

William Pearce QC, Independent Legal Opinion

20 June 2015

“You have asked me to provide you with a legal opinion regarding the above property. As a retired lawyer I am prepared to provide you with an opinion on a pro bono basis ie without compensation or expectation of a reward. As this request is of an urgent nature I will provide you with a quick informal opinion based upon my understanding of trust law but if you require a formal considered opinion on the subject you will have to hire a lawyer who unlike me is licensed to practice law.

You have provided me with an agreement dated September 19th 1973 between Mack Laing and the municipality of Comox . This agreement evidences a grant from Laing to Comox of a property "in trust, in perpetuity, as a public nature park". The purpose of the trust is that the property is to be "used as a public nature park for recreation and conservation purposes" to be "left to the greatest extent possible in its natural state."

There is a secondary purpose , namely that any building now constructed or any replacing structures be restricted to public use as specified in para 1 in perpetuity. You tell me that Comox has allowed the house to fall into disrepair and wishes to demolish the house. When Comox accepted the gift of property as a trust property they accepted a responsibility to maintain

the property in perpetuity as trustees in accordance with the terms of the trust. Part of the trust was to allow the public the use of Mack Laing's home for the comfort and convenience of those members of the public wishing to enjoy the quiet beauty of a natural park. The agreement also contemplated that the home might be replaced by Comox at some point in the future in which event it would continue to be used as outlined.

You have also provided me with an extract from the will of Mack Laing where he bequeaths an amount of money to Comox, 25% of which is to be used for capital improvements to the house to be used as a natural history museum and the remainder as an endowment to apply the income to the operating expenses. No mention is made of a replacement structure. Mack Laing played a pivotal role in the environmental history of western Canada for his literary and scientific contributions and had a particular interest in the preservation and display of natural specimens of which he collected over 10000 specimens in his lifetime. His will is a departure from the trust deed as to the use of his home. It would appear that he was hopeful when writing the will that Comox, if it accepted the legacy would turn the home into a natural history museum in his memory. Comox had no obligation to accept the bequest but in accepting the bequest it accepted the change in the purpose for which the house was to be used and the town assumed a trust obligations to not only use the house as stipulated in perpetuity but to use the monies as stipulated.

I am advised that the bequest of \$55k was deposited into general revenue and that Comox made no attempt to turn it into a natural museum but instead rented the premises out and presumably deposited the rents in general revenue. As a trust property Comox had no beneficial ownership to the land or the house upon it . Upon accepting the bequest Comox was under a trust obligation to use the monies as stipulated and the endowment portion of the bequest should have been placed in a separate trust account. They were in breach of trust when they rented the home with the intention of securing more general revenues and they were in breach of trust for not setting up a separate trust bank account and deposit the rents into that account (and use that account or the general upkeep of the home).

The fact that the terms of the trust were breached does not detract from the fact that the home is still subject to the trust and to demolish the home those officials who approved of same could be held to account for damages caused to the home. In addition I note that s122 of the Criminal code makes it an offence for an official (which is defined to include a person who holds office or is elected to discharge a public duty) to commit a breach of trust. I offer no opinion whether such officials could be prosecuted for their actions but one would hope the councilors and the mayor would take legal advice before proceeding with the demolition.

If it becomes impossible or impracticable to carry out the purpose of a trust the trust will not fail but instead the court

can direct the trust property be applied to another purpose that reasonably approximates the designated purpose, known as the cy pres doctrine ie to a purpose which is as near as possible to the original purpose. You tell me Comox has another property with a house on it that Mack Laing first lived in . If Shakesides is beyond repair or restoration Mack Laing's first home might serve as a substitute under the cy pres doctrine.

It seems to me that the city of Comox has an obligation before it commences demolition to apply to the court for directions as to whether or not it can proceed with the demolition and if so whether the bequested funds and accumulated rents(together with interest) ought to be applied to the other home to be used to further the charitable purpose trust which was created by their acceptance of the bequest.

It is my further recommendation that you notify the Attorney General of this situation. The provincial Crown acts as *parens patriae* with respect to charitable trusts and it has always been recognized that the Attorney General has a duty to intervene when necessary to protect and enforce charitable trusts. It would be my recommendation to contact Shirley Kay who is in the Vancouver office of the Legal Services Branch of the Attorney General who might be able to assist you in this regard. Her email address is Shiley.Kay@gov.bc.ca and feel free to share this opinion with her if you so desire.

If the Attorney General is not prepared to intervene you should contact a lawyer to see if there is a basis to seek an injunction to stop the demolition and to get an order that Comox carry out the terms of the trust as outlined.

I hope this provides you with some direction on the subject.”

William Pearce QC