of WC-043 and WC-043P, however, evidence of the problems posed by old growth forest cover removal was very compelling, resulting in a different evaluation of the hazard to the Watershed in that area….

> 10. Some of the evidence presented by [Western] was contradictory. Specifically, some of the soil and terrain stability assessments presented contradictory conclusions about the level of precaution to be taken.
>
> 11. In some cases insufficient fieldwork was conducted. Some of the evidence presented was based on other studies which, in turn, were based on still others.
>
> ...
>
> 13. Authors of studies presented by [Western] would not provide acceptable guarantees of their work. Disclaimers posted at the end of every study did not give the Local Board of Health the certainty it requires to determine that the hazard does not exist.

[29] Western takes issue with this analysis, both with regard to the extent of the work done by it in the course of the approval process and with regard to the substance of the reports prepared by its consultants. Western notes that the following reports were prepared by it or its consultants:

a) On July 25, 2006, EBA Engineering Consultants Ltd. ("EBA") completed a Coastal Watershed Assessment Procedure ("CWAP") update for a proposed 139 ha harvest area.

b) In June 2007, EBA prepared a revised CWAP to reflect a reduced harvest area of only 47 ha.

c) On October 25, 2006, EBA prepared a report entitled "Soil Surface Erosion Assessments for Proposed Roads in the Chapman Creek Community Watershed" ("SEFA").

d) Frank Baumann, a geological engineer, prepared two reports regarding a terrain stability field assessment of the proposed harvest areas. These are dated March 22, 2007 and April 7, 2007.

[30] The two CWAP reports are general overview reports. The 2006 CWAP report recommended that a soil erosion field assessment and a terrain stability assessment be completed to provide further and more detailed information regarding slope stability. As a result of that recommendation, Western retained EBA to prepare the SEFA and Mr. Baumann to prepare his two reports. Those reports all bore directly on the question of whether Western's planned operations would result in delivery of sediment into Chapman Creek, or have some other effect on water.

[31] In addition to the reports prepared by Western and its consultants, the SCRD obtained expert reports that were presented at the hearing. Triton Environmental Consultants Ltd. ("Triton") prepared a report dated June 28, 2007. Triton was asked specifically to provide an opinion regarding the effect of Western's forestry activities on water quality. Triton concluded that given the logging and road building methods proposed, the harvesting did not pose an imminent threat to drinking water quality.

[32] The first Triton report was a draft. On July 20, 2007, Triton produced a further report which confirmed its earlier conclusions and included the following comments:

> The proposed harvesting of 47.2 ha of timber in a watershed exhibiting advanced hydrological recovery with the methods proposed is not considered to pose a significant risk of an imminent drinking water health hazard;
>
> Cumulative effects are considered negligible (not measurable), as future logging activities are not expected until natural regeneration of

> the [Western] cutblocks has begun and no other current or planned activities in the watershed are expected to interact with the [Western] cutblocks to pose a significant risk of an imminent drinking water health hazard;
>
> …
>
> The potential for sediment generation associated with the proposed [Western], logging activities is low and is not expected to pose a risk to human health...

[33] Triton concluded its report with these comments:

> Triton understands the logging proposed by [Western] is controversial and our review, assessment and ultimate opinion have been carefully considered. The writer indicated at the meeting of June 19, 2007 Triton's review would be as comprehensive as possible given the contracted timeframe.

[34] In addition to the evidence of the consultants retained by Western and the SCRD, Brian Carson, a geoscientist, professional engineer and watershed management specialist, made a presentation at the hearing. He was not retained by nor had he ever worked for Western. He has, however, worked for other companies within the forest industry. He has worked extensively in the watersheds in Asia, Africa and British Columbia. He has done work in ten of the largest watersheds on the Sunshine Coast. He has also monitored the water quality and flows for five years in the Watershed.

[35] Mr. Carson gave evidence that properly planned and implemented logging could be conducted in watersheds without measurable change in water quality, quantity or timing of flows. He gave the opinion that Western was doing an excellent job in terms of water treatment and treatment of the drainages in the Watershed. He also 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 had been logged.

[36] The LBH also had before it evidence from Mr. Penner and Mr. Bouman, two of the Complainants. Neither of these individuals have relevant technical expertise or training.

[37] Mr. Bouman testified as to the unstable nature of the Watershed and stated that logging activity was likely to increase the instability, thus creating an increased risk of organic matter making its way into the water supply. In giving evidence, he relied heavily on the Integrated Watershed Management Plan (the "IWMP"). The IWMP was the result of a consensus-based decision-making process involving representative stakeholders in the Watershed including the SCRD, the Ministry of Forests and the forest industry. The IWMP was prepared in 1998, but was not implemented as it was voted down in a referendum. The IWMP established different management areas within the Watershed and established standards for activity within those zones in the Watershed.

[38] Mr. Penner and others testified as to damage to streams and culverts caused by Western's forestry activity. Their evidence included photographs and videos of work that was taking place in the Watershed.

[39] In addition to the Triton reports from 2007 the LBH also had before it the Chapman Creek Watershed Drinking Water Source Assessment which was prepared by Triton in July 2006. This report was undertaken at the direction of the Vancouver Coastal Health Authority. Triton was asked to identify current and future

drinking water health hazards, to characterize the risk posed by each identified hazard and to provide guidance for the development of the drinking water risk management strategy. With regard to the Watershed the report concluded:

> Based on the high vulnerability rating obtained for the assessment area…, the fact contaminants of concern (e.g., sediments) are already present, the documented effects of forestry activities on water quality… as well as the fact that these effects, although short-lived, are generally greater in the first several [years] after disturbance…, the likelihood that future forestry activities contribute sediment inputs and increased water turbidity levels in Chapman Creek within the next 10 years has been ranked as "Likely". The consequence associated with this hazard has been ranked as "Moderate". The risk associated with forestry activities has therefore been qualified as "High".

[40] The report qualified its conclusion in the following terms:

> Note, in listing these potential effects it has been assumed "best management practices" (BMPs) and/or pollution prevention methods, used under [today's] regulatory standards to prevent water quality degradation are <u>not</u> being applied. [Emphasis added]

[41] Later in its report, Triton made it clear that its conclusions were hypothetical in the sense that they did not take into account specific harvesting activities or the application of good forestry practices:

> It is thus important to understand that, while Module 7 assesses all potential risks, these may not represent actual risks to the drinking water source. In order to obtain a realistic appreciation of the risks posed by the identified land uses, land use-specific BMPs (required through legislation or voluntarily) are considered as part of the management strategies discussed in Module 8…

[42] The SCRD retained a further consultant, Forsite Consultants Ltd. ("Forsite") to answer certain questions regarding Western's forestry activities, including whether or not it was carrying out its forestry activities in accordance with BMPs or regulatory

standards. Forsite's assessment of Western harvesting was carried out on August 4, 2007 during an adjournment of the hearing. Forsite indicated that while there are no BMPs for timber harvesting and road building, Western's activities were consistent with its Environmental Management System and approved Forest Stewardship Plan. In other words, Western was carrying out its timber harvesting and road building in accordance with current regulatory standards. Forsite noted that in many cases, Western was exceeding those standards.

[43] It is also worth noting that Triton was not asked, when preparing its two 2007 reports, to consider whether or not there was an existing drinking water health hazard. Rather, it was asked to provide an opinion as to whether or not there was "a significant risk of an imminent health hazard". In other words, Triton was asked if the situation exists that would give a health officer, medical health officer or public health inspector jurisdiction to issue an order pursuant to s. 63(1)(b). It was not asked the question that would give these public authorities jurisdiction to issue an order under subsection (a), or the LBH jurisdiction to issue an order under s. 59(1)(b).

[44] There was also evidence before the LBH from the employees who operate the water treatment facility for the SCRD. The evidence of Mr. Gare and Mr. Johnson was that the new water treatment plant, which became operational in March 2004, is capable of providing water that meets Canadian drinking water guidelines even in circumstances where there is an excessive rainfall in a 24-hour period. The plant is able to effectively treat the water even when there are "very high spikes of turbidity and colour or organics in the water", although it may require

more staff to properly balance the chemicals. Neither individual gave evidence that the water treatment plant has or would experience problems as a result of Western's forestry activities in the Watershed.

[45] It is evident from this review that there was a substantial body of expert and other evidence presented at the hearing that supported Western's position. The evidence relied on by the LBH to support its decision was either non-expert evidence or expert evidence that was hypothetical in the sense that it did not consider Western's actual operations.

[46] The question that must be considered here is whether or not the LBH's decision was unreasonable. Was it unreasonable for the LBH to accept the views of the Complainants who were critical of Western's forestry activities and gave non-expert opinion evidence that the forestry activities would increase turbidity and levels of organics such that there was a risk to the drinking water? Was it reasonable for the LBH to accept the qualified, hypothetical conclusions in the 2006 Triton report in preference to the situation-specific opinions given in the 2007 Triton reports and by the other experts?

[47] The proper approach for a court to take in deciding whether or not the decision of an administrative tribunal is unreasonable is set out in ***Ryan***, *supra*, at para. 55:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then

> that the decision will not be unreasonable and a reviewing court must not interfere … This means that 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.

[48] In ***Ryan***, the court noted at para. 53 that where the standard of review is reasonableness *simpliciter*, the defect in a decision might only be discovered after significant searching or testing. Further, explaining the defect may require a detailed exposition to show that there are no lines of reasoning which could reasonably lead the tribunal to the decision it reached.

[49] In ***Dr. Q***, *supra*, the Court explained the proper approach to consideration of the evidence at para. 41:

> Yet when the standard of review is reasonableness, the reviewing judge's role is not to posit alternative interpretations of the evidence; rather, it is to determine whether, the Committee's interpretation is unreasonable…. With respect, when applying a standard of reasonableness *simpliciter* the reviewing judge's view of the evidence is beside the point; rather, the reviewing judge should have asked whether the Committee's conclusion on this point had some basis in the evidence. [Emphasis in original]

[50] The summary of the reasons upon which the LBH based its decision includes the following:

> a) The 2006 Triton report rated the hazard to drinking water from forestry activities as high. Such activities on the steep terrain may contribute to drainage alteration, increased turbidity and sediment in the raw water.
>
> b) The water treatment plant has encountered difficulties in treating water due to variations in turbidity.

c) The approval processes for Western's Cutting Permit and Road Permit did not take into account the impact of the activities authorized on public health.

d) In the face of uncertainty about the threat to public health, the principle of prudent avoidance justifies issuance of an order.

e) On the steep slopes, evidence of the problems posed by old growth forest cover removal results in a different evaluation of the health hazard to the Watershed.

f) Some evidence was contradictory. In some cases insufficient fieldwork was conducted. Some studies were based on other studies.

g) Experts could not guarantee their work. Disclaimers in the reports meant that the LBH could not be certain a health hazard does not exist.

h) Two cut blocks overlap a Forest Ecosystem Network designated in the IWMP process.

[51] Many of these reasons do not stand up to a cursory examination, let alone a somewhat probing one:

b) The water treatment plant employees did not indicate any problem with water quality arising from excessive water flows or turbidity, let alone forest activities.

c) The approval process was extensive and did consider the impact of the forestry activities on watercourses in the Watershed.

d) As noted above, the proper interpretation of the ***Act*** required the LBH to find sufficient credible information to give rise to a *bona fide* belief that a health hazard existed. The LBH's reliance on "scientific uncertainty" and the concept of "prudent avoidance" highlight the fact that it asked the wrong question when it reviewed the evidence.

f) The comments regarding contradictory evidence and studies being based on other studies are irrelevant to the decision that the LBH had to make. The comment that insufficient fieldwork was conducted does not stand up to a somewhat probing examination. It is unreasonable to challenge an expert's methodology without any apparent basis substantiated by professional standards or a contrary professional opinion.

> g) The reliance upon, the failure of the experts to "guarantee" their work by removing disclaimers included in each report, again indicates that the LBH asked itself the wrong question. The reasons show that it was requiring Western to establish with some certainty that the health hazard does not exist.

[52] The remaining reasons, subparagraphs a), e) and h), do not stand up to a somewhat probing examination. The LBH has relied upon the hypothetical or general assessment given in Triton's 2006 report in preference to the opinions contained in its 2007 reports. As noted above, the 2007 reports look at the specific work and methodologies proposed by Western and conclude that there is no significant risk of an imminent health hazard, let alone an existing health hazard. It is unreasonable to base a decision on the qualified, general assessment prepared by Triton in preference to the opinion that specifically considers the activities that may be said to give rise to a health hazard. It is even more unreasonable when the two opinions are given by the same expert and that expert's opinion is not contradicted by the opinion of other experts.

[53] Similarly, the reference to the IWMP does not assist in providing a line of analysis that could reasonably lead the LBH to the conclusion at which it arrived. The establishment, ten years earlier, in the course of a "consensus based decision making process", of a forest management zone that would have restricted forestry activities in two of the cut blocks in question cannot reasonably be relied upon by the LBH to find that a health hazard exists as a result of forestry activities being carried out today. The establishment of the forest management zones presumably occurred as a result of a balancing of interests that may or may not have had anything to do with potential health hazards.

[54] The last component of the LBH's line of analysis is the non-expert evidence of the Complainants. There will be circumstances where it is possible for a local board of health to arrive at decisions regarding the existence of health hazards without relying on expert evidence. There may be situations where the existence of a health hazard is obvious to a lay person or where inferences can be drawn without special training and expertise. However, the issue before the LBH was not such a situation. The question raised is a difficult technical or scientific question. Accordingly, expert evidence was sought and obtained by both Western and the SCRD.

[55] The question, as posed in ***Dr. Q***, is whether the LBH's interpretation of the evidence was unreasonable or whether its conclusion had some basis in the evidence. The answer here, simply put, is that the LBH's conclusion did not have a reasonable basis in the evidence. It is unreasonable to accept the evidence of non-expert lay witnesses in preference to a substantial, indeed, overwhelming, body of expert evidence that was not contradicted by other technical or expert evidence.

[56] As a result of the decision that I have reached, I need touch only briefly on whether the terms of the Order went beyond the jurisdiction of the LBH. It is clear from my earlier decision on the stay application that at that time I was of the view that paras. 2, 5, 6, 7, 8 and 10 of the Order did exceed the jurisdiction of the LBH. Having now had an opportunity to review the evidence presented at the hearing and to further consider the reasons of the LBH, I remain of the view that the LBH did exceed its jurisdiction and further that those terms in the Order are clearly unreasonable.

[57] The most significant of those terms is paragraph 6, which would have the effect of curtailing timber activities within cut blocks WC-021 and WC-023. As I noted at para. 25 of my earlier reasons, the LBH had no jurisdiction to make an order that would curtail those activities when it found that the evidence presented did not sufficiently demonstrate that a health hazard exists on the "more gentle slopes" of those cut blocks.

[58] In addition, para. 10 of the Order prevents the burning of logging debris. However, there was no evidence whatsoever before the LBH that such burning might pose the risk of a health hazard, let alone that such a health hazard existed.

Issue D – What is the appropriate test for consideration of bias for a regional district sitting as a local board of health under the *Act*? Should the Order be rescinded as a consequence of bias on the part of the LBH?

[59] Given the decision that I have arrived at, it is not necessary for me to consider this issue. If I had to decide that issue, the respondents' position that the appropriate standard of bias to apply to a local board of health should be the "capable of persuasion" test that is usually applied to municipal councilors, has some appeal here. The issues on which a local board of health must adjudicate relate to issues of public health. Public health is an issue of wide-ranging public interest. It is very likely that councillors will have expressed their views on matters of public health during their campaign or during their term in office. Further, public health is often inescapably related with other issues that councillors may have expressed their views on and made decisions about while in office. These could include issues such as the environment, industry and employment. It must be assumed that the Legislature knew when it established the scheme in the ***Act*** that councillors would

have publicly expressed their views on issues that might come before them for consideration or investigation while sitting as a local board of health under the ***Act***.

[60] Here, the SCRD sitting as the LBH was attempting to carry out one of its public health duties. In doing so it started from the position, which it had stated publicly, that a regional district should have the authority to determine what activities can take place within its watershed. It does seem somewhat anomalous that a regional district does not have that authority. However, that was not the issue before the LBH, nor was it the issue before this court.

[61] In summary, I find that the conclusion of the LBH that it had reason to believe that a health hazard exists due to the forestry activities of Western is unreasonable. Accordingly, I would rescind the Order of the LBH dated August 11, 2007.

"Butler J."

The Honourable Mr. Justice Butler