COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Western Forest Products Inc. v. Capital Regional District,* 2009 BCCA 356

Date: 20090813
Dockets: CA036765; CA036766

Docket: CA036765

Between:

Western Forest Products Inc.

Respondent
(Petitioner)

And

Capital Regional District

Appellant
(Respondent)

Docket: CA036766

Between:

Association of British Columbia Landowners and Lester Roy Monnington

Respondents
(Petitioners)

And:

Capital Regional District

Appellant
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Bauman
The Honourable Madam Justice D. Smith

On appeal from the Supreme Court of British Columbia, December 23, 2008, *Western Forest Products Inc. v. Capital Regional District*, 2008 BCSC 1776, Docket Nos. 081644 and 082201

Counsel for the Appellant:	G. McDannold
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Counsel for British Columbia Landowners And Lester Roy Monnington:	Did not appear
Place and Date of Hearing:	Vancouver, British Columbia 23 June 2009
Place and Date of Judgment:	Vancouver, British Columbia 13 August 2009

Written Reasons by:
The Honourable Mr. Justice Bauman

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Smith

Reasons for Judgment of the Honourable Mr. Justice Bauman:

I. Overview

[1] On 31 January 2007, the Minister of Forests and Range for the Province of British Columbia approved the removal of approximately 28,000 hectares of private lands from three tree farm licences ("TFLs") held by Western Forest Products Inc. ("WFP"). The lands are located within the Capital Regional District's ("CRD") Juan de Fuca Electoral Area (the "Electoral Area"), an unincorporated area of extensive size on the southwest coast of Vancouver Island. The Electoral Area abuts the District of Sooke in part and includes a number of small, unorganized communities.

[2] The removal of the lands from the TFLs was apparently ordered without any consultation with the CRD, the local government which has the responsibility for planning and land use management within the Electoral Area. The removal of the lands made them potentially ripe for residential development while the CRD's land use bylaws, then in place, were felt to be inadequate to properly regulate that development.

[3] The CRD thereafter moved quickly to enact amendments to various of its bylaws with the intention of placing the lands in what was effectively a holding zone while more detailed planning for the lands could be advanced. The bylaws implementing these amendments are challenged by WFP in these proceedings. While WFP advances a number of grounds, its essential submission is that the voting on the bylaws was improperly conducted because certain agreements made between the CRD and certain of its member municipalities unlawfully limited the members of the CRD board eligible to vote on the measures.

[4] In this proceeding brought by WFP, and in a companion petition brought by the Association of British Columbia Landowners et al. (the "Association"), Mr. Justice Metzger acceded to this submission and quashed the bylaw amendments. (The Association did not take an active part in the hearing of the appeal before this Court

as the Association has apparently reached an accommodation with the CRD.) The learned judge's reasons are indexed as 2008 BCSC 1776.

[5] This appeal then concerns the scope of judicial review of legislative actions by local government in British Columbia. It engages an examination of the tension arising between judicial deference to policy decisions made by the elected representatives of local government and the role of the courts in confining those local governments to the statutory jurisdiction which they enjoy by delegation from the Legislature. In the words of the majority in the leading decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190:

> [27] As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

II. Background

[6] The impugned bylaws amend various official community plans, land use and subdivision bylaws in force within the Electoral Area. It is a fair assessment of their tenor to say that the amendments severely curtail the ability of landowners to subdivide and develop their lands when compared with the provisions that were in place immediately before the removal of the lands from the TFLs. No issue was raised as to the lawfulness of these "downzoning" amendments, nor with the legitimacy of the CRD's planning concerns that prompted their passage.

[7] The bylaws were adopted by the CRD under the provisions of Part 26 of the *Local Government Act*, R.S.B.C. 1996, c. 323 ["*LGA*"]. Part 26 affords regional districts and incorporated municipalities various powers to regulate planning and land use management within their borders. As I have alluded to above, regional

districts are a type of local government that include as members both incorporated municipalities (i.e., cities, towns, districts and villages) and unincorporated areas known as electoral areas.

[8] Regional districts are governed by a board of directors made up of representatives from each member municipality and each electoral area within the regional district.

[9] With respect to a regional district's powers under Part 26 of the *LGA*, s. 873(b) provides:

> 873 Unless express authority is given by another provision of this Part,
>
> ...
>
> (b) the authority of a regional district under this Part is limited to that part of the regional district that is not in a municipality.

[10] Part 26 of the *LGA* gives power to the board of a regional district to enact regulations creating official community plans, advisory planning commissions, zoning bylaws and other development control tools such as bylaws regulating the subdivision of land and specific developments within the unincorporated areas of the regional district.

[11] Voting on resolutions and bylaws by members of a regional district board is a complicated subject and I turn to describe that scheme. These provisions lie at the heart of the issues on this appeal.

[12] Section 791(1) of the *LGA* provides that all resolutions and every reading of a bylaw must, except as otherwise provided, be decided by a majority of the votes cast and voting in accordance with subsections (2) to (17).

[13] Subsection (2) provides (again, "except as otherwise provided") that each director who is present at a meeting is entitled to vote and has one vote.

[14] The relevant provisions of subsection (3) are important. They identify the circumstances in which the "each director/one vote" rule is to apply:

> (3) Without limiting subsection (2), voting on the following matters must be in accordance with that subsection:
>
> ...
>
> (b) bylaws exercising a regulatory authority in relation to a regulatory service;
>
> * * *
>
> (g) subject to subsections (12) and (13), resolutions and bylaws under Part 26, other than bylaws referred to in paragraph (b).

The parties do not suggest that the impugned bylaws come within s. 791(3)(b) and I will say no more of that subsection.

[15] Before I turn to discuss sections 791(12) and (13), I must set out some other relevant provisions of the *LGA*. These provisions are found in Division 4.2 of Part 24 of the *LGA*. They regulate the recovery of costs for services incurred by the regional district from the members of the regional district. Generally, cost recovery is premised on the notion that members of the regional district who participate in various services offered by the regional district will pay for those services. Not every member of the regional district will participate in, nor enjoy the fruits of, every service offered by the regional district, and where that is so, generally, they will not be required to contribute to the costs thereof.

[16] Section 803.1(1) provides that:

> 803.1(1) All costs incurred by a regional district in relation to a service, including costs of administration attributable to the service, are part of the costs of that service.

[17] Section 804.1 deals specifically with cost sharing among the members of a regional district for regional district services under Part 26 of the *LGA*. The relevant provisions are as follows:

> 804.1(1) The costs of services under Part 26 [*Planning and Land Use Management*] must be apportioned on the basis of the converted value of land and improvements in the service area as follows:
>
> (a) if no municipality has entered into an agreement under subsection (2) or opted out under subsection (3), among all the municipalities and electoral areas, with the service area deemed to be the entire regional district;

> (b) subject to paragraphs (c) and (d), if one or more municipalities have opted out under subsection (3) and are no longer participants, among the electoral areas and any municipalities that have not opted out, with the service area deemed to be those areas;
>
> (c) if one or more municipalities have entered into an agreement under subsection (2) to share only some of the costs, those costs are to be recovered in accordance with the agreements and the remaining costs are to be apportioned among the other participants;
>
> (d) if a municipality is liable for costs under subsection (6) or (7), those costs are to be recovered from the municipality and the remaining costs are to be apportioned among the other participants.
>
> (2) The board and a municipality may enter into an agreement that the municipality is to share in some but not all of the costs of services under Part 26, to the extent set out in the agreement and in accordance with the terms and conditions for the municipality's participation established by the agreement.
>
> (3) Subject to subsection (4), a municipality may opt out of participation in services under Part 26 by giving notice to the board, before August 31 in any year, that until further notice it will no longer share the costs of services under Part 26.

[18] From this provision, a number of scenarios arise. First, in any particular case, the total cost of Part 26 services may be allocated to all municipalities and electoral areas within the regional district. Second, if some municipalities have opted out of participating in Part 26 services, the costs will be allocated to the participating municipalities and the electoral areas. Third, and of critical importance on this appeal, a municipality may enter into an agreement with the regional district under s. 804.1(2) under which it may only be required to "share in some but not all of the costs of services under Part 26". I will discuss that when I turn to the specific facts in the case at bar.

[19] Returning to the voting scheme provided for in s. 791 of the *LGA*, subsections (12) and (13) of that section provide:

> (12) In relation to an agreement under section 804.1 (2) [*cost sharing for Part 26 services*],
>
> (a) the director for the municipality is not entitled to vote on the resolution or bylaw authorizing the regional district to enter into the agreement,

(b) as soon as the agreement has been entered into, the director for that municipality is not entitled to vote on any resolution or bylaw authorizing the regional district to enter into any other agreement under that section, and

(c) while the agreement is in force, the director for that municipality is not entitled to vote on any resolution or bylaw under Part 26 [*Planning and Land Use Management*] except in accordance with the agreement.

(13) In relation to a municipality that has given notice under section 804.1 (3) [*withdrawal from participation in Part 26 services*],

(a) as soon as the notice has been given, the director for the municipality is not entitled to vote on any resolution or bylaw authorizing the regional district to enter into an agreement under section 804.1 (2), and

(b) effective the year following the year in which the notice is given and continuing until the municipality again becomes a participant, the director for that municipality is not entitled to vote on any resolution or bylaw under Part 26 except, if applicable, in relation to participation under section 804.1 (6) or (7) [*limited continued participation*].

[20] I underline the provisions of s. 719 (12)(c): while an agreement under s. 804.1(2) (a "Part 26 Agreement") is in force, the director of the participating municipality is not entitled to vote on Part 26 matters "except in accordance with the agreement".

[21] The voting and cost recovery schemes under this part of the *LGA* in respect of Part 26 matters can be summarized as follows:

(a) generally, it is one director/one vote with responsibility for a full share of the costs;

(b) where a municipality opts out of the service, it has no vote and no responsibility for costs;

(c) where a municipality enters into a Part 26 Agreement, its terms will define the extent of the municipality's participation in Part 26 services, its share of the costs thereof, and its voting rights in respect of Part 26 matters.

I turn now to the factual context at bar.

III. Facts

[22] Here I will relate in some detail the history of various voting schemes in effect within the CRD in respect of Part 26 services. But first I will describe the geopolitical context of the CRD. It is described in CRD's factum thus:

> 1. The Capital Regional District ("CRD") is the regional government for the thirteen municipalities and three Electoral Areas that are located on the southern tip of Vancouver Island. The urban centre of the CRD is the City of Victoria, and the Regional District also includes many of the Gulf Islands, a number of rural municipalities and a vast tract of wilderness that lies along the southwestern coast of Vancouver Island. This wilderness area is located in the Juan de Fuca Electoral Area and includes resource lands and rural communities.
>
> 2. The municipalities that are included in the CRD are the City of Victoria, District of Saanich, District of Oak Bay, Township of Esquimalt, Town of Sidney, Town of View Royal, City of Colwood, District of Central Saanich, District of North Saanich, District of Highlands, District of Langford, District of Metchosin, and District of Sooke. The three unincorporated Electoral Areas included in the CRD are the Juan de Fuca Electoral Area, southern Gulf Islands Electoral Area, and Salt Spring Island Electoral Area.
>
> 3. The CRD is governed by a 23 member Board of Directors made up of Municipal Directors and Directors from the Electoral Areas. Each municipality gets one Director for every 25,000 population. The Directors from the Electoral Areas are elected directly by the residents in those Electoral Areas during the general local government election held every three years.
>
> * * *
>
> 7. Since the CRD was formed in 1966, the Juan de Fuca Electoral Area has remained a primarily rural area. It is approximately 150,000 hectares in size and has a current population of approximately 4,500 people. Unincorporated settlement areas are located in Port Renfrew, Jordan River, Shirley District, Otter Point and East Sooke. Vast portions of the Electoral Area have historically been forestry lands with much of those lands located within tree farm licenses. As such, there was very little growth or development within much of the Juan de Fuca Electoral Area and consequently a limited need for planning or regulation with respect to growth, development and land use.

[23] The Juan de Fuca Electoral Area was formed in 1999 by amalgamating the Langford Electoral Area and the Sooke Electoral Area. Upon amalgamation, it was represented by only one director on the CRD board. Prior to 2000, all 13 municipalities within the CRD had opted out of participating in Part 26 services within

the Electoral Area. This then triggered the voting scheme set out in s. 791(11) of the *LGA*:

> (11) If, except for this subsection, only one director would be entitled to vote, each director who is present
>
> (a) is entitled to vote, and
>
> (b) has one vote.

[24] The CRD's factum reviews this background:

> 24. For thirteen months following the incorporation of the District of Sooke on September 2, 1999, Section 791(11) of the LGA required that voting on Part 26 matters involve all members of the Board, including directors that represented municipalities that were far removed from the Juan de Fuca Electoral Area, such as Sidney, Oak Bay, North Saanich, or Victoria, and that had no desire to be involved in the local political controversies in the largely rural electoral area.
>
> 25. On October 1, 2000, at the request of the Capital Regional District, the Provincial government enacted an amendment to Section 11 of the Capital Regional District Regulation by B.C. Reg. 338/2000 which established a limited list of directors who were to vote on matters under Part 26 of the *Local Government Act*.
>
> 26. Section 11 of the Capital Regional District Regulation provided as follows in 2000:
>
> "Voting on Part 26 decisions for the Juan de Fuca Electoral Area
>
> 11.(1) This section applies to resolutions and bylaws under Part 26 of the *Local Government Act* that are in relation to al [sic] or part of the Juan de Fuca Electoral Area.
>
> (2) As an exception to section 791 (11) of the *Local Government Act*, if that provision would otherwise apply to a resolution or bylaw referred to in subsection (1) of this section, the persons entitled to vote on the resolution or bylaw are
>
> (a) the directors for the Juan de Fuca Electoral Area, the District of Central Saanich, the City of Colwood, the District of Highlands, the District of Langford, the District of Metchosin, and the District of Sooke, and
>
> (b) one director for the District of Saanich, who must be
>
> (i) the mayor of the municipality, or
>
> (ii) if the mayor is not on the board, another director for that municipality who is chosen by the chair of the board to represent the municipality in these matters.
>
> (3) For the purposes of transition, this section applies only to votes that happen after the coming into force of this section,

even if the bylaw being voted on had first reading before this section comes into force."

27. Section 11 was amended by the Province a little more than a year later to further limit the municipalities that could vote in relation to community planning matters in the Juan de Fuca Electoral Area to create different voting structures for different parts of the electoral area with the enactment of B.C. Reg. 287/2001:

"11 (1) This section applies if

(a) a resolution or bylaw under Part 26 [*Planning and Land Use Management*] of the *Local Government Act* applies only to

(i) all or part of the Langford Electoral Area, as it existed on September 1, 1999, or

(ii) all or part of the Sooke Electoral Area, as it existed on September 1, 1999, and

(b) voting on the resolution or bylaw would otherwise be subject to the voting rule established by section 791(11) [*all directors vote if only one otherwise entitled*] of the *Local Government Act*, and operates to provide exceptions to the rule established by that section.

(2) If the resolution or bylaw applies only to all or part of what was the Sooke Electoral Area, the persons entitled to vote on the resolution or bylaw are the directors for

(a) the Juan de Fuca Electoral Area,

(b) the City of Colwood,

(c) the District of Langford,

(d) the District of Metchosin, and

(e) the District of Sooke.

(3) If the resolution or bylaw applies only to all or part of what was the Langford Electoral Area, the persons entitled to vote on the resolution or bylaw are

(a) the directors for

(i) the Juan de Fuca Electoral Area,

(ii) the District of Central Saanich,

(iii) the District of Highlands,

(iv) the District of Langford, and

(b) one director for the District of Saanich, who must be

(i) the mayor of the municipality, or

(ii) if the mayor is not on the board, another director for that municipality who is chosen by

> the chair of the board to represent the municipality in these matters."

[25] I digress to note that B.C. Regulation 287/2001 was preceded by the expression of concerns by the board of the CRD regarding governance issues affecting the Electoral Area. In correspondence dated 8 June 2000 the Deputy Minister of Municipal Affairs noted the CRD's "motion to place a moratorium on land-use discussion in the Juan De Fuca Electoral Area pending a resolution of the CRD's governance concerns by the Ministry." The Deputy Minister's letter in response concluded:

> In conclusion, the Ministry believes that the current legislation is sound, in that it ensures contentious land-use issues are not decided by one director. I am prepared to recommend that the Minister take forward a Cabinet regulation which would enable a panel of Board members to make land-use decisions. However, the Board has ample scope to make procedural changes to reduce the amount of time they might spend on land-use issues while still allowing sufficient opportunity for residents to have input.

[26] It is common ground between the parties that, but for the agreements under s. 804.1(2) to which I will refer below, voting on the Part 26 bylaws that are impugned in this proceeding would be governed by B.C. Reg. 287/2001.

[27] As noted, not all member municipalities in the CRD wished to take part in Part 26 services to the Electoral Area. This apparently included a number of the municipalities that were entitled to a vote on these matters pursuant to B.C. Reg. 287/2001. It will be recalled that the voting scheme mandated by the *LGA* (each director/one vote) and that mandated by B.C. Reg. 287/2001 (a limited number of voting municipalities) could be altered in turn by the existence of Part 26 Agreements.

[28] On 28 April 2004, the CRD enacted Bylaw No. 3166 ("Bylaw 3166") to establish the Juan de Fuca Land Use Committee. The recitals to Bylaw 3166 stated:

> WHEREAS the Board has expressed an interest in entering into agreements under section 804.1(2) of the *Local Government Act* for Part 26 Services with municipalities bordering on the Juan de Fuca Electoral Area; and

> WHEREAS the Board wishes to establish a Juan de Fuca Land Use Committee to make land use recommendations to the Board;

[29] Bylaw 3166 defined "Participating Municipality" as one that had entered into a Part 26 Agreement with respect to Part 26 services to the Electoral Area. The Bylaw then allowed a Participating Municipality, through its CRD director, to participate as a member of the committee. Section 4.0 of Bylaw 3166 set out the committee's powers:

> 4.0 POWERS OF THE COMMITTEE
>
> 4.1 The Committee may make recommendations to the Board on any of the following matters for the Electoral Area:
>
> (a) the preparation, adoption, amendment or repeal of an Official Community Plan
>
> (b) the preparation, adoption, amendment or repeal of a Zoning Bylaw;
>
> (c) the issuance or refusal of a temporary commercial or industrial use permit.
>
> (d) the issuance or refusal of a development permit or development variance permit.
>
> (e) whether the Board should accept, reject or discharge a covenant under Section 219 of the *Land Title Act*, given in connection with an application under Part 26 of the *Local Government Act*.
>
> 4.2 The Board delegates its authority to the Committee
>
> (a) to determine who will be consulted under section 879 of the *Local Government Act* on the preparation, adoption, amendment or repeal of an Official Community Plan, and
>
> (b) to instruct Regional District employees to commence work on an application under Part 26 of the *Local Government Act* when that authority is requested through a Regional District staff report.

Of course, as I have discussed, the existence of Part 26 Agreements would also affect the voting scheme when Part 26 matters involving the Electoral Area reached the board of the CRD.

[30] On 12 April 2006, the CRD purported to enter into Part 26 Agreements with the District of Central Saanich and the District of Metchosin. Under these agreements:

(a) the maximum cost of the Part 26 services within the Electoral Area apportioned to each municipality is $100;

(b) the director representing each municipality is entitled to vote on all matters relating to the Part 26 services.

The agreements are central to the issues on appeal and I attach the one executed by the District of Metchosin as Appendix A to these reasons.

[31] Since the adoption of Bylaw 3166, a number of member municipalities have voted against entering into Part 26 Agreements with the CRD. These include the District of Sooke, the District of Saanich, the District of Langford and the District of Highlands. In the result, only the Districts of Central Saanich and Metchosin have entered into Part 26 Agreements under Bylaw 3166.

[32] This affects the composition of the Juan de Fuca Land Use Committee and more importantly, as I have related, voting on Part 26 matters at the CRD board level. In particular, the adoption of these agreements had the effect of restricting voting on the impugned bylaws to the directors of the Electoral Area and those of the two participating municipalities, Central Saanich and Metchosin.

IV. The Chambers Judgment

[33] In its petition WFP raised these grounds (among others) in its attack on the impugned bylaws:

1. The Capital Regional District exceeded its authority, exceeded it jurisdiction, committed an error of law or acted unreasonably in creating a voting structure through the adoption of Capital Regional District Bylaw No. 3166 and/or by entering into purported cost sharing agreements with The Corporation of the District of Central Saanich and the District of Metchosin, respectively, with the intent and/or effect of circumventing or avoiding the legislated voting structure for regional districts provided in the *Local Government Act* or otherwise provided by law.
2. The Capital Regional District exceeded its authority, exceeded it jurisdiction, committed an error of law or acted unreasonably in utilizing provisions of the *Local Government Act* solely to alter the

> legislated voting structure for regional districts provided in the *Local Government Act* or otherwise provided by law.
>
> 3. The Capital Regional District exceeded its authority, exceeded it jurisdiction, committed an error of law or acted unreasonably by utilizing a cost sharing agreement with respect to planning, zoning or land use management services pursuant to section 804.1 of the *Local Government Act* to alter the legislated voting structure for regional districts provided in the *Local Government Act* or otherwise provided by law, when there is in fact no cost sharing for any planning, zoning or land use management services.
>
> [all typographical errors are in the original]

[34] Mr. Justice Metzger first dealt with the standard of review. He held that the standard applicable in testing the lawfulness of the Part 26 Agreements was that of correctness. He reasoned at paras. 26 and 27:

> [26] The standard of review of the CRD's actions with respect to the issues before this Court is correctness. Local governments are creatures of statute that must operate within the statutory framework set up by the Legislature: *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342, at para. 27 [*Nanaimo*]. Local governments have no greater ability to interpret their empowering statutes than a court: *Nanaimo*, at para. 29. As Mr. Justice Major concluded in *Nanaimo*, "[t]he test on jurisdiction and questions of law is correctness". The correct interpretation of the provisions of the *Act* at issue here involves questions of law for which the CRD is entitled to no deference.
>
> [27] This approach may be distinguished from that applicable to cases challenging the decision of a local government acting within its statutory authority. In those cases, the reviewing court will defer to the local government's decision on the basis that "[m]unicipal councilors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts": *Nanaimo*, at para. 35. I am satisfied that principle does not apply to the issues of statutory compliance raised in this case.

[35] The judge then proceeded to review the parties' positions. He noted that WFP essentially submitted that the Part 26 Agreements are so lacking in substantive provisions that, as a matter of law, they do not come within the type of agreement contemplated by the authorizing section of the *LGA*. This, of course, reflects the position of WFP in its petition to the effect that the Part 26 Agreements are a transparent attempt by the CRD to circumvent the voting scheme mandated by B.C. Reg. 287/2001.

[36] The judge then noted the CRD's position (at para. 33):

> [33] The CRD relies on the wording in s. 804.1 to suggest that the Legislature's intent in drafting this provision was to allow the parties to agree to whatever contract terms they decide are appropriate. The mandatory condition is that the participants pay for "some but not all" of the costs of services and the CRD submits that the agreements comply with this statutory requirement. The CRD argues that if the court correctly uses the benevolent approach to construction, keeping in mind the purposes of the *Act*, the correct conclusion is that the CRD has acted within its jurisdiction by meeting the bare requirements set out in the provision.

[37] Mr. Justice Metzger reviewed the provisions surrounding s. 804.1(2) of the *LGA* in some detail. He concluded at paras. 39 and 40:

> [39] Examination of s. 804.1(2), the surrounding sections, and the *Act* as a whole satisfy me that a cost sharing agreement under the *Act* must have some connection to actual costs shared under Part 26 by the parties, and also must have, at a minimum, terms relating to cost apportionment, valuation of services shared, service area and cost recovery.
>
> [40] This is not the case in these agreements. The terms and conditions established by the agreements relate solely to the payment of $100 for a vote on land use decisions in the Electoral Area. This alone cannot be sufficient to create an actual cost sharing arrangement. The amount has no connection to actual costs of Part 26 services, cost apportionment or recovery, and is only related to services provided in the Electoral Area.

[38] The learned judge went on to find that the agreements did not extend to participation in Part 26 services within the boundaries of the participating municipalities. He reasoned at paras. 44 and 45:

> [44] Furthermore, all of the examples of participation provided by the CRD indicate that these agreements solely pertain to services in the Electoral Area and not in planning or land use management in Central Saanich or Metchosin.
>
> [45] This "participation", limited to the Electoral Area, is not consistent with the language of the *Act*. The provisions of the Act relating to costs of services, cost recovery and cost apportionment connect participation directly to the service area. The service area expands to include participating municipalities and electoral areas when they receive or share a particular service. When a cost sharing agreement is in place, the service area similarly expands to include those municipalities that are parties to the agreement. Here, the service area is solely the Electoral Area. This is not participation as the Legislature intended.

[39] I will deal summarily with this secondary aspect of the learned judge's reasons. It was not an argument advanced by WFP. In my opinion, it reflects an incorrect view of the legislative scheme. As mentioned earlier, the CRD's Part 26 powers are to be exercised only in those areas of the CRD not within the boundaries of the member municipalities. It cannot be a valid objection to the Part 26 Agreements that Central Saanich and Metchosin do not receive any Part 26 services within their boundaries.

[40] In the result, the judge concluded that the Part 26 Agreements were illegal; that the voting on the impugned bylaws should have been, but was not, conducted in accordance with B.C. Reg. 287/2001; and that, as a consequence, the bylaws must be quashed.

V. Analysis

[41] I begin with the issue of the standard of review. In *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, 110 D.L.R. (4th) 1, Madam Justice McLachlin (as she then was) for the minority, discussed the scope of judicial review of actions by a municipal council (and for this purpose the regional district board is of the same ilk). The learned judge stated (at 244):

> The weight of current commentary tends to be critical of the narrow, pro-interventionist approach to the review of municipal powers, supporting instead a more generous, deferential approach: S. M. Makuch, *Canadian Municipal and Planning Law* (1983), at pp. 5-6; McDonald, *supra*; Arrowsmith, *supra*, at p. 219. Such criticism is not unfounded. Rather than confining themselves to rectification of clear excesses of authority, courts under the guise of vague doctrinal terms such as "irrelevant considerations", "improper purpose", "reasonableness", or "bad faith", have not infrequently arrogated to themselves a wide and sweeping power to substitute their views for those of the elected representatives of municipalities. To the same effect, they have "read in" principles of statutory construction such as the one which states that a by-law cannot affect "common law rights" unless the statute confers authority to do so "in plain language or by necessary implication"; *City of Prince George v. Payne*, [1978] 1 S C.R. 458, at p. 463. The result is that, to quote McDonald (at p. 79), "despite the court"s protestations to the contrary, they do, in fact, interfere with the wisdom which municipal councils exercise".

[42] Although writing in the minority, Madam Justice McLachlin's assessment of the modern approach finds support in other decisions, as Mr. Justice Esson noted in this Court's decision in *Canada Mortgage and Housing Corp. v. North Vancouver (District)*, 2000 BCCA 142, 77 B.C.L.R. (3d) 14 at paras. 31-32.

[43] But the modern approach to judicial review of local government conduct does not totally diminish meaningful review. As to matters of jurisdiction, deference gives way to correctness. In *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342, Mr. Justice Major for the Court said this (at paras. 30-33):

> A consideration of the nature of municipal government and the extent of municipal expertise further militates against a deferential standard on the question of jurisdiction. Furthermore, these factors reflect the institutional realities that make municipalities creatures distinct and unique from administrative bodies.
>
> First, in contrast to administrative tribunals, that usually adjudicate matters pertaining to a specialized and confined area, municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial government from which they derive their existence. Yet, unlike provincial governments, municipalities do not have an independent constitutional status. (See *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 52, and the *Constitution Act*, 1867, ss. 92(8) and 92(16).) While administrative agencies are equally statutory delegates, they are not a substitute for provincial legislative and executive authority to the extent that municipalities are. Municipalities essentially represent delegated government.
>
> Second, municipalities are political bodies. Whereas tribunal members should be and are, generally, appointed because they possess an expertise within the scope of the agency's authority, municipal councillors are elected to further a political platform. Neither experience nor proficiency in municipal law and municipal planning, while desirable, is required to be elected a councillor. Given the relatively broad range of issues that a municipality must address, it is unlikely that most councillors will develop such special expertise even over an extended time. Finally, as opposed to administrative tribunals, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent. To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise.
>
> The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for *intra vires* decisions but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

[44] A similar point was made in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485 at para. 5.

[45] The scope of judicial review of administrative action has been definitively revisited by the Supreme Court of Canada in *Dunsmuir*. I have already reproduced para. 27 of the reasons of the five justices, and I continue with paras. 28 and 29:

> [28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> [29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 21.

[46] These sentiments led the *Dunsmuir* majority to this conclusion on the standard of review for true jurisdictional questions (at para. 59):

> [59] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern*

> *Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[47] In approaching the case at bar, I conclude that the Court is faced with a true issue of jurisdiction: was the CRD board correct in concluding that its statutory grant of power in s. 804.1(2) gave it authority to enter into the Part 26 Agreements structured in the manner they are; that is for the purely nominal payment of $100 each, Metchosin and Central Saanich, to the exclusion of all other member municipalities, acquire the right to vote on all Part 26 matters within the Electoral Area.

[48] The answer to this question required the chambers judge to construe the grant of power given by s. 804.1(2). In doing so, he, and this Court on appeal, must adopt a broad and purposive approach to the interpretation of the power granted: *Calgary*, para. 6; *Nanaimo*, para. 18.

[49] In my view, the chambers judge correctly concluded that the Part 26 Agreements are not ones structured in accordance with the authorizing legislation.

[50] I earlier asked: what is the policy at work in providing the option represented by agreements under s. 804.1(2)? The section and arrangements made thereunder allow for a member municipality to participate in Part 26 services to a limited extent; to an extent less than full participation and the payment of a full share of the costs, and greater than no participation at all (which occurs when a member municipality opts out of the service completely). Partial participation is clearly intended because the section contemplates the sharing "in some but not all of the costs of services under Part 26".

[51] What purpose is served by allowing partial participation? I conclude, on reviewing the legislative scheme as a whole, that the cost recovery theme within the

regional district, as I discussed above, is very much guided by a "user pay" philosophy. That is, member municipalities in many cases pay for regional district services to the extent they participate in them. This is certainly so in respect of establishing bylaws for regional district services: see ss. 800, 800.1, 801 and 803.

[52] Presumably, member municipalities opt out of participating in Part 26 services within an electoral area because they have concluded that planning and land use management decisions in these areas have no measureable impact on their municipal interests.

[53] Similarly, where an electoral area is as large as the Juan de Fuca Electoral Area, one can appreciate that a bordering municipality may not perceive that all Part 26 measures within the extensive area affect its municipal interests; only some of them might do so, perhaps those relating to lands within the electoral area closest to the borders of the member municipality and its infrastructure of municipal services. Hence, partial participation is contemplated by s. 804.1(2). That is made clear by the section's reference to cost sharing "in accordance with the terms and conditions for the municipality's participation established by the agreement". Something less than full participation is contemplated because the municipality in a Part 26 Agreement is paying "some but not all" of the costs and the section contemplates the need to accordingly define "... the terms and conditions for the municipality's participation ...".

[54] This idea of partial participation and cost recovery commensurate therewith is finally reinforced by the most important aspect of municipal participation in the delivery of Part 26 services to an electoral area, the right to vote on bylaws and resolutions under Part 26 having effect in the electoral area.

[55] Here, s. 791(12)(c) comes into play. I repeat this provision:

> (12) In relation to an agreement under section 804.1 (2) [*cost sharing for Part 26 services*],
>
> ...
>
> (c) while the agreement is in force, the director for that municipality is not entitled to vote on any resolution or

> bylaw under Part 26 [*Planning and Land Use Management*] except in accordance with the agreement.

[56] This subsection contemplates the agreement setting the terms and conditions of the municipal director's right to vote on Part 26 matters within the electoral area. That right may only be exercised "in accordance with the agreement". The ability to vote on all Part 26 matters is not obviously contemplated here. If it were, subsection (c) would not have been worded in a way that contemplates terms in the agreement affecting the right to vote; it would simply have extended an unfettered right to vote in all Part 26 matters. I am not suggesting that a Part 26 Agreement that does extend full voting rights is invalid. What I am suggesting is that this subsection confirms the intended thrust of Part 26 Agreements: partial participation in Part 26 services in exchange for partial payment of the cost thereof and voting rights correspondingly defined.

[57] One must measure the Part 26 Agreements at bar against that legislative intent. In my view, they bear no resemblance to the type of arrangement contemplated by the enabling legislation. They effectively permit Metchosin and Central Saanich to purchase full voting rights for the nominal payment of $100. Where is the effort in the agreements to define voting rights (s. 791(12)(c)); to define in any meaningful way the municipality's share of some of the costs "to the extent set out in the agreement" and to set out "the terms and conditions for the municipality's participation" (s. 804.1(2))? In my view, the chambers judge was correct in concluding that the Part 26 Agreements at bar are not ones contemplated by the enabling legislation. Some of the parties in this litigation have referred to the agreements as "vote buying" vehicles. That is an apt description.

[58] WFP submits in its factum:

> 79. Here, similarly, there is no connection between the costs to be shared and the cost of land use planning in the Juan de Fuca Electoral Area. The Regional District does not attempt to contend that the $200 chipped in by Central Saanich and Metchosin reflects an important or significant contribution to the cost of provide [sic] land use planning services. Why,

> then, did the Regional District enter into the agreements? The answer is plain: to alter the applicable voting regime.
>
> 80. The Regional District's dissatisfaction with the voting rules set out in s. 791 is a matter of record. The evidence includes a June 2000 letter from the Ministry of Municipal Affairs wherein the Ministry advised the Regional District that it would not change the current legislation, but would (and later did) enact s. 11 of the Regulations:
>
> > In conclusion, the Ministry believes that the current legislation is sound, in that it ensures contentious land-use issues are not decided by one director. I am prepared to recommend that the Minister take forward a Cabinet regulation which would enable a panel of Board members to make land-use decisions.
>
> Having been refused a change to the legislation by the Province and then only given an eight person panel (later changed to a five person panel), the Regional District turned to the agreements as a means by which to set up the three-vote scheme by which the impugned bylaws were enacted.

[59] I agree with the thrust of these observations and with the submission that utilizing the section to alter the voting rules in this manner is not within the jurisdiction granted by the Legislature. This case bears some resemblance to the "gerrymandering" criticized by the courts in *Canadian National Railway Co. v. Fraser Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23, 26 B.C.L.R. (3d) 87 (C.A.), and *West Coast Energy Inc. v. Peace River (Regional District)* (1998), 167 D.L.R. (4th) 98, 54 B.C.L.R. (3d) 45 (C.A.).

[60] For these reasons I would dismiss the appeal. In the circumstances, it is not necessary to address the remainder of the grounds for quashing the bylaws advanced by WFP.

J.A.
The Honourable Mr. Justice Bauman

I agree:

The Honourable Madam Justice Newbury

I agree:

"D. M. Smith"
The Honourable Madam Justice Smith
per MV Newbury

APPENDIX A

THIS AGREEMENT made this 12th day of April, 2006.

BETWEEN:

CAPITAL REGIONAL DISTRICT
625 Fisgard Street
Victoria, B.C.
V8W 1R7

(the "Regional District").

OF THE FIRST PART

AND:

DISTRICT OF METCHOSIN
4450 Happy Valley Road
Victoria, B.C.
V9C 3Z3

(the "Municipality")

OF THE SECOND PART

WHEREAS pursuant to section 804.1 of the *Local Government Act*, a board of a regional district may enter into an agreement with a municipality that the municipality is to share in some but not all of the costs of services under Part 26 of the *Local Government Act*, to the extent set out in the agreement and in accordance with the terms and conditions for the municipality's participation established by the agreement;

AND WHEREAS the Regional District and the Municipality have agreed that the Municipality will share in some of the costs of providing some of the services in relation to management of development under Part 26 of the *Local Government Act*, in accordance with this Agreement and will be entitled to participate in relation to decisions relating to such services.

NOW THIS AGREEMENT WITNESSES that in consideration of the Municipal Share paid by the Municipality to the Regional District, and the terms and conditions hereinafter contained, the parties covenant and agree each with the other as follows:

1. In this Agreement:

"Commencement Date" means the date this Agreement is executed by the Municipality.

"Municipal Share" means the amount of One Hundred ($100.00) Dollars to be apportioned to the Municipality and applied by the Regional District towards the costs of providing Services in each year of the Agreement.

"Services", means services under Part 26 of the *Local Government Act* in relation to the Juan de Fuca Electoral Area.

2. The Municipality agrees to share in the costs of the Services by payment of the Municipal Share promptly upon receipt of an annual invoice therefore from the Regional District.

3. The Municipal Share shall be the maximum cost of Services apportioned to the Municipality.

4. Upon execution of this Agreement, the Municipality will be considered to be a participant in the service of management of development under Part 26 of the *Local Government Act* for the Juan de Fuca Electoral Area.

5. The Municipal Director appointed by the Municipality to the Board of the Regional District shall be entitled to a single vote on matters relating to the Services.

6. The term of this Agreement is five (5) years from the Commencement Date. The Municipality may terminate its participation in the Services in accordance, with the *Local Government Act*.

7. The Municipality shall not be obliged to share in any costs incurred by the CRD arising from any claims against the CRD in relation to the Services beyond the amount of the Municipal Share and the CRD shall indemnify and save harmless the Municipality from and against all claims, actions; causes of action, suits, demands, fees, fines and costs arising from the service of management of development under Part 26 of the *Local Government Act* including without limitation the costs referred to in section 803.1(2) of the *Local Government Act*.

8. It is hereby mutually agreed that any notice required to be given under or in respect of this Agreement will be deemed to be sufficiently given:

   (a) if delivered at the time of delivery; and

   (b) if mailed from any government post office in the Province of British Columbia by prepaid priority post addressed as follows:

   if to the Regional District:

   625 Fisgard Street
   Victoria,. B.C.
   V8W 1R7

   if to the Municipality:

   4450 Happy Valley Road
   Victoria, B.C.
   V9C 3Z3

Unless otherwise specified herein, any notice required to be given under this Agreement by any party will be deemed to have been given if mailed by prepaid priority post, or sent by facsimile transmission, or delivered to the address of the other party set forth on the first page of this Agreement or at such other address as the other party may from time to time direct in wilting, and any such notice will be deemed to have been received if mailed or faxed, 72 hours after the time of mailing or faxing and, if delivered, upon the date of delivery. If normal mail service or facsimile service is interrupted by strike, slow down, force majeure or other cause, then a notice sent by the impaired means of communication will not be deemed to be received until actually received, and the party sending the notice must utilize any other such services which have not been so interrupted or must deliver such notice in order to ensure prompt receipt thereof.

9. This Agreement may not be assigned

10. The waiver by a party of any failure on the part of the other party to perform in accordance with any of the terms or conditions of this Agreement is not to be construed as a waiver of any future or continuing failure, whether similar or dissimilar.

11. Wherever the singular, masculine and neuter are used throughout this Agreement, the same is to be construed as meaning the plural or the feminine or the body corporate or politic as the context so requires.

12. This Agreement is to be construed in accordance with and governed by the laws applicable in the Province of British Columbia.

13. This Agreement may not be modified or amended except by the written agreement of the parties.

IN WITNESS WHEREOF the parties hereto have set their hands and seals as of the day and year first above written.