LOCAL GOVERNMENT AND PUBLIC HEALTH HAZARDS

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INTRODUCTION

With the recent controversy on logging in the Chapman Creek community watershed, and the resulting order by the Sunshine Coast Regional District (SCRD) halting the logging because of concerns that it posed a health hazard, staff at West Coast Environmental Law are increasingly being asked about the powers of local governments under B.C.'s *Health Act*. The purpose of this paper is to discuss those powers in light of the Act and the developing case law.

In brief, the *Health Act* gives local governments the responsibility to investigate allegations of threats to public health and, if a "health hazard" exists, the power to order the owner or occupier of a property to take steps to address the hazard. Powers under the *Health Act* represent an important tool for the public in raising public health concerns, and for local government in addressing them.

WHAT HAPPENED ON THE SUNSHINE COAST?

For more than a decade residents of the Sunshine Coast, and their regional district (SCRD), have been concerned that logging in the Chapman Creek watershed may negatively impact their drinking water. Consequently, Western Forest Product's announcement in the summer of 2007 that it intended to finish logging its holdings in the watershed provoked public outcry.

Because provincial legislation prevents local governments from passing bylaws in respect of forestry operations, the SCRD initially assumed that there was little they could do to protect their drinking water. However, after the area's medical health officer initially expressed concern that the logging might cause a health hazard, West Coast Environmental Law pointed out that the regional district had additional powers under the *Health Act* to deal with health hazards.

In response to a complaint from local residents,[1] the SCRD held five days of public hearings into the matter. On August 11, 2007 the SCRD issued an order restricting logging on steep slopes and within 30 metres of streams.[2] This was, so far as anyone is aware, the first time a local government had used these powers in this way.

Western Forest Products then appealed the SCRD's order to the B.C. Supreme Court. Butler J. heard the appeal and, on October 9, 2007, set aside the SCRD's order, holding that the Board had acted unreasonably in ignoring the expert evidence presented by Western Forest Products.[3] Six of the individuals who signed the original complaint have announced that they will be appealing Butler J.'s decision.[4]

Western Forest Products and the provincial media painted the appeal as a loss for the environmental movement and local government. However, Butler J.'s decision accepted that local governments, including regional districts, have the power to order a stop to health hazards, even where they could not otherwise pass bylaws. As such, the decision is a precedent-setting win for local governments and members of the public concerned with protecting public health.

WHAT IS A LOCAL BOARD OF HEALTH?

Municipal lawyers are often not familiar with the provisions of the *Health Act* and thus may be surprised to find that local governments play a key role under that Act as "local boards of health". Section 37 of the *Health Act* states: "A local board of health is established in each municipality, consisting of the council of the municipality."[5] The definition of "municipality" in the Act includes, in addition to municipal governments, other levels of local government such as regional districts. In other words, the councils and boards of each local government are

also local boards of health, exercising the powers and responsibilities set out in the *Health Act*.

Local governments have this authority in addition to their normal powers as a local government, and may give the municipality or regional district powers to act in cases in which it might not otherwise. For example, until the SCRD made its recent order, it was widely assumed that local governments had no authority to regulate logging. Even though the SCRD order was overturned on appeal, the appeal judge, Butler J. of the BC Supreme Court, accepted that the regional district could regulate logging under the *Health Act*.

WHAT IS A HEALTH HAZARD?

According to the *Health Act*, a health hazard is (in part): "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 …."[6]

It is worth noting that this definition seems to accept that a health hazard can exist even where it has not been proven that the "condition or thing" actually endangers public health. It takes what might be called a precautionary approach to uncertainty – allowing government to take action even in the face of uncertainty.

While the Act may say this, Butler J.'s decision in the appeal of the SCRD's order casts some doubt on the current state of the law. Butler J. noted that medical health officers, unlike local boards of health, have the power to act where there is a "significant risk of an imminent health hazard", and found that this means that local governments cannot act unless there is proof of actual harm. In my respectful opinion this approach appears to be inconsistent with the legislation, and I expect it will be clarified on appeal or in a future case.[7] However, for the moment, the courts have said that "health hazard" means a condition or thing that can be shown to "endanger the public health or prevent or hinder the prevention or suppression of disease." Local governments seeking to use this power will want to keep this interpretation in mind.

It is important to note that "health hazards" arising from environmental problems are not limited to drinking water concerns. The powers of local governments to address health hazards could be used to address air pollution, pesticide safety, hygiene or other environmental conditions that raise human health concerns.

WHEN AND HOW SHOULD A LOCAL GOVERNMENT INVESTIGATE?

Section 57 of the *Health Act* provides:

> 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, or
>
> (d) any constable or officer of any police force or police department within the jurisdiction of the board.

Under section 58(1), once such "information" has been received "the local board must investigate the cause of the complaint."[Emphasis added]

An investigation process may therefore be initiated by members of the public (specifically anyone negatively affected by the health hazard, or simply by any two people living in the municipality). It can also be initiated by a police officer within the local government's jurisdiction.[8]

Having received such information the Act requires a local government, in its capacity as a local board of health, to investigate, or to delegate the investigation to two of its members, but does not state what form the investigation should take. Section 58(2) does give the local board of health the powers to hear from witnesses and to force witnesses to attend:

> 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.[9]

Consequently, a public hearing is the most obvious form for an investigation to take. This was the approach taken by the SCRD in making its *Health Act* order. However, a more focused investigation, provided it gives both the people affected by the alleged health hazard and the person (or people) allegedly causing it an opportunity to be heard, is probably also appropriate.[10]

That being said, Butler J.'s decision in the SCRD case suggests that there is a crucial role for expert evidence in this type of investigation. While not closing the door to cases in which expert evidence is not required, Butler J. found that it was unreasonable of the SCRD to prefer lay evidence to expert evidence:

> 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 [local board of health] was not such a situation.[11]

Local governments hearing evidence as a local board of health will want to consider whether the information is technical enough that it requires the evidence of experts. Where it does, the local board of health may want to retain its own experts to assist it in evaluating the actual health risks.

WHAT ORDER MAY A LOCAL GOVERNMENT MAKE?

Under section 59, a local government may make an order terminating a public health hazard where it has "reason to believe that a health hazard exists."[12] If a local board does reasonably believe that a health hazard is being caused, it may: "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 …."[13] Section 59 also sets out other powers for the local government to clean up a health hazard at the expense of the person causing it, or where the hazard was not the fault of the owner or occupier, at the local government's own expense.

A local government making an order under section 59 should consider carefully what actions are directly required to terminate the health hazard and carefully explain, in its reasons for the order, why the order is necessary to protect public health. A *Health Act* order should be easily linked to public health in order to be effective.

Also, a local government will want to consider whether its public health objectives are best achieved through a *Health Act* order or through its power to enact bylaws related to public health. To the extent that a health hazard is caused by a single owner or occupier of land, or by a small group of individuals, and is relatively unusual, the *Health Act* powers may be a completely suitable way to protect public health. Where, however, the problems are more widespread and caused by many property owners or individuals, local governments may wish to consider whether the health issues are better resolved through bylaws, which can ensure that everyone is subject to the same rules. Both municipalities and regional districts have wide bylaw powers to deal with public health.[14]

WHAT HAPPENS AFTER THE ORDER?

Once made, a local government is entitled to have its order followed. If it is not, the owner or occupier commits an offence under the *Health Act* and can be charged accordingly. In addition, the local government would be able to get a court order enforcing its order.

An order made under the *Health Act* can be appealed to the B.C. Supreme Court by the person who is the subject of the order or by any person who is "aggrieved by it."[15]

It was under this provision that Western Forest Products appealed the order of the Sunshine Coast Regional District. However, the court, in hearing the appeal, will only interfere with the order if the local government has made a legal error or can be shown to have acted "unreasonably". "[A] decision may [be considered reasonable] if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling."[16]

CONCLUSION

The *Health Act* powers are an important tool to protect public health for both the public and for local governments. The process is democratic, in that any affected member of the public can initiate an investigation. It is flexible, allowing the local government to deal with immediate threats to health that are too unusual or specific to have resulted in bylaws or provincial laws dealing with the situation. Moreover, in some cases these powers convey an authority on the local government that is not otherwise available. While the recent appeal of the SCRD's order should serve as a warning against using this tool too broadly, or without a firm basis in fact, a careful local government can use these tools to great effect to remedy a health hazard.

ENDNOTES

1 A copy of the complaint which gave rise to the investigation may be viewed at http://www.thescca.ca/ComplaintJune07.pdf (last accessed October 30, 2007).

2 The SCRD's order may be viewed at http://www.scrd.bc.ca/documents/Health Act Order.pdf (last accessed October 30, 2007).

3 *Western Forest Products v. Sunshine Coast Regional District*, 2007 BCSC 1508 ("WFP v. SCRD"). A copy of this decision may be found at http://www.courts.gov.bc.ca/jdb-txt/sc/07/15/2007bcsc1508err1.htm (last accessed October 30, 2007).

4 See the press release of the Sunshine Coast Conservation Association at http://www.thescca.ca/PressReleaseNotice.pdf (last accessed October 30, 2007)

5 *Health Act*, R.S.B.C. 1996, c. 179, s. 37.

6 *Health Act*, supra, s. 1.

7 In my opinion, the correct interpretation of "significant risk of an imminent health hazard" refers to a situation in which the condition or thing which gives rise to the threat to public health has not yet come into existence, but will do so imminently. In other words, "significant risk" and "imminent" refers not to the likelihood that a condition or thing, once it exists, will harm public health, but to the likelihood that such a condition or thing may come to exist.

8 Less clear is what is meant by "any officer of the local board", although the most likely interpretation is that municipal staff may lay an information before the local board of health.

9 *Health Act*, supra, s. 58(2).

10 Any investigation would need to be consistent with the requirements of procedural fairness, which generally require that those affected be afforded the opportunity to be heard by the decision-maker.

11 *WFP v. SCRD*, supra, para. 54.

12 In addition, the local board of health may be asked to make an order where the medical health officer has become involved. If a medical health officer has made his or her own order (under section 63 of the *Health Act*) and the person causing the health hazard has not followed the order, the medical health officer may request that the local board of health make its own order. In addition, the local board of health may make an order if the medical health officer advises the board that a health hazard exists: *Health Act*, supra, ss. 59(1)(a) and (c). There does not appear to be any obligation for the local government to conduct an investigation in such a case.

13 *Health Act*, supra, Section 59(1.1)

14 *Community Charter*, S.B.C. 2003, c. 26, s. 8 (3)(i); *Public Health Bylaws Regulation*, B.C. Reg. 42/2004; *Local Government Act*, R.S.B.C. 1996, c. 323, s. 523. The use of these powers to protect the public from environmental health threats has been discussed in a number of West Coast Environmental Law publications, including the *Clean Air Bylaws Guide* (http://www.wcel.org/wcelpub/2006/14251.pdf) and *A Citizen's Guide to Pesticide Use and the Law in BC* (http://www.wcel.org/wcelpub/2007/14256.pdf).

15 *Health Act*, supra, s. 102; note that it is unclear whether a member of the public who suffers as a result of a health hazard can appeal the *failure* of a local government, after conducting an investigation, to make an order.

16 *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 55, quoted in *WFP v. SCRD*, supra, para. 47, accepting this as the appropriate test in relation to local boards of health. In relation to legal questions (as opposed to the factual question of whether the health hazard exists), the court in *WFP v. SCRD* decided that the local board of health must be correct in its understanding of the law.