

SUPREME COURT  
OF BRITISH COLUMBIA  
VANCOUVER REGISTRY

AUG 27 2025



IN THE SUPREME COURT OF BRITISH COLUMBIA

S - 2 5 6 4 6 8  
No.  
Vancouver Registry

*In the matter of the Judicial Review Procedure Act, RSBC 1996 ch. 241*

BETWEEN:

ETHAN WILDING, DAVID NICHOLAS DEMNER, and HEIDI KUHRT

PETITIONERS

AND:

SALT SPRING ISLAND LOCAL TRUST COMMITTEE

RESPONDENT

**PETITION TO THE COURT**

ON NOTICE TO:

Salt Spring Island Local Trust Committee  
1 - 500 Lower-Ganges Road  
Salt Spring Island, British Columbia V8K 2N8

AND TO:

Ministry of Attorney General  
Legal Services Branch  
PO Box 9280 STN PROV GOVT  
1001 Douglas Street  
Victoria, British Columbia V8W 9J7

AND TO:

The Attorney General of Canada  
Suite 900 - 840 Howe Street  
Vancouver, British Columbia V6Z 2S9

*1/4*

The address of the registry is: Vancouver Law Courts  
800 Smithe Street  
Vancouver, British Columbia V6Z 2E1

- This matter is within the jurisdiction of an associate judge.  
 This matter is not within the jurisdiction of an associate judge.

The petitioner estimates that the application will take 3 days.

- This matter is an application for judicial review.  
 This matter is not an application for judicial review.

**This proceeding has been started by the petitioner for the relief set out in Part 1 below by the persons named as petitioners in the style of proceedings above**

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and  
(b) Serve on the petitioner(s)  
i. 2 copies of the filed response to petition; and  
ii. 2 copies of each filed affidavit on which you intent to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

**Time for response to petition**

A response to petition must be filed and served on the petitioner(s)

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1) The ADDRESS FOR SERVICE of the petitioner(s) is:

c/o Coal Harbour Law  
1208 West Pender Street, 3<sup>rd</sup> Floor  
Vancouver, British Columbia V6E 2S8

Fax number address for service (if any) of the petitioner(s): N/A

E-mail address for service (if any) of the petitioner(s):  
tfalcone@coalharbourlaw.ca

(2) The name and office address of the petitioner's(s') lawyer is:

Thomas Falcone  
Coal Harbour Law  
1208 West Pender Street, 3<sup>rd</sup> Floor  
Vancouver, British Columbia V6E 2S8

### CLAIM OF THE PETITIONERS

#### Part 1: ORDERS SOUGHT

1. A declaration that Section E.3 of the Salt Spring Island Local Trust Committee *Official Community Plan, Bylaw No. 434*, 2008, Vol. 2, titled “Development Permit Area 3 – Shoreline” and all subsections, and as amended, (“DPA – 3”) is void and of no effect with respect to the part of that area described as being “...300 m seaward of the natural boundary of the sea.”;

2. In the alternative, a declaration that DPA – 3, in whole, or in part respecting the specifically impugned subsections outlined in this petition, is *ultra vires* the Province of British Columbia and is invalid and of no effect;
3. A declaration that development permit applications PLDP20240056, PLDP20240057, and PLDP20240059 are exempt from requiring a development permit, pursuant to section E.3.1.3.f of the Salt Spring Island Local Trust Committee *Official Community Plan Bylaw No. 434*, 2008, Vol. 2;
4. A declaration that the decision made by the Salt Spring Island Local Trust Committee (the “**Trust Committee**”) on July 10<sup>th</sup>, 2025 denying the reconsideration of development permit applications PLDP20240056, PLDP20240057, and PLDP20240059 is unreasonable;
5. A declaration that the Trust Committee breached the rules of procedural fairness and natural justice during the initial consideration of development permit applications PLDP20240056, PLDP20240057, and PLDP20240059 and that during the reconsideration of the denial of these application at the July 10<sup>th</sup>, 2025 meeting breached the rules of procedural fairness and natural justice;
6. An order quashing the Trust Committee’s decision made July 10<sup>th</sup>, 2025;
7. An order that the Trust Committee issue approvals for development permit applications PLDP20240056, PLDP20240057, and PLDP20240059;
8. In the alternative, an order remitting development permit applications PLDP20240056, PLDP20240057, and PLDP20240059 to the Trust Committee for reconsideration.
9. Costs as against any party that opposes this petition;
10. Such other relief as this Honourable Court may deem just and necessary.

## **Part 2: FACTUAL BASIS**

### THE PARTIES

1. The petitioner, Ethan Wilding (“**Ethan**”), is a businessman and social entrepreneur, with an address for service in this proceeding of c/o 1208 West Pender Street, 3rd Floor, Vancouver, British Columbia V6E 2S8.
2. The petitioners David Nicholas Demner and Heidi Kuhrt (“**David and Heidi**”) are a married couple, with an address for service in this proceeding of c/o 1208 West Pender Street, 3rd Floor, Vancouver, British Columbia V6E 2S8
3. The respondent, the Salt Spring Island Local Trust Committee (the “**Trust Committee**”), is a local trust committee established under the *Islands Trust Act*, RSBC 1996 c. 239 (the “*Islands Trust Act*”) with a business office of #1 – 500 Lower-Ganges Road, Salt Spring Island, British Columbia.
4. As of date of filing of this petition, His Majesty the King in the right of the Province of British Columbia is not a party to this proceeding but is given notice pursuant to section 16 of the *Judicial Review Procedure Act*, RSBC 1996 ch. 241 (the “*JRPA*”) and section 8 of the *Constitutional Question Act*, RSBC 1996 ch. 68 (the “*Constitutional Question Act*”).
5. As of date of filing of this petition, His Majesty the King in the right of Canada is not a party to this proceeding but is given notice pursuant to section 8 of the *Constitutional Question Act*.

### BACKGROUND TO THE PROJECT

6. In or around 2020, Ethan acquired a property with a civic address of 434 Baker Road, Salt Spring Island, British Columbia, legally identified as:

PID: 009-555-781

LOT 5, SECTION 6, RANGE 1 WEST, NORTH SALT SPRING ISLAND,  
COWICHAN DISTRICT, PLAN 46155

(the “**Baker Road Property**”).

Affidavit #1 of Ethan Wilding (“**Wilding**”), ¶ 3

7. In or around 2016, David and Heidi acquired a property with a civic address of 235 Quarry Drive, Salt Spring Island, British Columbia, legally identified as:

PID: 009-555-706

LOT 1, SECTIONS 6 AND 7, RANGE 1 WEST, NORTH SALT SPRING  
ISLAND, COWICHAN DISTRICT PLAN 46155

Affidavit #1 of Heidi Kuhrt (“**Kuhrt**”), ¶ 3

8. After acquiring the Baker Road Property, Ethan began to worry about erosion along the seaward property boundary. In 2022 and 2023, professionals were retained to provide preliminary reports as to possible erosion mitigation strategies that could be employed to protect the Baker Road Property.

Wilding, ¶ 7 – 9 and Exs. “A” and “B”

9. Ethan – together with David and Heidi and the property-owners of another adjacent shoreline property – then decided to retain the services of the Aurora Professional Ground Inc. (“**Aurora**”), a professional engineering and construction management firm, to assist with acquiring the requisite approvals to stabilize their respective shorelines through nature-based means (the “**Project**”).

Wilding, ¶ 10

APPROVALS ARE SOUGHT FOR THE PROJECT

10. Although the Project is modest in scope – the careful placement of a small rock and sediment berm – it required approval from provincial and federal authorities in addition to the local municipal authority: the Trust Committee.
11. The specific requirements for approval from the Trust Committee are set out in the Salt Spring Island Official Community Plan Bylaw No. 434 (the “OCP”), which categorized the shoreline of the Baker Road Property under Development Permit Area 3 (“DPA 3”). Any construction in DPA 3 requires approval of the Trust Committee’s delegate.
12. A full and complete application seeking the Trust Committee’s approval of the Project was submitted on behalf of Ethan and the adjacent property-owners by Aurora on December 27<sup>th</sup>, 2023 (the “Application”).

Wilding, ¶ 11-13 and Ex. “C”

13. Pursuant to Bylaw 534, the decisions regarding permit applications in DPA 3 are delegated to planning services department staff at the Trust Committee.
14. While the requisite federal and provincial authorities treated the Project as singular applications, the Trust Committee eventually required each separate property-owner to submit separate applications.
15. An eight-month period of administrative email correspondence between the Trust Committee and Aurora followed the submission of the Application. It was not until July 12<sup>th</sup>, 2024, that the Application was assigned the file number of PLDP20240059 and a staff member of the Trust Committee was assigned to review the Application.

Wilding, ¶ 16 – 17

16. David and Heidi's application – which is identical to Ethan's – was similarly at this time assigned the file number PLD20240056. The other adjacent property owners' application – also identical – was assigned filed number PLDP20240057. Collectively, these applications will also be referred to in reference to the same defined term the **Application**.

17. On October 23<sup>rd</sup>, 2024, the Trust Committee made a request to Aurora for additional information on the Application, which Aurora quickly provided.

Wilding, ¶ 18 – 19

18. In January 2025, planning staff from the Trust Committee conducted a Project site visit. Aurora received feedback flowing from this Project site visit on the Application and on January 20<sup>th</sup>, 2025 responded to all of the comments and/or questions that the Trust Committee had.

Wilding, ¶ 21

19. Due to concerns about delay in receiving a decision from the Trust Committee on the Application, Ethan retained counsel to correspond with them in January 2025.

Wilding, ¶ 20 and Ex. "H"

20. On February 24<sup>th</sup>, 2025, a staff member from the Trust Committee requested further information on the Application from Aurora, which Aurora in turn quickly provided.

Wilding, ¶ 23

21. Delay by the Trust Committee staff has impeded the Petitioners' ability to obtain and maintain approval from provincial and federal authorities.

22. Federal approval for the Project was applied for and obtained through the Fish and Fish Habitat Protection Program of Fisheries and Oceans Canada (“DFO”). Formal approval of the Project work was issued by DFO’s letter of July 31, 2024 under file 24-HPAC-00369. This approval was valid for a period of one year and expired on July 31, 2025.

Wilding, ¶ 25 – 28, Ex “M”

23. Provincial approval for the Project has been managed by the Ministry of Water, Land and Resource Stewardship (“WLRS”). WLRS approval involves consultation with various stakeholders including the Trust Committee. WLRS indicated preliminary support for the Project, but given the Trust Committee’s rejection (described below) WLRS approval remains uncertain.

Wilding, ¶ 25 – 28, 44 – 45

Affidavit #1 of Bradley Fossen (“Fossen”), ¶ 17

THE TRUST COMMITTEE PLANNING SERVICES DEPARTMENT REJECTS THE APPLICATION

24. Due to the considerable delay in processing the Application, Ethan filed a petition in this Honourable Court seeking the writ of *mandamus* directing the Trust Committee to make a decision on the Application on April 4<sup>th</sup>, 2025.

Wilding, ¶ 31

25. Subsequently, the Trust Committee did issue a decision: on May 8<sup>th</sup>, 2025, the Planning Services department of the Trust Committee rejected the Application (the “**Planning Services Rejection**”).

Wilding, ¶ 33 – 34

26. The Planning Services Rejection stated that the Project was inconsistent with the following provisions of the OCP:

E.3.4.1: All work that takes place below the natural boundary of the sea should be done in a way that minimizes degradation of water quality and disturbance of the substrate. - There is potential for disturbance of substrate arising from the proposed sediment deposit and use of machinery.

E.3.4.2: All work that takes place on land within 10 m of the natural boundary of the sea should be planned and carried out in a way that is consistent with the Land Development Guidelines for the Protection of Aquatic Habitat (Appendix 7).

- The deposit of sediments is likely to have negative impact on the fish habitat and the applicant has neither provided information on the likely impacts of this activity nor provided mitigation measure to minimize these potential impacts.

E.3.4.9: The shoreline should not be filled in to create additional land, except minor areas of fill necessary to complete the boardwalk section of the Ganges Public Pathway System in Ganges Harbour.

- The proposed activity includes the deposit of 434.4m<sup>2</sup> of aggregate materials, over about 300m of shoreline and at an initial height of 1.0 m above existing grade level.

E.3.4.21: Applications for shoreline stabilization should include a report, prepared by a Professional Engineer with experience in geotechnical engineering, which describes the proposed modification and shows:

- a. The need for the proposed modification to protect existing structures.
- b. Where the modification is proposed to protect new structures, the locations on the property where those structures could be built and not require shoreline modification.
- c. If any natural hazards, erosion, or interruption of geohydraulic processes may arise from the proposal modification, including at sites on other properties or foreshore locations.
- d. The cumulative effect of shoreline stabilization works along the drift sector where the works are proposed.
- e. Whether there will be any degradation of water quality or loss of fish or wildlife habitat because of the modification.
- f. Whether conditions should be incorporated into the development permit to achieve the objectives of this Development Permit Area.

- It is unclear what damage to the existing structure that the proposed activities is preventing and as a result of the increased turbidity from sediment supplementation, there could be a negative impact on the fish habitat.

E.3.4.22: Shoreline stabilization should be limited to that necessary

- a. To prevent damage to existing structures or an established use on adjacent upland.
- b. To prevent damage to a proposed public land use.

New upland structures or additions should be located and designed to avoid or reduce the need for shoreline stabilization. Shoreline stabilization should not interrupt natural processes solely to reduce erosion of undeveloped land, except agricultural land. - The public use of the land is not considered as damaging by the naturally occurring slow sediment erosion.

- the proposed development activities are not consistent with some of the relevant objectives of the DPA 3:
  - E.3.3.1: To protect the quality of the tidal waters that surround Salt Spring Island.
  - E.3.3.2: To protect fish and wildlife habitat.

-- The proposed activities are likely to negatively impact the quality of tidal water as well as the fish and wildlife habitat through the changes to the sediment transport and water flow as a result of the sediment supplementation.

27. It took the Trust Committee 17 months to render the Planning Services Rejection.

#### THE RECONSIDERATION APPLICATION

28. The Planning Services Rejection contained the following instructions regarding an appeal of the decision:

The applicant may have the decision not to approve issuance reconsidered by the Salt Spring Island Local Trust Committee by submitting a written request for reconsideration to the Deputy Secretary/Legislative Clerk within thirty days after the decision is delivered to or made available to the applicant.

The request for reconsideration must include the following:

- The applicant's address for receiving correspondence related to the request for reconsideration;
- A copy of the written decision;
- Reasons why the applicant wishes the decision to be reconsidered by the Local Trust Committee;
- The decision which the applicant requests be made by the Local Trust Committee;
- Reasons in support of the decision requested from the Local Trust Committee; and
- A copy of any documents which support the applicant's request for reconsideration by the Local Trust Committee.

Each reconsideration request shall be placed on the agenda of a regular Local Trust Committee meeting and shall include a copy of the materials that were considered by the Director of Planning Services (the "delegate") in making the decision that is to be reconsidered, and any further materials delivered by the applicant.

The Local Trust Committee may consider any presentations made by the applicant and may either:

- confirm all or part of the delegate's decision,
- set aside all or part of the delegate's decision; or
- amend the delegate's decision or make a new decision.

#### **NEXT STEPS**

Director of Planning Services to contact applicant to inform them of decision. Applicant to consider appeal within 30 days. Deputy Secretary/Legislative Clerk to place appeal and relevant materials on regular Local Trust Committee agenda if applicable. Director to inform Local Trust Committee of decision once applicant has been informed. Planner to update file and/or direct Planning Team Assistant to update electronic file.

Wilding, Ex. "N"

29. Pursuant to these instructions and the requisite provisions of Bylaw 534, Ethan, David and Heidi, and the property-owners of the other adjacent property involved in the Project, instructed Aurora to prepare a reconsideration application to the three elected trustees of the Trust Committee (the “LTC”).

Wilding, ¶ 35

30. On June 6<sup>th</sup>, 2025, as instructed, Aurora submitted the reconsideration request to the LTC (the “**Reconsideration Request**”).

Wilding, ¶ 36 and Ex. “O”

31. On July 10<sup>th</sup>, 2025, the LTC held an in-person meeting, during which the Reconsideration Request was considered (the “**July 10<sup>th</sup> LTC Meeting**”). Submissions were made in support of the Reconsideration Request by team members assembled by Aurora, Ethan and Heidi Kuhrt.

32. The July 10<sup>th</sup> LTC Meeting was recorded and a video of the proceedings was made publicly available on the Trust Committee’s website.

Affidavit #1 of Andrew Dagleish (“**Dagleish**”), ¶ 2

33. At the conclusion of the July 10<sup>th</sup> LTC Meeting, the LTC unanimously voted to uphold the Planning Services Rejection.

Dagleish, Ex. “A” at p. 60

Wilding, ¶ 39

#### THE CURRENT SITUATION

34. The Application was denied by the Trust Committee: the first-level delegated decision was rejected per the Planning Services Rejection, and the Reconsideration Requested was rejected by the LTC at the July 10<sup>th</sup> LTC

Meeting. As a result of these decisions, the Petitioners have no further avenues of internal remedy or redress with the Trust Committee, and the Project cannot proceed.

35. Because the Project cannot proceed, the Petitioners are exposed to real and ongoing risk of irreversible erosion to their respective properties. Ethan, and David and Heidi, continue to face the prospect of their homes slipping into the sea.

Wilding, ¶ 40 – 42

Kuhrt, ¶ 5

### **Part 3: LEGAL BASIS**

#### STANDING

36. This proceeding is governed in part by the *JRPA*.

37. Section 2 of the *JRPA* provides as follows:

#### **Application for judicial review**

2 (1) An application for judicial review must be brought by way of a petition proceeding.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

(a) relief in the nature of mandamus, prohibition or certiorari;

(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

38. The Petitioners bring this application for judicial review pursuant to section 2 of the *JRPA*. The statute, however, is silent as to who has standing to commence an application such as this for judicial review. The common law of this province has commented extensively on the issue of standing.
39. The general rule on standing developed by the common law is that persons who were before the tribunal or “who are directly affected by the tribunal’s decision” or a person who is an “aggrieved person,’ an ‘affected person’, or someone who is ‘exceptionally prejudiced’ by the impugned administrative action” may bring an application for judicial review.

*Kitimat (District) v Alcan Inc.*, 2006 BCCA 562, at para 47

*Bradshaw v Workers’ Compensation Board*, 2017 BCSC 1092, at para 8

40. The Petitioners were parties before the Trust Committee. It is their applications that were rejected and their properties that face the threat of slipping into the sea if the Project is not ultimately approved. The other adjacent neighboring property owners have elected to not participate in this proceeding, but their evidence is that they are still interested in the Project proceeding.

Affidavit #1 of Patricia Sanders, ¶ 3

#### STANDARDS OF REVIEW

41. The standard of review in consideration whether a bylaw is *ultra vires* is correctness.

*TimberWest Forest Corp. v Campbell River (City)*, 2009 BCSC 1804, at  
paras 38, 40, 62

42. The standard of review applicable to the Trust Committee's decision to reject the Application, including the LTC's decision to reject the Reconsideration Request, is reasonableness.

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65  
("Vavilov")

43. Matters of procedural fairness are reviewed on a correctness standard: "the reviewing court owes no deference to the decision maker on procedural fairness issues."

*RNL Investments Ltd. v British Columbia (Agricultural Land Commission)*, 2021 BCCA 67, at para 57

#### ELEMENTS OF THE OCP ARE *ULTRA VIRES*

##### **Overview**

44. The Planning Services Rejection attaches a document titled "Staff Report" which recommended not approving the Application. It did so on the basis that the proposed development activities did not meet the DPA 3 Guidelines for Development in the OCP. Those guidelines feature several provisions for the protection of fish and fish habitat, usually in conjunction with protection of tidal water quality and protection of wildlife. The section of the Staff Report titled "Rationale for Recommendation" is approximately 1 page in length and makes three separate references to the potential negative impact on fish or fish habitat. The message conveyed to the reader of the Staff Report is that the Petitioners' application is being rejected primarily because the proposed activity fails to comply with the Trust Committee's rules respecting the protection of fish and fish habitat in tidal waters.
45. During the July 10<sup>th</sup> LTC Meeting, it became clear that the concern for fish and fish habitat arose primarily within the context of the LTC's concern over

Aboriginal rights to fish or harvest shellfish along Baker Beach, and a consequent concern that the applicable First Nations had not been involved in the process. The latter issue is addressed in the section dealing with procedural fairness.

Dalgleish, Ex. "A", at pp. 46 – 47, 51 – 52

46. The Trust Committee is created by and operates under the *Islands Trust Act* which provides the authority for the creation of the OCP. The *Islands Trust Act* does not authorize the Trust Committee to enact rules for the protection of fish or fish habitat in tidal waters. Nor can it be said that the regulation of fish or fish habitat in tidal waters is something that arises by necessary implication from the wording of the *Islands Trust Act* or its structure and purpose. The impugned portions of the OCP exceed the Trust Committee's statutory authority. They are invalid and ought to be set aside.
47. Further, even if it were established that the Trust Committee's enabling legislation authorized the impugned guidelines, fisheries, and specifically the protection of fish and fish habitat in tidal waters is a matter over which Parliament holds and exercises exclusive jurisdiction pursuant to s. 91(12) of the *Constitution Act, 1867*. The purpose and effect of the Trust Committee's guidelines is the imposition of regulations to protect fish and fish habitat in tidal waters. Such regulation is only permitted by Parliament. The government of Canada has enacted comprehensive legislation for the protection of fish and fish habitat in tidal waters, the management of which is overseen by DFO. Furthermore, the government of Canada, and DFO specifically, is the agent of the Crown tasked with the legal duty to consult with and, if appropriate, accommodate First Nations when any rights to fish might be adversely impacted. Indeed, the petitioners engaged in DFO's proscribed process for their Project and obtained formal approval from DFO to proceed with the proposed activity.

Wilding, ¶ 28, Ex. “M”

48. As the Trust Committee is a creature of provincial statute, it may not under any circumstance exercise statutory authority not possessed by British Columbia under s. 92 of the *Constitution Act, 1867*. By creating the impugned DPA 3 Guidelines for Development in the OCP, the Trust Committee has impermissibly stepped into an area of exclusive federal jurisdiction. The Trust Committee’s regulations interfere with Parliament’s legislation of fisheries, and erect unnecessary additional obstacles, the doctrine of interjurisdictional immunity and our constitution more generally seek to avoid. The impugned regulations, if statutorily authorized, are or would be *ultra vires* the Province of British Columbia, and ought to be struck or rendered inoperable.

### Statutory Authority

49. Municipalities are entirely creatures of provincial statute and can only exercise those powers which are expressly conferred upon them by a provincial statute.

*R. v Greenbaum* 1993 CanLII 166 (SCC), at para 22;

*Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34, at para 82;

*Labrecque v City of Toronto*, 2023 ONSC 4616 (“*Labrecque*”), at para 16;

*Shell Canada Products Ltd. v Vancouver (City)*, [1994] 1 S.C.R. 231

50. Where a municipal bylaw or policy exceeds the municipality’s legal authority, it will be declared invalid and set aside:

See for example *Labrecque*, at para 51, and *Lorval Developments Ltd. v Langley (Township)*, 2025 BCSC 1148, at para 134

51. Section 29 of the *Islands Trust Act* grants the Trust Committee, as a local trust committee, certain Planning and Land Use Management powers and

authorities of a regional district board under the *Local Government Act*, R.S.B.C. 2015, c. 1 (the “*LGA*”) including, with some limitations, the power to adopt, as a bylaw, an official community plan, and with that official community plan designate certain areas requiring a permit for alternation known as Development Permit Areas (“*DPAs*”).

*Local Government Act*, R.S.B.C. 2015, Part 14 [Planning and Land Use Management], and specifically, ss. 488 – 491 in relation to *DPAs*

52. Part 14 of the *LGA* deals exclusively with land use but does not provide authority for use of the ocean or any part of it. As such, where the Trust Committee’s local area extends into the ocean surrounding Salt Spring Island, its authority to regulate land use granted under the *Islands Trust Act* ends at the intertidal zone, or at most, the low tide line.
53. The Trust Committee has, in Part E.3 of the OCP, described the area designated as “*DPA 3 – Shoreline*” as follows:
  - E.3.1.1 [...] all that area of land covered by water between the natural boundary of the sea and a line drawn parallel to and 300 m seaward of the natural boundary of the sea. It also encloses the land within 10 m of the natural boundary of the sea (measured horizontally) in areas where the marine environment has been identified as being particularly sensitive to development impacts.
54. By purporting to regulate land use “...300 m seaward of the natural boundary of the sea...” the Trust Committee has exceeded its jurisdiction, and consequently, the entirety of *DPA 3 – Shoreline*, as currently enacted is void and of no effect.
55. In the alternative, if the whole of Part E.3 of the OCP is not void or invalid, it only achieves validity as a result of important exemptions which significantly limit its reach and scope. Those exemptions are set out in section E.3.1.3:

E.3.1.3: Despite Section E.3.1.2, the following activities are also exempted from the requirement to obtain a Development Permit:

- a. land alteration and vegetation removal on agricultural land that is more than 3 m from the natural boundary of the sea, that is done for farming purposes, and that is consistent with normal farm practices under the Farm Practices Protection (Right to Farm) Act.
- b. forest management activities related to timber production and harvesting in the Forest Land Reserve.
- c. fish habitat enhancement work approved by the Department of Fisheries and Oceans or the Ministry of Environment.
- d. the emergency removal of a hazardous tree.
- e. emergency works to prevent flood damage to structures.
- f. vegetation removal within 10 m of the natural boundary of the sea or works below the natural boundary of the sea that have been approved in writing by the Ministry of Environment or the Department of Fisheries and Oceans.
- g. the subdivision of land parcels where a conservation covenant satisfactory to and in favour of the Salt Spring Island Local Trust Committee or the Islands Trust Fund Board has already been registered for the maintenance of natural drainage and protection of environmentally sensitive areas.

56. The court ought to prefer an interpretation of the OCP that keeps it within the bounds of its enabling legislation. Such an interpretative exercise would reveal that the above exemptions, specifically the exemption in subparagraph (f) to exempt “...works below the natural boundary of the sea that have been approved in writing by the Ministry of Environment or the Department of Fisheries and Oceans” effectively eliminates the Trust Committee’s ability to exercise land use authority over works occurring strictly in the intertidal zone or at sea.

Though a potentially a strained interpretation of the OCP, it could permit section E.3 to stay within the bounds of its authority and preserve its validity.

### **Ultra Vires the Constitution Act, 1867**

57. The petitioners say that even if it were established that the Respondent's enabling legislation authorized the impugned DPA 3 - Guidelines for Development, the protection of fish and fish habitat in tidal waters is a matter over which Parliament exercises exclusive jurisdiction pursuant to s. 91(12), and as such the impugned Guidelines for Development are invalid and of no force or effect pursuant to s. 52 of the *Constitution Act, 1867*.

### **The Exclusive Federal Power to Regulate and Protect Fish**

58. The exclusive jurisdiction to regulate the management and the protection of fisheries in Canada is vested in Parliament pursuant to s. 91(12) of the *Constitution Act, 1867*. DFO is the federal institution, responsible for managing Canada's fisheries and ocean resources. DFO is also the agent of the Crown tasked with the legal duty to consult and, if appropriate, accommodate First Nations when any rights to fish might be adversely impacted. The duty to do so arises both from Parliament's jurisdiction over "Sea Coast and Inland Fisheries" and "Indians, and Lands reserved for the Indians".

*Constitution Act, 1867, ss. 91(12) and (24)*

59. The federal jurisdiction over fisheries intersects with the authority and jurisdiction over "property and civil rights", where, as with the case at bar, the land or seabed area in question lies within the boundaries of, and is thus the property of, the province.
60. In a seminal 1882 case, the Chief Justice explained

... the legislation in regard to “Inland and Sea Fisheries” contemplated by the British North America Act was not in reference to “property and civil rights” — that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding [of] fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water....

...

To all general laws passed by the Dominion of Canada regulating “sea coast and inland fisheries” all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights

in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either. [Emphasis added]

*The Queen v Robertson* (1882), 6 S.C.R. 52 [**“Robertson”**], at pp. 120-124

61. The result is that s. 91(12) conveys exclusive jurisdiction over regulation and protection of the fisheries to the federal government. Proprietary rights in relation to the fisheries remain with the provinces.
62. The continuing authority of *Robertson* has been recently affirmed.

*Ward v Canada (Attorney General)*, 2002 SCC 17 [**“Ward”**], at para 34

*Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, [**“Morton”**] at paras 128 – 150, aff'd 2009 BCCA 481

63. In *Ward*, upon surveying the authorities Chief Justice McLachlin concluded:

These cases put beyond doubt that the fisheries power includes not only conservation and protection, but also the general “regulation” of the fisheries, including their management and control. They recognize that “fisheries” under s. 91(12) of the *Constitution Act, 1867* refers to the fisheries as a resource; “a source of national or provincial wealth” (*Robertson*, supra, at p.

121); a “common property resource” to be managed for the good of all Canadians (*Comeau's Sea Foods*, supra, at para. 37). The fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation. [Emphasis added]

*Ward*, at para 41

64. The management and preservation of the fisheries has been clearly held to be within the exclusive jurisdiction of Parliament.

*Morton*, at para 157

65. The Province of British Columbia has no right to pass laws interfering with the *regulation* and *protection* of the fisheries, meaning the protection of *animals that inhabit the seas*.

66. The government of Canada has created comprehensive legislation under its s. 91(12) power; most significantly, the *Fisheries Act*, R.S.C., 1985, c. F-14 (the “**Fisheries Act**”). Section 35(1) of the federal *Fisheries Act* is a general prohibition of works and undertakings that harmfully alter, disrupt or destroy fish habitat. The exception to this rule is s. 35(2), which permits such works and undertakings if done “by any means or under any conditions” authorized by the Minister or by regulations under the *Fisheries Act*.

67. Developed by DFO under authority of the *Fisheries Act*, the “Fish and Fish Habitat Protection Program” (the “**Program**”) helps conserve and protect fisheries and aquatic ecosystems. According to its public description the Program is set up to administer and ensure compliance for development projects taking place in and around fish habitat under the:

- a. fish and fish habitat protection provisions of the *Fisheries Act*
- b. relevant provisions of the *Species at Risk Act*, S.C. 2002, c. 29

DFO webpage: <https://www.dfo-mpo.gc.ca/pnw-ppe/ffhpp-ppph-eng.html>

### **The Pith and Substance of the impugned Guidelines for Development**

68. The DPA 3 Guidelines for Development contain several explicit references to the protection of fish or tidal water quality as found in the following parts:

- a. E.3.4.1
- b. E.3.4.2 [incorporating separate guidelines for Protection of Aquatic Habitat]
- c. E.3.4.3 [protect fish]
- d. E.3.4.5 [to not restrict movement of aquatic life]
- e. E.3.4.13
- f. E.3.4.21
- g. E.3.4.27

69. The section of the Staff Report titled “Rationale for Recommendation” is only 1 page in length but makes three separate references to the potential negative impact on fish or fish habitat citing the DPA 3 Guidelines for Development and in particular:

- a. E.3.4.2 on the basis that the activity in question was to be “*carried out in a way that is consistent with the Land Development Guidelines for the Protection of Aquatic Habitat (Appendix 7)*” – and noted that “*The deposit of sediments is likely to have negative impact on the fish habitat*”
- b. E.3.4.21 which requires the production by the applicant of a report prepared by an engineer which shows, inter alia, (e) “*Whether there will be any degradation of water quality or loss of fish or wildlife habitat*”

*because of the modification*” – and then commented that the activity cause “*increased turbidity*” and concluded “*there could be a negative impact on the fish habitat*”

70. The section concludes by referring to two of the objectives of DPA 3, namely:
- E.3.3.1: To protect the quality of the tidal waters that surround Salt Spring Island.
  - E.3.3.2: To protect fish and wildlife habitat.

And concludes:

The proposed activities are likely to negatively impact the quality of tidal water as well as the fish and wildlife habitat through the changes to the sediment transport and water flow as a result of the sediment supplementation.

71. The Application was rejected primarily because the proposed activity failed to comply with the Respondent’s rules respecting the protection of fish and fish habitat in tidal waters.
72. The Petitioners primarily argue that impugned DPA 3 Guidelines for Development in the OCP and the decision resulting therefrom are an unconstitutional over-reach by the Trust Committee exercising powers over the protection of fish which neither it, nor the Province of British Columbia possesses. It is an impermissible foray into an area of exclusive federal jurisdiction. The action reaches into the core competence of federal jurisdiction contained in s. 91(12) and pursuant to the doctrine of interjurisdictional immunity, the offending portions ought to be read down significantly, eliminating their applicability to fish regulation, or struck down entirely.
73. However, as instructed by the Supreme Court of Canada, the resolution of a case involving the constitutionality of legislation in relation to the division of

powers must always begin with an analysis of the “pith and substance” of the impugned legislation.

*Canadian Western Bank v Alberta*, 2007 SCC 22 [“*CWB*”], at para 25

74. The impugned DPA 3 Guidelines for Development are in “pith and substance” a set of provisions regulating the protection of fish and fish habitat. As a result, the impugned guidelines are *ultra vires* the provincial Crown in its entirety. The impugned DPA 3 Guidelines for Development in the OCP are therefore invalid and of no force or effect pursuant to s. 52 of the *Constitution Act*, 1867.

### **Interjurisdictional Immunity and the Doctrine of Paramountcy**

75. Interjurisdictional immunity is the doctrine which renders inapplicable any law by one level of government that would impair a core competence of the other level of government (without necessarily “sterilizing” or “paralyzing”). The doctrine is limited to laws that go to the “basic, minimum and unassailable content” sometimes referred to as the “core” of the legislative power in question.

*CWB*, at paras 48-49

76. Interjurisdictional immunity addresses the mischief caused by a patchwork of overlapping laws and regulations from different levels of government over the same subject matter. The doctrine thereby protects the “basic, minimum and unassailable” core of each head of power in ss. 91 and 92 of the *Constitution Act*, 1867.

*CWB*, at paras 33 - 34

77. The first step is to determine whether the provincial law trenches on the protected “core” of a federal competence. If it does, the second step is to determine whether the provincial law’s effect on the exercise of the protected

federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity.

*Quebec (Attorney General) v Canadian Owners and Pilots Association*,  
2010 SCC 39, at para 27

78. The doctrine of federal paramountcy holds that where there are inconsistent (or conflicting) federal and provincial laws, the federal law prevails.

*CWB*, at para 69

79. Inconsistency between laws arises not only in area of direct conflict but also where a provincial law is held to frustrate the purpose of a federal law or scheme.

*Law Society of British Columbia v Mangat*, 2001 SCC 67 [“Mangat”], at  
para 72

80. The doctrine of paramountcy was recently applied to render inoperative City of Vancouver land use bylaws which would require a permit for the applicant’s proposed concrete batch plant located both within the City of Vancouver and the lands designated to the Vancouver Port Authority, governed by the federal power over navigation and shipping (s. 91(10)) and the *Canada Marine Act*.

*British Columbia (Attorney General) v Lafarge*, 2007 SCC 23

81. If the doctrine of interjurisdictional immunity applies, the impugned measure remains valid but has no application with regard to the core of the power of the other level of government that it impairs:

*Rogers Communications Inc. v Châteauguay (City)*, 2016 SCC  
23, at para 35

*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC  
44, at para. 58

82. Similarly, where the doctrine of federal paramountcy applies, the impugned provincial measure is rendered inoperative to the extent of its incompatibility with the federal legislation.

*CWB*, at para 69

*Mangat*, at para 74

83. Since 1867, the basic, minimum and unassailable core of the federal competence under its s. 91(12) power is the regulation and protection of fish and fish habitat in tidal waters of Canada.

84. Through the legislation it administers, DFO comprehensively and thoroughly regulates its area of core federal competence. Indeed, and in relation to DFO's Program, the petitioners sought the appropriate approvals for the proposed activity, taking place as it was proposed, within the intertidal zone; seaward of the natural boundary of the sea (or high tide line).

85. Through DFO's procedures under the Program and the petitioners' engagement of qualified engineers and other professionals, compliance with the Program was confirmed and a letter was issued by DFO on July 31, 2024, granting the Petitioners approval for the proposed activities.

Wilding, Ex. "M"

86. The impugned DPA 3 Guidelines for Development in the OCP noted above are replete with provisions purporting to regulate the protection of fish and fish habitat.

87. In *Morton*, this Honourable Court rejected the assertion that British Columbia's ownership of the seabed and its power to under s. 92(5)

(Management of Lands) of the *Constitution Act*, 1867, granted it some entitlement to legislate in the area of fishery management:

...the ability of the provincial Crown to legislate with respect to management of land is not a jurisdiction that overlaps with the federal jurisdiction respecting fisheries, and it does not, in my view, entitle the provincial Crown to enact the impugned legislation.

*Morton*, at para 169

88. Similarly in *Lafarge*, paramountcy was invoked to render inoperative municipal bylaws that affected a federal area of competence.
89. Provincial authority delegated to entities such as the Trust Committee to regulate land use and adopt bylaws in the form of official community plans cannot stray into the core of the federal competence over the protection of fish and fish habitat in tidal waters of Canada. The Planning Services Rejection relied on the DPA 3 Guidelines for Development in the OCP to reject the proposed activity out of concern for the potential impact on fish and fish habitat.
90. However, when one reviews the Planning Services Rejection in comparison to the DFO approval letter, it is clear, not only that the Planning Services Rejection omits any mention of the exemption contained in E.3.1.3(f) (works below boundary of the sea approved by DFO), but also that the Planning Services Rejection's references to the potential impact on fish are very general and vague, compared to the specificity contained in the DFO approval letter.
91. The Trust Committee's denial of the Application for vague reasons to do with fish protection lies in square contradiction to the approval the Petitioners received from DFO for that very purpose. The Trust Committee's purported regime, as implemented, creates a jurisdictional nightmare for residents such

as the Petitioners and frustrates the purpose of DFO's administration of the Program.

92. Pursuant to the doctrine of interjurisdictional immunity the DPA 3 Guidelines for Development in the OCP ought to be held inapplicable as they relate to the protection of fish and fish habitat in tidal waters. Alternatively, the doctrine of paramountcy arises to render inoperative those provisions which clearly frustrate the regime enacted under the federal area of competence.

THE UNREASONABLENESS OF THE TRUST COMMITTEE'S DECISION TO REJECT THE APPLICATION

**Reasonableness Review**

93. In *Vavilov*, the Supreme Court of Canada emphasized that reasonableness review is not a “rubber-stamping” process. Rather, this country's apex court called it a “robust” form of review meant to safeguard the legality, rationality, and fairness of the administrative decision-making process.
94. Where the standard of review is reasonableness, the reviewing court must consider whether the decision made by the administrative decision-maker – including both the rationale for the decision and the outcome to which it led – was reasonable. Even where the outcome is not necessarily reasonable, the decision may still be set aside where it was arrived at on the basis of an unreasonable chain of analysis.

*Vavilov*, at paras 83, 87

95. To be considered ‘reasonable’, the decision must be based on reasoning that is both rational and logical. The reviewing court must be able to trace a path through the reasoning process of the decision-maker – i.e., a “rational chain of analysis” – without “encountering any fatal flaws in its overarching logic.” The

decision must also be justified in relation to the “constellation of law and facts that are relevant to the decision.”

*Vavilov*, at paras 102 – 103, 105

96. Even more recently, the Supreme Court of Canada has confirmed that “a decision may be unreasonable due to a failure of justification in light of the legal and factual constraints, which can include the principles of statutory interpretation.”

*Pepa v Canada (Citizenship and Immigration)* 2025 SCC 21 (“*Pepa*”), at  
para 86

97. In *Pepa*, the Supreme Court of Canada also held that,

Through the application of the relevant legal and factual constraints, a reviewing court focuses exclusively on whether the decision maker’s decision was reasonable. However, it is natural that this process may incidentally eliminate other options that suffer from the same defects as the one under review, and may even narrow the field to only one possible interpretation. It should not be a surprise that there are cases in which one reasonable interpretation may arise, given that when legislatures speak, they intend to speak with clarity and purpose. This outcome will be more plausible when the question of interpretation is narrow, the statutory language is highly precise, and there are functionally very few options to choose from. A reviewing court should only conclude that there is one inevitable interpretation if that conclusion flows logically and inexorably from the legal and factual constraints already identified during the review of the decision maker’s reasons.

*Pepa*, at para 125

98. In other words, when the decision of an administrative decision-maker turns on a point of statutory interpretation that is unreasonable, and the factual and legal matrix before the reviewing court is such that only one possibly reasonable interpretation exists, the reviewing court ought not shy away from declaring that the only reasonable interpretation is the only reasonable interpretation.

### **The Failure to Apply the Exemption was Unreasonable**

99. The OCP at E.3.1.3 contains the following exemption – in other words, this part of the OCP says that if these conditions are satisfied, then a proposal project does not require a development permit from the Trust Committee:

E.3.1.3: Despite Section E.3.1.2, the following activities are also exempted from the requirement to obtain a Development Permit:

f. vegetation removal within 10 m of the natural boundary of the sea or works below the natural boundary of the sea that have been approved in writing by the Ministry of Environment or the Department of Fisheries and Oceans.

100. The Trust Committee should have exempted the Project from requiring a development permit because it is clear on “the natural meaning which appears when the provision is simply read through as a whole” that the Project is exempt.

*Canadian Pacific Air Lines Ltd. v Canadian Air Line Pilots Assn.*

[1993] 3 SCR 724, at p. 735

101. All the requisite elements of E.3.1.3(f) are met by the Project:
- a. The Project involves vegetation removal within 10 meters of the natural boundary of the sea;
  - b. The Project is a ‘works’ below the natural boundary of the sea;

c. The Project was approved by the DFO.

Wilding, Ex. "M"

102. The Planning Services Rejection failed to grapple at all with the exemption.

103. The LTC's decision to reject the Reconsideration Application made only passing reference to the exemption. The LTC failed to engage in even the shallowest attempts at statutory interpretation of their own OCP, and instead found that:

L. PATRICK: Right. The applicant has asked us about our interpretation of the exemption. I -- I don't have an interpretation of the exemption. I would have to assume staff, they've had that DFO -- that DFO letter of advice and what the title of it is that it identified as I would rely on staff to identify it as exempt. That's why we have staff, that's why we delegated this technical development permit to our staff because of its technical nature. So if they had agreed it was an exemption, they would have recognized it as an exemption at the beginning of the process. So that's how I look at the exemption in question.

Dalglish, Ex. "A", at p. 56

104. *Pepa* instructs that:

An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, if it is incompatible with

other provisions, or if it defeats the purpose of the statute or renders some aspect of it pointless or futile.

*Pepa*, at para 102

105. An interpretation of OCP E.3.1.3(f) that makes the exemption contained therein inapplicable to the Project would render OCP E.3.1.3(f) pointless: if it doesn't apply to the Project, it would never apply to anything. This is an absurd result that the Petitioners submit this Honourable Court cannot endorse. Rather, the Petitioners say that this Honourable Court ought to find that what is the only reasonable interpretation of OCP E.3.1.3(f): that it applies to the Project, and that the Project is exempt from the requirement of needing a development permit from the Trust Committee.

### **The Rejection was Substantively Unreasonable**

106. The Petitioners say that even if the exemption at E.3.1.3(f) of the OCP does not apply, the Trust Committee's ultimate decision to reject the Application – both the Planning Services Rejection and the LTC's rejection of the Reconsideration Request at the July 10<sup>th</sup> LTC Meeting – was unreasonable.
107. The Planning Services Rejection contained the following justification for recommending a rejection of the Application:

**- The deposit of sediments is likely to have negative impact on the fish habitat and the applicant has neither provided information on the likely impacts of this activity nor provided mitigation measure to minimize these potential impacts.**

**- The proposed activity includes the deposit of 434.4m<sup>3</sup> of aggregate materials, over about 300m of shoreline and at an initial height of 1.0 m above existing grade level.**

**- It is unclear what damage to the existing structure that the proposed activities is preventing and as a result of the increased turbidity from sediment supplementation, there could be a negative impact on the fish habitat.**

New upland structures or additions should be located and designed to avoid or reduce the need for shoreline stabilization. Shoreline stabilization should not interrupt natural processes solely to reduce erosion of undeveloped land, except agricultural land. – The public use of the land is not considered as damaging by the naturally occurring slow sediment erosion.

-- The proposed activities are likely to negatively impact the quality of tidal water as well as the fish and wildlife habitat through the changes to the sediment transport and water flow as a result of the sediment supplementation.

Wilding, Ex. “N”

108. The fact that the Trust Committee’s Planning Services Rejection so heavily relied on aspects of DPA 3 in the OCP that are *ultra vires* of the Trust Committee’s statutory authority is highlighted here – and the Petitioners address these arguments elsewhere in this Petition.
109. The Planning Services Rejection did not adequately engage the voluminous expert submissions made in the Application. After 17 months of waiting for Trust Committee staff to arrive at a decision, the Petitioners were presented with only the most fleeting level of engagement with the submissions in the Application.
110. The reasons provided in the Planning Services Rejection are deficient. Post-*Vavilov*, Canadian courts have consistently held that an administrative decision-maker’s decision will be found unreasonable where the reasons provided do not meet an applicant’s entitlement to fully fleshed out reasoning.

*Torkestani v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 1468

*Cliff v Canada (Attorney General)*, 2022 FC 930

111. At the LTC level, the Reconsideration Request provided direct and detailed responses to each and every ground of rejection provided by Trust Committee staff in the Planning Services Rejection. The Reconsideration Request

demonstrated that the Application was compliant with the requisite objectives and guidelines of the OCP.

Wilding, Ex. "O"

112. At the July 10<sup>th</sup> LTC Meeting, further detailed submissions were made outlining why the Application met the requisite objectives and guidelines of the OCP. The LTC, during the hearing, failed to adequately grapple with the submissions made on behalf of the Petitioners and the Reconsideration Request.
113. Instead, the LTC introduced a new requirement for the Application, one that is not listed in the OCP nor a requirement that the Petitioners had ever heard of before: the Project must not be *too big*.

It's -- it is a bit of an experiment. Like it or not nature -- you don't know what nature is going -- you can calculate it, you can do all the engineering and understand what -- what you think's going to happen. You won't know until it's done. That's where it's monitoring and careful -- looking at it is what's going to happen. And it's just -- it's a -- it's a big experiment.

T. PETERSON: Response, and then Trustee Harris comes back.

B. FOSSEN: Thank you. I guess with that concern, is there an alternative design that LTC would be comfortable with? Maybe we could go back to a berm, right, having a seawall which would -- it feels like that's the problem when they gave those concerns.

J. HARRIS: To the question?

L. PATRICK: I don't -- I don't know. I mean, I -- your own reports raised there are some questions of management of water on -- on the -- on your own -- on the -- up on the higher properties. Drive -- water coming down driveways and water in other things that are identified. So I don't know if that's been exhausted or what can be done. Or if it's the upper water that's causing some of the challenges.

Dalglish, Ex. "A", at pp. 39 – 40

114. The LTC here says the Project is "too big" and, when asked during the July 10<sup>th</sup> LTC Meeting what a better design might be, is met with the answer of, "*I don't know.*" This is not reasonable decision-making.

L. PATRICK: I mean, I've -- I've -- I've carefully read your response to our staff's concerns, but I -- I haven't -- I can't justify from -- that you have convinced me that their concerns have been addressed, that this is -- it is -- I think it's because of the sheer size -- there's a lot of material here and the impacts on the -- on the natural system that's there, is it -- is it -- while I can -- I understand you're trying to mimic it and to do the -- the best you can, that it is challenging and it certainly does attract a lot of attention because of the size. I think that's -- that's another --

E. WILDING: And can I ask, what -- what size would be appropriate? Like, 75 percent of the amount?

L. PATRICK: I don't know.

E. WILDING: 25, 40 percent?

L. PATRICK: I don't know. I'm -- I'm --

Dalglish, Ex. "A", at pp. 36 – 37

115. Again here, the LTC suddenly introduce the new and vague criteria of bigness, or size, and when the inquiry is made as to what size the Project must be in order to obtain a development permit, the answer is again, "*I don't know.*"
116. The Trust Committee – at both the staff level and on appeal at the LTC level – did not provide a decision that was reasonable, or at the very least failed to provide the kind of reasons to the Petitioners that they are entitled to. Instead, the Petitioners submit, the reasons given by the LTC were arbitrary and tailored fit not to the requirements of the OCP, but rather to a pre-

determined outcome that was arrived at months before the Planning Services Rejection was even released. This problem of bias is discussed more in this next section of this Petition.

## THE PERMITTING PROCESS WAS PROCEDURALLY UNFAIR

### Overview

117. Public decision makers such as local governments have a duty to act fairly:

Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual.

*Dunsmuir v New Brunswick* 2008 SCC 9, at para 79

118. The content of procedural fairness can vary. The content is decided in the specific context of each case, after a consideration of all of the circumstances. A variety of factors must be considered to determine the extent to which a person affected by a decision is entitled to participate in the decision-making process.

*Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 S.C.R. 817, at paras 22 – 28

119. The Application was marred by procedural unfairness at the delegated planning services department level, and at the LTC level.

### Procedural Fairness Issues at the Planning Services Department Level

120. The doctrine of legitimate expectations is well-established in Canadian administrative law. The core of this doctrine is that, “if a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the

past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been.”

*Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*,  
2013 SCC 36, at para 94 [emphasis added]

121. It is also well-established that inordinate delay in an administrative decision-making process can amount to an abuse of process:

The test for whether delay amounts to an abuse of process has three steps. First, the delay must be inordinate. This is determined on an assessment of the context overall. Second, the delay must have caused significant prejudice. When these two requirements are met, the court or tribunal is to conduct a final assessment as to whether abuse of process is established. This will be so when the delay is manifestly unfair to the party to the proceedings or in some other way brings the administration of justice into disrepute

*Law Society of Saskatchewan v Abrametz*, 2022 SCC 39, at para 72

122. At the planning services department level, the Petitioners suffered both a breach of their legitimate expectations in how the permit approval process for the Project would unfold, as well as delay so inordinate so as to amount to an abuse of process:

- a. The approach taken by the Trust Committee planning services staff to the Application was markedly different from the usual approach taken. In contrast to the typical process employed by staff, there was a lack of dialogue between Aurora and staff, very few questions posed by staff, and no discussion or inquiry on whether an exemption applied;

- b. There was inordinate delay: it took 7 months just to assign file numbers, and it took 17 months in total to render the Planning Services Rejection. This inordinate delay was significantly prejudicial to the Petitioners, given the real and ongoing erosion damage. Given the interference in the delegated decision by elected trustees of the LTC, this inordinate and prejudicial delay amounted to an abuse of process.

Wilding, ¶ 43

Kuhrt, ¶ 5

### **Bias at the LTC Level**

123. At the LTC level, the Petitioners were faced with a decision-maker that violated the rules of natural justice and procedural fairness by failing to be unbiased.
124. The LTC approached the July 10<sup>th</sup> LTC Meeting with a pre-determined decision to reject the Project and uphold the Planning Services Rejection. The record of the July 10<sup>th</sup> LTC Meeting demonstrates that the LTC created a reasonable apprehension of bias and were incapable of being persuaded.
125. Additionally, the evidence of Ethan further demonstrates that at least one elected trustee was not only incapable of persuasion at the July 10<sup>th</sup> LTC Meeting but was actively campaigning against the Project for a very long time.

Wilding, ¶ 38

126. Furthermore, one of the elected trustees at the July 10<sup>th</sup> LTC Meeting admitted that he was “involved” in the delegated decision of Trust Committee planning services staff:

E. WILDING: I see that you're passionate about this. Were you -- maybe with your passion, were you actively involved in it before -- before it came to LTC --

J. HARRIS: Yes.

E. WILDING: -- before it was the staff -- before it went to staff, before they rejected it --

J. HARRIS: Yes.

E. WILDING: -- you were involved in it before they rejected it?

J. HARRIS: Yes.

Dalgleish, Ex. "A", at pp. 47 – 48

127. This elected trustee also made public comments clearly suggesting that he had long opposed the Project. This elected trustee also attempted to call the question in rejecting the Reconsideration Request before fulsome submissions were made at the July 10<sup>th</sup> LTC Meeting. The LTC did not function as an unbiased, neutral, and open-minded administrative decision-maker. The Petitioners never had a chance.

Dalgleish, Ex. "A", at pp. 47 – 48, 50 – 52, 55

128. There is also evidence on record that the Trust Committee Planning Services Department staff were, as early as October 2024, supportive of the Project and indicated that the Project would be approved. However, in November 2024 an elected trustee on the LTC participated in the province's WLRS public consultation process and provided the following comments:

## Crown Lease Application 1415573

I am commenting on Crown Lease Application 1415573 as an individual trustee. You need to be aware that the Crown Lease application nor the associated development permit applications have been provided to the Salt Spring Local Trust Committee for input. Any responses that you have received from the Islands Trust have been a staff response only.

I learned about the Crown Lease application from Facebook, which is not an acceptable means of notification to an elected body with the jurisdiction for land use planning.

The Letter of Understanding between BC Assets and Land Corporation and the Islands Trust concerning the use and protection of crown land resources through balancing local and provincial interests lays out the consultation process and respective roles. It says that "Input on Crown Lease Referrals shall be communicated from a local trust committee through Islands trust planning staff to BC Lands' staff." It also says, "BC Assets and Land Corporation shall provide a referral, including a sketch of the proposed use, dimension of the tenure and any structures and proposed work plans, to the Islands Trust for referral to the appropriate local trust committee for comment."

Please be advised that the local trust committee has not been forwarded the application package from Islands Trust Staff nor been given any opportunity to provide input on the Crown Lease Referral 1415573.

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Fossen, ¶ 17 – 21 and Ex. "B"

129. Shortly after this elected trustee submitted these comments to WLRS, Trust Committee planning services staff suddenly adopted a new position on the Application.

Fossen, ¶ 22 and Ex. "C"

130. Thus, *despite indications from Trust Committee staff that the Application met the requirements of the OCP DPA 3*, at least one elected trustee on the LTC signaled opposition to the Application 8-months prior to the Reconsideration Request. This signaling, it can reasonably be inferred, resulted in a change in the position of Trust Committee staff that ultimately resulted in the Planning Services Rejection.
131. The Petitioners journey through the administrative process to obtain approval for the Application thus unfolded like this:
- a. Trust Committee staff initially indicate to WLRS that the Application will be approved;
  - b. an elected trustee steps in and signals opposition;
  - c. the Trust Committee staff reverse course;

- d. another elected trustee makes public statements opposing the Application;
  - e. Trust Committee staff issue the Planning Services Rejection;
  - f. an appeal is lodged via the Reconsideration Request to the LTC, a adjudicative body with at least two trustees who have interfered with the delegated decision at the staff-level and/or already made up their mind about the Project;
  - g. the Reconsideration Request is rejected by the LTC.
132. This process exemplifies bias in decision-making.
133. Where a decision-maker performs an adjudicative function, Canadian courts will apply the general reasonable apprehension of bias test. On the other hand, where a decision-maker exercises a policy or legislative function, a different test applies: the decision-maker is only required to keep an open mind.
- Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 (“*Newfoundland Telephone*”)
134. The LTC in its capacity as an administrative decision-maker adjudicating appeals such as the Reconsideration Request from delegated decisions of Trust Committee staff pursuant to Bylaw 534 was functioning as an adjudicative body. Resultingly, the Petitioners say that the LTC is subject to the general test applied by Canadian courts for the determination of whether an adjudicator or other decision-maker should be disqualified: the reasonable apprehension of bias test.
135. The leading formulation of the reasonable apprehension of bias test continues to be:

The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, the test of “what would an informed person, viewing the matter realistically and practically—conclude?” There is no real difference between the expression found in the decided cases “reasonable apprehension of bias”, “reasonable suspicion of bias” or “real likelihood of bias” but the grounds for the apprehension must be substantial.

*Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978]  
1 SCR 369, at pp. 394 – 395

136. The Nova Scotia Court of Appeal has recently confirmed that elected municipal councils can, when functioning as adjudicative bodies, be subject to the reasonable apprehension of bias test.

*Halifax (Regional Municipality) v Dalhousie University*, 2025 NSCA 33, at  
paras 134 – 145

137. The Alberta Court of Appeal applied the reasonable apprehension of bias test in overturning a municipal appeal board’s permit application when an elected municipal councillor who sat on that board made public statements opposing the sort of projects that the application was for. Alberta’s appellate court noted in this case that,

This is a case where an elected county councillor, who had publicly advocated positions directly adverse to, or limiting of, developments of the precise sort which was proposed here, also took a key role in the SDAB panel which decided the specific proposed development in this case adversely to the development applicant.

*Beaverford v Thorhild (County No. 7)*, 2013 ABCA 6, at para 14

138. The Court of Appeal for Ontario recently set aside the decision of an international arbitration tribunal that was constituted pursuant to the North American Free Trade Agreement on the basis that the mere fact that one of the three tribunal members had sent emails to officials in the Mexican government related to possible appointment to entirely unrelated panel lists.

*Vento Motorcycles, Inc. v Mexico*, 2025 ONCA 82 (“*Vento Motorcycles*”), at paras 10 – 11

139. The Ontario appellate court in *Vento Motorcycles* also confirmed that a reasonable apprehension of bias in just one member of a tribunal is sufficient to disqualify the entire tribunal.

*Vento Motorcycles*, at paras 42 – 52

140. A reasonable and right-minded person viewing the matter as a whole would conclude that there was a reasonable apprehension of bias of the LTC against the Project. Elected trustees not only interfered with the delegated decision at the Trust Committee planning services staff level, but on multiple occasions made public comments opposing the Project well before the Reconsideration Request was made. Given the evidence on the record, there was a reasonable apprehension of bias.

141. In the alternative, if the Petitioners are wrong that the test to be applied to the LTC is the reasonable apprehension of bias test because per *Newfoundland Telephone* the LTC was exercising a policy or legislative function in adjudicating the Reconsideration Request, then the Petitioners say that the open-mindedness test applies.

142. The open-mindedness test in context of elected municipal authorities is best expressed in *Old St. Boniface Residents Assn. Inc. v Winnipeg (City)* 1990 CarswellMan 235 (SCC) (“*Old St. Boniface*”):

In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of council who are capable of being persuaded. The legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of council, while they may very well give rise to an appearance of bias, will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

*Old St. Boniface*, at para 94

143. Well prior to the July 10<sup>th</sup> LTC Meeting, Trustee Harris made public comments that expressly indicated that he had made up his mind about the Application. The Petitioners were not given an opportunity before the LTC to have their Reconsideration Request adjudicated by decision-makers with an open mind. They submit that on the record, the LTC approached the Reconsideration Request without an open mind and had pre-judged the Reconsideration Request before the July 10<sup>th</sup> LTC Meeting.

144. Trustee Harris' attempts to put forward a motion rejecting the Reconsideration Request before submissions had even concluded at the July 10<sup>th</sup> LTC Meeting also indicates that he did not have an open mind capable of persuasion.

#### **Other Procedural Fairness Issues at the LTC Level**

145. Instead of following the requisite requirements of the OCP, the LTC at the July 10<sup>th</sup> LTC Meeting instead opined that if only a redesigned permitting process might have existed or might have been followed, then perhaps the LTC would have considered the Application.

Dalgleish, Ex. "A", at pp. 46, 53 – 54

146. The LTC also during the course of the July 10<sup>th</sup> LTC Meeting stated that they could not approve the Reconsideration Request due to what they saw as a lack of indigenous consultation. The OCP does not list indigenous consultation as a requirement in obtaining a development permit, and in any event Aurora at the July 10<sup>th</sup> LTC Meeting clarified that consultations had and were being conducted collaborated with the WLRS, who have mandate in that area. Despite this, the LTC relied on this arbitrary ground of reasoning to reject the Reconsideration Request.

Dalgleish, Ex. "A", at pp. 51 – 53

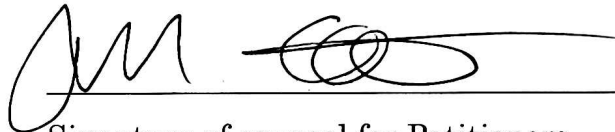
147. A breach of the duty to act fairly renders a decision void regardless of the substantive issues addressed by the decision – resultingly, the Petitioners submit that this Honourable Court should quash the LTC's decision to uphold the Planning Services Rejection made at the July 10<sup>th</sup> LTC Meeting.

*Cardinal v Kent Institution* [1985] 2 SCR 643, at pp. 660 – 661

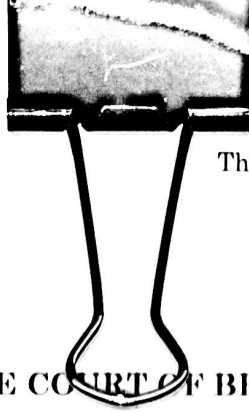
**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Ethan Wilding sworn on August 27<sup>th</sup>, 2025;
2. Affidavit #1 of Heidi Kuhrt, sworn August 19<sup>th</sup>, 2025;
3. Affidavit #1 of Bradley Fossen, sworn August 21<sup>st</sup>, 2025;
4. Affidavit #1 of Patricia Sanders, sworn August 19<sup>th</sup>, 2025;
5. Affidavit #1 of Andrew Dalglish, sworn August 22<sup>nd</sup>, 2025; and
6. such further material as counsel may provide with leave of this Honorable Court.

Date: August 27<sup>th</sup>, 2025

A handwritten signature in black ink, consisting of a stylized 'M' followed by a series of loops and a long horizontal stroke.

Signature of counsel for Petitioners  
Thomas Falcone



This is the 1<sup>st</sup> Affidavit of Andrew Dalglish and it was made on August 22, 2025

No. **S-256468**  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

*In the matter of the Judicial Review Procedure Act, RSBC 1996 ch. 241*

Between:

**ETHAN WILDING, DAVID NICHOLAS DEMNER, and HEIDI KUHRT**

Petitioners

And:

**SALT SPRING ISLAND LOCAL TRUST COMMITTEE**

Respondent

**AFFIDAVIT #1 OF ANDREW DALGLEISH**

I, Andrew Dalglish, official reporter, of 3760 Pinantan – Pritchard Rd., Pinantan Lake, BC V0E 3E1, MAKE OATH AND SWEAR THAT:

1. I am an Official Reporter in the Province of British Columbia and as such, have experience and qualifications to prepare certified transcripts.
2. I was retained through Charest Legal Solutions Inc., who had been engaged by Thomas Falcone, counsel for the Petitioner, to prepare certified excerpts from a recording available through the following link:

<https://collaboratevideo.net/MaxPlayer/default.aspx?cid=isthost&pid=vod&vid=250710C&bw=720p&webcastID=IST-250710C>

(the “Recording”):

3. I was advised by counsel for the Petitioner, and verily believed same to be true, that the recording pertains to the municipal council meeting of the Salt Island LTC held on July 10, 2025 at Salt Spring Legion, Meaden Hall, 120 Blain Rd., Salt Spring Island, BC.