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Parsing the judgments–a compressed history of Galiano's bylaws and lawsuits ~ Patrick Brown

Note: the following includes, so far as I can determine, all the Bylaws and court judgments relevant to the long-running dispute about residential development on Galiano's forest lands. Quotes selected from court judgments and Bylaws are in italics.

How It All Started

'...a large forestry company, in 1951 purchased slightly over one-half the island. In 1990, those holdings comprised sixty-six parcels ranging in size from 20 acres to 220 acres. Those holdings had been logged previously, I believe in the early part of this century, and thus the timber upon them is not what is known as 'old growth'.' The above is a quote from Madame Justice Mary Southin's 1995 Appeal Court judgment. The forestry company was MacMillan Bloedel (MB) and it had decided to develop its Galiano tree farm lands for residential use.

The OCP & Bylaws Before MB's Land Sale

Galiano's 1974 Official Community Plan (OCP) included, among others, a Forest Area, where one 'family dwelling' was permitted per legal parcel. Its preamble read, in part:

The people of Galiano Island being mindful of the pressures from a growing West Coast population, and a demonstrated desire of many to find relief from urban congestion and associated tension through a rural atmosphere, and being aware of the physical limitations of Galiano Island to accept uncontrolled population increase without degradation of the rural way of life and damage to the ecological system, deem it desirable to create a Community Plan to deal with these issues.

And it went on:

The following land use categories are authorized:

(e)Wilderness Areas—These zones are designated as a nature reserve to preserve the unique flora and fauna of the Gulf Islands biotic zone. No dwelling unit or structure of any kind shall be permitted in the area. Access shall be by means of hiking trails only. No camping or fires shall be permitted in the area. The area shall be declared a wildlife preserve and no flora may be removed and no hunting shall be permitted.

(f)Wilderness-Forest Area—This area shall include all land under present Tree Farm Certificate and License and any land so designated in the future. All activities permitted under the License shall continue. Owners of such land shall be encouraged to permit access to hikers and horseback riders, but the use of vehicles in such areas, except those of the owners or their agents or fire-protection vehicles, shall be prohibited. Only one family dwelling per parcel of land shall be permitted.

It has been explained that some parcels under the latter designation, not owned by MB, could be operated as family woodlots, in which case the permitting of a 'family dwelling' was deemed appropriate. Otherwise, obviously, MB had no reason to need residences in its tree farm. Most 'parcels' were unsubdivided District Lots.

Zoning Bylaw 5 (1978), Section 13:

13.1 Uses permitted: Subject to Section 13.2 . . . the following uses and no others shall be permitted in the Forest Zone:

(1) growing and harvesting of forest crops and such improvements as are designed to facilitate the growing and harvesting of wood; (2) one family dwelling.

13.2 Application of the Forest Zone: So long as any lands within the boundaries of the Forest Zone are designated in a Tree-farm License or are included within a forest reserve pursuant to the Forest Act, or are designated in a tree-farm certificate under the Taxation Act, the provision of this part shall not apply thereto.

13.5 Site Density: the maximum density shall be one (1) family dwelling per parcel

Subdivision Bylaw 6 (1978):

Forest: Minimum Subdivision area 20 acres

Bylaw 66 (1989):

Galiano Trust Committee Bylaw No. 5 Cited as 'Zoning Bylaw, Galiano Island and Area, 1978' is amended as follows:

(b) By deleting Section 13.2.

Bylaws 81-85

The decision was made by MB to sell their lands, and the Galiano Trust Committee initiated further amendments to the Bylaws. Quoting the Appeal Court decision again:

On all the evidence it is clear that the decision to amend the bylaws came as a consequence of and in response to the plaintiff's decision to sell the lands. The trustees were well aware throughout the process of negotiation with the plaintiff over logging practices, development and community acquisition that sale to the public was one of the options the plaintiff was considering. They were also aware of the November 30, 1990 deadline imposed by the plaintiff regarding community acquisition. However, it was not until the announcement by the plaintiff was made that concrete steps as to the preparation of the bylaws were taken.

MB Challenges the Bylaws

In July 1993, MB sued the Galiano Island Trust Committee, seeking: *a declaration that certain bylaws adopted on January 24, 1992 by the defendant, the Galiano Island Trust Committee, are void for illegality.*

The MB Amended Statement of Claim (from the Appeal Court judgment), disputed by Galiano LTC:

10. On January 24, 1991, the Defendant Trust Committee gave first reading to Galiano Island Trust Committee By-law No. 81, 82 and 83. The intended effect of such By-laws was:

(a) By-law No. 81 changed the Official Community Plan by removing the permitted use of one family dwelling per legal parcel in the Forest Area land use category;

(b) By-law No. 82 changed By-law No. 5 by removing the permitted use of one family dwelling per legal parcel in the Forest Zone; and

(c) By-law No. 83 increased the minimum parcel size in the Forest Zone from 20 acres to 20 hectares.

14. On May 10, 1991, the Defendant Trust Committee gave first reading to a revised By-law No. 82, and proposed Galiano Island Trust Committee By-law No. 84 and 85. These By-laws, together with By-laws 81 and 83 have the purpose and effect of removing one family dwelling per legal parcel from the zoning for the Plaintiff's lands.

15. On January 24, 1992, the Defendant Trust Committee adopted By-law Nos. 81, 82, 84 and 85. The Defendant Trust Committee further resolved to proceed no further with By-law No. 83 which had been superceded by By-law No. 84.

MB claimed that the Bylaws 'removed all residential capability' from 63 of 66 parcels of its land, totalling some 55% of the land area of the Island. The Galiano LTC denied 'allegations of fact' in para 14. The Bylaws, they said, required that there be rezoning before residential development could take place in the Forest Zone, and provided criteria for this.

After a lengthy trial, Justice Paris' judgment said:

This case is an example of the problem of individual rights in conflict with perceived collective interests. But if collective interests call for some interference with private rights in this case, it must be effected lawfully and by the proper legislative authority. A municipal council (in this case, the Galiano Island Trust Committee) can operate only within the powers delegated to it by provincial legislation.

Therefore, the bylaws, being beyond the powers of the defendant in that they were discriminatory and passed in bad faith in the special sense contemplated in the jurisprudence, must be declared void for illegality.

Note that MB did not seek, nor did Justice Paris order, that the bylaws be 'quashed'. There was confusion as to whether 'void for illegality' meant the same thing.

Before the Appeal

The Islands Trust decided to appeal the judgment. Meanwhile MB put its land up for sale, marketing it as an 'investment in Paradise'. But in the meantime, Bylaws 81, 82, 84, and 85 were not applied or enforced.

The assumption made by MB and many of the individuals who had purchased land from MB was that the law reverted to what it had been before Bylaws 81, 82, 84, and 85 were passed. That is, the minimum lot size was set by Subdivision Bylaw 6 (1978) at 20 acres, and the right to one family dwelling per parcel was set by Zoning Bylaw 5 (1978) and not changed by Bylaw 66 (1989). However, to cover itself, MB saw to it that all purchasers signed a disclosure document certifying that they knew that the Paris decision was to be appealed.

Some provinces have laws that clarify the status of Bylaws that are upset in court and are under appeal. BC does not. The Galiano LTC appealed to the government to clarify the situation and, more particularly, to declare a moratorium on development applications until the matter was decided by the Appeal Court. The government demurred, citing the probability that litigation against the government would result.

Many landowners in the Forest zone started in on the lengthy process of subdivision, road planning and construction, and approvals. The Ministry of Transportation and Highways, which for years has had responsibility for approving land subdivision, applied the original Bylaws 5 and 6.

Galiano Conservancy Challenge

In July 1995, the NGO, Galiano Conservancy, initiated a Supreme Court action against the ministry and two developers, Treeco and Winstanley, asserting that the approving officer should have rejected the subdivision applications on the basis that they were 'not in the public interest' (as evidenced by the Galiano OCP), and that any decision should be delayed until the Appeal of *MB vs. Galiano LTC* had been decided. Referring particularly to the proposed Treeco subdivision, which would create 32 lots, Chief Justice Esson dismissed the action:

I cannot find that the approving officer erred in law in his interpretation of the public interest.... The petitioner, by its approach to cabinet, sought to achieve its goals through the political process. It is probably only that process which could properly lead to the result sought by the petitioner. The responsible ministers having considered the matter and having decided not to intervene, it was appropriate for the approving officer to proceed on the basis of existing law.

Court of Appeal Judgment

In June 1995, the Court of Appeal reviewed the Paris judgment. In its August 10, 1995 decision, noting that 'the bylaws in issue having been declared void,' Madam Justice Mary Southin referred to the *Islands Trust Act*:

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 the Province generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of the Province.

She went on to comment:

No comparable provision is to be found in any other legislation of this Province concerning municipal government. Although the learned trial judge did not mention it in his reasons, I consider, as will become apparent, that this provision is critical to this appeal.... Thus, these by-laws were within and not beyond the powers conferred on these trustees under the legislation governing them. . . . I would allow the appeal and dismiss the action.

The Appeal Court thus reversed Justice Paris' decision. The effect was that Bylaws 81, 82, 84, and 85 were held to be in

effect from January 24, 1992, the day they were signed into law by the Minister of Municipal Affairs.

New Official Community Plan

Immediately following the Appeal decision, a new OCP, Bylaw 108, was passed, incorporating the new Forest zoning and regulations:

The principal use shall be forestry. . . .

b) Dwellings are permitted in the Forest designation in the following circumstances:

i) on land in the Forest Land Reserve and zoned FLR under the Land Use Bylaw, one accessory dwelling is permitted per lot if the lot complies with Land Transportation Policy.

ii) land whose owner grants to the Silva Forest Foundation and the Local Trust Committee or any other covenantee satisfactory to the Local Trust Committee a covenant to manage the land in accordance with sustainable forest practices and prohibiting subdivision of the land into lots less than 20 hectares (49.4 acres), may be rezoned to permit one accessory dwelling per 20 hectares (49.4 acres) if the lot complies with Land Transportation Policy. The location of the dwelling and any accessory buildings or structures must be selected to minimize their impact and the impact of related services on the forest, and the Land Use Bylaw amendment must specify the location of the buildings.

iii) on lands zoned F2 on the date of adoption of this policy, one accessory dwelling is permitted per lot.

c) The lot size for subdivision of Forest land shall be at least 20 hectares (49.4 acres) except as permitted under policy d).

d) Lands zoned F1 on the date of adoption of this policy may despite the minimum lot area specified in F1 zoning regulations be rezoned to RR (Rural Residential) and FH (Heritage Forest) to permit one dwelling per 8 hectares (19.76 acres) of F1 zoned land, if the owner

i) complies with Land Transportation Policy;

ii) submits development approval information that recommends a preferred location and layout for such dwellings minimizing their impact, and that of related services, on the integrity of the forest ecosystem of adjoining lands that will retain Forest zoning, with the area proposed to be rezoned to RR occupying not more than one-third of any waterfront boundary of any lot proposed to be rezoned; and

iii) transfer any lands in excess of 2 hectares (4.94 acres) per 8 hectares (19.76 acres) of F1 land being rezoned, which excess lands must be rezoned FH (Heritage Forest) to permit forestry and associated educational uses only, to an incorporated Galiano Island organization of at least 30 years standing that has as one of its objects the stewardship of forest land. The owner must prior to the transfer grant to the Silva Forest Foundation and the Local Trust Committee or any other covenantee satisfactory to the Local Trust Committee a covenant to manage the Land in accordance with sustainable forest practices and prohibiting subdivision of the Land.

Thus the essence of Bylaws 81-85 was written into the 1995 OCP.

Chief Justice Esson and *de facto* Law

In January 1996, the Galiano Conservancy once again appeared before Chief Justice Esson, noting the decision of the Appeal Court and asking him to review his previous decision.

He then wrote:

No doubt, it is correct in this instance to say that the theory is that the bylaws have always been in effect. It does not follow that, for all purposes, the bylaws will be treated as always having been in effect.

He went on to cite the *de facto* doctrine:

The application of the de facto doctrine is, however, limited to validating acts which are taken under invalid authority; it does not validate the authority under which the acts took place. In other words, the doctrine does not give effect to unconstitutional laws. It recognizes and gives effect only to the justified expectations of those who have relied upon the acts of those administering the invalid laws and to the existence an efficacy of public and private bodies corporate, though irregularly or illegally organized. Thus, the de facto doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and always will be, enforceable and unassailable.

(The Manitoba case referred to is one in which the Supreme Court of Canada was asked to rule on the validity of many years of Manitoba statutes which had not, as the *Manitoba Act* required, been translated into French.) Chief Justice Esson went on to say that an order of the Court (referring to Justice Paris' decision) is 'never a nullity and that it is valid until it is set aside on appeal.' He therefore validated the approving officer's decision with respect to Treeco (which had completed the subdivision process before the Appeal Court ruling) but specifically did not deal with applications which had not completed the process.

Applications That Didn't Make the Cut

In September 1996, an action was brought before Mr. Justice Sigurdson by those forest property owners who were partway through the subdivision process when the Appeal Court judgment was brought down. The approving officer had then refused to process the applications further, since they did not meet the requirements of Bylaws 81, 82, 84, or 85. Sigurdson concluded that:

None of the applicants have vested rights which require the approving officer to process their subdivision applications; nor is there a legal basis for the applicants to be exempt from the current law.

For these reasons I conclude that the position taken by the approving officer was correct. After the Court of Appeal's decision, the governing law was a bar to approval of the applicants' subdivisions. Accordingly, the answer to the issue for resolution on the special case is no; the applicants do not have rights with respect to their applications so that they ought to be processed and considered by the approving officer without regard to the Court of Appeal's decision.

In November 1997 Justice Sigurdson's decision was appealed, but was upheld.

Land Use Bylaw 127, 1999

In 1999, a new Land Use Bylaw (Bylaw 127) clarified the Forest zoning. It is summarized as follows:

Forest 1: *Permits timber production, harvesting, accessory forestry uses including sawmilling, planning, and the growing of seedlings in nurseries, and a 93-square-metre unenclosed building, but no residential use.*

Forest 2: *Permits timber production, harvesting, accessory forestry uses as above, a 93-square-metre unenclosed building, one dwelling 'accessory to timber production' per parcel, but no cottages. No lot having an area less than 20 hectares may be created by subdivision. (But it includes some existing lots of less than 20 hectares.)*

Forest 3: *As Forest 2, except that all lots in this zone are created by subdivision and must be 20 hectares or more.*

Heritage Forest: *Permits timber production and harvesting, accessory forestry uses as above, a 70-square-metre unenclosed building, enclosed buildings for forestry education and research uses, not exceeding 70 square metres in total floor area.*

And further: *No lot having an area less than 65 hectares may be created by subdivision unless the lot is being created subsequent to the rezoning of a F1 zoned parcel pursuant to Forest policy d) iii) of the Galiano Island Official Community Plan Bylaw Nº 108, 1995* (see above).

Forest Land Reserve Zone: *Permits a variety of forest, grazing, wildlife, research, education, and also one residential dwelling per parcel, with a minimum lot size of 65 hectares to be created by subdivision. However, with the demise of the Forest Land Reserve classification, this zone would appear to be obsolete.*

Private Managed Forest Land

During 2004, the *Private Managed Forest Land Act* was brought into force, replacing the Forest Land Reserve. The PMFL permits, as one of many forest management uses, one residential dwelling per parcel, plus an undefined number of residential buildings for employees. No local authority permission is required to construct these buildings. The land may be transferred out of PMFL at any time, either before or after construction, without any reference to local authority.

A significant proportion of Galiano forest land owners have registered their holdings with PMFL, but cannot take advantage of the permitted residential use, because Galiano's bylaws predate the creation of the PMFL, and still apply.

The *PMFL Act* says:

21 (1) A local government must not

(a) adopt a bylaw under any enactment, or

(b) issue a permit under Part 21 or 26 of the Local Government Act in respect of land that is private managed forest land that would have the effect of restricting, directly or indirectly, a forest management activity.

(2) For certainty, this section applies if the bylaw or permit would have the effect described in subsection (1) even though the bylaw or permit does not directly apply to land referred to in that subsection.

Should the Galiano Bylaws be changed or modified, forest land owners might be able to invoke this section of the *Act* to construct housing. The land may subsequently be taken out of the PMFL upon payment of a proportion of the back tax differential as laid out in the PMFL regulations, but the resultant status of such land does not appear to have been tested in court.

Later Court Cases

A November 2000 case brought by the Galiano Conservancy challenged whether the plans submitted by a particular forest lot owner had met the requirements for a building permit prior to the passing of Bylaw 127. The plans would not have met the requirements of Bylaw 127. Justice Lowry decided that the issuance of a building permit was legal, and dismissed the case.

A December 2004 case before Mr Justice Groberman sought the removal of a restrictive covenant against the cutting of trees on a number of the 20-acre lots created by Treeco in the time between the Paris judgment and the Appeal Court reversal of that judgment.

The argument was that, since under the existing zoning (F1, as defined in Bylaw 127, 1999) no residential use was permitted, the covenenant meant that the land could not be used for either residential or forestry purposes. The petition was refused, despite the inclusion of the land under the *Private Managed Forest Land Act*; the judge remarking that the *PMFL Act* would not necessarily protect the trees since the land could be withdrawn from PMFL at any time.

Conclusions

The net result of all this is still being argued. The ex-MB lands are still zoned F1, which means that they will have to rezone in order to establish residential use, under current bylaws. The original Treeco 32-lot subdivision is also zoned F1, with registered 8-hectare lots that do not conform to current Bylaws. A few Forest-zoned lot owners have rezoned according to the current bylaws.

This year, at the request of the current Galiano Local Trust Committee, the provincial government provided funding for Phase 1 of a review of the Forest section of the OCP in isolation. Phase 2 is apparently pending. There is community disagreement over how, and if, the isolated review should be continued. (See also related letter from former Galiano Trustee Margaret Griffiths, page 4.) ✐

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