

Dear Dan,

RE: Western Forest Products v. Sunshine Coast Regional District

Further to our telephone conversation and emails of this past week, I write to provide you with our opinion and recommendation with respect to the decision of Mr. Justice Butler in the above referenced matter, and the potential for appeal thereof.

This is not intended to be a comprehensive discussion of all of the errors and flaws we have identified with the decision, but rather simply a general comment on the concerns we have with the decision and the impact of that decision on future decision-making by tribunals and municipalities generally and in health and environmental contexts in particular.

Our concerns with the decision itself can generally be divided into three categories:

- (a) The interpretation of the Health Act
- (b) The Court's substitution of the Board's view of the evidence with its own; and
- (c) The Court's misapprehension of the evidence.

The first two of these concerns are issues of law that the Court of Appeal will review closely for error; however, the concerns arising from the misapprehension of evidence is a more difficult one to address, because the Court of Appeal will generally give this more deference.

Turning to the Court's interpretation of the Health Act, we have serious concerns with the fact that the Court adopted Western's interpretation of the Health Act, and in particular with the very restrictive interpretation of the jurisdiction of the Board and with the rejection of the principle of prudent avoidance.

In our view, there are strong grounds to appeal this aspect of the decision in that there are some serious flaws in logic, and the Court ignored certain statutory language. More importantly, however, in our view the Court's rejection of precaution as an appropriate approach contradicts the very purpose of the Health Act as well as the specific provisions (not to mention international law).

Furthermore, we are extremely concerned with the precedent that this approach creates, not only for decisions under the Health Act, but potentially for decisions relating to environmental and public health generally. In other words, this aspect of the decision has ramifications far beyond the confines of this case, and in our opinion, warrants review by a higher court. In this respect, in discussions with other people and groups in the environmental community, we believe there is significant support for an appeal.

With respect to the Court's treatment of the Board's decision, the main issue with the Court's reasons is that it appears to impose too high a standard on the Board's decision. In other words, in stating that it was unreasonable for the Board to accept one body of evidence over another, in effect the Court is simply substituting its own opinion for that of the Board, which does not accord with the standard of reasonableness.

In addition to the fact that this is, in our opinion, an error in law on the part of the Court, this is a problematic approach, particularly in the environmental context, since it will often be the case that the industrial party has much greater access to expert evidence than do the concerned community members.

If it is not open to a board with significant experience and knowledge of community issues to accept certain evidence over that provided by the industrial party, it effectively restricts the board from acting in anything but the most obvious of circumstances - which in turn relates back to the precautionary principle.

Finally, in attacking the reasons of the Board, in our view, the Court misapprehended or misstated some of the facts of the case itself. As noted above, although there are undoubtedly some flaws in this aspect of the decision, this is likely the weakest aspect of an appeal given the deference an appeal court is likely to give in this regard.

Overall, as demonstrated above, it is our view that strong arguments can be made that Mr. Justice Butler erred in his decision. Having said that, unfortunately this does not necessarily mean there is a strong chance of success on appeal. Because there are several aspects of his decision, any one of which, if upheld, can justify the result, we may need to win on every point in order to overturn the decision and uphold the order of the Board.

Of course, even if we are successful in one aspect of the case, if the result below is not overturned, there is the chance of an award of costs being made against you. There are public interest arguments to be made in this respect, but there is always a chance that these costs will be ordered.

On balance, however, given the potential impact of this precedent on future cases, in our opinion, the risk is warranted in this case, and we would recommend appealing the decision. This case has the potential for being an important one in the environmental and health context, and in our view, win or lose, would benefit from being heard by the higher court.

Should you have any questions or concerns with respect to the above, please feel free to contact us. In the meantime, I look forward to receiving your instructions

Yours sincerely,

UNDERHILL, FAULKNER, BOIES PARKER
LAW CORPORATION INC

Per:

Robin Gage