

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Western Forest Products Inc. v. Capital
Regional District,***
2009 BCCA 80

Date: 20090225
Docket: CA036765; CA036766

Docket: CA036765

Between:

Western Forest Products Inc.

Respondent
(Petitioner)

And

Capital Regional District

Appellant
(Respondent)

- and -

Docket: CA036766

Between:

**Association of British Columbia Landowners
and Lester Roy Monnington**

Respondents
(Petitioners)

And

Capital Regional District

Appellant
(Respondent)

Before: The Honourable Mr. Justice Frankel
(In Chambers)

VANCOUVER

FEB 25 2009

**COURT OF APPEAL
REGISTRY**

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Place and Date of Hearing:

Vancouver, British Columbia
January 26, 2009

Place and Date of Judgment:

Vancouver, British Columbia
February 25, 2009

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] The Capital Regional District (“C.R.D.”) seeks a stay pending its appeals from two orders of the Supreme Court of British Columbia declaring invalid certain cost-sharing agreements that affect who is entitled to vote on matters pertaining to planning and land use management in the Juan de Fuca Electoral Area, and quashing six bylaws down-zoning land in that Area. In addition, the C.R.D. seeks a stay of the orders as they relate to costs against it, and an order consolidating its two appeals.

[2] The respondents, Western Forest Products Inc., the Association of British Columbia Landowners (“A.B.C.L.O.”) and Lester Roy Monnington, do not oppose consolidating the appeals, but do oppose C.R.D.’s application for a stay on both jurisdictional and substantive grounds. In addition, as a preliminary matter, the A.B.C.L.O. and Mr. Monnington seek to have C.R.D.’s application, and all other proceedings in connection with these appeals, stayed pending the determination of their application in the Supreme Court for an order quashing the C.R.D. board’s resolution that authorized the bringing of these appeals.

[3] For the reasons that follow, I have concluded that I have jurisdiction to grant the stays sought by the C.R.D. However, I am prepared to stay only those parts of the formal orders of the Supreme Court that quash the bylaws in issue. In addition, I refuse the application of the A.B.C.L.O. and Mr. Monnington to stay these appeals, and order them to be consolidated.

Factual Background

[4] The Juan de Fuca Electoral Area is one of three unincorporated electoral areas at the south end of Vancouver Island which, together with 13 municipalities, have the C.R.D. as their regional government. Those municipalities include the Districts of Central Saanich and Metchosin. The C.R.D.'s board is made up of directors representing each electoral area and municipality. The number of directors allocated to an electoral area or municipality is based on its population. The Juan de Fuca Electoral Area covers some 150,000 hectares and has a population of approximately 4,500 people. It has one director on the C.R.D. board.

[5] The Juan de Fuca Electoral Area is primarily rural. On January 31, 2007, the Provincial Minister of Forests and Range, without prior notice to the C.R.D., approved the removal of approximately 28,000 hectares of land from three coastal tree-farm licences in the Electoral Area. Primarily to block development of those lands, the C.R.D. adopted six bylaws on April 23, 2008, pursuant to Part 26 (Planning and Land Use Management) of the *Local Government Act*, R.S.B.C. 1996, c. 323, down-zoning large areas within the Electoral Area: Bylaws 3474, 3495, 3497, 3498, 3499, and 3500. By reason of separate "cost-sharing" agreements the C.R.D. entered into with the Districts of Central Saanich and Metchosin on April 12, 2006, voting on those bylaws was restricted to one director from each of these municipalities and the director from the Electoral Area.

[6] Western Forest Products owns approximately 6,500 hectares of the land removed from the tree-farm licences. Mr. Monnington owns approximately

24 hectares of land also affected by the down-zoning. The A.B.C.L.O. is a society with an interest in property rights and the development of land in British Columbia.

[7] Western Forest Products challenged the validity of the bylaws. A similar challenge was jointly brought by the A.B.C.L.O. and Mr. Monnington. Both applications were heard together by Mr. Justice Metzger of the Supreme Court of British Columbia. His reasons are indexed as 2008 BCSC 1776.

[8] The chambers judge determined that the cost-sharing agreements did not meet the requirements of s. 804.1 of the *Local Government Act*, and were, therefore, invalid. As a result, he held that the impugned bylaws had not been properly adopted, and quashed them. As a consequence of quashing the bylaws, the chambers judge declared void the approval given to them by the Minister of Community Services. In addition, the chambers judge declared that eligibility to vote on matters involving planning and land use management in the Electoral Area is governed by s. 11 of the *Capital Regional District Regulation*, B.C. Reg. 65/90, as amended. That regulation lists the directors that are entitled to vote on matters affecting the Electoral Area.

[9] Formal orders giving effect to the chambers judge's decision were entered on February 13, 2009. The operative part of the order entered on the Western Forest Products application reads:

1. Capital Regional District Bylaws No. 3474, 3495, 3497, 3498, 3499, and 3500, adopted April 23, 2008, are quashed;
2. The agreements made April 12, 2006 between the Capital Regional District and the Corporation of the District of Central

Saanich and the District of Metchosin, which purport to provide for cost sharing in relation to the management of development under Part 26 of the *Local Government Act* in the Juan de Fuca Electoral Area are unlawful;

3. The provisions of Order in Council No. 287/2001, this is, section 11 of the *Capital Regional District Regulation*, govern the vote of directors at the Capital Regional District for the purposes of making decisions related to Part 26 services of the *Local Government Act* in the Juan de Fuca Electoral Area;
4. The approval of Capital Regional Bylaws 3497, 3498 and 3499 given by the Minister of Community Services on April 14, 2008, is void; and
5. The Respondent shall pay costs to the Petitioner on Scale B.

[10] The order entered on the application brought by the A.B.C.L.O. and Mr. Monnington is to the same effect, although it is worded somewhat differently:

1. The agreements made April 12, 2006 between the Capital Regional District and the Corporation of the District of Central Saanich and the District of Metchosin, which purport to provide for cost sharing in relation to the management of development under Part 26 of the *Local Government Act* in the Juan de Fuca Electoral Area are unlawful;
2. The provisions of Order in Council No. 287/2001, this is Section 11 of the *Capital Regional District Regulation*, govern the vote of directors at the Capital Regional District for the purpose of making decisions related to Part 26 Services of the *Local Government Act* in the Juan de Fuca Electoral Area;
3. The approval of Capital Regional District Bylaws 3497, 3498 and 3499 given by the Minister of Community Services on April 14, 2008 is void;
4. Capital Regional District Bylaws No. 3474, 3495, 3497, 3498, 3499, and 3500 be and are hereby quashed;
5. The Capital Regional District shall pay the Petitioners costs, on Scale B.

Analysis

Should Proceedings In This Court Be Stayed?

[11] The A.B.C.L.O. and Mr. Monnington submit that these appeals were not properly brought because the entire C.R.D. board voted on the resolution authorizing them. They say that only those directors listed in s. 11 of the *Capital Regional District Regulation* were entitled to vote, as the resolution involved a matter relating to planning and land use management. Their position is that the C.R.D. should not be permitted to take any steps in connection with the appeals until their challenge to the resolution is heard and determined by a judge of the Supreme Court. Western Forest Products supports this application. The C.R.D.'s position is that it is without merit.

[12] I regard the application to stay these appeals as ill-conceived, and see no need to engage in a discussion of the merits regarding the validity of the authorizing resolution or the law that generally applies to stays of proceedings. At the present time, the C.R.D. has appeals pending before this Court. Unless and until a court decides otherwise, the C.R.D. is entitled to prosecute those appeals. This includes seeking interim relief, such as a stay. A.B.C.L.O. and Mr. Monnington have not cited any case in which this Court has, in effect, put an appeal "on hold" pending a decision by another court as to whether the appellant has authority to bring it.

Can An Order Quashing A Bylaw Be Stayed Pending Appeal?

[13] A.B.C.L.O. and Mr. Monnington submit that, as a judge in chambers, I do not have jurisdiction to stay an order quashing a bylaw, which they say amounts to

“unquashing” the bylaw. They also say that I have no jurisdiction to stay the order declaring the cost-savings agreements invalid.

[14] In support of their position, A.B.C.L.O. and Mr. Monnington refer to the judgment of Mr. Justice Sigurdson in *Thomas v. British Columbia (Provincial Approving Officer)* (1996), 139 D.L.R. (4th) 685 (B.C.S.C.), affirmed (1997), 156 D.L.R. (4th) 190 (B.C.C.A.). That case dealt with the impact on land developers of a decision of this Court which revived several municipal bylaws that had been quashed by a judge of the Supreme Court. As a result of the Supreme Court decision, a number of former bylaws became effective again, and the developers received preliminary approval for subdivisions under those bylaws. In his decision, Sigurdson J. noted that the municipality had not sought a stay pending its appeal to this Court to keep the quashed bylaws in place, and expressed the view that, had such an application been made, it probably would have failed. In so doing, he referred to similar comments made by Chief Justice Esson, as he then was, in another case: see *Thomas* at para. 70.

[15] I do not find what was said by either Esson C.J.S.C. or Sigurdson J. to have any bearing on the question of the jurisdiction of a judge of this Court to stay an order quashing a bylaw. Their respective *obiter* comments were directed only to the issue of whether applications of this nature are likely to succeed on their merits.

[16] For its part, the C.R.D. relies on *Riley v. Columbia Shuswap (Regional District)*, 2001 BCCA 654, 26 M.P.L.R. (3d) 82 (Chambers). In that case, Madam Justice Proudfoot granted a stay pending appeal of an order quashing two bylaws.

[17] The A.B.C.L.O. and Mr. Monnington submit that *Riley* is distinguishable because the bylaws that were quashed dealt with building inspections, and without them the Regional District was powerless to carry out any inspections. They say that the present case is different because the order of the chambers judge has had the effect of reviving the previous zoning bylaws. They also point out that it does not appear that any jurisdictional objection was taken in *Riley*.

[18] The fact that the Regional District in *Riley* would not have been able to carry out any inspections if a stay had not been granted does not go to the issue of jurisdiction. It is only a factor to be considered in determining whether to exercise such jurisdiction. However, I agree that it does appear the question of whether an order quashing a bylaw can be stayed was not argued before Proudfoot J.A.

[19] The power to grant a stay pending appeal is conferred by s. 18(1) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77. That section reads:

After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.

[20] The purpose of a stay is to temporarily suspend the operation of the decision made by the court from which the appeal is taken. That decision is evinced by that court's formal order (i.e., judgment). In this case, the formal orders that have been entered include recitals declaring the cost-sharing agreements unlawful, and quashing the bylaws. As those orders are "part of the proceedings ... in the cause or

matter from which the appeal has been taken”, I have the power to stay them, i.e., to suspend their operation.

Should A Stay Be Granted With Respect To The Bylaws?

[21] The parties agree that the test to be applied in determining whether to grant a stay is that set out in the judgment of Mr. Justice Sopinka and Mr. Justice Cory in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. As summarized at page 334 of that decision, to obtain relief an applicant must demonstrate that (a) there is a serious question to be tried, (b) there will be irreparable harm if a stay is not granted, and (c) the balance of convenience favours granting a stay.

[22] The threshold for determining whether there is a serious question to be tried is “a low one”, as a court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious; “a prolonged examination of the merits is generally neither necessary nor desirable”: *RJR – MacDonald Inc.* at 337, 338.

[23] At the hearing, all parties made extensive submissions regarding the merits of their respective positions on the validity of the cost-sharing agreements, and whether the bylaws were properly enacted. I do not think it is appropriate for me to comment on the substance of those submissions, other than to say that I am satisfied that the C.R.D. has an arguable case. That is all it is required to show: *Hutchingame v. Johnstone*, 2006 BCCA 353, 229 B.C.A.C. 48 at para. 10.

[24] Turning to irreparable harm, “‘irreparable’ refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”: *RJR – MacDonald Inc.* at 341.

[25] The C.R.D. says that, as a public authority, it has responsibility for land use and development in the Juan de Fuca Electoral Area. It submits that there is a substantial risk of harm to the public interest if development is allowed to move forward under the old zoning bylaws while the question of the validity of the new bylaws is before this Court.

[26] Western Forest Products, the A.B.C.L.O., and Mr. Monnington collectively submit that, in light of the pace at which development takes place, the likelihood of any harm is remote. In addition, they say that the C.R.D. has mechanisms at its disposal to now put the new bylaws in place. They point out that it is open to the C.R.D. to seek to have the impugned bylaws retroactively validated by the Legislative Assembly, as it has done in the past: see *Municipalities Enabling and Validating Act (No. 3)*, S.B.C. 2001, c. 44, s. 21. They further say that it is open to the C.R.D. to seek to have the impugned bylaws re-enacted using the voting scheme in s. 11 of the *Capital Regional District Regulation*.

[27] In response to the suggestion that it seek to have the impugned bylaws validated by legislation, the C.R.D. submits that it cannot be assumed that the Legislative Assembly will do so. As well, it says that the process that it would have to follow to re-enact the bylaws would take some time.

[28] In my view, there is the potential for irreparable harm if a stay is not granted. The C.R.D. is responsible for regulating land development in the Juan de Fuca Electoral Area in a manner it considers to be in the public interest. To allow development and growth to proceed contrary to the C.R.D.'s express wishes would result in harm to the public interest if this Court finds that the impugned bylaws were properly adopted. Further, given the present uncertainty as to which bylaws govern, allowing matters to proceed under the old bylaws could result in what ultimately proves to be the unnecessary expenditure of funds by the C.R.D., landowners, potential developers, and others.

[29] With respect to the balance of convenience, the following from *RJR – MacDonald Inc.* is germane (at 342):

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

[30] Western Forest Products, the A.B.C.L.O. and Mr. Monnington, submit that the balance of convenience lies in allowing them to enjoy the fruits of their victory. They say that granting the stay would prejudice their interests. In this regard, Western Forest Products notes that its development plans are consistent with the C.R.D.'s former Official Community Plan, i.e., the one revived when the new bylaws were quashed. The C.R.D.'s position, on the other hand, is that, having regard to the

public interest, the balance of convenience lies in not allowing development to proceed at this time.

[31] In my view, the balance of convenience in this case lies in not allowing development to proceed until this Court has had the opportunity to determine the validity of the impugned bylaws. The order I am being asked to make will be of short duration. Any prejudice to those seeking to develop their land will be minimal.

[32] As I have determined that it is appropriate to stay the orders quashing the impugned bylaws, it is also appropriate to stay the orders declaring void the ministerial approval given to some of them.

Should The Declaration Regarding Voting Procedure Be Stayed?

[33] I am not prepared to grant the C.R.D.'s request to stay the order declaring the cost-sharing agreements invalid. To do so would permit the C.R.D. to adopt new bylaws using a voting scheme that has been found to be unlawful. It is one thing to permit the present impugned bylaws to remain in force pending a decision by this Court as to their validity, but quite another to allow the C.R.D. to adopt additional bylaws that would be invalid if this appeal is dismissed. In my view, allowing the C.R.D. to continue to rely on the cost-sharing agreements would not be in the public interest. In this regard, I note that the parties are agreed that the C.R.D. currently has authority to enact land use and planning bylaws using the voting scheme set out in the *Capital Regional District Regulation*.

Should the Costs Order Be Stayed?

[34] The C.R.D. submits that the costs order against it should be stayed pending the determination of its appeal. It has, however, not suggested that there is any reason to believe that it would be unable to recover any monies paid, should its appeal be allowed. In light of this, I see no reason to deprive the successful parties of this aspect of the judgment in their favour. In addition, in so far as the A.B.C.L.O and Mr. Monnington are concerned, to deprive them of their costs at this time could prejudice their ability to contest this appeal; an appeal which raises an important issue concerning the operation of local government.

What Conditions Are Appropriate?

[35] The C.R.D. submits that it would be appropriate to require it to bring its appeal on for hearing promptly. I agree. However, I do not agree with Western Forest Products, the A.B.C.L.O. and Mr. Monnington that lands presently affected by the impugned bylaws should be exempt from the effects of the stay. To do so would effectively negate the stay.

[36] Western Forest Products also submits that it would be appropriate to preclude the C.R.D. from adopting any new bylaws down-zoning its lands during the period the stay is in effect. In my view, such a condition is consistent with the purpose for which the stay is being granted. Since the C.R.D. takes the position that the impugned bylaws are valid, and those bylaws will remain in effect until this appeal is decided, there is no need for the C.R.D. to take any further zoning action with respect to the affected lands while the appeal is outstanding.

[37] Having regard to the circumstances I, therefore, make the following order:

Subject to the following conditions, clauses 3 and 4 of the order of the Supreme Court of British Columbia pronounced on December 23, 2008, in Victoria Registry Nos. 08 1644, and entered on February 13, 2009, and clauses 1 and 4 of the order of the Supreme Court of British Columbia pronounced on December 23, 2008, in Victoria 08 2201, and entered on February 13, 2009, are stayed pending the hearing of this appeal.

Conditions

1. The Capital Regional District shall not adopt any new bylaws dealing with planning and land use management with respect to the lands that are subject to Bylaws 3474, 3495, 3497, 3498, 3499, and 3500, adopted by it on April 23, 2008;
2. The District shall make all reasonable efforts to have this appeal heard on or before June 30, 2009, and shall forthwith, in consultation with the respondents, obtain a date for the hearing of this appeal;
3. The District shall file its appeal record, factum and appeal book on or before March 31, 2009; and
4. If this appeal is not heard on or before June 30, 2009, then the respondents are at liberty to vary or set aside this order, on two clear days notice to the District.

Conclusion

[38] The application of the A.B.C.L.O. and Mr. Monnington to stay these appeals is dismissed.

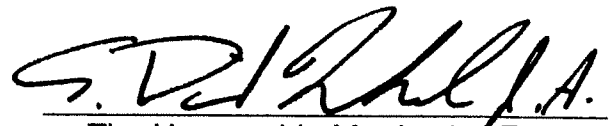
[39] The application of the C.R.D. to stay the orders quashing Bylaws 3474, 3495, 3497, 3498, 3499, and 3500 is granted as set out in paragraph 37 above.

[40] The application of the C.R.D. to stay the declarations of invalidity with respect to the cost-sharing agreements it has entered into with the Districts of Saanich and Metchosin is dismissed.

[41] The application of the C.R.D. to stay the costs ordered in favour of Western Forest Products, the A.B.C.L.O., and Mr. Monnington is dismissed.

[42] The application of the C.R.D. to consolidate these appeals is granted, and they shall continue as one appeal under File No. CA036765.

[43] As success on these applications is divided, each party will bear its own costs.


The Honourable Mr. Justice Frankel