COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. Friends of Beacon Hill Park,* 2023 BCCA 83

Date: 20230221

Docket: CA48187

In the matter of s. 86 of the *Trustee Act,* R.S.B.C. 1996, c. 464
Re: Beacon Hill Park Trust

Between:

His Majesty the King in right of the Province of British Columbia

and the Attorney General of British Columbia

Appellants

And

Friends of Beacon Hill Park, Corporation of the City of Victoria,

Together Against Poverty Society, Shea Smith, and Dennis Davies

Respondents

And

Songhees Nation and Esquimalt Nation

Intervenors

Before: The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated February 24, 2022 (*Beacon Hill Park Trust (Re)*, 2022 BCSC 284, Victoria Docket S210676).

Counsel for the Appellants, His Majesty the King in right of the Province of British Columbia and the Attorney General of British Columbia:	S.M.L. Kirkpatrick
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Counsel for the Intervenors, Songhees Nation and Esquimalt Nation:	K. Rose
Place and Date of Hearing:	Vancouver, British Columbia November 14–15, 2022
Place and Date of Judgment:	Vancouver, British Columbia February 21, 2023

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Voith

Summary:

Beacon Hill Park in Victoria is held by the City of Victoria in trust for the use, recreation and enjoyment of the public. An issue arose as to whether the Park can be used by persons experiencing homelessness for temporary overnight sheltering. Relying on s. 86 of the Trustee Act, the City applied for the opinion, advice or direction of the Supreme Court of British Columbia on a question respecting the management or administration of the trust property, namely whether use of the Park for temporary overnight sheltering by persons experiencing homelessness is consistent with the trust conditions under which the City holds the Park. A chambers judge held that the answer to the question was "No". The Province appeals, submitting that the question required a more qualified answer, namely, "No, except to the extent that an individual experiencing homelessness has a need to fulfil a basic necessity of life by erecting a temporary overnight shelter in a public place and has nowhere else to go but the Park."

Held: Appeal dismissed. The question posed by the trustee must be reframed to ensure that it relates solely to the management and administration of the trust property, and does not purport to limit or qualify the constitutional rights of others, including the rights, if any, of persons experiencing homelessness to shelter in the Park when they have no other options. If rights to use the Park for other purposes are asserted, they will have to be adjudicated based on the facts and law at the time. The terms of the trust, however, are that the Park is to be used for the recreation and enjoyment of the public, which use does not include temporary overnight sheltering.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] Beacon Hill Park ("the Park") is the largest park in Victoria. It was established in 1882 by a Crown grant to the City of Victoria on terms that it be held in trust for the use, recreation and enjoyment of the public. The Park includes natural areas, sports facilities and other facilities available for use by the general public. It does not include overnight facilities. In recent years, as a consequence of the homelessness crisis affecting cities throughout Canada, people experiencing homelessness have been sheltering in the Park in greater numbers. This has led to a question whether sheltering in the Park is consistent with the terms of the trust under which the City holds the Park.

[2] In March of 2021, the Corporation of the City of Victoria ("Victoria") filed a petition in the Supreme Court of British Columbia pursuant to s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464, for the Court's opinion, advice or direction on a question respecting the management or administration of the Park. Section 86 of the *Trustee Act* provides in relevant part that:

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.

[3] The question stated in the petition 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?” Although the question has been framed in broad terms, it is common ground that the question relates solely to the interpretation of the terms of the trust under which the City holds the Park. To be clear, the answer to the question is limited to the interpretation of the trust, and does not affect other rights that may exist external to the trust itself. I would therefore reframe the question as follows:

> Is the use of Beacon Hill Park for temporary overnight sheltering by persons experiencing homelessness consistent with the trust conditions under which the City of Victoria holds the Park?

[4] The City’s petition was heard in chambers in the Supreme Court. In a carefully worded judgment indexed at 2022 BCSC 284, the chambers judge reviewed the circumstances of the grant of the Park to the City, and concluded that it did not contemplate persons sheltering overnight in the Park. Accordingly, he answered the question posed, “No”.

[5] The Province of British Columbia has appealed this opinion to this Court. The Province argues that the grant of the Park should be interpreted as a legislative instrument, and seeks an order allowing the appeal and answering the question posed in this way: “The answer to the question is no, except to the extent that an individual experiencing homelessness has a need to fulfil a basic necessity of life by erecting a temporary overnight shelter in a public place and has nowhere else to go but the Park”.

[6] For the reasons that follow, I would dismiss the appeal. In my opinion, the terms of the trust do not contemplate persons using the Park for temporary sheltering.

[7] Whether in a particular situation, homeless persons have a constitutional right to use the Park for temporary sheltering that overrides the terms of the trust is not a matter that can be addressed in the abstract. Nothing in this judgment should be taken to determine the rights of individuals or groups who may assert rights to use the Park. This opinion is limited to an interpretation of the trust conditions to assist the City as trustee in its management and administration of the Park.

Background

[8] The grant of the Park to the City of Victoria on trust has its source in the *Public Parks Act, 1876*, 39 Vict., c. 6 (“the 1876 Act”), which is the original legislation respecting public parks in British Columbia. In s. 1 of the 1876 Act, the Legislature authorized the Lieutenant-Governor in Council to appoint trustees “of any public park or pleasure ground for the recreation and enjoyment of the public.” The trustees were given powers to lay out 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 make regulations “as may be necessary and proper for any of the purposes aforesaid”: ss. 3, 4.

[9] The 1876 Act was amended in 1881 (*An Act to Amend the Public Parks Act 1876*, 44 Vict., c. 18, 1881) to authorize the grant of Crown lands for a public park or pleasure ground (the "1881 Act"). Sections 6 to 8 as amended 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.]

[10] In February of 1882, the Lieutenant Governor in Council granted the lands constituting the Park to the City of Victoria under the authority of the 1876 Act 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 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 ...

[Emphasis added.]

[11] The Park is registered in the Victoria Land Title Office as a legal lot under the *Land Title Act*, R.S.B.C. 1996, c. 250. On that title is a registered Right of Entry in favour of the Crown.

[12] Within two years of the transfer of the Park to the City, an issue arose as to the scope of the terms on which it was held. A proposal was made to construct a permanent agricultural exhibit in the Park on 20 acres of the Park which were to be transferred by the City to an Agricultural Association. In *Anderson v. Victoria (City)* (1884), 1 B.C.R. (Pt. 2) 107 (S.C.), Chief Justice Begbie granted an application for an interlocutory injunction to prevent this use of the Park on the basis that the Park was to be used for recreation and enjoyment, and for no other purpose. He reviewed the relevant statutory instruments and concluded as follows (at 110):

3. 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.

[13] The terms of the trust were reviewed more recently in *Victoria (City) v. Capital Region Festival Society* (1998), 62 B.C.L.R. (3d) 143 (S.C.) ("*Festival Society*"). The Capital Region Festival Society had proposed a music festival in the Park. The City had approved the proposal in principle, but sought the direction of the Court under s. 86 of the *Trustee Act* on whether the trust conditions permitted such a use. The Court held that it did not. Justice R.D. Wilson reviewed *Anderson* and the trust conditions that required that the Park be maintained and preserved for the use, recreation and enjoyment of the public. He described the Park as a nature park and ornamental pleasure ground, with playing fields. A music festival was not consistent with those objectives.

[14] The third judgment of relevance to this issue is *Victoria (City) v. Adams*, 2008 BCSC 1363, aff'd 2009 BCCA 563 ("*Adams*"). *Adams* did not concern Beacon Hill Park specifically, and there was no discussion of the terms of the trust. The judgment does, however, provide the context for the modification proposed by the Province on this appeal. The context of *Adams* was that in 2009 there were 1,000 homeless people in Victoria, but only 104 shelter beds. The trial judge found that hundreds of the homeless had no option but to sleep outside in the public spaces of the City of Victoria. Many had set up shelters in public parks. At the time, the City's bylaws did not prohibit sleeping in public spaces, but did prohibit taking up a temporary abode in these places. The City brought an application for an injunction to enforce its bylaws prohibiting sheltering in the parks. The defendants counterclaimed that the City's bylaws prohibiting overnight sheltering breached their *Charter* rights under s. 7. The City subsequently discontinued its injunction application, and only the *Charter* counterclaim proceeded to trial.

[15] After a thorough review of the circumstances existing at the time, Justice Ross concluded that the prohibition in the bylaws against the erection of temporary shelter in the form of tents, tarpaulins, cardboard boxes or other structures exposed the homeless to a risk of significant health problems or even death, which constituted a deprivation of the rights to life, liberty and security of the persons protected under s. 7: at paras. 153–155. The judge then granted a declaration that the bylaws were of no force and effect insofar as they applied to prevent homeless people from erecting temporary shelter in the City's parks: at para. 237.

[16] On appeal, this Court characterized the issue as a narrow one (2009 BCCA 563 at para. 1 ["*Adams BCCA*"]):

… when homeless people are not prohibited from sleeping in public parks, and the number of homeless people exceeds the number of available shelter beds, does a bylaw that prohibits homeless people from erecting any form of temporary overhead shelter at night – including tents, tarps attached to trees, boxes or other structure – violate their constitutional rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*?

The trial judgment was affirmed, but this Court clarified that the declaration of invalidity could be terminated if the conditions that made the *Parks Regulation Bylaw* unconstitutional ceased to exist: *Adams BCCA* at paras. 165–166.

[17] It is not suggested that *Adams* has any direct application to this appeal. No *Charter* or constitutional remedy has been sought, and it is common ground that the conditions that led to the declaration of invalidity in 2009 no longer apply. The City now has sufficient shelter space to ensure that those who are experiencing homelessness can be housed without the necessity of sheltering in the City's parks. Nevertheless, the principle in *Adams* is the basis for the modification of the opinion proposed by the Province, and its submission that *Charter* values should inform the interpretation of the trust conditions at issue.

[18] Following the *Adams* decision, the City amended its bylaw to expressly allow for overnight sheltering in public parks between 7 p.m. to 7 a.m., provided that sheltering in certain environmentally and culturally sensitive areas was prohibited. In September 2020, in response to the state of emergency declared as a result of the COVID-19 pandemic, the City amended its bylaw to allow for daytime sheltering by persons experiencing homelessness. These provisions were repealed in May 2021. In July 2021, the City prohibited camping in the Park for two years on the basis that prolonged camping in the Park had caused substantial damage in certain areas of the Park and it would take this long to restore and remediate those areas.

[19] On March 2, 2021, the City of Victoria filed its petition pursuant to s. 86 of the *Trustee Act* seeking an opinion or advice respecting the management or administration of the Park as the trust property. The specific question raised was: "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?" The Province, as settlor of the trust, and the Attorney General were added as parties to the petition. The Friends of Beacon Hill Park, Shea Smith, Dennis Davies and the Together Against Poverty Society were added as persons from whom the Court considered it expedient to hear, a status authorized by s. 86.

[20] The Attorney General took the position that the question did not lend itself to a "Yes" or "No" answer, but required a more nuanced approach. The Attorney submitted that the trust should be interpreted as a statutory instrument, not a contractual document, and accordingly that the trust must be read as always speaking, remedial, subject to the Constitution. The Friends of Beacon Hill Park, a society whose goal is the preservation of the Park, submitted that the answer to the question posed was "No". They further submitted that the document containing the trust conditions was a contractual document, not a statutory instrument, and should be interpreted

according to contractual principles. Shea Smith, Dennis Davies and the Together Against Poverty Society submitted that the trust instrument must be read in a manner consistent with *Charter* values, and that there was nothing in the terms of the trust that required the Park to be managed in such a way as to exclude the use of the Park for shelter by persons experiencing homelessness. The City took no position on the answer to the question, but did submit that the Crown grant containing the trust conditions was a contractual document, not a statutory instrument, and should be interpreted accordingly.

Opinion of the Chambers Judge

[21] In his consideration of the legal characterization of the trust document, the judge reviewed the circumstances of the issuance of the Crown grant and concluded as follows:

[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.

[Emphasis in original.]

[22] He went on to observe that conveyances by Letters Patent, as had occurred in this case, have been construed by several courts as documents, not legislation, citing *Gibbs v. Grand Bend (Village)* (1995), 129 D.L.R. (4th) 449 (Ont. C.A.) and *Herold Estate v. Canada (Attorney General)*, 2021 ONCA 579, as well as this Court's judgment in *Bonavista Energy Corporation v. Fell*, 2020 BCCA 144. He concluded that the trust was a contractual document conveying an interest in land, not an enactment.

[23] The judge then considered the interpretation of the Crown grant in accordance with the approach set out in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53. He made the following observations about the critical phrase, "use, recreation and enjoyment of the public":

[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”.

[24] Finally, after reviewing this Court’s judgment in *Robb v. Walker*, 2015 BCCA 117, the judge concluded as follows:

[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.

…

[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.

[Emphasis in original.]

Issues on Appeal

[25] The Attorney General submits that the answer to the question is more nuanced than “No”, and that a proper answer would be “The answer to the question is No, except to the extent that an individual experiencing homelessness has a need to fulfil a basic necessity of life by erecting a temporary overnight shelter in a public place and has nowhere else to go but the Park”. The Attorney General submits that in providing his opinion on the question posed, the chambers judge erred in the following ways:

(a) the chambers judge made a palpable and overriding error of fact in finding as a fact that the Trust was not an Order in Council and was not part of the Order in Council.

(b) the chambers judge erred in law in finding that the Trust was contractual in nature and not an enactment, and in applying contractual interpretive rules rather than statutory interpretive rules to interpret the Trust.

(c) the chambers judge erred in law in interpreting the wording of the Trust as unambiguous.

(d) the chambers judge thus erred in answering the question posed by the City with an unqualified "No", without considering application of s. 7 of the *Charter* and the rights of persons experiencing homelessness to shelter themselves overnight in public spaces when they have nowhere else to go.

Analysis

[26] The question raised in this proceeding requires an interpretation of the trust conditions under which the City of Victoria holds Beacon Hill Park. All parties to this appeal have accepted that s. 86 of the *Trustee Act* is the appropriate mechanism to bring this matter to court. There is, however, some controversy as to whether s. 86 should be used for the construction of an instrument. In *Re Royal Trust Co*. (1962), 39 W.W.R. 636 (B.C.S.C.), Justice Hutcheson reviewed a line of English authority and concluded that the provision was designed to enable the court to assist trustees in matters of discretion but is not to be used as the basis for applications to construe an instrument. This principle was reiterated by Justice Taylor in *Re Bailey* (1982), 38 B.C.L.R. 227 at 229 (S.C.) and has been mentioned several times since in judgments in the Supreme Court of British Columbia. On the other hand, the leading text on the law of trusts states that "[t]he proper and typical [s. 86] application will concern the construction of the instrument": Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at 1233, and of course that was the nature of the proceeding in *Festival Society* with respect to this very trust.

[27] The trust at issue here is a public trust, unlike the trusts under consideration in *Re Royal Trust Co.* and *Re Bailey*. The parties to this proceeding, including the settlor of the trust (His Majesty the King in right of the Province of British Columbia) and the Attorney General, are in agreement that s. 86 provides an appropriate procedure to resolve an issue that has been outstanding for some time. In my view, this Court should provide the advice and directions the City of Victoria as trustee has sought. However, as already mentioned, I propose to reframe the question to better reflect the narrowness of the question raised.

[28] I turn first to the issues raised by the Attorney General.

Was the trust an order in council or part of an order in council?

[29] The document that contains the relevant trust conditions is a two-page document filed in the Land Title Office under number DD15937. After a reference to the 1876 Act, the operative part reads as follows:

… we do by these presents … give and grant unto the said Corporation of the City of Victoria … that piece or parcel of land known as Beacon Hill Park … TO HAVE and TO HOLD … 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 previous provisions of the Public Parks Act 1876 and the said Act to amend the Public Parks Act 1876…

[30] The document is not titled Letters Patent, but it includes the statement that "We have caused these Our Letters to be made Patent…", language that was commonplace for grants by letters patent and is still in use today for Crown grants under the *Land Act*, R.S.B.C. 1996, c. 245. I would characterize this instrument as a Crown grant with trust conditions made by Letters Patent.

[31] The circumstances under which the grant took place are in various historical documents filed in this proceeding. The sequence of events that led to the grant of the Park is not entirely clear. The chambers judge took the view that the grant had occurred in three steps. The 1876 and 1881 statutes authorized the grant "for the recreation and enjoyment of the public", which was the first step. The second step was a one-page document in which the Executive Council "recommends that Beacon Hill Park be granted to the Corporation of the City of Victoria upon trust," with the form of the grant approved by the Attorney General on February 20, 1882. Finally, the grant was issued the next day, on February 21, 1882.

[32] The Attorney General took the position before the chambers judge, as before this Court, that the trust was part of the order-in-council ("OIC") that approved the grant. In other words, the process was done in *two* steps (statute and OIC) rather than three steps (statute, OIC and Crown grant) as found by the chambers judge. The significance of this distinction is said to be that if the trust was contained in the OIC, that conclusion would enhance the Attorney General's submission that the trust should be interpreted by reference to principles of statutory interpretation, not contractual interpretation. The basis for this position, as I understand it, is that the documentary record includes a handwritten document almost identical to the Crown grant that was eventually issued. The Attorney General takes the position that this document must have been attached to the one page document identified by the chambers judge as the OIC.

[33] The Friends of Beacon Hill Park support the conclusion of the chambers judge, with one modification. They submit that the handwritten form of the grant likely was attached to the one-page OIC, but that on the record before the Court, this took place on February 20, 1882, based on a note approving the form of the grant dated February 20, 1882. In their submission, the form of the grant is separate from the actual Crown grant, which was issued by its terms on February 21, 1882.

[34] The position of the Attorney General is that in failing to find that the trust was part of the OIC, the chambers judge committed a palpable and overriding error. I cannot agree. His conclusion was open to him on the somewhat equivocal evidence before him. While I am more inclined to the view of the Friends of Beacon Hill Park that the February 20 OIC contained the form of the grant as an attachment, I do not consider that this interpretation alters the conclusion of the chambers judge that the grant with its trust conditions was issued by way of a conveyance document the next day, and was separate from the OIC. I would not give effect to this ground of appeal.

Did the chambers judge err in his interpretation of the trust conditions?

[35] The dispute over the sequence of events leading to the issuance of the Crown grant was the first part of the Crown's central argument that the trust conditions for Beacon Hill Park should be interpreted according to principles of statutory interpretation, including *Charter* values, rather than by principles of contractual interpretation. The principal argument is that s. 1 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 defines an "enactment" as an Act or a regulation, and "regulation" is defined as (among other things) letters patent or other instrument enacted in execution of a power conferred under an Act, or by or under the authority of the Lieutenant Governor in Council. The chambers judge characterized the Crown grant as a conveyance by letters patent. Accordingly, the Attorney General submits that the conveyance should be interpreted using principles of statutory interpretation.

[36] The chambers judge did not accept this analysis. He concluded that the phrase "we have caused these our Letters to be made Patent…" did not convert the grant or conveyance into Letters Patent as that term is used in the *Interpretation Act*. They set out the process taken to create the trust, but they did not change the nature of the grant itself. He went on to point out that several courts have interpreted conveyances by letters patent as documents, not legislation, citing *Gibbs* and *Herold Estate*. He concluded that the trust was a contractual document conveying an interest in land, not an enactment.

[37] The submission of the Attorney General that letters patent are defined as an enactment for purposes of the *Interpretation Act* does not, in my view, lead to the conclusion that this Crown grant must be interpreted as if it were a statute. An enactment as defined in the *Interpretation Act* is not a statute; it includes both statutes and legal instruments made pursuant to statute. The significance of letters patent being defined as an enactment for purposes of the *Interpretation Act* is that the provisions of the *Act* applying to enactments apply to letters patent. The only provisions of the *Interpretation Act* said to apply in the case at bar are the provisions that every enactment must be construed as always speaking (s. 7(1)) and the provision that every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects (s. 8). Neither of these requirements assists in interpreting the scope of the trust condition that the Park is to be managed for the use, recreation and enjoyment of the public.

[38] In my respectful view, it is unnecessary to categorize trust conditions in a Crown grant by reference to statutory or contractual principles. A Crown grant is neither a statute nor (necessarily) a contract. The interpretation of a grant will depend on the circumstances, and may require consideration of principles of statutory interpretation or contractual interpretation depending on those circumstances. Context will be relevant in either case. For example, a Crown grant of land to a grantee who has paid consideration for the grant after a negotiated transaction, such as the disposition of Crown land by way of purchase pursuant to s. 45 of the *Land Act*, R.S.B.C. 1970, c. 17, will attract a contractual analysis. On the other hand, a Crown grant that is made pursuant to specific statutory qualifications may require the interpretation of those provisions, just as the interpretation of regulations must be read in the context of their enabling Act, having regard to the language and purpose of the Act in general and more particularly the language and purpose of the relevant enabling provisions: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed., (Toronto: LexisNexis, 2022) at §13.02–13.03. The specific question at issue may also influence the interpretive technique. A dispute about the geographical

scope of the grant may require extrinsic evidence not needed to interpret a condition of the grant. Similarly, the nature of a trust is neither that of a statutory instrument or a contractual document, although a trust can be created through either of these mechanisms. A trust is an obligation imposed on the trustee, and must be interpreted in that context.

[39] In *Bonavista Energy Corporation v. Fell*, 2020 BCCA 144, this Court commented on the range of interpretive techniques that may be employed to construe a Crown grant:

[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 in original; emphasis added.]

[40] The source of the statement in *Angel & Honsberger* that Crown grants are to be interpreted so as to give effect to the plain meaning as set out in the grant is the judgment of the Newfoundland and Labrador Court of Appeal in *Janes v. Newfoundland and Labrador*, 2006 NLCA 4, where a condition in a Crown grant was interpreted according to the ordinary meaning of the language of the condition, supplemented by evidence of the dealings of the parties before the grant was made. The Court of Appeal did not find it necessary to refer to principles of statutory or contractual interpretation, although it seems apparent that the grant was being interpreted by reference to principles of contract interpretation.

[41] I recognize that in *Herold Estate*, the Ontario Court of Appeal has recently held that Crown grants of land by letters patent are to be interpreted in accordance with contractual principles, and I agree that this will often be the case, but I cannot agree that this is a principle that must as a matter of law apply to all conveyances by letters patent. I note that the principal authorities relied on in *Herold Estate, Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp*., 2020 SCC 29 and this Court's judgment in *Robb v. Walker*, both concerned the

interpretation of easements granted between private parties, a circumstance that supports a contractual analysis but has little to say about a grant of land by the Crown pursuant to statutory powers.

[42] The issue in this case is whether overnight sheltering falls within the scope of the trust conditions contained in the Crown grant. To interpret the language of the trust conditions, it is necessary in my view to consider the plain language of the grant in the context of the grant as a whole, and in the additional context of the language and purpose of the enabling legislation. Here the purpose of the enabling legislation (the 1876 Act) was to create a public park or pleasure ground for the recreation and enjoyment of the public. The Crown grant tracks that language. Thus, the trust conditions are to be interpreted in a way that gives effect to the statutory purpose and the plain language of the conditions of grant.

[43] How does this analytical framework assist in providing advice to the City as to the management of the trust? The respondent Smith points out that the question posed does not relate to how the trustees should manage the trust, but rather what members of the public are permitted to do. I agree with this criticism. The advice this Court can provide is whether overnight sheltering is contemplated by the terms of the trust. Whether in a given circumstance individuals have a right to shelter overnight in the park will depend on the circumstances that may arise, and cannot be answered in the abstract.

[44] Mr. Smith also submits that the answer to the question posed by the City should be "Yes". He says that the trust imposes a duty on the City to maintain and preserve the Park for the public, but does not impose direct limitations on the use of the Park. Accordingly, overnight sheltering is not inconsistent with the terms of the trust, but there may be circumstances where the City can reasonably restrict sheltering in the Park.

[45] At the outset of submissions, the Friends of Beacon Hill Park, supported by the City, applied for an order that Mr. Smith's factum be struck, in whole or in part, because it was in effect an appellant's factum and no notice of cross appeal had been filed. As the judgment under appeal had answered the question posed by the City in the negative, it was not open to a respondent to argue for a different result without filing its own cross-appeal. The division reserved judgment and heard full argument from Mr. Smith.

[46] In my opinion, the application to strike the factum should be dismissed. If this were *inter parties* litigation, the objection to Mr. Smith's position would be sound, but this is a special statutory procedure authorized under the *Trustee Act*. The purpose of the proceedings is to provide advice to the City as trustee of the Park to assist in the management of its responsibilities. The result of this appeal will not be a judgment in favour of any of the parties, but rather a judicial opinion to assist the trustees. In these circumstances, it has been helpful for the Court to hear the full range of submissions by the parties to the appeal, including Mr. Smith who, as an individual who has used the Park for overnight sheltering in the past, provided a helpful perspective on the issues before the Court.

[47] Having said that, I am not in agreement with Mr. Smith that the trust conditions do not restrict the use of the Park. In my opinion, the purpose of the trust conditions, as reflected in the

legislative scheme and the plain language of the trust, is inherently restrictive. It is designed to ensure that the land conveyed by the Crown will be used as a park for the recreation and enjoyment of the general public, and not for other purposes.

[48] Both the Attorney General and Mr. Smith have focused on the word "use" in the phrase introduced in the 1881 Act and repeated in the trust conditions in the Crown grant that the lands be maintained and preserved by the trustees for the "use, recreation, and enjoyment of the public." The submission is that "use" has a broad meaning and is not inconsistent with temporary overnight sheltering in the Park. Whether inclusion of the word "use" was intended to expand the concepts of recreation and enjoyment by the public depends on a statutory interpretation of the 1876 Act (as amended in 1881), and then a contextual interpretation of the trust conditions in the Crown grant authorized by the 1876 Act. In the original 1876 Act, the word "use" does not appear. Section 1 of that Act states in relevant part:

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; and the Trustees so appointed, … shall have power to hold any lands or hereditaments that may be conveyed to them by deed or grant from the Crown … on trust for the establishment of purpose of a public park or pleasure ground for the recreation and enjoyment of the public."

[Emphasis added.]

[49] The 1881 Act amended the 1876 Act adding three sections, the most significant of which for our purposes is s. 6, which reads in relevant part as follows:

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; …

[Emphasis added.]

[50] The Crown grant establishing the Beacon Hill Park repeats this language faithfully.

[51] Did the Legislature intend to broaden the purpose of the grant of land by adding the word "use" to the phrase "recreation and enjoyment of the public" in the 1881 Act, or was it the intention that parks granted under this authority be maintained for the use by the public for recreation and enjoyment? To answer this question, the words of the 1876 Act, as amended, must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the 1876 Act, the object of the Act, and the intention of the Legislature: *Sullivan* at §2.01. The *Public Parks Act, 1876*, as amended in 1881, is no longer in existence. It was repealed in 1908 by the *Provincial Parks Act, 1908*, c. 39, except as to parks for which trustees had been appointed before the repeal of the Act. Nevertheless, it was the 1876 Act as amended

that enabled the Crown grant, and it is the object and scheme of that Act that informs the interpretation of the trust conditions authorized by that Act.

[52] The object and scheme of the 1876 Act was to create public parks for the recreation and enjoyment of the public, which can be taken to have been the intention of the Legislature. To interpret "use" more broadly than the fulfilment of this purpose would be to frustrate the statutory scheme. With respect to the ordinary sense of the language, the chambers judge defined "recreation" as an "enjoyable leisure activity"; no issue has been taken with that meaning in this proceeding. To the extent that the word "use" in the 1881 amendment suggests an independent meaning, the associated words rule supports an interpretation that would restrict a more general meaning of use to a sense analogous with the less general words, recreation and enjoyment: *Sullivan* at §8.06. Thus, reading the language harmoniously with the scheme of the Act, the meaning of the phrase "for the use, recreation and enjoyment of the public" in the 1881 Act means for the use of the public for recreation and enjoyment.

[53] The scope of the trust conditions in the Crown grant must be read in the context of the enabling legislation. In this case, because the enabling legislation restricts the scope of the Crown grant, the most important interpretive factor is the meaning of the language in the statute, language that has been faithfully repeated in the trust conditions. Thus, the trust conditions require that the trustees preserve and maintain the Park for the use of the public for recreation and enjoyment. In my opinion, overnight sheltering is not a use by the public for recreation and enjoyment. Framed in that way, I do not understand any of the parties to suggest otherwise. The only remaining question is whether it is necessary in providing advice on this matter to the City to include the qualification suggested by the Attorney General.

Is it necessary to qualify the advice by referring to the potential application of s. 7 of the Charter and the rights of persons experiencing homelessness to shelter themselves overnight in public spaces when they have nowhere else to go?

[54] The Attorney General has not contested the general proposition that the terms of the trust do not contemplate overnight sheltering by the homeless, but has argued on this appeal that the Court's advice should be qualified by excluding circumstances where an individual experiencing homelessness has a need to fulfil a basic necessity of life by erecting a temporary overnight shelter in a public place and has nowhere else to go but the Park. The theory advanced by the Attorney is that the trust must be interpreted in accordance with principles of statutory interpretation, and that these principles include *Charter* values, such that the potential s. 7 rights of individuals experiencing homelessness must be read into the interpretation of the trust.

[55] In my view, it is neither necessary nor appropriate to qualify the trust conditions that have been interpreted according to their terms and the context of their enabling legislation to include the possibility that a specific group of individuals may have constitutional rights in certain circumstances that conflict with the terms of the trust under which the Park is held. Other possibilities of conflicting uses may arise. The interveners have cautioned the Court not to resolve this question in a way that would limit any Indigenous rights they may wish to assert. How the trustees will respond to assertions of constitutionally protected rights that are

inconsistent with the terms of the trust can only be determined when such assertions are made, based on the facts and law at the time.

[56] Any uncertainty as to the scope of this opinion can be addressed by clarifying the question the Court is prepared to answer. As I have indicated, I do not consider that the question as framed clearly expresses the limitation of this opinion to the management and administration of the Park by the City. The Court was advised throughout argument that the purpose of the proceeding was not to exclude the Park from the potential exercise of constitutional rights by individuals experiencing homelessness, but rather to obtain a definitive view of the scope of the trust under which the City holds the Park for the benefit of the trustee. As I have stated, the question that reflects the submissions we have heard and that relates more directly to the management and administration of the trust, should be expressed in this way: "Is the use of Beacon Hill Park for temporary overnight sheltering by persons experiencing homelessness consistent with the trust conditions under which the City of Victoria holds the Park?" That is substantially the question addressed by the chambers judge in his opinion, and reflects the submissions the Court has received. The answer to this question is "No".

[57] In reframing the question in this way, it should be clear that the opinion given by this Court on this narrow question does not affect the constitutional rights, if any, of homeless individuals in particular circumstances. Whether such individuals have a constitutional right to shelter in the Park that overrides the terms of the trust is a question that cannot be answered in the abstract. It is to be hoped that it will never be necessary to answer that question, but if circumstances arise where individuals experiencing homelessness assert that they have no place to shelter other than the Park, and accordingly that any bylaw of the City prohibiting such shelter contravenes their constitutional rights, the issue will have to be determined based on the facts and law at that time. The potential for such a clash of rights and interests does not require qualification of the scope of the trust conditions for the Park, which relates to the duties of the trustee, not the rights of third parties. Similarly, nothing in this opinion affects the rights, if any, of Indigenous communities to use the Park in ways that are constitutionally protected. If such rights are asserted, they, like the rights of individuals experiencing homelessness, will have to be adjudicated based on the facts and law at the time.

Disposition

[58] I would reframe the question in this way:

> Is the use of Beacon Hill Park for temporary overnight sheltering by persons experiencing homelessness consistent with the trust conditions under which the City of Victoria holds the Park?

[59] I would answer the question "No". Accordingly, I would dismiss the appeal.

[60] The Friends of Beacon Hill Park and Mr. Smith have applied for costs of this appeal, but the parties agreed that the question of costs would be left for determination following the decision of this Court. If any of the parties wish to make further submissions on costs, they

should do so in writing within 21 days of the date of this opinion. Any submissions in response to any request for costs should be made in writing within 28 days of the date of this opinion.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Voith"