IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Western Forest Products Inc. v. Sunshine Coast Regional District***, 2007 BCSC 1283

Date: 20070824
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

Respondent

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

August 21 & 22, 2007

Counsel for Appellant	D. Webster, Q.C., D. Bennett, G. Allison
Counsel for Respondent, SCRD	C.S. Murdy
Counsel for Complainants: D. Bouman, G. Smith and B. Benson	R.J. Gage
Counsel for Complainants: H. Penner, J. Keates and R. Neilson	J. Conroy, Q.C.
Place of Hearing:	Vancouver, B.C.

INTRODUCTION

[1] Western Forest Products Inc. (“Western”) is applying for a stay of an order (the "Order”) of the Sunshine Coast Regional District (“SCRD”), acting as a Local Board of Health (“LBH”), pending Western’s appeal of the Order. Western also seeks directions regarding the appeal.

BACKGROUND

[2] Western is an integrated forestry company engaged in timber harvesting operations inside and adjacent to the area known as the Chapman Creek Community Watershed (the “Watershed”). It carries out those timber harvesting operations in accordance with a Timber Licence, Road Permit and Cutting Permit issued to it by the Ministry of Forests and Range. The Watershed provides 90% of the drinking water for the residents of the Sunshine Coast in the area between Langdale and Earl’s Cove. The lands in the Watershed are Crown lands, hence the involvement of the Ministry of Forests and Range.

[3] Western was granted a Cutting Permit in respect of four cut blocks which are located either wholly or partially within the Watershed. The SCRD has been opposed to any logging in the Watershed for some time. It has indicated to Western that it would like to have the power to control all activities within the Watershed, including logging. When the SCRD received a complaint on June 22, 2007, which alleged a health hazard to the public drinking water as a result of logging activities in the Watershed, it constituted itself as the LBH in order to conduct an investigation, pursuant to s. 58 of the ***Health Act***, R.S.B.C. 1996, c. 179, into whether or not

Western's activities in the Watershed constitute a health hazard. The investigation involved a 5-day hearing in late July and August during which the complainants and Western presented detailed evidence.

[4] The Order was made by the LBH on August 11, 2007, at the conclusion of the hearing. The Order provides that "Western shall cease all forestry activities within the watershed where slopes measure 60% or greater", with some exceptions. The Order provides that the prohibition against forestry activities shall also extend to all riparian areas defined to mean 30 metres on both sides of all water courses in the watershed. Other provisions in the Order include a requirement that Western sample and monitor water on a daily basis and retain a hydrologist to work with or under the direction of the Medical Health Officer or the Drinking Water Protection Officer. In addition, Western was ordered to stop construction or reactivation of a road described as D1000. (The terms of the Order are attached as a schedule to these Reasons). Western says that the Order effectively prevents it from carrying out any logging whatsoever in the Watershed, even though it has spent a great deal of time and money in obtaining the "multi-level" approvals required under the forestry regime in British Columbia.

[5] The appeal of the Order was brought pursuant to s. 102(2) of the ***Health Act***, which provides that "The Supreme Court may, on good cause shown, vary or rescind the order made" by a local board of health. The stay application has been brought because Western says that the right of appeal will be moot if the stay is not granted. This is because its right to harvest the timber under its Timber Licence and Cutting Permit expires on April 26, 2008. The cut blocks are at a high elevation,

such that if the harvesting is carried out it must be concluded by October of this year. After that time there is too much snow. Further, the winter shutdown will likely last until too late in the spring for Western to harvest timber before the end of April. There is no possibility of extending that deadline.

[6] Western further claims that it can show good cause for rescinding the Order. It says that the LBH finding that there was a health hazard is unreasonable. It argues that there was no evidence before the LBH capable of supporting the conclusion that Western's activities did, or were likely to, endanger public health. It says that LBH exceeded its jurisdiction by extinguishing rights conferred on Western by officials acting pursuant to the ***Forest Act***, R.S.B.C. 1996, c. 157. Additionally, it argues that the Order should be set aside because there is a reasonable apprehension of bias and because the Order is overly broad and goes well beyond the action required to terminate an existing health hazard.

[7] In support of its position, Western refers to the decision of Mr. Justice Kelleher of this Court in ***Western Forest Products Inc. v. Hans Penner and Others*** (unreported July 19, 2007), Vancouver Registry S074556 (B.C.S.C.). The defendants in that case include some of the complainants to the SCRD. Prior to the issuance of the Order, those defendants erected a blockade of the logging road, which prevented Western's access to the cut blocks. Justice Kelleher heard an injunction application and considered much of the same evidence that was placed before the LBH, and which will be before this Court again on the appeal in this matter. Justice Kelleher made a number of findings that Western argues are

relevant to this application, including the following, found at para. 32: "There is simply no substantial threat to drinking water."

[8] The respondents argue that there was evidence before the LBH that could support the Order. However, they say it is inappropriate on this application to look closely at that evidence and that such an examination should await the appeal. They say that the balance of convenience clearly favours the respondents and that Western cannot show that it will suffer irreparable harm if the stay is not granted. On the contrary, it argues that if a stay is granted, it would effectively cause irreparable harm to the respondents as logging would cause damage to land that could not be remedied. Source protection, which is accomplished by retaining timber in the Watershed, represents one of the barriers in the "multi-barrier" water system. Further, they say that if the stay is granted Western may be able to complete the harvesting before the appeal is heard, and so the stay would have the effect of granting to Western the whole relief it is seeking without a hearing on the merits.

Test for Granting a Stay

[9] A stay of proceedings and an interlocutory injunction are remedies of the same nature and so the same test applies: ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110.

[10] An applicant seeking a stay of an order must demonstrate:

(a) a serious issue to be tried;

(b) the existence of irreparable harm to the applicant if the stay is not granted; and

(c) the balance of convenience favours the granting of the relief sought.

RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311.

Serious Issue to be Tried

[11] The parties approached this issue quite differently. Western, in its written and oral arguments, went into great detail regarding the merits of the appeal. In doing so, it indicated that this case might fall within one of the exceptions to the rule that the motions judge hearing a stay application should not engage in an extensive review of the merits. One of the exceptions to this rule is where the result of the interlocutory motion will amount to a final determination of the action. As noted in ***RJR-MacDonald***, *supra*, at 338, this will be the case when the right which the applicant seeks to protect can only be exercised immediately or not at all.

[12] The respondents, on the other hand, concede that there is a serious question to be tried. They say that it is inappropriate to consider the merits in detail on this application as that should be left for the appeal judge.

[13] I do find that there is a serious question to be tried. I will not engage in an extensive review of the merits of the case. However, given the decision I have arrived at, I want to comment briefly on three issues that arise under the merits.

[14] First, the jurisdiction of the LBH to make the Order arises from ss. 59(1) and (1.2) of the ***Health Act***. Pursuant to those provisions, it can make an order to "terminate a health hazard", but only if it "has reason to believe a health hazard

exists". In contrast to the powers of a drinking water officer under the ***Drinking Water Protection Act***, S.B.C. 2001, c. 9, and a medical health officer or a local board of health under s. 63(1) of the ***Health Act***, the LBH has no power to make an order if "there is a significant risk of an imminent health hazard". Under principles of statutory interpretation some meaning must be given to the phrase "a significant risk of an imminent health hazard". That must describe a set of circumstances where there is something less than the existence of a health hazard. Accordingly, the ability of a local board of health to make an order under s. 59 of the ***Health Act*** is restricted to situations where there is reason to believe a health hazard presently exists. It does not have the power to make an order where it only has reason to believe that there is a risk of an imminent health hazard.

[15] In order to determine whether or not there was an existing health hazard to the drinking water, the LBH retained a consultant, Triton Environmental Consultants Ltd. ("Triton"). The report prepared by Triton, dated July 20, 2007, sets out the scope of its assignment:

> Triton was retained by the SCRD to complete an information review and provide an expert opinion on whether proposed (Western) logging activities in the Chapman Creek watershed pose a significant risk of an imminent drinking water health hazard…

[16] Triton concluded:

> The proposed harvesting of 47.2 ha of timber in a watershed exhibiting advanced hydrologic recovery with the methods proposed is not considered an imminent threat to drinking water quality and cumulative effects are considered negligible.
>
> …

> 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.

[17] It is evident that the LBH did not accept Triton's opinion. The LBH, in its Order, and the respondents before me were critical of Triton's methodology, but there appears to have been little or no other expert evidence considering the health hazard issue before the LBH.

[18] In the face of that evidence (which was available in draft at the time of the injunction application), Mr. Justice Kelleher concluded that there was no substantial threat to the drinking water. The issue on the appeal will be whether or not it was possible for the LBH to arrive at its contrary conclusion in accordance with the evidentiary standard stipulated by s. 59 of the ***Health Act***. The "reason to believe" standard requires the board to have sufficient credible information to give rise to a *bona fide* belief that a health hazard exists: ***Barcode Systems Inc. v. Symbol Technologies Canada ULC***, 2004 FCA 339. The reasons provided by the LBH as part of its Order seem to focus on what is described as "scientific uncertainty" and the principle of "prudent avoidance". The respondents rely upon the decision of the Supreme Court of Canada in ***114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)***, 2001 SCC 40, for the proposition that authorities need not wait for scientific certainty before moving to protect health and the environment.

[19] Any decision on this fundamental issue will have to consider the appropriate standard of review, the proper evidentiary standard, and may need to consider all of

the evidence. I have not made this analysis. However, there is no doubt that this is a serious issue to be considered on the appeal.

[20] Second, Western argued that the Order is in conflict with, and must yield to, the rights conferred on it pursuant to the forestry regime. It relies upon the decision of the Supreme Court of Canada in ***British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.***, [1995] 2 S.C.R. 739. That case sets out the principles to be applied where there are overlapping administrative decisions that are in conflict. The first step is to determine if there is an operational conflict. The parties are not in agreement as to whether or not there is such a conflict here. The Order requires Western to take investigative steps, to monitor water quality and to refrain from forestry activities in certain areas before it can harvest timber. Western says that, on its face, this appears to be an attempt to regulate forest activities rather than an attempt to terminate an existing health hazard. This raises a serious question with regard to an apparent conflict with rulings or orders of the two regulatory regimes. It is a question that may also arise in other watersheds in British Columbia.

[21] The third issue I wish to comment on is the question of the effect of the Order. Western said that it is prevented from carrying out any logging as a result of the combined effect of paragraphs 1, 2 and 6 of the Order. The respondents say that this is inaccurate. The Order, on its face, appears to permit logging of the two cut blocks located in areas where the slope is much less than 60% (cut blocks WC-021 and WC-023). It also permits removal of those logs felled in WC-043 and those prepared for removal by the standing stem method in cut block WC-043P. Western says that while the Order appears to permit those activities, the prohibition against

any “Forestry Activities” in riparian areas, and the prohibition against construction or reactivation of road D1000, mean that it has no place to use as a staging area for the helicopter logging. Furthermore, it cannot truck any logs out as the roads all pass through riparian areas. The respondents agree that the effect of paragraph 6 of the Order is that Western cannot do any logging within 30 metres of any watercourse within the two cut blocks with more gentle slopes.

[22] The respondents argue that a stay should not be granted because Western failed to exhaust its other remedies as it did not return to the LBH to clarify the effect of the Order. It says that Western could have done so by giving notice to the complainants and appearing back before the LBH to vary or clarify the terms of the Order. It claims that, had Western done so, it is likely that it would have been able to remove the felled trees as that was the clear intent of the Order.

[23] I am of the view that the decision of Western not to return to the LBH to vary or clarify the terms of the Order is not a bar to seeking a stay. There is no certainty that the LBH had the jurisdiction to, or would have, varied or clarified the Order. Further, the SCRD took the position that before Western could go back to the LBH it had to give notice to all of the complainants of the variations it was seeking. Section 102 of the ***Health Act*** provides that an appeal from an order of a local board of health must be brought within 10 days. Given the time constraints that Western was facing, both for the appeal and the exercise of their rights under the Cutting Permit, the decision to appeal was, from its perspective, the prudent course to follow.

[24] What is most significant on the question of the effect of the Order is that the respondents agree with Western that it was not intended to prevent the removal of the felled timber nor the prepared standing stem timber removal. Further, if the Order prevents the logging of cut blocks WC-021 and WC-023, that would also appear to be an unintended consequence of the decision. I say that because the reasons issued as part of the Order state in paragraph 9 that:

> The evidence presented in support of the complainant 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.

[25] If no health hazard exists as a result of the logging that is taking place on those cut blocks, the LBH had no jurisdiction to issue an order that gave any direction that would have the effect of restricting or regulating logging in those areas. If there is no health hazard, then there is no reason to "terminate" the conditions that could be said to create a health hazard. The effect of paragraph 6 of the Order is to prevent logging in most or all of the areas of those cut blocks. Either that result was unintended or the LBH was exceeding its jurisdiction by making the Order.

[26] There is no doubt that the merits of Western's case are sufficiently strong that there is a need to order a stay to permit those activities to take place. The circumstances of this case are such that, if the stay is not granted, there is a likelihood that Western would lose the right to conduct the logging activity that the Order did not intend to prohibit.

Irreparable Harm and Balance of Convenience

[27] I will follow the approach usually taken in British Columbia where the question of irreparable harm is considered to be bound up with and part of the consideration of balance of convenience: ***Onkea Interactive Ltd. v. Smith***, 2006 BCCA 521. The factors to take into account when considering the balance of convenience, as summarized in ***Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd.***, (1992), 64 B.C.L.R. (2d) 96 (C.A.) include:

a) whether one of the parties will suffer irreparable harm;
b) consideration of the status quo;
c) consideration of factors affecting the public interest; and
d) the strength of the applicant's case.

Irreparable Harm

[28] Western argues that it will suffer irreparable harm. It says this because, if the stay is not granted, it will lose its opportunity to harvest the timber and will not be able to recover damages, even if the appeal is successful. It says that the timber has a value of over $2 million which it would lose. In addition, it has spent hundreds of thousands of dollars doing preparatory work. It also says that interference with a business as an ongoing concern amounts to irreparable harm: ***International Forest Products Ltd. v. Kern***, 2000 BCSC 1141.

[29] The respondents say that Western has not provided sufficient proof of their potential loss. There is no evidence of the cost of the work, so the actual loss of

profit may be small. However, clear proof of irreparable harm is not required: ***British Columbia (A.G.) v. Wale*** (1986), 9 B.C.L.R. (2d) 333 (C.A.)

[30] If the stay is granted, the respondents say that past history has shown that Western will move quickly to conclude the logging. Western does not deny this. The respondents say that the harm to the SCRD is great if it loses the source protection provided by the barrier of the old growth timber. If it were to be successful on the appeal, this could never be replaced.

[31] This case is somewhat unusual in that both parties have strong arguments that each will suffer irreparable harm if the stay order goes against them. On the one hand, Western would suffer interference with its business and loss of profits without any possibility of recovery. On the other, if the SCRD loses its source protection in the form of the old growth trees, that source protection is gone for generations until the trees grow back. In my view, the positions of the two sides are evenly balanced on consideration of the nature of the harm.

Status Quo

[32] Where the parties' interests are evenly balanced and damages would not be adequate to compensate either party for its potential loss, the status quo should be preserved. While there was some suggestion that the situation prior to the Order represents the status quo, I must consider the situation at the time of the commencement of the appeal. The status quo here is that the Order in place prevents logging activity in the Watershed. As the respondents note, that Order must be presumed to be valid until overturned. In the circumstances, absent my

conclusion that there is some other interest to be considered that might shift the balance between the parties, such as the existence of a very strong case for the appellant, the status quo should be preserved.

Public Interest Considerations

[33] The respondents argue that there are significant public interest issues to be considered. The SCRD sitting as the LBH has a statutory responsibility to take steps to terminate health hazards within the community. In addition, the residents of the community have an interest in the preservation of healthy drinking water. The respondents say that these interests trump those of a private person who has only a commercial interest at stake.

[34] In ***RJR-MacDonald***, *supra*, at 346, the Court considered the interests of a public authority in the context of a stay application:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[35] While those comments were made in reference to the approach that courts should take in *Charter* cases, they are applicable to the situation here. There is no question that the SCRD is charged with the duty of promoting or protecting the

interests of the community in terminating health hazards that are found to exist. The investigation that it performed was required, following receipt of the complaints, by the provisions of s. 58 of the ***Health Act***. Accordingly, there is a strong argument that harm to the public interest would result if a stay were issued to restrain the actions of the SCRD.

Strength of the Applicant's Case

[36] As I have indicated above, Western appears to have a strong case on the question as to whether or not there was an existing health hazard, such that the LBH had jurisdiction to issue the Order. However, the merits of the case have not been argued in full and I have not considered them in detail. Further, counsel for the respondents were at somewhat of a disadvantage on this application as they were not in attendance at the board hearing and so did not have the familiarity with the evidence that Western's counsel had. The strength of Western's case is not sufficient to tip the balance of convenience given the potential for irreparable harm to the respondent, SCRD.

[37] There is, however, an exception to the above conclusion. Western's case with regard to the terms of the Order that prevent removal of the felled timber, or prepared timber from cut blocks WC-043 and WC-043P and the logging in cut blocks WC-021 and WC-023, is very strong. It is clear that the Order did not intend to prevent the removal of the felled timber and the timber prepared for standing stem logging. In addition, the LBH could not make orders restricting logging activity in those cut blocks with "gentle slopes" where the LBH found that the evidence does

not demonstrate a health hazard. As a result, the balance of convenience does favour the granting of a stay with regard to those portions of the Order that have the effect of restricting that activity.

Conclusions

[38] I have concluded that the balance of convenience favours maintenance of the status quo. I have arrived at this decision based on the evenly balanced position of the parties with regard to irreparable harm that each may suffer and the consideration of the public interest concerns raised by the respondents. However, that conclusion is limited to those portions of the Order that were described before me as the "fundamental" provisions. These include paragraph 1 which provides that Western "shall cease all Forestry Activities within the Watershed where slopes measure 60% or greater, except as otherwise stated below in paragraphs 3 and 4 of this order." This is the provision that is intended to maintain the source barrier in the form of the old growth timber on the steep slopes of cut blocks WC-043 and WC-043P. It also includes paragraph 3 which permits removal of felled timber and timber prepared for standing stem removal on those two cut blocks and paragraph 4 that permits reforestation activities to take place.

[39] As indicated above, I am of the view that the balance of convenience, taking into account the strength of Western's case with regard to removal of felled timber and timber prepared for standing stem removal on cut blocks WC-043 and WC-043P and the continuation of logging on the gentle slopes of cut blocks WC-021 and WC-023, requires the issuance of a stay of the other terms of the Order. I should

indicate that all parties agreed that it was open to me to stay some, but not all, terms of the Order. Accordingly, the provisions of paragraphs 2, 5,6,7,8 and 10 are hereby stayed.

[40] Western also sought directions regarding the appeal. I have advised counsel that the appeal will be set for four days commencing September 10, 2007. The early date for the appeal will assist in dealing with the concerns of all parties. The serious issues that are raised by this case can be heard and ruled upon expeditiously.

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B. Butler, J.

S C H E D U L E

1. By no later than 12:00 am on Sunday, August 12, 2007, WFP shall cease all Forestry Activities within the Watershed where slopes measure 60% or greater, except as otherwise stated below in paragraphs 3 and 4 of this order.

2. For greater certainty, WFP is not to build or complete the construction or reactivation of the following road in the Watershed: (Block WC-043), which WFP has defined as D1000 in the affidavit of Jeffrey Ternan sworn July 4, 2007.

3. Notwithstanding the prohibition specified in paragraph 1 of this order, WFP may remove, by helicopter, logs and timber as follows:

   A) those trees that, as of 12:00 pm, August 11, 2007 have already been felled in cutblock WC-043;

   B) those trees that, as of 12:00 pm, August 11, 2007 have already been prepared for removal by helicopter from cutblocks WC-043 and WC-043P.

4. AND FURTHER, notwithstanding the prohibitions in paragraph 1, this Order does not preclude WFP from undertaking a reforestation program in the Watershed as may be required or permitted by law.

5. AND FURTHER, RAINFALL GUIDELINES FOR ALL Forestry Activities not precluded by any section of this Order shall be amended so that no road construction shall be permitted during any period when rainfall exceeds 37mm (1.5 inches) in a 24 hour period and for the further 24 hours following the end of that period.

6. AND FURTHER, the prohibition against Forestry Activities shall also extend to and apply in all riparian areas, defined in this Order to be 30 meters on both sides of all watercourses in the Watershed measured from the high watermark.

7. AND FURTHER, laboratory reports on all water sampling and monitoring in relation to Timber License No. TO797 shall be provided on a daily basis by WFP for a period until two weeks after the conclusion of all Forestry Activities, with the location of sampling and monitoring to be established by WFP in consultation with the SCRD, conducted in cooperation with the SCRD, and with such areas to include the entrance to Chapman Creek. Copies of all monitoring and testing results are to be delivered to the SCRD concurrently with WFP.

8. AND FURTHER, that WFP shall retain a hydrologist to work with or under the direction of the Medical Health Officer and/or the Drinking Water Protection Officer to review any impact of Forestry Activities on water quality for a period until two weeks after the conclusion of all Forestry Activities and report the conclusion of that review to the SCRD.

9. AND FURTHER, that this Order shall not preclude any removal of any trees that must be removed because they constitute a safety hazard and as may be permitted by the Ministry of Forests or WorkSafe BC.

10. AND FURTHER, that WFP shall not burn any logging debris in the Chapman Creek Watershed.

(collectively, the “Orders”)