

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Talbot v. Hornby Island Local Trust
Committee,*
2010 BCSC 524

Date: 20100420
Docket: S116227
Registry: New Westminster

Between:

Jane Talbot and Stepan Vanicek

Plaintiffs

And

**Hornby Island Local Trust Committee, William Wilson, Ron Emerson, Tony
Law, George Buyyer, The Islands Trust, and The Islands Trust Council**

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiffs:

H. N. Purewal

Counsel for the Defendants, Hornby Island
Local Trust Committee, Ron Emerson, Tony
Law, George Buyyer, The Islands Trust, and
The Islands Trust Council:

M. Skorah, Q.C.
J. K. Lamb

Place and Date of Hearing:

New Westminster, B.C.
March 2-4, 2010

Place and Date of Judgment:

New Westminster, B.C.
April 20, 2010

INTRODUCTION

[1] The defendants, Hornby Island Local Trust Committee (“HILTC”), Ron Emerson (“Emerson”), Tony Law (“Law”), George Buwyer (“Buwyer”), the Islands Trust, and the Islands Trust Council, apply for dismissal of all or part of the claims set out in the plaintiff’s statement of claim on the basis of Rule 19(24) of the *Rules of Court*.

[2] Rule 19(24) is as follows:

(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that:

- (a) it discloses no reasonable claim or defence as the case may be,
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
 - (d) it is otherwise an abuse of the process of the court,
- and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[3] Rules 19(1), 19(7) and 19(27) are also relevant. They are as follows:

(1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

(7) A party shall not plead an allegation of fact or a new ground or claim inconsistent with the party’s previous pleading.

(27) No evidence is admissible on an application under subrule (24)(a).

[4] Although the notice of motion refers to all subsections of Rule 19(24), the applicants rely primarily upon Rule 19(24)(a). They argue that the statement of claim dated November 5, 2008 (Appendix “A” to these Reasons) fails to disclose a reasonable claim.

[5] The applicants also argue that the claims against the Islands Trust should be struck out or dismissed on the ground that the Islands Trust is not an entity capable of being sued.

[6] Subsequent to the filing of the statement of claim, the plaintiffs have retained new legal counsel, who appeared before me on the application. The current legal counsel of the plaintiffs has drafted a proposed amended statement of claim, attached as Appendix “B” to these Reasons.

[7] The plaintiffs have consented to dismissal of their claims against the previously named defendants, the Regional District of Comox-Strathcona, and James Bast.

BACKGROUND

Factual Context

[8] On an application to strike out pleadings pursuant to Rule 19(24)(a) of the *Rules of Court*, the facts set out in the pleading in question are assumed to be true. This principle of law is reinforced by Rule 19(27), which provides that no evidence is admissible on an application under subrule 19(24)(a).

[9] In summary, the plaintiffs contend that they purchased property on Hornby Island for residential purposes in March of 1994. Their adjacent neighbour is the defendant, William Wilson (“Wilson”). They allege that Wilson has operated an unregulated, unlicensed private garbage dump on his property. They allege that Wilson’s conduct amounts to the tort of Private Nuisance. There is no issue in relation to that claim on this application.

[10] The defendant HILTC is effectively the local government of Hornby Island. HILTC has three trustee members, who are the defendants Emerson, Law and Buvyer (the “Trustees”).

[11] It is alleged that HILTC trustees failed or neglected to act concerning the nuisance on Wilson’s property (para. 18).

[12] The HILTC brought legal proceedings in the Supreme Court of British Columbia against Wilson in July of 1997 to cause Wilson to clean up his property.

An order was issued by Mr. Justice Shabbits, on May 25, 1998, requiring that Mr. Wilson remove all waste and salvage material from the property.

[13] As noted in para. 14 of the statement of claim, the order also provided that if Wilson did not comply, the plaintiff (HILTC) “may” remove the waste and salvage material from the property.

[14] The plaintiffs contend that the HILTC and the Trustees failed to take appropriate measures to clean up the Wilson property and eliminate the nuisance.

[15] Further proceedings were taken by HILTC against Wilson in 2008. These proceedings are referred to in paras. 16 and 25(k) of the statement of claim. The further proceedings resulted in an order of this Court made December 3, 2008 by Mr. Justice Halfyard, which declared that Wilson was using his land for storage of waste and salvage material contrary to the applicable Hornby Island land use bylaw, and again ordered him to remove the waste and salvage material, and, once again, provided authority to the HILTC to clean up in the event of failure to comply on the part of Wilson.

[16] In para. 22 the plaintiffs allege that HILTC and the Trustees have “acted negligently, in bad faith, with malice, and in abuse of public office”. Negligence is alleged against the Islands Trust and the Islands Trust Council.

[17] Various “specifics” (particulars) of the allegations of “breach of trust, negligence, bad faith, malice and abuse of public office” are set out in para. 24.

[18] Of note, para. 24(g) alleges that the Islands Trust and the Islands Trust Council misled the Ombudsman with respect to his investigation of a complaint made by the plaintiffs. Paragraph 24(l) alleges that the HILTC filed a misleading affidavit in the legal proceedings which resulted in the order of December 3, 2008 made by Mr. Justice Halfyard.

[19] The plaintiffs contend that they were forced to leave their house and reside in Vancouver for several years due to the actions of the defendants. They allege a loss in value of the property, among other unspecified loss, damage and expense.

[20] In para. 26 of the statement of claim, the plaintiffs allege a breach of s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [*Charter*]. On the hearing of the application, legal counsel for the plaintiffs advised me that the plaintiffs were not pursuing that claim. The proposed amended statement of claim provided to me on the hearing of the application indicates that the *Charter* claim has been deleted.

[21] During the hearing of the application, counsel for the plaintiffs advised that the proposed amended statement of claim was merely a first draft.

The Islands Trust

[22] The relevant statutory framework was recently reviewed by Madam Justice Stromberg-Stein of this Court in *Costello v. Hornby Island Local Trust Committee*, 2009 BCSC 1334:

The Islands Trust

[11] The conduct of the defendants must be viewed in the context of their respective statutory obligations or functions as delineated in the *Islands Trust Act*, R.S.B.C. 1996, c. 239 [*Act*].

[12] In 1974, the province enacted legislation to create the Islands Trust to ensure the preservation and protection of the trust area, through land use planning and regulation for the benefit of the 25,000 residents of the trust area and of the province generally. Hornby Island, which has a permanent population of less than 1,000, is one of 13 major islands designated a trust area that, along with 450 smaller islands, comprise the Islands Trust.

[13] The object of the Islands Trust is stated in s. 3 of the *Act*:

[T]o 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.

[14] Two policies to carry out the protection and preservation of the trust area are relevant to these proceedings. The first is an advocacy policy,

directed at ensuring cooperation between other government agencies and local governments in fulfilling the object of the trust. This policy permits communication and advocacy on the part of local government and local trustees with government agencies about how best to address various issues and community interests which are otherwise outside the jurisdiction of local governments.

[15] The second policy relates to preserving and protecting the unique amenities and environment of the trust area by having regard to aesthetic and overall visual qualities and the preservation of a rural, scenic environment. The principal goal of this policy is to retain the rural residential character of the trust area. Therefore, home occupations such as Ms. Costello's proposed winery are permitted, but with restrictions and/or limitations that are designed to protect the integrity of the quiet, residential and rural neighbourhoods.

[16] The Official Community Plan plays a critical role in assessing community objectives and is reviewed every 5-10 years to re-evaluate community objectives.

[17] Section 4 of the *Act* outlines the organization and structure of the Islands Trust "for the purpose of carrying out the object of the trust":

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.

(2) The trust council is intended to establish the general policies for carrying out the object of the trust and to be responsible for the financial management of the trust, other than financial management of the trust fund.

(3) The executive committee is intended to carry out the daily business of the trust, to review the activities of the local trust committees and to act as a local trust committee for that part of the trust area that is not in a local trust area or municipality.

(4) The local trust committees are intended to regulate the development and use of land in their local trust area by exercising powers conferred by this Act, including powers that would otherwise belong to the regional district for each area.

(5) The trust fund board is intended to administer the trust fund and to manage the real and personal property assets of the trust fund.

[18] The Islands Trust is effectively a federation of independent local governments which plan land use and regulate development by developing official community plans, zoning and bylaws for each of the local trust areas. The original *Islands Trust Act* was replaced on April 1, 1990 by the *Islands Trust Act*, S.B.C. 1989, c. 68 which is substantially the same as the current version of the *Act*.

[19] Each designated trust area elects two local trustees every three years. The 26 local trustees comprise the Trust Council, which elects three trustees, one chair and two vice-chairs, to be members of the Executive Committee. The Trust Council's mandate is to establish land use policy within

the trust area. The two elected local trustees of each designated trust area, with a chair from the Executive Committee, form the Local Trust Committee.

[20] The headquarters of the Islands Trust is located in Victoria. There are approximately 44 employees. There are three planning teams with the one for Hornby Island located on Gabriola Island. The budget of the Islands Trust, raised mostly from property taxes, is just over \$6 million a year. The annual budget of the HILTC is about \$3,000. A small amount of money is garnered through fees and grants. At the relevant time, local Trustees were paid an annual salary of approximately \$6,500.

[21] Local Trust Committees have the same powers as regional districts to regulate land use. The bylaws of Local Trust Committees are subject to review by the Executive Committee and the Minister, and they must comply with established land use policy. There is no authority to deliver building inspection on permitting functions, which is handled by Regional Districts. The Regional District assigned to Hornby Island in 1999 was the Comox Strathcona Regional District.

...

[23] The Islands Trust is a unique creature of statute. While similar to local governments, its actions must be viewed through the statutory framework and stated objects in s. 3 of the *Act*: “to preserve and protect the trust area and its unique amenities and environment”. This was highlighted in *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* (1995), 10 B.C.L.R. (3d) 121, 28 M.P.L.R. (2d) 157 (C.A.) [*MacMillan Bloedel Ltd.*]. Madam Justice Southin, at para. 22, commented on the uniqueness of s. 3: “no comparable provision is to be found in any other legislation of this Province concerning municipal government”. In the context of considering whether a Local Trust Committee had acted lawfully in “down zoning” with the intention of preventing development, she held, at para. 130:

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.

[24] Further, Finch J.A. (as he then was), commented on the increased powers conferred on democratically elected local trust committees by the legislature, at paras. 177-178:

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 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 object statement in s. 3.

Moreover, all members of the Islands Trust Committees are now elected, either directly or indirectly. In my view courts should be slow to find bad faith in the conduct of democratically elected

representatives acting under legislative authority, unless there is no other rational conclusion.

LEGAL PRINCIPLES - RULE 19(24)

[23] The purpose of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff: *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92 at paras. 59-60, citing *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.); and *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544.

[24] In *Homalco Indian Band*, K. Smith J. stated at para. 5:

The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action.

[25] The leading case relating to an application under Rule 19(24)(a) is *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. There, the Court, at 968, related the Rule and analogous provisions in other provinces to the court's "inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action".

[26] Madam Justice Wilson, for the Court in *Hunt*, referred at 978 to some of the relevant British Columbia authorities as follows:

In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that *Carey Canada* invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A.), Tysoe J.A. observed at p. 122:

In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no

ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied. [Emphasis added in *Hunt*.]

For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):

I might add that upon the motion, with respect, it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [Emphasis added in *Hunt*.]

[27] Madam Justice Wilson, at 980, summarized as follows:

Most recently, in *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in *Inuit Tapirisat* was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[28] The "plain and obvious" (or "beyond reasonable doubt") test means that the court is "obliged to read the statement of claim as generously as possible":

Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441 at 451. The plaintiff's case is "put at its highest" by the court assuming that facts set out in the statement of claim are true: *Alford v. Canada (Attorney General)* (1997), 31 B.C.L.R. (3d) 228 (S.C.) at para. 7, *aff'd* [1998] B.C.J. No. 2965 (C.A.); and *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15.

[29] The meaning of the terms used in subrules 19(24)(b) and (c) was discussed by Romilly J. in *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.) at para. 47:

Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* (1987), 17 B.C.L.R. (2d) 38 (B.C.S.C.). An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (B.C.C.A.). An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons of B.C. v. Cleland* (1968), 66 W.W.R. 499 (B.C.C.A.). A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [1992] B.C.J. No. 86 (Q.L.) (B.C.S.C.). A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber and Timber Co.* (1920), 28 B.C.R. 39 (C.A.). A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd. et al.*, [1992] B.C.J. No. 1567, (6 July 1992), Prince George Registry 20714 (B.C.S.C.).

[30] The modern view is that novel claims should not be struck at the pleadings stage: *Mohl v. University of British Columbia*, 2006 BCCA 70 at para. 40, citing *Hunt*.

[31] The plain and obvious test also applies to subrules (b), (c) and (d) of Rule 19(24): see *Parmar v. Blenz the Canadian Coffee Co.*, 2007 BCSC 1190 at para. 33.

ISSUES

[32] The issues to be decided are as follows:

1. whether the statement of claim, or any parts thereof, should be ordered to be struck out or amended on any of the grounds set out in Rule 19(24);
2. if so, what remedy or relief should be ordered in the circumstances; and
3. is the Islands Trust an entity that is capable of being sued?

ANALYSIS

Whether the statement of claim, or any parts thereof, should be ordered to be struck out or amended on any of the grounds set out in Rule 19(24)?

Preliminary Comments

[33] As presently drafted, the statement of claim offends basic principles relating to proper drafting of pleadings. Most notably, para. 24 jumbles together various “specifics” (particulars) relating to several different allegations that are apparently intended to signify causes of action: “breach of trust”, “negligence”, “bad faith”, “malice”, and “abuse of public office”.

[34] The pleadings are inconsistent, in that, for example, the reference in para. 24 to “negligence” is inconsistent with the reference to “abuse of public office”.

[35] The tort of misfeasance in public office is an intentional tort; mere negligence will not suffice: *Odhavji Estate* at para. 26. The tort requires deliberate unlawful conduct in the exercise of public functions, as well as an awareness that the conduct is unlawful and likely to injure the plaintiff: *Odhavji Estate* at para. 32.

[36] Current counsel for the plaintiffs, who was not legal counsel at the time the existing statement of claim was drafted, recognizing the deficiencies of the existing pleading, has proposed a draft amended statement of claim.

[37] On an application under Rule 19(24)(a), the Court must consider the pleadings as they stand and should consider how the pleadings might be amended to set out a proper claim: *Citizens for Foreign Aid Reform Inc.* at para. 34.

Position of the Parties

[38] The applicants argue, in summary, as follows:

1. there is no cause of action against the applicants for failing to act concerning the nuisance on Wilson’s property; and
2. the Islands Trust is not a legal entity capable of being sued.

[39] The applicants argue that there is no duty on a local government to enforce a bylaw. The local government retains prosecutorial discretion. There is no duty of care to enforce a bylaw in a timely way: see *Dusevic v. Columbia Shuswap (Regional District)*, [1989] B.C.J. No. 668 (S.C.); *City of Toronto v. Polai*, [1969] O.J. No. 1624 (C.A.) at para. 14; and *Whistler Service Park Ltd. v. Whistler (Resort Municipality)*, [1990] B.C.J. No. 1546 (S.C.).

[40] They argue that there is no proper claim for breach of duty based on *The Islands Trust Act*, R.S.B.C. 1996, c. 239. Mere breach of statutory duty does not constitute negligence: *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9. There is no common law duty on the applicants to preserve and protect the plaintiff's property: *Wirth v. Vancouver City* (1990), 47 B.C.L.R. (2d) 340; *Cambridge Plumbing Systems Ltd. v. Vancouver City*, 2002 BCSC 530. The applicants further argue that in the absence of an analogous category in which a duty of care has been imposed, the plaintiffs must satisfy the two-stage *Anns* test in order to establish a duty of care: *Cooper v. Hobart*, 2001 SCC 79.

[41] The applicants further argue that there is no cause of action in favour of the plaintiffs with respect to failure of the HILTC to clean up the property pursuant to the authority granted by the order of Mr. Justice Shabbits of May 25, 1998. They argue that there is no reasonable claim arising from "misleading the Ombudsman" or in connection with the allegation of filing a "misleading affidavit" with the Court.

[42] They argue that the claim against the trustees in their individual capacity ought to be struck as they have immunity pursuant to s. 287 of the *Local Government Act*, R.S.B.C. 1996, c. 323.

[43] The material portions in s. 287 are as follows:

Immunity for individual municipal public officers

287 (1) In this section, "municipal public officer" means any of the following:

...

(k) a trustee of a body of the Islands Trust under the Islands Trust Act;

(l) an officer or employee of a municipality, regional district, improvement district, library board under the Library Act, a greater board referred to in paragraph (f), the trust council under the Islands Trust Act or the Okanagan Basin Water Board;

...

(2) No action for damages lies or may be instituted against a municipal public officer or former municipal public officer

(a) for anything said or done or omitted to be said or done by that person in the performance or intended performance of the person's duty or the exercise of the person's power, or

(b) for any alleged neglect or default in the performance or intended performance of that person's duty or exercise of that person's power.

(3) Subsection (2) does not provide a defence if

(a) the municipal public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or

(b) the cause of action is libel or slander.

(4) Subsection (2) does not absolve any of the corporations or bodies referred to in subsection (1) (a) to (k) from vicarious liability arising out of a tort committed by any of the individuals referred to in subsection (1) for which the corporation or body would have been liable had this section not been in force.

[44] In response, the plaintiffs concede that in some respects their claims are novel. They rely on the proposition that a claim should not be struck out unless it is plain and obvious that it has no reasonable prospect of success.

[45] The plaintiffs characterize their claims as follows:

1. negligence of the defendants; and
2. claims against the individual trustees for misfeasance in public office.

[46] The plaintiffs deny that they are making a claim simply for failure to enforce the bylaw or to comply with statutory duties.

Negligence

[47] The law to date has not recognized an action for negligent breach of statutory duty. The mere breach of a statutory duty does not constitute negligence: *Holland* at para. 9.

[48] However, in that case, the Court recognized that there was a possible cause of action for negligent failure to implement a judicial decree, and that on that basis such a claim should be not struck on a preliminary motion: *Holland* at para. 14.

[49] The plaintiffs argue that while it is possible the applicants would not be liable in negligence had they simply declined to act in relation to the Wilson property, they did not decline to act. They acted, but in various ways they acted negligently. Thus, the plaintiffs argue, the conduct of the applicants is “operational”. They again rely on *Holland* at para. 14:

More recent authorities describe the distinction in terms of “policy” versus “operational” decisions. Policy decisions about what acts to perform under a statute do not give rise to liability negligence. On the other hand, once a decision to act has been made, the Government may be liable in negligence for the manner in which it *implements* that decision: *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145. Public authorities are expected to implement a judicial decision. Consequently, implementation of a judicial decision is an “operational” act. It is therefore not clear that an action in negligence cannot succeed on a breach of a duty to implement a judicial decree. [Emphasis in original.]

[50] Other authorities demonstrate that public officers carrying out statutory duties may be liable in negligence: see *Odhavji Estate*.

[51] The statutory scheme is relevant to assessing the issue of proximity between the parties: *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 at para 27, citing *Cooper v. Hobart* and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; and *Reference re Broome v. Prince Edward Island*, 2010 SCC 11 at paras. 13 and 20.

[52] The possibility of a cause of action in negligence based on the *Anns* test was recently analyzed by Stromberg-Stein J. in *Costello*, at paras. 122-139. She ruled that there was insufficient proximity, and there were policy considerations which would preclude imposition of the duty of care. That decision was rendered following a 28 day trial. Clearly, I am not in a position on this application to conduct such an analysis.

[53] There are a few bright lines in the law of negligence, including negligence of statutory public authorities. In A.M. Linden and B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis, 2006) at 710, the authors comment as follows:

Since the middle of the last century, the ambit of negligence liability for statutory public authorities has ebbed and flowed. At times, the legislatures and courts have adopted new principles and rules to expand or contract the ambit of liability. At other times, the principles have remained the same, but their interpretation has varied dramatically from one period to another, and even from case-to-case. The interpretation of the scope of immunity for policy decisions is a case in point. Underlying this lack of certainty is a fundamental disagreement amongst judges and scholars about what ought to be the appropriate scope of liability.

[54] Given the state of the law, it is difficult on an application such as this for the applicants to demonstrate that claims in negligence against statutory public authorities are bound to fail.

[55] In my judgment, it is not clear and obvious that the plaintiffs' claim in negligence against the applicants is bound to fail, with respect to their conduct in relation to the Wilson property.

[56] With respect to claims of negligence, the Trustees will have the benefit of the protection afforded by s. 287(2) of the *Local Government Act*, which prohibits claims against them for, among other things, alleged neglect or default in the performance of their duties. The protection is not available if they are proven to be guilty of "dishonesty, gross negligence or malicious or wilful misconduct".

[57] The plaintiffs could therefore plead and attempt to prove facts coming within the exemption. In my view, therefore, it would not be appropriate to strike out the claims and negligence against the individual trustees on this basis.

Misfeasance in public office

[58] The plaintiffs seek to claim against the applicants for misfeasance in public office.

[59] Misfeasance in public office is a recognized tort: see *Odhavji Estate*. Similar claims were rejected, on the facts, in *Costello* at paras. 89-121.

[60] I cannot say it is plain and obvious that the claims of the plaintiffs in misfeasance in public office are bound to fail.

[61] In *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61 at para. 23, the Supreme Court of Canada held that a municipality could be liable in tort for enacting a bylaw if the municipality was acting in bad faith in so doing. From this I take that, although *Odhavji Estate* speaks only of liability of individual public office holders, it is not plain and obvious that a claim against a municipal corporation is bound to fail, based upon bad faith misconduct. Both the existing pleading and the proposed amended pleading allege bad faith, in addition to misfeasance in public office.

What remedy or relief should be ordered in the circumstances?

[62] Rule 19(24) provides the court with authority to strike out or amend any part of the pleading, or to grant judgment, or order that the proceeding be stayed or dismissed, and may order the costs of the application be paid as special costs.

[63] As noted previously, the existing statement of claim offends basic principles of pleading, and is confusing and contradictory. It does not serve the basic purpose of pleadings, which is, as previously noted, to clearly define the issues of fact and law to be determined by the court. It fails to state the material facts.

[64] I order that all paragraphs of the existing statement of claim be struck out.

[65] The proposed draft amended statement of claim is an improvement upon the existing pleading, but still suffers from significant shortcomings.

[66] For example, para. 27 refers to negligence, but also “breach of trust”. On the application, counsel for the plaintiffs conceded that there is no “breach of trust” claim. It is in fact plain and obvious that there is no such claim. This issue was dealt with by my colleague Stromberg-Stein J. in *Costello* at paras. 140-142. At para. 142, Stromberg-Stein J. stated:

[142] The *Act* was not intended to create a private law duty as between the Islands Trust and Ms. Costello. Rather, it intended to create a general public

law duty for the Islands Trust to act in a manner to preserve the trust area. Further, local trust committees cannot be responsible as fiduciaries to individual residents, particularly in the realm of bylaw enforcement.

[67] The allegations concerning misleading the Ombudsman and filing a misleading affidavit illegal proceeding are irrelevant.

[68] I fail to see the potential relevance of the proposed new para. 28, as pleaded, which refers to a “failure to act in accordance with the principles of fairness or due process as required by law”.

[69] I recognize that in drafting the proposed amended statement of claim, counsel may have felt somewhat constrained by the existing pleading.

[70] The plaintiffs will be at liberty to file an amended statement of claim which will properly plead causes of actions as follows:

1. Nuisance, as regards to William Wilson.
2. Negligence, against all defendants.
3. Mifeseance in public office, and bad faith, in relation to the defendants other than Wilson.

[71] The newly revised pleading must comply with the requirements of the rules and the general principles of proper pleadings referred to previously.

[72] The plaintiffs will have 60 days to file the amended pleadings. The defendants shall be at liberty to make a further application for relief under Rule 19(24) or Rule 9-5 of the new 2010 rules.

[73] With respect to the proposed amendments, the applicants argue in reply, that if amendments are allowed, they ought to be “without prejudice” to the right of the applicants to plead and argue limitations defences. For greater certainty, nothing in these reasons is intended to affect any limitation issue that may exist or arise.

[74] The action is stayed until the new pleading is filed.

Is the Islands Trust an entity that is capable of being sued?

[75] The defendants argue that the claims against the Islands Trust ought to be struck as it is no longer a legal entity, under the governing legislation.

[76] The argument of the applicants is as follows:

1. The *Islands Trust Act* was first enacted in 1974. The Act established the trust, to be known as the Islands Trust. The trust consisted of three general trustees.
Islands Trust Act, S.B.C. 1974, c. 43, s. 2
2. By amendment, the Islands Trust was said to "constitute a corporation".
Islands Trust Amendment Act, S.B.C. 1975, c. 32, s. 2(5)
3. In the *Islands Trust Act*, S.B.C. 1989, c. 68, s. 2, the Islands Trust was continued, but there was no provision constituting the trust as a corporation. At the same time, the amendments to the Act at that time established the trust council, the executive committee, the local trust committees, and the trust fund board for purpose of carrying out the object of the trust.
Islands Trust Act, S.B.C. 1989, c. 208, s. 2, 4, 5, 18, 21, 36
4. The trust council (s. 10(1)), the local trust committees (s. 23(1)), and the trust fund board (s. 38(1)) constitute corporations under the Act. By implication, the Islands Trust is no longer a corporation. All of the statutory powers and duties afforded by the *Islands Trust Act* are exercised and carried out by one or more of the trust council, the executive committee, the local trust committees, and the trust fund board. Corporate status was conferred on these entities to allow them to exercise their powers and carry out their duties.
Islands Trust Act, R.S.B.C. 1979, c. 208, s. 10(1), 23(1), 38(1)

[77] The 1989 legislation states in s. 2(1) that "the trust known as The Islands Trust is continued". Section 2(1) of the current legislation, *The Islands Trust Act*, also says "the trust known as The Islands Trust is continued". I interpret that to mean "continued" in the same form in which it existed under the prior legislation, the 1975 *Islands Trust Amendment Act*, S.B.C. 1975, c. 32, which constituted the Islands Trust as a corporation.

[78] In *Islands Trust v. Pinchin Holdings Ltd.* (1981), 32 B.C.L.R. 209 (C.A.), the Court stated that the Islands Trust "is a body corporate". That was clearly so, under the then-applicable legislation. I am advised by counsel that there have been other

legal proceedings over the years in which the Islands Trust has been a party. To date there has been no judicial determination of this issue, following the 1989 legislation.

[79] The legislature did not abolish the Islands Trust, nor does the legislation it passed say that the Islands Trust is no longer a corporate body. Instead, the legislation says that the Islands Trust is “continued”. I do not accept the argument of the applicants that by implication, the legislature intended to remove corporate status from the Islands Trust. I conclude that the Islands Trust remains a corporation, and is therefore capable of being sued.

[80] It is therefore unnecessary for me to consider whether, if the Islands Trust is not a corporation, it nonetheless has the capacity to sue or be sued by legislative authority: *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 at 429; and *Northern Pipeline Agency v. Pehinec*, [1983] 2 S.C.R. 513.

CONCLUSION

[81] The application is allowed in part, in accordance with these reasons.

[82] While there has been divided success on this application, faced with the deficient nature of the statement of claim as originally filed, the applicants were as a practical matter compelled to apply to strike out, or require wholesale amendments to it. I therefore order that the applicants will have costs of this application payable forthwith in any event of the cause.

“Verhoeven J.”

The Honourable Mr. Justice Verhoeven

APPENDIX "A"

Statement of Claim [dated November 5, 2008]

1. The Plaintiff Jane Talbot (hereinafter referred to as "Talbot") is an assistant director in the film industry, and resides at 5540 Harby Road, Hornby Island, British Columbia.
2. The Plaintiff Stepan Vanicek (hereinafter referred to as "Vanicek") is an art director in the film industry, and resides at 5540 Harby Road, Hornby Island, British Columbia.
3. The Defendant Hornby Island Local Trust Committee (hereinafter referred to as "HILTC") is a corporation under the provisions of the Islands Trust Act and has an address for delivery at 700 North Road, Gabriola Island, British Columbia, V0R 1X3.
4. The Defendant William Wilson (hereinafter referred to as "Wilson"), whose occupation is unknown to the Plaintiffs, is the registered owner of, and resides at 5520 Harby Road, Hornby Island, British Columbia.
5. The Defendant Ron Emerson (hereinafter referred to as "Emerson") was at all times material to this action an elected Trustee with the HILTC.
6. The Defendant Tony Law (hereinafter referred to as "Law") was at all times material to this action an elected Trustee with the HILTC.
7. The Defendant George Buyyer (hereinafter referred to as "Buyyer") was at all times material to this action an elected Trustee with the HILTC.
8. The Defendant The Islands Trust (hereinafter referred to as "Islands Trust") is a statutory Trust established and continued under the *Islands Trust Act* RSBC 1996 Chapter 329 and has an address for delivery at Suite 200 - 1627 Fort Street, Victoria, British Columbia, V8R 1H8.
9. The Defendant, The Islands Trust Council (hereinafter referred to as "The Trust Council") is a corporation under the provisions of the *Islands Trust Act* and has

an address for delivery in care of Suite 200 - 1627 Fort Street, Victoria, British Columbia, V8R 1H8.

10. The Defendant Regional District of Comox-Strathcona (hereinafter referred to as "The Regional District) is a regional district and has an address for delivery at 600 Comox Road, Courtenay, British Columbia, V9N 3P6.

11. The Defendant James Bast is an employee, servant or agent of The Regional District with an address for delivery at 600 Comox Road, Courtenay, British Columbia, V9N 3P6.

12. Talbot and Vanicek first came to Hornby Island in 1988, and purchased the property that they presently reside on, in about March 1994. They have improved the property and erected a custom built house. Their property is next door to the property owned by Wilson, and both properties are in a residential subdivision.

13. At all material times, Wilson has acted as a private garbage man, and operated an unregulated, unlicensed private dump on his property. He has allowed residents of Hornby Island to dump garbage without charge, and has been paid to collect garbage, all of which the other Defendants knew or ought to have known about.

14. Wilson, has during the period between 1993 and the present accumulated large quantities of garbage, junk, used building materials and dead vehicles on his property. The materials also include organic garbage from the recycling center, the Hope Kitchen, Jans Café, and the Co-op, all on Hornby Island. Wilson also collects and stores human feces. These materials, and the storing of these materials on Wilson's residential lot, amount to a nuisance and a continuing nuisance. Talbot and Vanicek brought the condition of Wilson's property to the attention of all of the Defendants on numerous occasions, between 1993 and 2000. No action was taken by anyone until July 1997.

15. On May 25, 1998 a Court Order was issued against Wilson requiring him to clean up the property, and the Order specifically said:

...if the Defendant, William Robert Wilson does not by December 1, 1998, remove all waste and salvage material from the land,...the Plaintiff may, by its officers, employees, agents, contractors, and others, enter onto the land...and remove from that land all waste and salvage material that had been located on that land, and dispose of the waste and salvage material so removed...

16. Wilson did not remove all the waste and salvage material from his property, and the Plaintiff (the Defendant herein, HILTC) undertook to remove all the waste and salvage material, and removed some of it but did not complete the job, contrary to the Order. The fact that the clean up was incomplete was brought to the attention of the Defendants Emerson, Law, Buuyer, Islands Trust, Trust Council, The Regional District and Bast, by the Plaintiffs.

17. The Plaintiffs Talbot and Vanicek continued to complain to the Defendants other than Wilson, until further action was taken in the summer of 2008. That action is presently pending.

18. At all times material to this action The Regional District and James Bast had the legal authority to enforce the Bylaw No. 2052 concerning the maintenance of property, but they failed refused or neglected to act at all.

19. The Defendants HILTC, Emerson, Buuyer, and Law failed, refused or neglected to act in a timely manner, or at all, concerning the nuisance on Wilson's property.

20. As a result of the actions of the Defendants, or one or more of them, Talbot and Vanicek have suffered and continue to suffer loss damage and expense, mental distress and aggravation of damages.

21. Wilson has engaged in a campaign of harassment which includes making excessive noise, coming on to Talbot and Vanicek's property and continuing the nuisance.

22. The conduct of the HILTC, Law, Emerson, Buuyer, The Regional District and Bast as set out herein is outrageous, high handed, vexatious, and entitles Talbot and Vanicek to punitive damages.

23. The HILTC, Emerson, Law, Buyyer, The Regional District, and Bast have acted negligently, in bad faith, with malice, and in abuse of public office. The Islands Trust, Trust Council, and Wilson have acted negligently, and Wilson has committed and continues to commit nuisance.

24. The Defendants HILTC, Emerson, Buyyer, Law, Islands Trust and Trust Council have all breached their duty as Trustees to Talbot and Vanicek and have failed to preserve and protect the property belonging to Talbot and Vanicek, and the unique amenities on that property, as required by law.

25. The specifics of the breach of trust, negligence, bad faith, malice, and abuse of public office include the following

- a. The Defendants and each of them have attempted to prevent, and have prevented, the Plaintiffs from having the use and enjoyment of their property, and, since 2007, caused the Plaintiffs to suffer a diminution in value of their property, and a loss of rental income ;
- b. The Defendants HILTC, Law, Buyyer, and Emerson, have failed to act in an even handed manner as between Wilson and the Plaintiffs, thus breaching their duties as Trustees, further they have wilfully concealed material facts relating to the causes of action herein;
- c. Wilson has collected large amounts of garbage and junk, and continues to collect large amounts of garbage and junk and has failed refused or neglected to clean up his property as required by Court Order dated May 25, 1998;
- d. HILTC, Emerson, Buyyer, Law, The Regional District and Bast have failed, refused neglected or delayed in enforcing bylaws that were validly in force and enforceable to prevent Wilson from continuing his collection activities, and to cause him to clean up his property and to abate the nuisance;
- e. The Trust Council, and the Islands Trust, failed to review the activities of the HILTC as required by the *Islands Trust Act*, which activities include the failure of the HILTC to act promptly on the complaint from Talbot and Vanicek concerning the condition of Wilson's property; further they have failed, refused or neglected to properly instruct the HILTC, Emerson, Law and Buyyer in the proper execution of their duties;
- f. HILTC, Emerson, Buyyer, and Law have breached the Order dated May 25, 1998 by interfering with the cleanup of Wilson's property;
- g. The Islands Trust, and the Trust Council, through their employees, servants or agents misled the Ombudsman in his investigation of a complaint made by the Plaintiffs, by falsely claiming that Wilson's property had been cleaned up;

- h. HILTC, Emerson, Buvyer, and Law failed to report to the Trust Council with respect to the steps that they were, and were not taking concerning Wilson;
 - i. HILTC, Emerson, Buvyer, Law, The Regional District and Bast failed, refused or neglected to conduct a proper or any inspection of Wilson's property after the May 25, 1998 Order was made against him. The nuisance continued and Talbot and Vanicek continued to complain and the Defendants continued to ignore their complaints;
 - j. Wilson engaged in a campaign of harassment which included the matters set out herein;
 - k. HILTC, Emerson and Law have caused further delay in forcing Wilson to clean up his property by commencing a new action in the Supreme Court of British Columbia Nanaimo Registry Action No. S54256, when they simply could have moved to enforce the original Order, since it was known at all material times to them that the clean up was never properly completed as required by the Order of May 25, 1998;
 - l. The HILTC, through its employee Peter Phillips has caused a misleading Affidavit to be filed in Supreme Court Action No. 554256 by saying in paragraph 14:

After receiving the Court Order in 1998, Mr. Wilson did not clean up the Property, and the Local Trust Committee proceeded to remove the waste and salvage materials pursuant to the Order. Mr. Wilson has since reaccumulated an even greater amount of waste and salvage on the Property.
26. It was well known to all the Defendants that the Local Trust Committee did not completely remove all of the waste and salvage material, and in the material filed before the Court in Action No. S54256 is an email from the Plaintiffs which says:
27. The Trust hired a local in 2000 to remove part of the land's contents, much of which was brought back in after they left the Island.
28. As a result of the actions of the Defendants herein, the Plaintiffs were forced to leave their house and resided in Vancouver on a full time basis for several years. Further the damages that they have suffered include a reduction in value of their property, and the inability to sell their property. The value of their property has declined sharply since they renewed their efforts in early 2007 to get the Defendants to do something about the nuisance. Talbot and Vanicek continued to suffer loss, damage and expense including the continued loss of value in their property.
29. Further the HILTC, the Islands Trust, Trust Council, and The Regional District are "Government" as defined in the Canadian Charter of Rights and Freedoms.

These Defendants owed a duty to the Plaintiffs to enact a scheme of even-handed, non-political bylaw enforcement. These Defendants failed to enact such a scheme, and allowed bylaw enforcement to be conducted at the whim of the local Trustees on Hornby Island, and thus infringed on the Plaintiffs' rights under Section 7 of the Charter.

WHEREFORE the Plaintiffs claim as against the HILTC, Wilson, Emerson, Buwyer, Law, The Regional District, and Bast;

- a. Damages;
- b. Special Damages;
- c. Punitive Aggravated and Exemplary damages;
- d. Special Costs;
- e. Interim and permanent injunction against Wilson restraining and enjoining him from bringing any further refuse of any description onto his property, and requiring him to immediately remove all the refuse and junk on his property and further to restrain and enjoin him from conducting any further campaigns of harassment against Talbot and Vanicek in any way including making excessive noise, causing rats and vermin to breed on his property, failing to prevent mosquitoes from breeding on his property, and generally to prevent and abate nuisance on his property;
- f. A declaration that the rights of the Plaintiffs to liberty, under the *Charter of Rights* has been infringed or denied;
- g. Such further and other relief as this honourable Court deems just.

Wherefore the Plaintiffs claim as against the Islands Trust, the Trust Council, and each of them;

- a. Damages;
- b. Special Damages;
- c. Aggravated Damages;
- d. Special Costs;
- e. Declaration that the rights of the Plaintiffs to liberty, under the *Charter of Rights* has been infringed or denied;
- f. Such further and other relief as this honourable Court deems just.

APPENDIX "B"

[Proposed] Amended Statement of Claim

The Parties

1. The Plaintiff Jane Talbot (hereinafter referred to as "Talbot") is an assistant director in the film industry, and resides at 5540 Harby Road, Hornby Island, British Columbia.
2. The Plaintiff Stepan Vanicek (hereinafter referred to as "Vanicek") is an art director in the film industry, and resides at 5540 Harby Road, Hornby Island, British Columbia.
3. The Defendant Hornby Island Local Trust Committee (hereinafter referred to as "HILTC") is a corporation under the provisions of the Islands Trust Act and has an address for delivery at 700 North Road, Gabriola Island, British Columbia, V0R 1X3.
4. The Defendant William Wilson (hereinafter referred to as "Wilson"), whose occupation is unknown to the Plaintiffs, is the registered owner of, and resides at, 5520 Harby Road, Hornby Island, British Columbia.
5. The Defendant Ron Emerson (hereinafter referred to as "Emerson") was at all times material to this action an elected Trustee with the HILTC.
6. The Defendant Tony Law (hereinafter referred to as "Law") was at all times material to this action an elected Trustee with the HILTC.
7. The Defendant George Buvyer (hereinafter referred to as "Buvyer") was at all times material to this action an elected Trustee with the HILTC.
- ~~7.~~ 8. The Defendant the Islands Trust (hereinafter referred to as "Islands Trust") is a statutory Trust established and continued under the *Islands Trust Act* RSBC 1996, Chapter 329, and has an address for delivery at Suite 200-1637 Fort Street, Victoria, British Columbia, V8R 1H8.
- ~~8.~~ 9. The Defendant The Islands Trust Council (hereinafter referred to as "The Trust Council") is a corporation under the provisions of the *Islands Trust Act* and has an address for delivery in care of Suite 200-1637 Fort Street, Victoria, British Columbia, V8R 1H8.
- ~~9.~~ The Defendant Regional District of Comox Strathcona (hereinafter referred to as "The Regional District") is a regional district and has an address for delivery at 600 Comox Road, Courtenay, British Columbia, V9N 3P6.

~~10. The Defendant James Bast is an employee, servant, or agent of The Regional District with an address for delivery at 600 Comox Road, Courtenay, British Columbia, V9N 3P6.~~

Background Facts

~~11-10.~~ Talbot and Vanicek first came to Hornby Island in 1988, and purchased the property that they presently reside on, in about March 1994 (the "Talbot Property"). They have improved the property and erected a custom built house. Their property is next door to the property owned by Wilson, and both properties are in a residential subdivision.

~~12-11.~~ At all material times, Wilson has acted as a private garbage man, and operated an unregulated, unlicensed private dump on his property. He has allowed residents on Hornby Island to dump garbage without charge, and has been paid to collect garbage, all of which the other Defendants knew or ought to have known about.

~~13-12.~~ Wilson has during the period between 1993 and the present, accumulated large quantities of garbage, junk, used building materials and dead vehicles on his property. The materials also include organic garbage from the recycling center, the Hope Kitchen, Jans Café, and the Co-op, all on Hornby Island. Wilson also collects and stores human feces. These materials, and the storing of these materials on Wilson's residential lot, amount to a nuisance and a continuing nuisance. Talbot and Vanicek brought the condition of Wilson's property to the attention of all of the Defendants on numerous occasions, between 1993 and 2000 and the present. No action was taken by anyone until July 1997.

13. Wilson has also used his property in the past, and continues to use his property in the present, to collect and store chemical wastes, including bottles of paint, rusted old vehicle, and used batteries.

14. The Plaintiffs say that the materials stored on Wilson's property are dangerous, and are a health and environmental hazard.

15. In a legal action commenced by the Hornby Island Local Trust Committee against Wilson, on May 25, 1998 a Court Order was issued against Wilson requiring him to clean up the property, and the Order specifically said:

...if the Defendant, William Robert Wilson does not by December 1, 1998, remove all waste and salvage material from the land,...the Plaintiff may, but its officers, employees, agents, contractors, and others, enter onto the land...and remove from that land all waste and salvage material that has been located on that land, and dispose of the waste and salvage material so removed....

~~15.16.~~ Wilson did not remove all of the waste and salvage material from his property, and the Plaintiff (the Defendant herein, HILTC) undertook to remove all the waste and salvage material, and removed some of it but did not complete the job, contrary to the Order. The fact that the clean up was incomplete was brought to the attention of the Defendants Emerson, Law, Buwyer, Islands Trust, and Trust Council, ~~the Regional District and Bast~~, by the Plaintiffs.

~~16.17.~~ The Plaintiffs Talbot and Vanicek continued to complain to the Defendants other than Wilson about the condition of Wilson's property until the Defendants took further action was taken in the summer of 2008. That action is presently pending.

18. The *Islands Trust Act* states in section 3 that "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".

19. The Plaintiff pleads and relies upon the provisions of the *Islands Trust Act*.

General Allegations against Defendants

~~17.~~ At all times material to this action The Regional District and James Bast had the legal authority to enforce the Bylaw No. 2052 concerning the maintenance of property, but they failed refused or neglected to act at all.

~~18.20.~~ The Plaintiffs say that the Defendants HILTC, Emerson, Buwyer and Law failed, refused or neglected to act in a timely manner, or at all, concerning the nuisance on Wilson's property.

19.~~21.~~ As a result of the actions of the Defendants, or one or more of them, Talbot and Vanicek have suffered and continue to suffer loss damage and expense, mental distress and aggravation of damages.

20.~~22.~~ The Plaintiffs say that Wilson has engaged in a campaign of harassment which includes making excessive noise, coming in to Talbot and Vanicek's property and continuing the nuisance.

21.~~23.~~ The conduct of the HILTC, Law, Emerson, Buwyer, The Regional District and Bast as set out herein is outrageous, high handed, vexatious, and entitles Talbot and Vanicek to punitive damages.

22.~~24.~~ The HILTC, Emerson, Law, Buwyer, The Regional District and Bast have acted negligently, in bad faith, with malice, and in abuse of public office. The Islands Trust, Trust Council, and Wilson, have acted negligently, and Wilson has committed and continues to commit a nuisance.

23.25. The Defendants HILTC, Emerson, Buwyer, Law, Islands Trust and Trust Council have all breached their duty as Trustees to Talbot and Vanicek and have failed to preserve and protect the property belonging to Talbot and Vanicek, and the unique amenities on that property, as required by law.

Negligence of the Defendants

26. The Plaintiffs say that the Defendants have been aware of the nuisance, and environmental hazards on Wilson's property, since at least 1994, or earlier, and have failed to remedy the situation, or in the alternative, have taken active steps to interfere or stop the cleanup of Wilson's property.

24.27. The Plaintiffs say that the Defendants have breached the duty of care owed to them, and are negligent, the specifics of the breach of trust, and negligence bad faith, malice, and abuse of process include, but are not limited to, the following:

(a) The Defendants and each of them have attempted to prevent, and have prevented, the Plaintiffs from having the use and enjoyment of their property, and since 2007, caused the Plaintiffs to suffer a diminution in value of their property, and a loss of rental income since 2000;

(b) The Defendants HILTC, Law, Buwyer and Emerson, have failed to act in an even-handed manner as between Wilson and the Plaintiffs, thus breaching their duties as Trustees, further they have willfully concealed material facts relating to the causes of action therein;

(c) Wilson has collected large amounts of garbage and junk, and continues to collect large amounts of garbage and junk and has failed or neglected to clean up his property as required by Court Order dated May 25, 1998;

(d) HILTC, Emerson, Buwyer, Law, The Regional District and Bast have failed, refused, neglected or delayed in enforcing bylaws that were validly in force and enforceable to prevent Wilson from continuing his collection activities, and to cause him to clean up his property and to abate the nuisance, and the Plaintiffs say that they relied on the Defendants' representations that they would take action against Wilson, to their own detriment;

(e) The Trust Council, and the Islands Trust, failed to review the activities of the HILTC as required by the *Islands Trust Act*, which activities include the failure of the HILTC to act promptly on the complaint from Talbot and Vanicek concerning the condition of Wilson's property; further they have failed, refused or neglected to properly instruct the HILTC, Emerson, Law and Buwyer in the proper execution of their duties;

(f) HILTC, Emerson, Buyyer and Law have breached the Order dated May 25, 1998 by interfering with the cleanup of Wilson's property;

(g) The Islands Trust, and the Trust Council, through their employees, servants, or agents misled the Ombudsman in his investigation of a complaint made by the Plaintiffs, by falsely claiming that Wilson's property had been cleaned up, when they knew that Wilson's property was still causing a nuisance to the Plaintiffs and an environmental hazard to the community on Hornby Island;

(h) HILTC, Emerson, Buyyer and Law failed to report to the Trust Council with respect to the steps that they were, and were not taking concerning Wilson;

(i) HILTC, Emerson, Buyyer, Law, The Regional District and Bast failed, refused or neglected to conduct a proper or any inspection of Wilson's property after the May 25, 1998 Order was made against him. The nuisance continued and Talbot and Vanicek continued to complain and the Defendants continued to ignore their complaints;

(j) Wilson engaged in a campaign of harassment which included the matters set out herein;

(k) HILTC, Emerson and Law have caused further delay in forcing Wilson to clean up his property by commencing a new action in the Supreme Court of British Columbia Nanaimo Registry Action No. S54256, when they simply could have moved to enforce the original Order, since it was known at all material times to them that the clean up was never properly completed as required by the Order of May 25, 1998;

(l) The HILTC, through its employee Peter Phillips has caused a misleading Affidavit to be filed in Supreme Court Action No. S54256 by saying in paragraph 14:

After receiving the Court Order in 1998, Mr. Wilson did not clean up the Property, and the Local Trust Committee proceeded to remove the waste and salvage materials pursuant to the Order. Mr. Wilson has since re-accumulated an even greater amount of waste and salvage on the Property.

It is well known to all the Defendants that the Local Trust Committee did not completely remove all of the waste and salvage material, and in the material filed before the Court in Action No. S54256 is an email from the Plaintiffs which says:

The Trust hired a local in 2000 to remove part of the land's contents, much of which was brought back in after they left the Island.

(m) The Defendants have failed to ensure that the salvage and waste on Wilson's property has been removed pursuant to another Court Order that granted in the Court Action No. S54256, whereby the Defendants had authority again to remove all of the waste and salvage, but have failed to do so;

(n) The Defendants Law, Buyyer, and Emerson have negligently informed the Plaintiffs and other community members on Hornby Island that Wilson's property has been cleaned up, when they know, or ought to know, that this is not the case;

(o) The Defendant HILTC, Trust Council and Islands Trust failed to hire a reputable contractor to remove the salvage and materials from Wilson's property in 2000, when they knew or ought to have known, that if the material was not removed from Hornby Island, Wilson would bring the salvage and materials back to his property, which he did; and

(p) the Defendants, excluding Wilson, negligently released confidential information about the Plaintiffs' complaints to the Defendant Wilson, which put the Plaintiffs in serious harm as the Defendant Wilson engaged in a malicious campaign of harassment against the Plaintiffs as a result of this knowledge; and

(q) All of the Defendants, excluding Wilson, have breached the duty of care owed to the Plaintiffs to ensure that all of their complaints were investigated in a manner that accords with the principles of justice, rather than applying different rules to different members of the community.

28. The Plaintiffs further say that the Defendants, other than Wilson, have been aware of the nuisance, and environment hazards on Wilson's property, since at least 1994, or earlier, and have failed to act in accordance with the principles of fairness or due process as required by law, the particulars of which include but are not limited to:

(a) they have failed to establish rules and guidelines with respect to when enforcement of certain bylaws will occur, or in the alternative, have failed to establish rules and guidelines in accordance with the principles of procedural fairness;

(b) they have failed to inform the Plaintiffs of the guiding rules and principles of the Islands Trust with respect to which bylaws will be enforced;

- (c) in the event that there are internal policies with respect to when bylaws will be enforced, the Defendants have applied their own internal rules and procedures haphazardly to the residents of Hornby Island;
- (d) they have discriminated against the Plaintiffs in failing to enforce the bylaws against Wilson because the Plaintiffs are considered "non-residents" and are newcomers to Hornby Island; and
- (e) there is no process for appealing decisions of the Islands Trust, or a complaint process by which the Plaintiffs can complain about the decisions of the Islands Trust for failing to ensure that Wilson did not harm the Plaintiffs.

Malice, Abuse of Public Office, Bad Faith

29. The Plaintiff says that the Defendants Emerson, Law and Buvyer (together referred to as the "Trustees") have engaged in behavior that amounts to malice, abuse of public office and bad faith in relation to the Plaintiffs, the particulars of which include, but are not limited to:

- (a) one of the Trustees breached confidentiality in 1996 by telling Wilson about the Plaintiffs' first complaint about his property and the nuisance emanating from it, when he knew that this would cause the Defendant Wilson to engage in behaviour that would further harm the Plaintiff, given the Defendant Wilson's mental history;
- (b) in 2006, Emerson directed that all derelict vehicles be removed from Hornby Island by the Royal Canadian Mounted Police, except those vehicles parked in front of Wilson's property, and on his property, despite numerous requests from the Plaintiffs to have the derelict vehicles removed from their road, and Wilson's property, as they were causing a environmental hazard and a nuisance;
- (c) the Trustees ignored numerous requests from the Plaintiffs, and other neighbours of Wilson, as they are friends with Wilson;
- (d) one or more of the Trustees has/have openly made remarks to the public indicating that individuals who have resided on Hornby Island the longest are exempt from the law, including Wilson;
- (e) one or more of the Trustees have been persuaded by their family members not to take action against Wilson, when they knew that by not taking action based on personal family ties, he would be harming the Plaintiffs;

- (f) the Trustees have purposely and maliciously misled the community on Hornby Island, and abroad, into thinking that Wilson's property has been "cleaned up", when they know that this was not the case;
- (g) the Trustees have purposely and maliciously misled the community on Hornby Island into thinking that Wilson's property has been "cleaned up" for their own benefit in upcoming Trustee elections, so as to show the community that they were "getting the job done" when in fact, they knew the opposite to be true;
- (h) one or more of the Trustees stopped the cleanup of Wilson's in 2000 despite the fact that the court Order ordering the cleanup; and
- (i) the Plaintiffs discovered in 2007 that the Trustees has been holding secret votes where they voted not to proceed against Wilson regarding the salvage and dump on his property, despite the numerous requests by the Plaintiffs to do so since 1994, and despite telling the Plaintiffs, and the community, that they doing the opposite.

30. The Plaintiffs say that the Trustees acted in a high-handed manner as a result of their personal relationships with the Defendant Wilson or their concerns with re-election.

31. The Plaintiffs also say that the Trustees knew the extent of the emotional anguish and trauma the Plaintiffs were enduring as a result of Wilson's property, but the Trustees chose to ignore their complaints, knowing that the Plaintiffs would be harmed by their inaction, or ineffective action.

32. The Plaintiffs further say that HILTC, the Trust Council and the Islands Trust (collectively referred to as the "Trust Defendants") have breached their duties and engaged in behavior that amounts to malice, abuse of public office and bad faith in relation to the Plaintiffs, the particulars of which include, but are not limited to:

- (a) the Plaintiffs have contacted numerous outside agencies to help them with the nuisance on Wilson's property, however, each time they are informed by these external agencies that the matter is already being dealt with. The Plaintiffs say that the Trust Defendants are purposely, and maliciously lying, or misleading external agencies so that an independent investigation is not conducted on Wilson's property with respect to the environmental hazard that is created as well as the nuisance;
- (b) the Trust Defendants have purposely and maliciously misled bylaw enforcement officials, and other agencies, with respect to how much (c)they have cleaned up on Wilson's property, and specifically with respect to the 2000 cleanup;

- (c) the Trust Defendants have purposely refused to conduct environmental testing on Wilson's property when they have been informed in a number of complaints from community members, including the Plaintiffs, that they see hazardous material on Wilson's property, and also have seen him burying this hazardous material into the ground;
- (d) the Plaintiffs have seen representatives of the Trust Defendants removing batteries and other toxic waste from Wilson's property prior to media, or other agencies, arriving at Wilson's property to do an investigation;
- (e) the Trust Defendants have systematically and maliciously discriminated against the Plaintiffs for not being long-time residents of Hornby Island, and therefore have been advised by representatives of the Trust Defendants that different rules apply to the two types of residents; and
- (f) the Trust Defendants have high-handedly determined that they will not apply the provisions of the *Islands Trust Act*, or enforce the bylaws in this particular case for the Plaintiffs, when they have done so for other individuals on many occasions.

Damages

33. As a result of the actions of the Defendants, the Plaintiff have sustained numerous damages, both to their land and to themselves.

25.34. As a result of the actions of the Defendants herein, the Plaintiffs were forced to leave their house and resided in Vancouver on a full time basis for several years. Further the damages that they have suffered include a reduction in value of their property, and the inability to sell their property. The value of their property has declined sharply since they renewed their efforts in early 2007 to get the Defendants to do something about the nuisance. Talbot and Vanicek continued to suffer loss, damage and expense including the continued loss of value in their property.

35. The Plaintiffs have also suffered from loss of enjoyment of property as a result of the nuisance, the particulars of which include, but are not limited to:

- (a) the sewage and salvage material present on Wilson's property has led to an extreme increase in mosquitoes, which then transcend onto the Plaintiffs' property all year around;
- (b) the Plaintiffs have endured the smell of feces, garbage and other toxic waste all year around, with it being more potent in the summer months;

- (c) Wilson has systematically threatened and harassed the Plaintiffs, indicating that he could "get away" with anything on Hornby Island, thereby forcing the Plaintiffs to move to Vancouver to avoid further harassment and violence; and
- (d) the Plaintiffs were advised that their garden would never be considered organic as they resided next to a "dump", thereby created a toxic environment for vegetables and plants.

36. The Plaintiffs have also sustained emotional stress and trauma as a result of the actions of the Defendants, and in particular, they seek punitive damages against the Trustees and Trust Defendants for causing the Plaintiffs further anguish and torment as a result of their malicious and high-handed behaviour.

26. Further the HILTC, the Islands Trust, Trust Council and The Regional District are "Government" as defined in the Canadian Charter of Rights and Freedoms. These Defendants owed a duty to the Plaintiffs to enact a scheme of even handed, non-political bylaw enforcement. These Defendants failed to enact such a scheme, and allowed bylaw enforcement to be conducted at the whim of the local Trustees on Hornby Island, and thus infringed on the Plaintiff's rights under section 7 of the Charter.

37. The Plaintiffs expressly waive any and all rights to recover from the Defendants or any other party, any portion of the Plaintiffs' loss that may be attributable to the fault or liability of any of James Bast, the Comox Valley Regional District or the Comox-Strathcona Regional District, and for which the Defendants or any other party, might reasonably be entitled to claim from any one or more of James Bast, the Comox Valley Regional District and/or the Comox-Strathcona Regional District in contribution, indemnity or an apportionment at common law, in equity, or pursuant to the Negligence Act, R.S.B.C. 1996, c. 333 and amendments thereto, or any successor legislation.

WHEREFORE the Plaintiffs claim as against the HILTC, Wilson, Emerson, Buyyer, Law, The Regional District, and Bast:

- (a) Damages;
- (b) Special Damages;
- (c) Punitive, Aggravated and Exemplary damages;
- (d) Special Costs;
- (e) Interim and permanent injunction against Wilson restraining and enjoining him from bringing any further refuse of any description onto his property, and requiring him to immediately remove all the refuse

and junk on his property and further to restrain and enjoin him from conducting any further campaigns of harassment against Talbot and Vanicek in any way including making excessive noise, causing rats and vermin to breed on his property, failing to prevent mosquitoes from breeding on his property, and generally to prevent and abate nuisance on his property;

- (f) ~~A declaration that the rights of the Plaintiffs to liberty, under the Charter of rights has been infringed or denied.~~
- (g) Such further and other relief as this honourable Court deems just.

Wherefore the Plaintiffs claim as against the Islands Trust, the Trust Council, and each of them;

- (a) Damages;
- (b) Special Damages;
- (c) Aggravated Damages;
- (d) Special Costs;
- (e) ~~Declaration that the rights of the Plaintiffs to liberty, under the Charter of Rights has been infringed or denied;~~
- (f) Such further and other relief as this honourable Court deems just.

PLACE OF TRIAL: New Westminster, British Columbia

~~Dated at the City of Vancouver, in the Province of British Columbia, this 5 day of November 2008.~~

Dated at the City of Vancouver, in the Province of British Columbia this 1st day of March, 2010.