

M. LOUISE MANDELL, Q.C.*†	CLARINE OSTROVE*
BRENDA GAERTNER*	MARY LOCKE MACAULAY††
TIMOTHY HOWARD	ROSHAN DANESH
CHERYL SHARVIT	JANELLE DWYER*
LINDSAY WADDELL	SHAIN JACKSON

* Personal Law Corporation
† Also of the Alberta Bar
†† Also of the Ontario Bar

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The Gulf Islands Alliance
P.O. Box 795
Salt Spring Island, BC V8K 2W3

Dear Sir:

The Gulf Islands Alliance has asked me to provide a legal opinion on the following question:

Are a Local Trust Committee (“LTC”), the Trust Council and/or the Executive Committee (the “Trust Bodies”) created under the *Islands Trust Act* R.S.B.C. 1996, c. 239 as amended (the “*Islands Trust Act*”) required to exercise their powers consistent with the trust objects stated in s. 3 of the *Islands Trust Act*?

I am pleased to provide the requested opinion by this letter. In brief, it is my view that s. 3 of the *Islands Trust Act* places a positive legal obligation on Trust Bodies to act in furtherance of the trust objects, namely the preservation and protection of the trust area. A decision by a Trust Body that was made for a purpose other than the statutory purpose stated in s. 3 would arguably fall outside the Trust Body’s statutory power, and be vulnerable to legal challenge.

The Islands Trust Policy Statement (Bylaw No. 17, as amended – the “Trust Policy Statement”) imposes further constraints on the exercise of powers by Trust Bodies. Under the *Islands Trust Act*, neither the Trust Council nor the Executive Committee may approve a bylaw that is contrary to or at variance with the Trust Policy Statement. The Trust Policy Statement contains specific directions regarding the implementation of the preserve and protect mandate stated in s. 3, and the approval of a bylaw that contravened or failed to implement those directions would arguably fall outside the statutory powers of the Trust Council and Executive Committee.

1. Analysis

The *Islands Trust Act* is a unique piece of legislation in British Columbia. The Legislature has, through the *Local Government Act* RSBC 1996, c. 323, granted local governments extensive powers to regulate the use of land within their boundaries through zoning and permitting bylaws. Pursuant to s. 1 of the *Local Government Act*, those powers are granted

for the general purpose of enabling local governments to represent and respond to the needs of their communities:

s. 1 The purposes of this Act are

- (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
- (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
- (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.

The *Local Government Act* does not provide specific direction to local government officials on how to prioritize or rank these needs. That determination is left to the local governments themselves.

The *Islands Trust Act* was originally enacted in 1974, subsequently amended and then, in 1989, repealed and replaced with the current legislation. In contrast with the *Local Government Act*, the *Islands Trust Act* gives the Trust Bodies created under it very specific direction on the purposes for which the powers created under the Act may be exercised, and the objects that should be achieved through the exercise of those powers.

Section 3 states the object, or purpose, of the Islands Trust (all underlining is for emphasis and does not appear in the original):

s. 3 The object of the trust is to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia.

Section 4 places the responsibility for fulfilling those purposes with the Trust Bodies:

s. 4(1) The trust council, executive committee, local trust committees and trust fund board are continued for the purpose of carrying out the object of the trust.

Sections 8 and 9 (in relation to the Trust Council), 21 (in relation to the Executive Committee) and 24 (in relation to LTC's) preface the grant of specific powers to each Trust Body with the obligation that the powers are to be exercised "for the purposes of carrying out the object of the trust".

Thus it is apparent from the plain language of the Act that the powers of the Trust Bodies have been granted for the purposes of fulfilling the trust objects stated in s. 3, and the objects of the trust operate to direct and, if necessary, constrain the powers of the Trust Bodies. This interpretation is supported by the decision of the BC Court of Appeal in *MacMillan Bloedel v. Galiano Island Trust Committee*, [1995] BCJ No. 1763, the seminal decision interpreting the *Islands Trust Act*. The respondent MacMillan Bloedel had successfully challenged bylaws passed by the Galiano Island Trust Committee as being *ultra vires*, or outside, the Trust Committee's powers under the Act. The Court of Appeal reversed the lower Court decision and

restored the bylaws. In doing so, two members of the Court specifically noted the unique nature of the *Islands Trust Act* and in particular s. 3:

If there were no s. 3 of the *Islands Trust Act*, I might be of a different opinion, but s. 3 is not a mere piety. To put it another way, these by-laws were enacted for the purposes or the objects of s. 3 as well as for the health and welfare of the inhabitants of Galiano Island. They therefore had a lawful purpose. (*per* Southin J.A. at para. 130)

The history of the *Islands Trust Act* indicates a legislative intent to increase the powers of local trust committees. It also shows an intent to give increased effect to the object statement now contained in s. 3 by setting out the object statement in a separate section of the Act. I think it is a clear inference that local trust committees exercising the powers conferred under the Act, including the powers conferred in both s. 4(4) and s. 27(1)(a), have a legislative mandate to act in conformity with [the] object statement in s. 3. (*per* Finch J.A. at para. 177; emphasis added)

Both Justices emphasized the importance of s. 3 in supporting the exercise of the bylaw making power at issue on the appeal. Finch J.A.'s reasons extend further by noting that the exercise of powers by LTC's must as well be in conformity with s. 3. This confirms the view expressed above that s. 3 acts as an ultimate limit on the purposes for which Trust Bodies can use their powers. A Trust Body decision that is not directed to achieving the preservation and protection of the trust area and its unique amenities and environment, would arguably be outside the scope of powers granted to the Trust Body under the Act.

The exercise of zoning bylaw powers to permit increased residential density provides an example of how this limit operates. Increased density creates direct impacts – road networks, fragmentation of landscapes, increased water usage - that *prima facie* affect and impair the unique amenities and environment. These negative effects do not impair or limit the power of a municipality governed by the *Local Government Act*, to adopt zoning and permitting bylaws authorizing increased density. The municipality may deem increased density to be in the best interests of its residents, because of the expanded economic activity or tax base it may bring, or because the development will contribute funds towards the construction of amenities such as a community centre. Under the *Local Government Act*, municipalities are empowered to engage in this kind of trading off of environmental or natural values, for other benefits.

A LTC operating under the *Islands Trust Act*, in contrast, is mandated to place the preservation and protection of the trust area's environment uppermost in its considerations. When considering whether to authorize increased density, a LTC may not trade off the trust mandate of environmental protection in pursuit of other purposes collateral to that mandate. The LTC must ensure that the trust mandate and purposes are carried out. If the circumstances of the enactment of the bylaw disclose that the predominant purpose of a bylaw is to fulfil a purpose other than the preservation and protection of the trust area and its unique amenities and environment, the bylaw is *prima facie* beyond the LTC's statutory mandate and susceptible to legal challenge.

The Trust Policy Statement also operates to restrict the power of Trust Bodies in enacting bylaws. Under s. 15, the Trust Council is required to prepare a "trust policy statement" that is a

“general statement of the policies of the trust council to carry out the object of the trust. (emphasis added).” The Trust Policy Statement contains five parts, three of which are particularly relevant here. In PART II – THE ISLANDS TRUST’S OBJECTS AND GUIDING PRINCIPLES, the Trust Policy Statement cites s. 3 and invokes a strong commitment to preserving and protecting the Islands Trust area through land use planning and regulation. In Schedule I the following definitions of preserve and protect are adopted:

Preserve – to maintain in a given condition. Preservation often requires maintaining the processes that generate the desired condition.

Protect – to maintain over the long term by managing, or if necessary limiting, the type and intensity of development or activity to ensure that valued attributes are not compromised or destroyed.

In PART III – ECOSYSTEM PRESERVATION AND PROTECTION and PART IV – STEWARDSHIP OF RESOURCES the general commitments stated in Part II are particularized through specific “Commitments of Trust Council” and “Directive Policies”. Directive Policies identify matters that must be addressed by LTC’s through their respective OCP’s and bylaws (Trust Policy Statement, p. 3). By way of example, the Trust Policy Statement requires LTC’s to address the following issues regarding forest lands and ecosystems in their OCP’s and bylaws:

- (a) “the protection of unfragmented forest ecosystems ... from potentially adverse impacts of growth, development and land-use” (Directive Policy 3.2.2).
- (b) “the need to protect the ecological integrity on a scale of forest stands and landscapes” (Directive Policy 4.2.6).
- (c) “the retention of large land holdings and parcel sizes for sustainable forestry use, and the location and construction of roads, and utility and communication corridors to minimize the fragmentation of forests” (Directive Policy 4.2.7).
- (d) “the designation of forest ecosystem reserves where no extraction will take place to ensure the preservation of native biological diversity” (Directive Policy 4.2.8)

Neither the Trust Council nor the Executive Committee, as the case may be, can approve a bylaw of a LTC if it is “contrary to or at variance with the trust policy statement.” While the Act does not explicitly state that the LTC may not adopt bylaws contrary to or at variance with the Trust Policy Statement, the limitation is inherent in the fact that the bylaw requires approval by the Trust Council or Executive Committee.

The phrase “contrary to or at variance with” is also found in the *Vancouver Charter* and the previous *Municipal Act*, and has been judicially considered on several occasions. In general, the law requires that a bylaw must be in “absolute and direct collision” with a higher level planning document such as the Trust Policy Statement before it will be found to be contrary to or at variance with that higher level document¹.

¹ *Pender Islands Trust Protection Society v. North Pender Island Local Trust*, 2001 BCSC 1451; *Rogers v. Corporation of the District of Saanich* (1983), 22 MPLR 4 (BCSC)

This test sets a high standard. However, the Directive Policies are mandatory and prescribe specific requirements that must be addressed through LTC bylaws. Using the Directive Policies cited above as an example, there is a strong argument that a bylaw adopting or amending an OCP that failed to contain specific measures designed to preserve unfragmented forest land base and large lot sizes, would be “at variance” with the Trust Policy Statement and accordingly outside the bylaw approval powers of the Executive Committee and/or Trust Council.

In the interests of thoroughness I will address three further issues. The first is whether the *Islands Trust Act* creates a trust in the full legal sense to which the principles of trust law apply. The Legislature may impose upon itself, or any delegated body within its statutory power, the duties of a trustee in relation to public assets, including the environment and natural resources, by clearly expressed legislative intention². The use of terms with defined meaning in trust law, such as “objects”, “trust” and “trustees” suggests that this intention is present in the *Islands Trust Act*.

Despite two decades of case law under the *Islands Trust Act*, this issue has yet to be definitively addressed by a Court, and remains an outstanding question. As the plain language of the Act and existing legal precedent are sufficient to answer the question posed in this opinion, a detailed analysis addressing whether the Act creates an enforceable trust is not required. It is sufficient to point out that the Legislature’s use of the language of trusts expresses a clear intention to impose enforceable limits on the exercise of powers by Trust Bodies, which limits would only be rendered more restrictive in the event a Court were to rule that the *Islands Trust Act* creates a “true” trust to which the common law and equitable principles of trust law apply.

The second issue is legal commentary regarding the treatment of the *Islands Trust Act*, and in particular the purposes section, in previous Court decisions. In “The Islands Trust: 30 Years of Protecting B.C.’s Gulf Islands” (2005) 2 D.M.P.I. (2d) March 2005, Issue 3, the author questions whether s. 3 has been given meaningful legal effect by the Courts. In particular, the author points to the decision in *Denman Island Local Trust Committee v. 4064 Investments Ltd.* (2001), 96 B.C.L.R. (3d) 253 (B.C.C.A.), in which the Court struck down bylaws concerning the protection of forest lands and the regulation of forestry on Denman Island, as indicating a judicial reluctance to breathe life into s. 3.

The *Denman Island* decision is distinguishable and does not undermine the opinion expressed above. The issue before the Court in the *Denman Island* case was the validity of bylaws described by the Court as enacting a “detailed regulatory scheme” for logging on private lands. The Court’s conclusion that the bylaws exceeded the LTC’s jurisdiction, rests on its view that the extensive regulation of forestry by the Province through other Acts and regulations, is incompatible with a general grant of power to the LTC to regulate that same matter though the *Local Government Act*. The Court makes it clear that it was the LTC’s attempt to directly regulate forestry itself, that put the bylaw beyond the LTC’s jurisdiction.

In my view, there is nothing in the *Denman Island* decision which contradicts the fundamental point expressed in this opinion, which is that the plain language of s. 3 indicates that

² *Waters’ on Law of Trusts in Canada* (3rd ed.) p. 567

Trust Bodies must use their delegated powers for purposes and objects consistent with the preserve and protect mandate.

The final issue is the implication of recent authority from the Supreme Court of Canada regarding the powers of municipal bodies, for the proper interpretation of the powers of Trust Bodies under the *Islands Trust Act*. In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 and related decisions, the Supreme Court stated that a previously restricted approach to interpreting municipal powers has been abandoned in favour of a "broad and purposive approach" consistent with the modern approach to drafting municipal legislation, which has moved away from granting municipalities lists of specific powers in favour of the grant of general powers necessary to fulfilling their purposes and functions (*United Taxi Drivers' Fellowship*, para. 6). Thus the law with respect to municipal powers is arguably moving towards a more expansive approach in which the municipality, rather than the Court, is best situated to determine the appropriate balancing of the competing needs of its community.

In my view this line of authority does not detract from the conclusions expressed above. As noted, the *Islands Trust Act* is not standard local government legislation. It contains a clearly expressed legislative intention to direct the exercise of powers by Trust Bodies towards achieving the trust objects stated in s. 3, and is an exception to the modern approach to drafting municipal legislation relied on by the Supreme Court in *United Taxi Drivers' Fellowship*.

In conclusion, the scheme of the *Islands Trust Act*, to paraphrase Southin J.A. in *MacMillan Bloedel*, is not simply filled with statements of "mere piety" that have no effect on the exercise of powers by the Trust Bodies. It expresses a clear and vigorous legislative intention to preserve and protect the trust area and its unique amenities and environment, and vests the Trust Bodies with the duty to do so. The specific measures required to fulfil that duty are addressed, in part, through the Trust Policy Statement. In my opinion, for a Trust Body to legally exercise its powers, it must comply with both the spirit and the letter of the Act.

Yours truly,

MANDELL PINDER

A handwritten signature in black ink, appearing to read 'Tim Howard', with a stylized flourish at the end.

Tim Howard
Barrister & Solicitor