IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Beacon Hill Park Trust (Re),* 2022 BCSC 284

Date: 20220224
Docket: S210676
Registry: Victoria

In the matter of section 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464

Re: Beacon Hill Park Trust

Before: The Honourable Mr. Justice Punnett

REASONS FOR JUDGMENT

In Chambers

Counsel for the Corporation of the City of Victoria:	C. Moffatt T. Zworski
Counsel for HMTQ in Right of B.C. and Attorney General of British Columbia:	M. Weintraub S. Kirkpatrick
Counsel for Friends of Beach Hill Park Society:	L. J. Alexander L. LeBlanc
Counsel for Shea Smith and Dennis Davies:	C. Boies Parker, Q.C. C. Kanigan
Counsel for Together Against Poverty Society:	D. King I. McGee, Articled Student
Place and Date of Hearing:	Victoria, B.C. September 20-23, 2021
Place and Date of Judgment:	Victoria, B.C. February 24, 2022

INTRODUCTION

[1] The Corporation of the City of Victoria (the "City"), as trustee, petitions the Court, pursuant to s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464 for its opinion, advice, or direction on a question respecting the management or administration of trust property located in Victoria and known as Beacon Hill Park (the "Park") settled on trust February 21, 1882 (the "Trust").

[2] Section 86 of the *Trustee Act* states:

> 86 (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.
>
> (2) The application under subsection (1) must be served on, or the hearing attended by all persons interested in the application, or by those that the court thinks expedient.
>
> (3) The costs of an application under subsection (1) are in the discretion of the court.

[3] The question posed by the City is:

> Can the land known as Beacon Hill Park, held in trust by the City of Victoria, be used by persons experiencing homelessness for temporary sheltering?

[4] The respondents are Her Majesty the Queen in Right of British Columbia, a settlor of the trust; the Attorney General of B.C., the guardian of the public interest in administration of public trusts; Friends of Beacon Hill Park ("FBHP"), a society whose goal is the preservation of the park; Together Against Poverty Society ("TAPS"), a public advocacy group; and Shea Smith and Dennis Davies, two individuals who have sheltered in the Park.

[5] The City brings this petition because increased sheltering has occurred in the Park over the past several years, raising the question of whether such use is consistent with the maintenance and preservation of the Park for "the use, recreation, and enjoyment of the public." The City seeks guidance on how to

reconcile the Trust terms with the constitutionally protected right of persons experiencing homelessness to shelter overnight in public parks where no shelter space is otherwise available.

[6] Sheltering has consisted of the use of the Park as a place to reside, shelter from the elements, or establish an encampment for people and their goods, including raising structures of varying permanence.

WHAT THIS PETITION IS NOT

[7] It is useful to state explicitly at the outset what this petition is not.

[8] This proceeding is not a challenge to the Trust's legality, on constitutional or any other grounds. It is not a challenge to the legality of any City bylaw, or any action taken by the City to either limit or allow sheltering in the Park. It is not a breach of trust action or an action to enforce the Trust as only the Attorney General or a relator has standing to bring such an action (*Armstrong v. Langley (City)*, 69 BCLR (2d) 191 (C.A.), at paras. 33-35). It is not an application to vary the Trust under s. 184 of the *Community Charter*, S.B.C. 2003, c. 26 or at common law.

[9] More generally, these reasons do not address any challenge under the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, something that requires a full factual matrix be in evidence for a decision to be made. No constitutional remedy is sought by any party.

[10] Nor is the City seeking the Court's directions on whether the City, as trustee, can, under the terms of the Trust, use the park to provide temporary or permanent shelter to persons experiencing homelessness. Rather the City seeks the Court's opinion whether the Trust places the Park in a distinct category of public parks such that, notwithstanding *Victoria (City) v. Adams,* 2008 BCSC 1363, reviewed in part 2009 BCCA 563 and other cases, sheltering by people experiencing homelessness cannot be allowed in the Park, even when there are no other viable alternatives available.

[11] In posing the question, the City is not shifting its responsibility as trustee to the Court. The Court is not being asked to answer questions of what particular uses are permitted under the Trust or how the City should carry out its duties as Trustee once the question is answered. The Court is only being asked to provide its advice, opinion or direction on the question posed. It is then for the City to apply that advice to specific circumstances and take the appropriate action to fulfil its obligations under the Trust. That action may be subject to judicial review and, possibly, a challenge under administrative and constitutional law processes.

[12] The role of the Court is limited to confirming the legal principles that guide the interpretation and application of the Trust, whether it is an enactment, statutory instrument or contract, and advising or directing the parties as to how the terms of the Trust should be interpreted, including whether and how the *Charter* informs that interpretation.

BACKGROUND

[13] In 1876 the *Public Parks Act, 1876*, No. 6 [*Public Parks Act, 1876*] came into force. It is the original legislation respecting public parks in British Columbia. Section 1 provides:

> 1. It shall be lawful for the Lieutenant-Governor in Council, from time to time, to appoint so many Trustees as may be thought fit, of any public park or pleasure ground for the recreation and enjoyment of the public; every such appointment to be published in the Government Gazette of the Province; and the Trustees so appointment and their successor to be appointed as hereinafter mentioned, shall have power to hold any lands or hereditaments that may be conveyed to them by deed or grant from the Crown, or by any other sufficient deed of conveyance, on trust for the establishment or purpose of a public park or pleasure ground for the recreation and enjoyment of the public.

[14] The powers of the trustees so appointed are set out in s. 3:

> 3. The Trustees of any such public park or pleasure ground shall have power to enclose any lands so to be granted or conveyed as aforesaid, with proper walls, rails, fences, or pallisades, and to erect suitable gates and entrances, and to lay out and ornament such park or pleasure ground, in such manner as may be most convenient and suitable for the enjoyment and recreation of the public, and to embellish the same with walks, avenues, roads, and shrubs, as may seem to them fitting and proper, and to preserve,

> maintain, and keep in a cleanly and orderly state and condition, and cause to be so maintained and kept the whole of any such park or pleasure ground, and its walls and fences, and all monuments, buildings, erections, walks, plantations, and shrubberies therein and belonging thereto.
>
> (Emphasis added)

[15] The trustees also have the power to make regulations:

> 5. The Trustees of any such park shall have power and authority to make such rules and regulations, and to do and perform, and to cause to be done and performed, all such acts, matters, and things as may be necessary and proper for any of the purposes aforesaid, ...

[16] The *Act* was amended in 1881 (*An Act to Amend the Public Parks Act 1876*, 44 Vict. Ch. 18 (1881) [*Public Parks Act, 1881*]) expanding a transfer to trustees to include a transfer to a municipal corporation, city or town as trustees. Amended sections 6 to 8 provided:

> 6. It shall be lawful for the Lieutenant-Governor to grant and convey any public park or pleasure ground set apart or reserved out of any Crown lands of the Province, for the recreation and enjoyment of the public, to the Municipal Council or Corporation of any City or Town within the Province, upon trust to maintain and preserve the same for the use, recreation, and enjoyment of the public; and any such Corporation to whom such grant or conveyance shall be made shall have power to hold the lands thereby conveyed, upon the trusts and for the purposes aforesaid.
>
> 7. Upon such grant being made, such Corporation may, within its municipal limits and the limits of the park so conveyed to it, levy rates for maintaining such public park or pleasure ground, and shall have and may exercise all the power and authorities conferred on the trustees of any public park or pleasure ground appointed under the provisions of this Act.
>
> 8. The powers and authorities hereby conferred on any such Corporation shall be exercised by by-laws, in lieu of rules and regulations, which by-laws the said Corporation is hereby authorized from time to time to make, alter, or revoke: Provided always, that such by-laws shall be made and may be enforced in the same manner and subject to the same conditions as if the same were by-laws made by such Corporation under the provisions of any Municipality Act for the time being relating to such Corporation, and such by-laws shall not be subject to the approval of the Lieutenant-Governor in Council.
>
> (Emphasis added)

[17] As a result, the transfer of crown lands for park purposes could be made to a municipality, city or town, in trust, which then had the power to enact by-laws to facilitate the trust created.

[18] In 1908, the *Provincial Parks Act,* 1908, c. 39 repealed the *Public Parks Act* while preserving trusts created under its authority, such as the Beacon Hill Trust:

> 22. Chapter 148 of the Revised Statutes, 1897, being the "Public Parks Act," is hereby repealed, except as to parks or pleasure grounds for the government of which Trustees have been appointed before the coming into force of this Act.

[19] On February 20, 1882, the Lieutenant Governor in Council granted the lands constituting the Park to the City under the authority of the *Public Parks Act, 1876* by Crown Grant (the "Crown Grant"), on terms that it be held by the City in trust:

> ...TO HAVE and TO HOLD the said piece or parcel of land and all singular the premises hereby granted with their appurtenances unto the said Corporation and their successors to and for the several uses intents and purposes and upon the several trusts and with under and subject to the several powers provisos agreements and declarations expressed and declared of and concerning the same that is to say <u>UPON TRUST to the express use intent and purpose that the said hereditaments and premises hereby granted shall be maintained and preserved by the said Corporation and their successors for the use recreation and enjoyment of the public under the provisions of the Public Parks Act 1876 and the said Act to amend the Public Parks Act 1876...</u>
>
> (Emphasis added)

[20] The Park is a parcel of land registered in the Victoria Land Title Office as a legal lot under the *Land Title Act*, R.S.B.C. 1996, c. 250 [*Land Title Act*]. The Park's legal description is:

> PID: 010-503-587
>
> Section 87, Victoria District, Shown Coloured Red on a Plan Attached to DD15937 and described in the Crown Grant dated 21.02.1882 as "The Public Park or Pleasure Ground known as Beacon Hill"

[21] On that title is registered a "Right of Entry". It is a reservation of a right granting title for so long as the land is used for the purposes described in the Crown

Grant. That grant or conveyance is the document referred to in these proceedings as the Trust. Under “Charges, Liens and interests” is registered:

Nature:	Right of Entry
Registration number:	EM109419
Registration Date and Time:	1909-13-13 14:20
Registered Owner:	The Crown in Right of British Columbia DD15937 See S.B.C. 1876, Public Parks Act and amendments thereto.

[22] The Park is the largest park in Victoria covering approximately 183 acres and is the City’s primary feature park including natural areas, many of which are environmentally sensitive, culturally sensitive areas, manicured greenspace, horticultural areas, two sports fields, a golf putting green, a baseball diamond, a cricket pitch, a lawn bowling pitch, outdoor fitness equipment, tennis courts, two playgrounds and spray parks. As well there is a children’s petting zoo, a music performance stage, a maintenance yard, pathways and roadways, artificial ponds, sculptures and monuments and a story pole.

[23] Since it was transferred to the City in 1882 the Park has been used for a range of purposes. For example, cattle grazing, digging gravel pits and the like continued after the settlement of the Trust. At various times it has been used for shelter. The Victoria Rifle Volunteer Corps camped in the Park from at least 1866 to 1870 and Boy Scouts camped there in 1913. During the 1970s, the Park was used as a campground with limited opposition from the City. Five acres of the Park were used during World War I to house and train soldiers, with at least 20 structures having been built for this purpose by the time it was dismantled in 1917. Beacon Hill Park Nursery was established in 1909 and it supplied plants for City parks and boulevards but also generated revenue through commercial sales from that date until the 1930s. Other uses include a road and expanded parking lots. Currently, the City operates a maintenance yard within the Park.

[24] While the Park is the subject of this application, the City also maintains and operates an extensive public park system comprising some 138 other public spaces.

All public parks in the City are regulated through the City's *Parks Regulation Bylaw*, No. 07-059 (the "Bylaw") adopted under the City's local government jurisdiction over public places within its boundaries (*Community Charter*, s. 8(3)(b)).

[25] Public parks are created in a variety of ways. The Bylaw applies no matter how the park in question was created. Although the Bylaw can, and does, contain regulations unique to a specific park or parks, it generally treats all public parks in the same manner.

[26] Neither the *Public Parks Act, 1876*, as amended, nor the Crown Grant contain a detailed list of activities permitted or prohibited under the Trust. The terms of the Trust have only been judicially considered twice.

[27] In *Anderson v. Victoria (City)* (1884), 1 B.C.R. (pt. 2) 107 (S.C.) Begbie C.J. granted an interlocutory injunction to stop the proposed construction of a permanent agricultural exhibit in the Park on land to be bestowed by the City to an Agricultural Association. He concluded:

> 4 Now the prominent words, repeated four times over in these five or six clauses, are, that the land is to be "a park or pleasure ground," and that it is to be held by the trustees for the "recreation and enjoyment of the public." At the end of sec. 1 of 1881, the word "use" is introduced; but that does not at all vary the matter. The park, alias the pleasure ground, is to be used for recreation and enjoyment; and therefore, I think, in no other manner; not for general purposes of profit, or utility, however great the prospect of these may be. A trustee cannot go beyond his express trust; at least, cannot do anything inconsistent with it.
>
> **5** Nobody, I suppose, would wish to deny, -- everybody would maintain, -- the very great utility, in this Province, of a well-organized, well-directed Agricultural Association. As regards both the internal and external relations of the Province, and within and without the Dominion, it might, and almost necessarily would, be of great public interest and utility. I shall not waste a word on that. But so would a University be of great public interest and utility; or a Sanatorium for our fleets in the Pacific and China Seas; or barracks for a garrison of soldiers; or a proper Lunatic Asylum. So is a cemetery a useful and indeed a necessary public matter. For any or all of these, Beacon Hill would afford an admirable site. But none of these are objects of pure recreation. None of these institutions but would be out of place in a pleasure ground. All establishments addressing themselves to profit or utility are, I think, excluded by the terms of the trust, except the profit and utility to be derived (and it is great) from open air recreations, such as may be carried on in a public park or pleasure ground, and such buildings

> and erections as are ancillary to public recreations there. That, according to my present view, is the clear reiterated intention of the declarations of trust contained in the Acts of Parliament; and the word "buildings" used in s. 4 of the Act of 1876 must be confined to such buildings as are consistent with the main objects of the Act.
>
> (Emphasis added)

[28] Begbie C.J. summarized the order made:

> 9 The order now made will follow very nearly the terms of the order in the case cited, viz., it will, until the hearing, restrain the Corporation, their grantees, licensees, agents, or servants, and also the three other defendants, by themselves, their agents, contractors, or servants, from alienating any portion of Beacon Hill Park, and from appropriating any portion of the said park, for the erection of the buildings, &c., proposed by the Agricultural Association, or of any erection or building not needful for or incidental to the maintenance or use of Beacon Hill Park as a public park or pleasure ground.

[29] The order was interlocutory. On January 24, 1885, Mr. Anderson's action against the City was dismissed hence the interlocutory order ceased to be in force or effect.

[30] The Trust was next considered over a 100 years later in *Victoria (City) v. Capital Region Festival Society*, (1998) 62 B.C.L.R. (3d) 143 (S.C.) when the City sought the Court's advice on whether the Park could be used for an annual folk music festival. Mr. Justice R.D. Wilson held it could not, as the music festival involved a commercial component consisting of advertising and concessionaires.

[31] In reaching that conclusion he stated:

> 24 The duty imposed on the trustee is to maintain and preserve the asset. There is a correlative right in the beneficiary to a maintained and preserved asset.
>
> 25 There is a further duty on the trustee to permit "use" of the asset: in this case, to go upon the asset. There is a correlative right in the beneficiary to go upon the asset.
>
> 26 There is no independent duty on the trustee, nor a correlative right in the beneficiary, in connection with the notions of enjoyment and recreation. To put it another way, there is no duty on the trustee to provide recreation or enjoyment. Any rights or privileges attaching to the beneficiary, in connection with the notions of enjoyment and recreation, must be informed by the duty to maintain and preserve.
>
> ...

32 The most apt descriptive adjective which comes to my mind, in this case, is the word “nature”. That was the emphasis urged by the opponents. It is also consistent with the park objectives defined by the City. From the festival society’s perspective, important characteristics are – “...natural shade, grass and spectacular beauty...”.

33 I define the park therefore, as a nature park and ornamental pleasure ground, with playing fields. The enjoyment and recreation contemplated by the trust terms is the enjoyment and recreation of the trust asset in its physical state as a nature park and ornamental pleasure ground, with playing fields. To achieve the trust objects, the trustee is under a duty to maintain and preserve that "physical state as such".

34 The introduction of tents, food kiosks, sound systems operating with digital delay and proper equalization, and commercial advertising are not necessary, incidental, or necessarily incidental to that objective.

35 There is a companion principle to necessary incidence discussed in the authorities referred to above, namely, the "consistency" of a utilization of a property, with the character of the property. The festivals described fail to meet that principle. In my opinion the notion of being - "held captive...in an enclosed controlled environment", surrounded by commercial advertising is consistent with an amusement park, or a major league ball park; it is not consistent with a park whose cardinal features include "natural shade, grass and spectacular beauty".

...

40 In *Anderson*, the court was dealing with the size of the asset and the integrity of its title. I am dealing with the character of the asset. I think the character of the asset is no less worthy of protection than its size and the integrity of its title. Alteration of the character of the asset is a mischief equivalent to although different from alteration of size. Both are liable to being enjoined.

...

44 Finally, I am urged to note that "...contemporary standards of what may constitute appropriate public recreation and enjoyment of the public will not necessarily be the same as those held in the 1880's". I have serious reservations about the applicability of that notion with respect to this park. Because, as the late Will Rogers observed, in a different context, they aren't making these any more. Further, I understand the jurisprudential major premise of *Anderson* to be conservation, not innovation.

45 If there be public outcry for relief from the suffocating fetters of a past generation, then, the solution, in my judgment, is not the expedient manipulation of referents to accommodate a contemporary agenda. With its attendant risk of converting the enduring into the episodic. But rather, to move for a termination of the trust, and conveyance of legal and beneficial title to the City. The property then may be administered free of the encumbrances imposed by the aspirations for us of a generation long since dead, and the interests of generations yet to be born.

(Emphasis Added)

[32] In both *Anderson* and *Capital Region Festival Society* the decisions related to actions of the City as a trustee, not activities in the Park by members of the public.

[33] The terms of the Trust then, prohibit the City from utilizing any part of the Park for profit or utility as the City must hold the land comprising the Park for the use, enjoyment and recreation of the public as a public park or pleasure ground. However, there is no prohibition on members of the public engaging in activities in the Park that may be of profit or utility provided such activities are consistent with the nature of the Park as a public park.

[34] Nor does the Trust mandate preservation of any particular physical features or plants, so long as the Park's character is maintained. Under s. 4 of the *Public Parks Act*, 1976 the trustees are authorized:

> ... to lay out and ornament such park or pleasure ground, in such manner as may be most convenient and suitable for the enjoyment and recreation of the public, and to embellish the same with walks, avenues, roads, and shrubs, as may seem to them fitting and proper, and to preserve, maintain, and keep in a cleanly and orderly state and condition, and to cause to be so maintained and kept, the whole of any such park or pleasure ground, and its walls and fences, and all monuments, buildings, erections, walks, plantations, and shrubberies therein and belonging thereto.

[35] The question before the Court arises from people experiencing homelessness sheltering in the Park in greater numbers. People have been sheltering in city parks, including the Park, and other public places for decades. As first recognized in *Adams*, persons experiencing homelessness are constitutionally entitled to erect shelters overnight in public parks when there is no practicable shelter space available elsewhere.

[36] In 2009, following the *Adams* decision, the City amended the Bylaw to expressly allow for overnight sheltering in public parks. The amendments limited sheltering to nighttime (7 p.m. to 7 a.m.) and prohibited sheltering in certain

locations, such as environmentally and culturally sensitive areas, playing fields, playgrounds, pathways, and other locations not suitable for sheltering.

[37] Such sheltering has occurred in many parks, including the Park, in compliance with the amended Bylaw and in contravention of it. It has resulted in significant additional expenditure of funds by the City to deal with the negative consequences of such use of public spaces including damage to sensitive areas of the park, soil contamination, denuding of vegetative cover, damage to trees and foliage and the like.

[38] On March 18, 2020, the Province declared a state of emergency in response to the COVID-19 pandemic. This led local shelters and social service providers to either suspend their services or dramatically downsize such services to prevent the spread of the virus. It resulted in the number of persons who were homeless and sheltering in public parks, including the Park, increasing from approximately 24-35 temporary shelters before March 2020, to 465 by April 24, 2020.

[39] To permit self-isolation the City ceased enforcing the prohibition on daytime sheltering. Then on September 14, 2020, the City adopted temporary amendments to the Bylaw which allowed for daytime sheltering by persons experiencing homelessness in public parks, provided they complied with certain specific regulations such as rules about the size, location, and spacing of shelters. These temporary provisions were set to expire 30 days after the end of the provincial state of emergency.

[40] The Bylaw prohibited all sheltering in some specific public parks. For example:

a. parks that are entirely or mostly a culturally sensitive area (e.g., Pioneer Park and Coffin Island);
b. parks that are entirely or mostly an environmentally sensitive area (e.g., Summit Park, Moss Rocks Park);

c. parks that are used for school purposes under an arrangement with School District 61 (e.g., MacDonald Park, South Park, Robert Porter Park, and David Spencer Park).

[41] The City has enforced the terms of the Bylaw in the Park, including those relating to the erection of shelters or other unauthorized shelters although the degree of enforcement is in dispute. On July 10, 2020, the City initiated legal proceedings to enforce the prohibition on sheltering in environmentally and culturally sensitive areas and other locations where sheltering is prohibited under the Bylaw. On July 28, 2020, the City obtained an interim injunction enforcing the Bylaw and subsequently took measures to implement the terms of that order. Sheltering was then confined mainly to lawn and hard surfaces so that sensitive areas of the Park would not be damaged.

[42] Because of the collaborative efforts of the City and the Province, sufficient indoor housing and shelter spaces now exist for all persons sheltering in City parks. Accordingly, the City repealed the temporary provisions of the Bylaw that allowed for daytime sheltering during the pandemic effective May 1, 2021. As of July 20, 2021, there were only eleven shelters in City parks and four of those were in the Park.

[43] I turn first to the overall positions of the parties which range from the answer being a simple no, a yes, or a more nuanced answer.

POSITIONS OF THE PARTIES

Position of the City

[44] The City's interest is as trustee with the obligation to administer the trust property for the benefit of the Trust's purpose. In posing the question, the City took no position on it. Instead, the City restricted its submissions to providing the factual and legal context for the question. It is the view of the City that the Crown Grant is a contractual document, not an enactment, and should be construed contractually. However, the City also took the position that it is not necessary to decide whether the Trust is an enactment or a document of conveyance, because it does not matter

for purposes of this question as it is not ambiguous and in any event any Crown Grant must be interpreted in accordance with *Charter* values.

Position of the Attorney General

[45] The Attorney General's interest in the matter is as guardian of the public interest in a public purpose trust, and after the City, it is the second protector of the Trust. In this role the Attorney General has exclusive standing to decide whether and how to enforce the terms of the Trust.

[46] The Attorney General considers it consistent with the City's role as trustee to seek the opinion, advice, or direction of the Court on the question posed. The Attorney General's position is that the question posed does not lend itself to a simple yes or no answer. The answer, it says, is more nuanced. The Attorney General submits that "...the Court must interpret the Trust to determine whether temporary sheltering by those experiencing homelessness is a use, recreation or enjoyment of the [Park] by the public".

[47] The Attorney General's position is that the Trust is properly understood as a statutory instrument and its interpretation a question of law. As a result, the modern rule of statutory interpretation governs and "the Trust must be read as always speaking, remedial, subject to the *Constitution.*" It says the Court is not at liberty to vary the Trust.

Position of the FBHP

[48] The FBHP submit the answer to the question posed by the City is "no".

[49] They submit that in arriving at that answer the Right of Entry registered on the title is, as with any other document, not a statutory enactment but a contractual document, conveying an interest in land subject to conditions. Hence the Trust should be interpreted according to the principles of contractual interpretation, not statutory interpretation, giving primacy to the words of the document read together. Such is, they say, a question of mixed fact and law. The FBHP point to *Anderson*

and *Capital Regional Festival Society* in support for their position that use of the Park for temporary sheltering contravenes the terms of the Trust.

Position of Shea Smith and Dennis Davies and TAPS

[50] The respondents Mr. Smith, Mr. Davies and the TAPS filed a joint written submission as their positions coincide. They have standing given the participatory wording of section 86 of the *Trustee Act*. The Court previously concluded it was expedient they be heard in this proceeding (s. 86(2) order of June 8, 2021). Their participation is in the context of a reference under the *Trustee Act*. They do not have standing to raise issues respecting the Trust beyond the question posed by the Petitioner.

[51] Mr. Smith, Mr. Davies, and TAPS submit that persons experiencing homelessness must perform life-sustaining activities in public spaces when they have no private space available. These activities include creating shelter to protect oneself from the elements, sleep, store belongings, and sustain some measure of privacy. They emphasize that *Adams* established that interfering with the ability of those experiencing homelessness to shelter in parks is contrary to the constitutionally protected rights of those individuals in certain circumstances.

[52] In their submission, determining whether prohibitions against outdoor sheltering are contrary to the *Charter* is a fact and context specific question, dependent on all the circumstances of a particular case. Those circumstances include the needs of specific individuals experiencing homelessness, the availability of alternative opportunities for safe and secure shelter, and the impact of the particular form of shelter on other members of the public and the integrity of public assets.

[53] These respondents submit that the answer to the question is “yes” based on a plain reading of the Trust, in the context of the statute that created it. They submit there is nothing in the terms of the Trust that requires the Park to be managed in such a way as to exclude the use of the Park by persons experiencing

homelessness for shelter as such use is as legitimate as other uses by members of the public. This interpretation is, they argue, reinforced by the importance of reading the Trust instrument in a manner consistent with *Charter* values.

[54] In the alternative, if the Court finds that the Trust is inconsistent with temporary sheltering, Mr. Smith, Mr. Davies and TAPS submit that alone is an insufficient basis on which to answer the question "no". That is, even if permitting sheltering would be contrary to the Trust, such a conclusion does not determine whether the City would be acting constitutionally if it enforced such a prohibition. Due to the constitutional rights that may be at stake, they say that whether individuals experiencing homelessness can shelter in the Park at any given time, in any given manner, can only be determined in the context of a particular case. In their submission, even if sheltering is found to be contrary to the terms of the Trust, the question of whether enforcement of a blanket permanent prohibition would be constitutional remains. A question, in their view, not to be answered in the abstract.

ISSUES

[55] The nature of the Crown Grant, the Right of Entry and the legal tests to be applied in interpreting the Trust are in dispute. The nature of these documents determines what principles of interpretation apply, contractual or statutory. These principles differ. The issues raised are:

a) Is the Trust a statutory enactment or a contractual document?
b) What principles govern its interpretation?
c) Is the trust wording ambiguous such that the law of testamentary trusts is relevant?
d) Can the Park be used by those experiencing homelessness for temporary sheltering?

[56] I will address each of these in turn, after addressing a preliminary issue raised by the Attorney General regarding what evidence is relevant to answering the question posed by the City.

Preliminary Evidentiary Issue

[57] The Attorney General submits that the Trust is an enactment and statutory interpretation is a question of law squarely within the purview of the courts. As such, the Attorney General argues that in construing the Trust and applying that construction to the circumstances of temporary sheltering in the park by persons experiencing homelessness, extrinsic evidence is only relevant where it accords with the rules of statutory interpretation and does not intrude on the ultimate issue. In particular, the Attorney General submits two categories of evidence sought to be relied on by FBHP and Mr. Smith and Mr. Davies respectively are not relevant or admissible.

[58] The first category is evidence that goes to the meaning of the Trust or the intention of its drafter, namely, the evidence of Ron Williams in his affidavit regarding the "original intent of the 'grantors'" relied on by FBHP, and commentary of Richard Mackie in an article titled "The Colonization of Vancouver Island, 1849-1858" (*BC Studies,* No. 96, Winter 1992-93) relied on by Mr. Smith and Mr. Davies. Mr. Mackie's article discusses the Wakefield system through which the Park was apparently set aside for public purposes.

[59] The second category of evidence the Attorney General takes issue with is of uses to which the Park has been put over time. In their submission this evidence is not relevant or probative as to whether temporary sheltering by persons experiencing homelessness is permitted by the Trust. This includes evidence of the uses of the Park before the Trust was settled as it is impossible to determine whether the Cabinet sought to approve or prevent such activities by settling the Park on trust. In addition, the Attorney General submits that evidence of the uses of the Park after the Trust was settled does not establish it was an activity contemplated by the Trust.

[60] However, neither Mr. Williams evidence nor Mr. Mackie's article is admissible where it goes to the meaning of the Trust or the intention of the settlor as this encroaches on the ultimate issue: interpretation of the terms of the Trust.

Interpreting the Trust is a question for the Court to decide, whether the Trust is characterized as an enactment or not. Opinion evidence concerning the intent of the settlors usurps the role of the court and is unnecessary (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada, 5th ed*., LexisNexis Canada Inc., March 2018, at ss. 12.2, 12.35, 12.42 and 12.13).

[61] In addition, the evidence adduced concerning different uses of the Park over time is not relevant to the issue of whether the Trust permits temporary sheltering by persons experiencing homelessness in the Park. Evidence of the uses of the Park before the creation of the Trust has not been linked to the decision of the 1882 Lieutenant Governor in Council to settle the Park on trust, nor an intention by the Cabinet to include or exclude such activities in the Trust. Evidence of uses to which the Park was put after the Trust was settled, other than providing context, are also irrelevant because the mere fact of their occurrence does not establish that those activities were contemplated by the Trust. I agree with the Attorney General that the second category of evidence is not relevant to the interpretive analysis.

[62] As the parties disagree on the nature of the Trust, that is whether it is statutory or contractual, and such being relevant to how it is to be interpreted, I turn next to the nature of the Trust.

Nature of the Trust: Contractual or Statutory?

[63] The first issue is the exact nature of the Trust. Is it a statutory enactment or a contractual document? The answer to this question determines the second issue: what principles of interpretation apply.

[64] The Trust document registered in the Land Title Office on the title to the Park, is described as a Right of Entry, that is, a grant or conveyance on conditions. In this case, a grant of title to the lands comprising the Park to the City so long as the City held it in trust for the use, recreation and enjoyment of the public.

[65] The *Public Parks Act, 1881* provided the Province the authority to transfer lands to municipalities for public parks in trust. Section 6 stated:

> It shall be lawful for the Lieutenant-Governor to grant and convey any public park or pleasure ground set apart or reserved out of any Crown Lands...

[66] The Lieutenant-Governor is defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 [*Interpretation Act*] as:

> "Lieutenant Governor" means the Lieutenant Governor of British Columbia and includes the Administrator of British Columbia;

[67] The Lieutenant Governor in Council is different than the Lieutenant Governor. The *Interpretation Act* defines it as:

> "Lieutenant Governor in Council" means the Lieutenant Governor acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Executive Council";

[68] The Executive Council is also defined:

> "Executive Council" means the Executive Council appointed under the *Constitution Act*;

[69] Under the *Constitution Act*, R.S.B.C. 1996 c. 66, s. 9 the Executive Council is defined as:

> 9. (1) The Executive Council is composed of the persons the Lieutenant Governor appoints, including the Premier of British Columbia, who is president of the Executive Council.
>
> (2) The Lieutenant Governor in Council must from among those persons appointed under subsection (1) designate
>
> (a) those officials with portfolio and must designate the portfolio for each official, and
>
> (b) those officials without portfolio.

[70] The power to make laws or enactments rests with the Executive Council and the Lieutenant Governor in Council, not the Lieutenant Governor. The Lieutenant Governor has no legislative power. In this context, the role of the Lieutenant Governor is simply to grant and convey the lands intended to be held in trust as a public park pursuant to s. 6 of the *Public Parks Act, 1881*. To grant is defined in

Black's Law Dictionary, 11th ed., as "1. [t]o formally transfer (real property) by deed or other writing."

[71] The argument that the Trust is an enactment begins with the premise that the Order in Council (OIC 35/82) and resulting grant by letters patent (the granting document) are one document. This is what the Attorney General submits. That premise fails to recognize the distinction between the Lieutenant Governor and the Lieutenant Governor in Council as defined in the *Interpretation Act*, s. 29.

[72] In this instance, in reliance on the *Public Parks Act, 1881*, the second step in the process after the authorizing legislative authority, was the exercise of the decision-making power by the Executive Council on whether or not to make such a grant. That was done by OIC 35/82 which states the Committee of Council "recommends that Beacon Hill Park be granted to the Corporation of the City of Victoria upon trust". The Executive Council granted the trust under the *Public Parks Act, 1881* which was then approved by the Lieutenant Governor at the time, Clement Cornwall.

[73] The third step was the approval of the form of the grant by the Attorney General on February 20, 1882, which was then executed on February 21, 1882. That execution was authorized by the Order in Council. The grant is the document relevant to the transfer.

[74] The OIC is a single paragraph on a single page while the actual grant signed by the GC and the Attorney General is a two-page document setting out the actual transfer and trust terms of the Park lands.

[75] The parties introduced two similar examples of parks granted to a municipality in trust; one in Kamloops, the other in Vancouver. The same general process occurred: first, the Order in Council was made, followed by the actual grant of land to the municipality. While Hastings Park in Vancouver followed the exact same procedure as the case at bar, in the Kamloops example the empowering act itself addressed and authorized the sale of the land for park purposes in 1911 (as

opposed to an order in council). The actual grant of the land followed to affect the transfer.

[76] In this case, while the Trust document at one point made the grant public or published it by the use of the phrase: “IN TESTIMONY WHEREOF we have caused these our Letters to be made Patent and the Great Seal...to be hereto affixed...” that wording does not convert the grant or conveyance itself into Letters Patent as that term is used in the definition of regulation in s. 1 of the *Interpretation Act*. “Letters patent” is included in the definition of “regulation” in that section:

> ”regulation” means a regulation, order, rule, form, tariff of costs or fees, proclamation, letters patent, commission, warrant, bylaw or other instrument enacted
>
> (a) in execution of a power conferred under an Act, or
>
> (b) by or under the authority of the Lieutenant Governor in Council,
>
> but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

[77] Those words simply set out the process or steps taken to create the Trust. They do not change the nature of the grant itself.

[78] The Trust came into existence because of an executive act of the provincial government of the day as follows:

a) the legislative authority found in the *Public Parks Act, 1881* provided the basis for granting the land; then,
b) the approval of the legislative authority was obtained; and finally,
c) the grant was made as a result of the approval.

[79] In approving the Order in Council, the Attorney General approved the form of the grant and was not engaged in an exercise of legislative authority. The grant is an instrument not an Order in Council. The result is the approval of the form of the grant is not a legislative act, nor an enactment. It is a stand-alone document effecting the already approved transfer. The Trust itself is not an Order in Council, nor is it encompassed by or part of the Order in Council.

[80] As noted, the Attorney General submits that regulations and Orders in Council, being enactments, must be interpreted under the modern principle of statutory interpretation relying on *Amaratunga v. Northwest Atlantic Fisheries Organization,* 2013 SCC 66.

[81] In *Amaratunga,* the document in issue was an order of the Governor in Council enacted pursuant to a federal statute:

> [33] The authority of the Governor in Council to make orders in respect of the immunities of inter-national organizations is granted in s. 5(1)(*b*) of the *FMIO Act*, which reads as follows:
>
> > 5**.** (1) The Governor in Council may, by order, provide that
> >
> > . . .
> >
> > (*b*) an international organization shall, to the ex-tent specified in the order, have the privileges and immunities set out in Articles II and III of the Convention on the Privileges and Immunities of the United Nations, set out in Schedule III;

[82] While *Amaratunga* supports the general statement that regulations and Orders in Council, being enactments, must be interpreted under the modern principle of Statutory interpretation, it does not follow that the Trust falls into this category of document. The statutory provisions quoted above bear no resemblance to the grant in this case.

[83] Conveyances by Letters Patent, as occurred here, have been construed by several courts as documents, not legislation.

[84] In *Gibbs. v. Grand Bend (Village)*, (1995) 129 D.L.R. (4th) 449, a decision of the Ontario Court of Appeal, the ownership of a beach property was in issue and whether it was included in land granted under the original Crown Grant. The Grant contained a reservation in favour of the Crown related to navigable streams, beds and banks thereof relating to the parcels of land granted. The Court addressed the interpretation of conveyances whether by deed or Crown Grant and determined they were to be interpreted as documents not legislation.

[85] More recently in *Herold Estate v. Canada (Attorney General),* 2021 ONCA 579 the Ontario Court of Appeal addressed ownership of certain lands and whether they were included in Letters Patent making the grant. The Court found the Letters Patent were a contract, grant or conveyance to be interpreted as a contract. The Court stated:

> [5] In my view, the application judge's determination that the Letters Patent conveyed the Islands as part of the conveyance of Lot 35 is not subject to deference, since he made extricable errors of law. The application judge failed to follow the fundamental principle of interpretation—to determine the meaning of the Letters Patent in accordance with the intentions of the parties, objectively ascertained from the language they used in light of the relevant factual matrix. He also erred in treating a legal principle about the effect of sudden changes in water levels on boundaries between different owners as applicable and determinative. Finally, he failed to properly consider the Crown's obligations to the First Nations in determining what the Crown intended to convey by the Letters Patent.
>
> ...
>
> [36] As I discuss in more detail below, the interpretation of the Letters Patent involves discerning what the parties to them objectively intended. That is a fact specific exercise; it is a function of the language used, read in light of the relevant factual matrix or surrounding circumstances, and the legal principles that arise from those circumstances. ...

[86] The Court also confirmed that interpreting grants and other interests in land is undertaken under the *Sattva* principles:

> [45] First, the Supreme Court of Canada has noted that the construction of an easement - clearly an interest in land - is a question of mixed fact and law as it must be interpreted in light of the entire factual matrix: *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.,* 2020 SCC 29. 450 D.L.R. (4th) 105, at para. 101. In support of that proposition, the Supreme Court cited both *Robb v. Walker,* 2015 BCCA 117. 383 D.L.R. (4th) 554, at paras. 30-31 (which held the principles in *Sattva* to be applicable to the interpretation of an easement) and *Sattva* itself. There is no apparent reason to distinguish the principles applicable to the interpretation of an instrument granting or conveying an easement from those applicable to a different type of interest in land. Determining the objective intentions of the parties is thus equally the goal of interpreting a conveyance, as that is the overriding concern of interpretation as identified in *Sattva.*
>
> [46] Second, the need for certainty and finality in conveyancing is respected by determining the objective intentions of the parties to the instrument through examining its words in light of the factual matrix that illuminates their meaning, in accordance with the principles in *Sattva.*

> [47] Third, this approach is in line with this court's holding in the leading case concerning the interpretation of conveyances by deed or Crown grant: *Gibbs v. Grand Bend (Village)* (1995), 1996 CanLII 2835 (ON CAL 129 D.L.R. (4th) 449 (Ont. C.A.). Although expressed in pre-*Sattva* language, the basic principles articulated in *Gibbs* do not vary, in any respect that is material to this case, from those articulated in *Sattva.* Those principles equally focus on determining the intention of the parties to the deed or grant.
>
> [48] Under *Gibbs,* the primary determinant of the meaning of a conveyance, whether by deed between private parties or by Crown grant, is its language: *Gibbs,* at p. 461. This is consistent with the role played by the text of a written agreement under *Sattva*: at para 57. Extrinsic evidence cannot be used to contradict the unambiguous terms of a conveyance made by deed or Crown grant *(Gibbs,* at p. 461), just as it cannot be used to contradict the meaning of the language of any contract (*Sattva,* at paras. 59-60). But just as evidence of factual matrix or surrounding circumstances can be used to ascertain contractual intention when it is difficult to do so by looking at the words alone (*Sattva,* at para. 47), in the case of a deed or Crown grant, extrinsic evidence can be used “to explain the sense in which words, open to more meanings than one, have been used by the contracting parties", and thus to give effect to the grantor's intention: *Gibbs,* at p. 461 (citations omitted). The purpose of reviewing such evidence is “to permit the court to carry out the intentions of the parties”: *Gibbs,* at p. 463.

[87] The Attorney General submits the Ontario authorities are distinguishable because the Ontario *Legislation Act*, S.O. 2006, c. 21 Sched. F [*Legislation Act*] does not include letters patent in its definition of “regulation” while British Columbia *Interpretation Act* does.

[88] The relevant sections of the *Legislation Act* state:

> s. 1 “legislation” means Acts and regulations;
>
> ...
>
> s. 17 “regulation” means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,
>
> (a) a by-law of a municipality or local board as defined in the Municipal Affairs Act, or
>
> (b) an order of the Ontario Land Tribunal.

[89] As set out above, section 1 of the *Interpretation Act* states:

> 1. "enactment" means an Act or a regulation or a portion of an Act or regulation;

> "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation, letters patent, commission, warrant, bylaw or other instrument enacted
>
> (a) in execution of a power conferred under an Act, or
>
> (b) by or under the authority of the Lieutenant Governor in Council,
>
> but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons;

[90] While the *Legislation Act* definition is more general than the *Interpretation Act*, both encompass legislative actions. The inclusion of “letters patent” in the *Interpretation Act* definition does not distinguish the Ontario decisions given the breadth of what is included in the definition of regulations in Ontario. In addition, the term Letters Patent in the *Interpretation Act* differs from its interpretation in the authorities both in Ontario and British Columbia.

[91] The nature of the of letters patent as a document is reinforced in the British Columbia the *Land Act*, R.S.B.C. 1996, c. 245 [*Land Act*] which defines a Crown Grant in s. 1:

> **"Crown grant"** means an instrument in writing conveying Crown land in fee simple;

[92] Section 1 of the *Land Title Act* provides:

> **"instrument"** means
>
> (a) a Crown grant or other transfer of Crown land, and
>
> (b) a document or plan relating to the transfer, charging or otherwise dealing with or affecting land, or evidencing title to it, and includes, without limitation
>
> (i) a grant of probate or administration or other trust instrument, and
>
> (ii) an Act;

[93] As noted earlier, the Ontario Court of Appeal in *Herold*, relying on *Gibbs*, concluded that conveyances by Letters Patent are interpreted as documents not legislation. In *Bonavista Energy Corporation v. Fell*, 2020 BCCA 144, the British

Columbia Court of Appeal accepted as correct the *Gibbs* concept that such documents are to be considered in context:

> [38] I pause to observe that, while the Crown grant is not itself an enactment, it is an "instrument" as defined under section 1 of the *Land Title Act*, RSBC 1996, c 250, and was enacted in the exercise of the power conferred under the *Land Act*. On this basis, the common-law principles of statutory interpretation are a helpful guide. On the interpretation of Crown grants specifically, further guidance is provided by Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, loose-leaf (2019-Rel. 22), 3rd ed. (Toronto: Thomson Reuters, 2006) at §31:90:10:
>
> > Much of the law that relates to the interpretation of contracts applies to Crown grants. There are, however, certain specific rules that have evolved in respect of these grants. Where the Crown is the grantor, the grant is generally to be interpreted in favour of the Crown. This rule will not apply when it would be necessary to give a forced construction in favour of the Crown. It will also not apply when a grantee gave valuable consideration. Where this is the case, the grant will be construed, where possible, in favour of the grantee. Lastly, this rule will not apply where the result would be to avoid the grant.
> >
> > Where possible, Crown grants are to be interpreted so that they are upheld. Crown grants are also to be interpreted so as to give effect to the plain meaning as set out in the grant. …
> >
> > [Footnotes omitted.]
>
> [5] In my view, the application judge's determination that the Letters Patent conveyed the Islands as part of the conveyance of Lot 35 is not subject to deference, since he made extricable errors of law. The application judge failed to follow the fundamental principle of interpretation—to determine the meaning of the Letters Patent in accordance with the intentions of the parties, objectively ascertained from the language they used in light of the relevant factual matrix. He also erred in treating a legal principle about the effect of sudden changes in water levels on boundaries between different owners as applicable and determinative. Finally, he failed to properly consider the Crown's obligations to the First Nations in determining what the Crown intended to convey by the Letters Patent.
>
> [36] As I discuss in more detail below, the interpretation of the Letters Patent involves discerning what the parties to them objectively intended. That is a fact specific exercise; it is a function of the language used, read in light of the relevant factual matrix or surrounding circumstances, and the legal principles that arise from those circumstances. ...

[94] The respondents Mr. Smith, Mr. Davies and TAPS, submit that because the grant of land was a government-to-government transaction the Letters Patent should

be interpreted as an enactment. However, there is no rationale for that, and it is contrary to s. 51 of the *Land Act*:

> **Grant of Crown land to government corporations and bodies**
>
> 51. (1) Despite any other provision of this Act, Crown land may, with the approval of the Lieutenant Governor in Council and subject to the terms, reservations and restrictions that the Lieutenant Governor in Council considers advisable, be disposed of by Crown grant under this Act, free or otherwise, to a government corporation, municipality, regional district, hospital board, university, college, board of education, francophone education authority as defined in the School Act or other government related body or to the South Coast British Columbia Transportation Authority continued under the South Coast British Columbia Transportation Authority Act or any of its subsidiaries.
>
> (2) A disposition under subsection (1) may be limited to a specific public purpose.

[95] As a result, a grant by government to another government body is no different than any other grant.

[96] These same respondents also submit the Trust is statutory in nature because the words in the Crown Grant are the words in the enabling statute and Order in Council. As a result of this consistency with the legislation, they say the words of the Trust are also always speaking, as are statutes. These respondents note that even if the grant as registered was a document the intent of its creator was to impose the Trust required under the legislation. That is, as everyone would be on notice of legislative intent, that should carry through to the interpretation of the Trust. These respondents also note the legal description on the title references the date of the Order in Council not the date of the grant and argue that what is filed in the Land Title Office should not result in a change in how the words of the legislation are interpreted.

[97] As noted, Beacon Hill Park is registered in the Victoria Land Title Office in the name of the City. However, registered on that title is what is described as a “Right of Entry” which attaches the grant or conveyance. This grant or conveyance is the document referred to herein as the “Trust”. It is a reservation of a right to hold title for so long as the land is used for the purposes described.

[98] Rights of Entry at common law were recognized as the conveyance or transfer of a limited fee, or something less than the fee simple interest, leaving with the transferor a right to regain the land upon the happening of certain events, such as the land no longer being used for its purpose. The concept is described in Ziff, *Principles of Property Law*, 4th ed. 2006 Thompson Carswell, at page 222:

> An interest is defeasible if it may be brought to a premature end on the occurrence of a specified event. Imagine a devise 'to the School Board in fee simple, on the condition that if the property shall no longer be needed for school purposes, my estate may re-enter'. Here the School Board receives a defeasible interest, or more precisely in this instance, a fee simple subject to a condition subsequent. The decedent's estate retains a right of re-entry, which may be exercised if the stated event comes to pass. In other words, the School Board holds a present estate in fee simple and if the condition is adhered to that interest will continue on. If the condition is broken the right of re-entry may be relied upon by the estate to reclaim the land. Conceptually, this re-entry cuts short the fee simple estate. Think of it as a dark cloud that hovers over the fee.

See also the *Land Title Practice Manual*, 3rd ed. Continuing Legal Education Society, November 2020, 13.3 to 13.5.

[99] Upon the adoption of the Torrens system and transfer of titles to the indefeasible title system s. 10(4) of the *Property Law Act* read:

> 10 (1) An estate in fee simple must not be changed into a limit fee or fee tail, but the land, whatever form of words is used in an instrument, is and remains an estate in fee simple in the owner.
>
> (2) A limitation which, before June 1, 1921, would have created an estate tail transfers the fee simple or the greatest estate that the transferor had in the land.
>
> (3) This Act does not prevent the creation of a determinable fee simple or a fee simple defeasible by condition subsequent.
>
> (4) A possibility of reverter or a right of entry for condition broken may be registered under the Land Title Act against the title to the land affected in the same manner as a charge.

[100] As a result, such lands, despite the transferor having a right to re-take the lands, or for the land to revert to the transferor if the condition is breached, can have the indivisible title registered for such land, subject to that reversionary interest registered as a charge.

[101] I conclude the Trust is a contractual document conveying an interest in land, not an enactment. I turn now to the interpretation of the Trust and the principles that govern it.

INTERPRETATION OF THE TRUST

[102] The Trust, as a contractual document not a statutory instrument, must be interpreted according to the approach set out in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53. While surrounding circumstances are relevant to assist, they cannot overwhelm the actual wording of the document in question:

> [47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League,* 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also *Hall*, at p. 22; and *McCamus*, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using

> those words against the relevant background would reasonably have been understood to mean. [p. 115]

...

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives

> of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[103] The Ontario Court of Appeal in *Herold* unequivocally interpreted the Letters Patent as a contract, grant or conveyance and applied the *Sattva* principles:

> [40] Although the meaning of the Letters Patent was a core issue identified by the application judge, he declined to determine the intentions of the parties to it. This was an error, as objectively ascertaining the intention of the parties is the very goal of interpreting a written instrument.
>
> [41] As the Supreme Court of Canada said in *Sattva,* the "overriding concern" in the interpretation of contracts is to:
>
> > ... determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole ... consistent with the surrounding circumstances known [or that reasonably ought to have been known] to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning [Emphasis added.] [Citations omitted.]: *Sattva,* at para. 47.
>
> [42] In other words, when interpreting a contract, the question is not the abstract meaning of its words, but what the parties to the contract are objectively taken to have intended by the words they chose in light of the circumstances - the factual matrix - in which they used them. A court objectively derives the parties' intentions by examining the words to determine what the parties intended, and examining the surrounding circumstances "to deepen [its] understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" (emphasis added): *Sattva*, at para. 48, 57-58, 60; *McLean v. McLean*, 2013 ONCA 788, 118 O.R. (3d) 216, at para. 54, leave to appeal refused, [2014] S.C.C.A. No. 76.
>
> [43] This approach is consistent with the goals of finality and certainty in contractual dealings - the interpretation that is reached is grounded in the text of the agreement read as a whole, and the factual matrix is used as an interpretive aid for determining the meaning of the written words chosen by

> the parties, not to overwhelm or deviate from them, or change or overrule their meaning: *Sattva,* at paras. 57, 59-60.

[104] The Court further confirmed the established law that interpretation of grants and other interests in land is undertaken in accordance with the *Sattva*:

> [45] First, the Supreme Court of Canada has noted that the construction of an easement - clearly an interest in land - is a question of mixed fact and law as it must be interpreted in light of the entire factual matrix: *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp*., 2020 SCC 29. 450 D.L.R. (4th) 105, at para. 101. In support of that proposition, the Supreme Court cited both *Robb v. Walker*, 2015 BCCA 117. 383 D.L.R. (4th) 554, at paras. 30-31 (which held the principles in *Sattva* to be applicable to the interpretation of an easement) and *Sattva* itself. There is no apparent reason to distinguish the principles applicable to the interpretation of an instrument granting or conveying an easement from those applicable to a different type of interest in land. Determining the objective intentions of the parties is thus equally the goal of interpreting a conveyance, as that is the overriding concern of interpretation as identified in *Sattva*.
>
> [46] Second, the need for certainty and finality in conveyancing is respected by determining the objective intentions of the parties to the instrument through examining its words in light of the factual matrix that illuminates their meaning, in accordance with the principles in *Sattva*.
>
> [47] Third, this approach is in line with this court's holding in the leading case concerning the interpretation of conveyances by deed or Crown grant: *Gibbs v. Grand Bend (Village*) (1995), 129 D.L.R. (4th) 449 (Ont. C.A.). Although expressed in pre- *Sattva* language, the basic principles articulated in *Gibbs* do not vary, in any respect that is material to this case, from those articulated in *Sattva*. Those principles equally focus on determining the intention of the parties to the deed or grant.
>
> [48] Under *Gibbs,* the primary determinant of the meaning of a conveyance, whether by deed between private parties or by Crown grant, is its language: *Gibbs,* at p. 461. This is consistent with the role played by the text of a written agreement under *Sattva*: at para 57. Extrinsic evidence cannot be used to contradict the unambiguous terms of a conveyance made by deed or Crown grant *(Gibbs,* at p. 461), just as it cannot be used to contradict the meaning of the language of any contract (*Sattva,* at paras. 59-60). But just as evidence of factual matrix or surrounding circumstances can be used to ascertain contractual intention when it is difficult to do so by looking at the words alone (*Sattva,* at para. 47), in the case of a deed or Crown grant, extrinsic evidence can be used "to explain the sense in which words, open to more meanings than one, have been used by the contracting parties", and thus to give effect to the grantor's intention: *Gibbs,* at p. 461 (citations omitted). The purpose of reviewing such evidence is "to permit the court to carry out the intentions of the parties": *Gibbs,* at p. 463.

[105] As noted earlier, the *Public Parks Act, 1876* used the words “for the recreation and enjoyment of the public”. However, in the *Public Parks Act, 1881* the wording was changed to: “for the use, recreation and enjoyment of the public”.

Positions of the Parties

The City

[106] As the City has restricted its submission they simply note that neither the *Public Parks Act, 1881*, nor the Crown Grant contain a detailed list of activities that are permitted or prohibited under the trust.

The Attorney General

[107] The Attorney General characterizes the question as whether temporary sheltering by those experiencing homelessness is a use, recreation or enjoyment of the Park by the public. The Attorney General submits temporary sheltering is a use by the public permitted by the Trust, but a use that must be limited so as to preserve and maintain the Park as a nature park. Such use should not degrade the park or preclude its use, recreation, and enjoyment by other members of the public.

[108] Further, the *Charter* must inform the Trust’s interpretation given Courts have recognized that in some circumstances an individual’s right to life, liberty and security of the person under section 7 of the *Charter* may be infringed by laws that prohibit them from sheltering overnight in parks. In the Attorney General’s submission, the Court’s answer to the question should advise the City as to how it can balance the public interest in the Park with the limited s. 7 *Charter* interests of those experiencing homelessness.

[109] The Attorney General also submits that the law of trusts is part of the context in which the Trust is to be read. The Attorney General acknowledges that in 1882 when the Trust was created it is unlikely that “use, recreation and enjoyment” of the Park was contemplated as including sheltering by members of the public. The Attorney General notes there is little evidence of the factors considered by the Province in making the grant to the City.

[110] The Attorney General also submits that permissible uses of the Park by the public may vary over time and that current circumstances such as homelessness and sheltering are part of the external factual circumstances or context that inform the interpretation of the Trust today. In so doing, the words of the Trust should be interpreted in their grammatical and ordinary sense.

FBHP

[111] The FBHP submit this is a land use case. As such the use in issue must be clearly delineated. They point to photographic evidence of the shelters, their permanence, density, communal structures, and their interference with other usual "park" uses. They note the existence of rigid and non-rigid structures including tents with fences. In addition, ground disturbances, ditches, degradation of soil profiles, contamination of soils, denuding of ground of vegetative cover, erosion, damages to trees and the like and infestations of rats. They point to the City's evidence that some temporary sheltering in City parks has lasted five years to show this sheltering is not really temporary.

[112] They submit that the sheltering in issue must be taken to mean all the activities that the City expressly permitted in its bylaws. They define "sheltering" for the purposes of this application as:

> "the use of land as place to reside, shelter from the elements, sleep, or establish an encampment as a permanent or semi-permanent location for people and their goods to be stationarily located; and "shelter" means a structure, improvement or overhead shelter, whether con id material, and used for Sheltering."

[113] They further submit the intention of the Province, as settlor of the Trust, was to preserve the park area for passive recreation, to remain non-commercial, and not residential "land use". In their view, "park use" is a land use, separate from the activities observed in 2020 and 2021, such being inconsistent with the objective of long-term preservation of the area for its original purpose.

[114] They rely on the plain meaning of the words of the Trust submitting since the words are clear, resort to extrinsic evidence or surrounding circumstances is unnecessary.

Mr. Smith, Mr. Davies and TAPS

[115] These parties submit there is nothing in the terms of the Trust that prohibits use of the Park by persons experiencing homelessness for shelter. They note that people experiencing homelessness are also members of the public, and their use of the Park is no less important or legitimate than that of others.

[116] Mr. Smith, Mr. Davies and TAPS state the language of the Trust is broad and should be interpreted in a way that does not prohibit the exercise of constitutionally protected activities. Read in context they state the purpose of the Trust is to ensure the Park is preserved as a public park as opposed to being alienated for development, turned into private property, or used in a way that is fundamentally in conflict with the nature of a public park.

[117] They point to the variety of uses to which the Park has been put in the past, including uses that exclude certain members of the public from a specific space or limit the use to which a particular space may be put. In their submission the Trust allows the City to balance competing uses and that in doing so it must be read in a manner consistent with *Charter* values.

[118] Further, these respondents argue that a finding that the Trust does not permit temporary sheltering does not mean the answer to the question posed is “no”. This is because such a conclusion does not determine whether the City would be acting constitutionally if it enforced such a prohibition. They submit answering “no” would prevent all sheltering and that on the present record whether a total prohibition would survive constitutional scrutiny cannot be determined.

[119] They acknowledge that reading the word “use” too broadly could eviscerate the Trust because it would allow for any “use” at all. However, they say that a judicially recognized use means the Trust permits it without eviscerating the Trust. In

addition, they submit permitting sheltering is not inconsistent with maintaining the Park as a "nature park". They submit the use of the Park for sheltering is key to personal security, dignity and independence of those experiencing homelessness and such values are within the scope of the use and enjoyment of the Park by the public.

Discussion

[120] I repeat the words in the Trust for convenience:

> UPON TRUST to the express use intent and purpose that the said hereditaments and premises hereby granted shall be maintained and preserved by the said Corporation and their successors for the use recreation and enjoyment of the public under the provisions of the *Public Parks Act* 1876…"
>
> with the Trust deed setting out that the said Act expressly:
>
> declared that it shall be lawful…to grant and convey any public park or pleasure ground set apart or reserved … for the recreation and enjoyment of the public … upon trust to maintain and preserve the same for the use recreation and enjoyment of the public..."

[121] In *Monsanto Canada Inc. v. Schmeiser*, 2004 SCC 34 at para. 31 the Court stated:

> Determining the meaning of "use" under s. 42 is essentially a matter of statutory construction. The starting point is the plain meaning of the word, in this case "use" or "*exploiter*". *The Concise Oxford Dictionary* defines "use" as "cause to act or serve for a purpose; bring into service; avail oneself of": *The Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 1545. This denotes utilization for a purpose.

[122] The *Concise Oxford English Dictionary* 11th ed. (Toronto, Ontario: Oxford University Press, 2004) defines "recreation" as an "enjoyable leisure activity." "Enjoyment" is defined as:

> 1. the state or process of taking pleasure in something → `a thing that gives pleasure. 2. the action of possessing and benefiting from something.

[123] In *Anderson* at para. 4, recreation and enjoyment are construed with specific reference to the Park and not for the general purposes of profit or utility. Begbie CJ

also notes that the introduction of the word “use” does not vary that interpretation. That is, the Park is to be used for recreation and enjoyment.

[124] The Attorney General submits that in *Capital Region Festival Society* at para. 25 the word “use” as construed with specific reference to the Park means that the public has the right to go in or upon the Park. The Attorney General also notes that every word of a statute is presumed to have meaning (*Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis, 2014 at 210-211). Hence each of the word’s “use”, “recreation” and “enjoyment” add some meaning to the purpose of the Trust and the activities that are permitted under the Trust terms. Further, that by adding the word “use” in the 1881 amendment to the *Public Parks Act*, *1876* and in the Order, it must be different than that of “recreation” or “enjoyment” and, as the meaning of “use” has developed over time, may expand the activities that are permissible under the Trust Terms.

[125] The *Public Parks Act, 1876*, provided for the appointment of trustees of any “public park or pleasure ground for the recreation and enjoyment of the public” (para. 1). In para. 3 it empowered the trustees to deal with the lands “in such manner as may be most convenient and suitable for the enjoyment and recreation of the public”. Paragraph 5 provided them with the authority to make rules and regulations “as may be necessary and proper for any of the purposes aforesaid”. The 1881 amendments in granting trusteeship to municipalities, towns and cities, for the first time used the word “use” in the phrase “upon trust to maintain and preserve the same for the use, recreation, and enjoyment of the public”.

[126] In my view, “use” does not have a meaning different than the words “recreation and enjoyment”. To attribute to “use” an expansion of the activities permitted by the Trust is contrary to the plain reading of “use, recreation and enjoyment of the public”.

[127] In *Robb v. Walker*, 2015 BCCA 117 [*Robb*] the Court applied the *Sattva* principles to the interpretation of a grant of an interest in land. In that case, the words of the grant governed, the court disallowing an expansion beyond the

specifically expressed uses of entry, passing and re-passing. The easement in *Robb* granted:

> ...a free and uninterrupted easement in common with the Grantor or persons, animals and vehicles of any kind whatsoever including trailers or other objects attached to a vehicle to use, enter, pass and repass...

[128] The Court noted at para. 31:

> [31] When interpreting an easement, the court must have regard to the plain and ordinary meaning of the words in the grant to determine what the intention of the parties was at the time the agreement was entered into. Surrounding circumstances, that is, objective evidence of the background facts at the time of the execution of the contract, are to be considered in interpreting the terms of a contract: *Sattva* at para. 58.

[129] In addressing the wording, the Court stated:

> [36] The reference to the "use" of the land suggests some activity other than mere transit over it. Simple access would be permitted by an easement that allowed the dominant owner to pass and repass upon the easement. For that reason, the judge could have read the easement as granting rights other than mere transit over the property. Further, the instrument might have been found to be sufficiently ambiguous to permit consideration of the circumstances in which the grant was executed. The trial judge might have read the instrument so broadly as to permit use of the easement consistent with its designation as public land. That would include conveyance of sewage and water and transmission of power.
>
> [37] In my view, however, it cannot be said the judge erred by interpreting the grant as he did. The easement would only permit the installation of underground sewage lines if the word "use" in the instrument were read so broadly as to grant an easement to "use for any purpose" or "use in any manner consistent with the designation of the easement as public land". But that reading of the grant is inconsistent with the reference to specific uses (entry, passing and repassing) and deprives those words of meaning. Interpretation may be aided by use of the *ejusdem generis*, or the limited class rule. Employing that rule, the judge could reasonably have considered all four words in the phrase "use, enter, pass and repass over and upon the easement" (emphasis added) to have been intended to describe the same type of activity, and read the word "use" in the instrument to mean "use for a purpose such as entry, passing and repassing".
>
> [38] The words used in the grant are clearly meant to be repetitive and to clarify each other. It is hard to see how a right to pass over the property can be distinguished from a right to enter upon the property. It is hard to see how a right to pass over the property can be distinguished from a right to repass over the property. The apparent repetition of similar words suggests that we should consider them to be variations on the same theme, rather than considering each word as describing a different use.

[130] In the case at bar, the addition of “sheltering” to the express use as “park”, would similarly offend the rule of deviation to the extent of effectively creating a new agreement (*Sattva*, para. 57). The phrase “for the use, recreation, and enjoyment of the public” in my view means the public may “use” the Park for the purpose of “recreation” and “enjoyment”. That is utilization for a purpose which is then described and defined as recreation and enjoyment. Such an interpretation is consistent with the nature of the Park.

[131] In conclusion, having regard to the surrounding circumstances, and while not binding, consistent with the reasoning in *Anderson* and *Capital Region Festival Society,* but with a focus on the actual wording of the document in question, I conclude that temporary sheltering cannot be interpreted as a use for the purpose of recreation and enjoyment and is therefore contrary to the terms of the Trust. Under the Trust the Park may not be used by persons experiencing homelessness for temporary sheltering.

Application of the Law of Testamentary Trusts

[132] The FBHP submit that if any doubt or ambiguity exists regarding the interpretation of the Trust, the Court may rely on rules of interpretation developed in the law of testamentary trusts. That is, the Court may consider what the settlor intended using the “four corners” approach or the “armchair” approach (*Killam v. Killam*, 2018 BCCA 64, paras. 12-14), as when interpreting a testamentary trust such as one created in a will. The FBHP submit the armchair approach applies to the interpretation of all trusts including inter-vivos trusts (*Bank of Nova Scotia (Trustee) v. Quinn*, 2019 BCSC 439).

[133] Given my conclusions regarding the wording of the Trust and the lack of ambiguity it is not necessary to resort to the rules of interpretation of testamentary trusts.

CONCLUSION

Can the Park be used by persons experiencing homelessness for temporary sheltering?

[134] In sum, the answer to the question posed by the City is “no”. The Trust does not permit use of the Park for temporary sheltering by persons experiencing homelessness. Such activity by the members of the public is contrary to the purpose of the Trust: preservation of the Park for the use, recreation and enjoyment of the public.

COSTS

[135] The FBHP seek an order for public interest special costs. All other parties submit each should bear their own costs.

[136] Section 86(3) of the *Trustee Act* authorizes the Court to make an order as to costs:

> (3) The costs of an application under subsection (1) are in the discretion of the court.

[137] The FBHP seek public interest special costs, citing *Victoria (City) v. Adams*, 2009 BCCA 563, on the basis that:

a) the case involves matters of public importance that transcend the immediate interests of the named parties, and which have not been previously resolved;
b) the FBHP have no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding economically;
c) the City has a superior capacity to bear the costs of the proceeding; and
d) the litigation is not abusive, vexatious or frivolous.

[138] The Attorney General submits a s. 86 reference is a unique participatory proceeding which does not lend itself to any costs award, including public interest costs. The Attorney General submits that the City posed a question to the Court in its role as trustee and invited the Province, the Attorney General and interested

members of the public to participate. All the respondents chose to do so but none of them sought public interest standing.

[139] The City acknowledges that normally a trustee, and potentially other parties, may be entitled to costs payable from the trust, for legal proceedings to construe a trust instrument or resolve difficulties in the administration of a trust: see *Turner v. Andrews*, 2001 BCCA 76 and *Collett Estate (Re*), 2005 BCCA 291.

[140] However, the City submits that is not appropriate in this instance as the sole trust asset is the public land comprising the Park. Unless it is leased or sold the City says costs cannot be paid from the Trust. To encumber or sell the Park or any portion of it to pay costs would be contrary to the purposes of the *Public Parks Act, 1876* and the Trust.

[141] Although the FBHP rely on *Adams* in support of their request for public interest special costs it was considered by the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, 2015 SCC 5 where the Court concluded that *Adams* "sets the threshold for an award of special costs too low." The Court stated:

> [137] Against this, we must weight the caution that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being": *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 44. With this concern in mind, we are of the view that *Adams* sets the threshold for an award of special costs too low. This Court has previously emphasized that special costs are only available in "exceptional" circumstances: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48. The test set out in *Adams* would permit an award of special costs in cases that do not fit that description. Almost all constitutional litigation concerns "matters of public importance". Further, the criterion that asks whether the unsuccessful party has a superior capacity to bear the cost of the proceedings will always favour an award against the government. Without more, special costs awards may become routine in public interest litigation.

[142] The Court then addressed the test for awarding special costs in a case involving public interest litigants:

> [140] ... First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact.

> Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

[143] As a result, the fact that a claim is novel or that it involves "matters of public importance" that "transcend the immediate interests of the named parties" as described in *Adams* is not sufficient to satisfy the first ground of the public interest test. To meet the test the issues must be "truly exceptional" with "significant and widespread societal impact" (*Trial Lawyers Association of British Columbia (Attorney General)*, 2021 BCSC 1675, para. 31).

[144] The application at bar asks the Court to assist with the interpretation a particular Trust in a specific factual context. While it is important in the sense it will guide future administration of the Trust, and similarly worded instruments, it is not "truly exceptional", nor will it have a "significant and widespread societal impact". The FBHP cannot meet the first branch of the test.

[145] Nor can they meet the second branch of the test. The FBHP have, apparently, effectively pursued this litigation with private funding. They have led no evidence to the contrary, such as the case being pursued *pro bono* by counsel. As in *TLABC* it appears they "were ready, willing and able to retain and pay counsel to bring these proceedings whether or not they obtained an award of special costs" (para. 61).

[146] As noted, this matter is brought for the advice or direction of the Court under s. 86 of the *Trustee Act*. The parties involved voluntarily elected to participate although not required to do so. As in *Capital Region Festival Society* at para. 47, the method chosen by the City in placing this matter before the Court was appropriate and prudent. Trustees of trusts of this nature should not be discouraged from bringing forward questions about the appropriate management and administration of

trust assets due to the spectre of a costs award against them. Nor is this a case of adverse litigants where there are clear winners and losers.

[147] The *Carter* test is not met. The FBHP are not entitled to public interest special costs. All parties shall bear their own costs.

"The Honourable Mr. Justice Punnett"