



No. 21 0676

Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Re: Beacon Hill Park Trust

PETITION TO THE COURT

ON NOTICE TO:

Her Majesty the Queen in Right of British Columbia and The Attorney General for the Province of British Columbia

c/o Deputy Attorney General for the
Province of British Columbia
PO Box 9290 Stn Prov Govt
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part 1 below, by

- the person named as petitioner in the style of proceedings above
- The Corporation of the City of Victoria (the petitioner)

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

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

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

Time for response to petition

A response to petition must be filed and served on the petitioner,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: The Law Courts 850 Burdett Avenue Victoria, BC V8W 9J2
(2)	The ADDRESS FOR SERVICE of the petitioner is: The Corporation of the City of Victoria Office of the City Solicitor 1 Centennial Square Victoria, BC V8W 1P6
(3)	The name and office address of the petitioner's lawyers is: Tom Zworski and Carrie Moffatt Office of the City Solicitor 1 Centennial Square Victoria, BC V8W 1P6 Tel: 250-361-0547 / 250-361-0360 Email: tzworski@victoria.ca cmoffatt@victoria.ca

Claim of the Petitioner

Part 1: ORDER(S) SOUGHT

1. A declaration setting out the opinion, advice or directions of the court on the following question concerning the management or administration of the trust created by the Crown grant dated February 21, 1882:

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?

Part 2: FACTUAL BASIS

Introduction

1. The petitioner, the Corporation of the City of Victoria (the "City") is a local government continued pursuant to the *Community Charter*.
2. Pursuant to an 1882 Crown grant, the City is the owner of lands known as Beacon Hill Park ("BHP") and legally described as:

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"

3. The 1882 Crown grant was issued pursuant to the *Public Parks Act, 1876* as amended and provided that the City is to hold the lands consisting of BHP 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...

4. This proceeding is brought by the City in its capacity as the trustee of BHP pursuant to the provisions of the *Trustee Act*.
5. The respondent Her Majesty the Queen in Right of British Columbia is given notice of this proceeding as the settlor of the trust.
6. The respondent Attorney General for the Province of British Columbia is given notice of this proceeding in his role as the person with standing to see to the proper administration of any public trust.

Beacon Hill Park

7. BHP is a large urban park, comprising approximately 184.14 acres (74.12 hectares) in size, located in Victoria.
8. BHP consists of a variety of areas, including:
 - a. natural areas, many of which are environmentally sensitive, such as camas fields and Garry Oak meadows;

- b. culturally sensitive areas, such as a First Nations burial site on the south slope of Beacon Hill;
- c. manicured greenspace;
- d. horticultural areas such as flower beds and a rose garden;
- e. two sports fields, golf putting green, baseball diamond, cricket pitch, lawn bowling pitch, outdoor fitness equipment, and tennis courts;
- f. two playgrounds and spray parks;
- g. children's petting zoo;
- h. music performance stage known as the Cameron Bandshell;
- i. parks maintenance yard;
- j. pathways and roadways;
- k. artificial ponds;
- l. sculptures and monuments; and
- m. story pole (totem pole).

City Park System

9. The City maintains and operates an extensive public park system within its boundaries that includes some 138 public parks and open spaces. BHP is the largest of these public parks.

10. The majority of the parks in the City are located on land owned by the City. Under the City's *Parks Regulation Bylaw*, any area of greenspace or other public place, other than a street, that is under the custody, control or management of the City's Director of Parks, Recreation and Facilities is deemed to be a public park.

11. Public parks in the City may simply be City lands that are used as parks, or may be formally reserved or dedicated as public parks in various ways, including:
 - a. park dedication bylaws adopted by the City which dedicated or reserved a piece of City land as a public park (e.g., Central Park);
 - b. provincial crown grants of land to the City under the *Public Parks Act, 1876*, as amended, or otherwise (e.g., Holland Point Park);
 - c. federal crown grants of land to the City with conditions restricting their use as a public park (e.g., Clover Point Park); or
 - d. covenant registered on title which limits the use of City land as public park (e.g., Selkirk Green).

12. A number of City parks, including BHP, were granted to the City under the provisions of the *Public Parks Act, 1876*, as amended, and other parks are subject to similar trust conditions.

13. All public parks in the City are regulated through the City's *Parks Regulation Bylaw* adopted pursuant to the City's local government jurisdiction over public places within its boundaries.

Sheltering in City Parks

14. People experiencing homelessness have been sheltering in City parks and other public places for decades.
15. Beginning with the decision in *Victoria (City) v. Adams*, 2008 BCSC 1363, rev'd in part 2009 BCCA 563, this Court has recognized that persons experiencing homelessness have a constitutionally protected right to erect shelters overnight in public parks when there is no practicable shelter space available elsewhere.
16. In 2009, following the *Adams* decision, the City amended its *Parks Regulation Bylaw* to expressly allow for such overnight sheltering in public parks. These amendments limited sheltering to nighttime (7 p.m. to 7 a.m.) and expressly prohibited sheltering in certain locations, such as environmentally and culturally sensitive areas, playing fields, playgrounds, pathways, and other locations not suitable for sheltering.
17. The number of people experiencing homelessness consistently exceeds the number of available shelter spaces, leaving many no alternative but to shelter in public parks, including BHP.

18. Since 2009, sheltering has occurred in many City parks, including BHP, both in compliance with the *Parks Regulation Bylaw* as amended in 2009, and, on occasion, in contravention of that bylaw.

19. Sheltering in City parks has placed increased burdens on City operations and required significant expenditure of additional funds to deal with the consequences of such use of public spaces. For example, the City allocated the following amounts for dealing with consequences of sheltering as part of its annual budgets:
 - a. 2017: \$211,900
 - b. 2018: \$300,000
 - c. 2019: \$362,000
 - d. 2020: \$513,884
 - e. 2021: \$1,740,000

20. On March 18, 2020, the Province declared a provincial state of emergency in response to the declared health emergency resulting from the COVID-19 pandemic. Soon after, local shelters and social service providers either suspended their services entirely or dramatically downsized to satisfy provincial health guidelines to prevent the spread of the virus, causing an influx of persons forced to live on the streets and in public parks, including in BHP.

21. Prior to March 18, 2020, there were approximately 24 to 35 temporary shelters inhabited by homeless persons in City parks, including BHP, on a regular basis. By

April 24, 2020, the number of temporary shelters inhabited by homeless persons in City parks had increased to approximately 465.

22. Shortly after the Province declared a provincial state of emergency and local shelters began suspending or reducing their services, the City suspended enforcement efforts relating to the prohibition on “daytime sheltering” (i.e., between the hours of 7 a.m. and 7 p.m.) in the interest of supporting the ability of persons experiencing homelessness to self-isolate and continue to shelter in place in accordance with advisories from public health authorities.
23. On September 14, 2020, the City adopted temporary amendments to the *Parks Regulation Bylaw* which allow for daytime sheltering by persons experiencing homelessness in public parks, provided they comply with certain specific regulations such as rules about the size, location, and spacing of shelters. These temporary provisions are set to expire 30 days after the end of the provincial state of emergency.
24. Urban parks are not designed or intended for continuous sheltering. Most City public parks lack the necessary infrastructure to support the essential, life-sustaining activities of unhoused persons. Only a few City parks contain public washrooms or have drinking fountains with potable water. BHP has three public washrooms and five drinking fountains.

25. While the *Parks Regulation Bylaw* now allows for overnight sheltering (and temporarily for daytime sheltering during the pandemic), it also prohibits all sheltering in some specific 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).

Sheltering in BHP

26. Members of the public experiencing homelessness have sheltered in BHP since before the *Adams* decision and subsequent amendments to the *Parks Regulation Bylaw*.
27. The City has enforced the terms of the *Parks Regulation Bylaw* in BHP, including in relation to the erection of shelters or other unauthorized structures.
28. On July 10, 2020, the City initiated legal proceedings to enforce the prohibition on sheltering in environmentally and culturally sensitive areas and in other locations in BHP where sheltering is prohibited under the *Parks Regulation Bylaw*.

29. On July 28, 2020, Mr. Justice Mayer granted an interim injunction order enforcing the *Parks Regulation Bylaw* in relation to parts of BHP and, subsequently, the City took measures to implement the terms of that order.

30. As a result of enforcement of the interim injunction, sheltering in BHP is predominantly confined to lawn and hard surface areas where it does not cause damage to sensitive areas of BHP.

31. On November 20, 2020, the City, with the assistance of the police, removed a number of unauthorized structures, including a community warming tent and portable showers, from BHP because their presence contravened the provisions of the *Parks Regulation Bylaw*.

32. Some members of the community have expressed concerns that sheltering activity in BHP contravenes the terms of the trust created under the 1882 Crown grant.

Part 3: LEGAL BASIS

1. This petition is brought pursuant to section 86 of the *Trustee Act*, which specifically authorizes a trustee to seek this Court's opinion, advice or directions on a matter related to the administration or management of a trust:
 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.

- 2. The role of the court in a proceeding under section 86 of the *Trustee Act* is to provide the opinion, advice or directions on the legal question posed by the trustee. It is for the trustee to then decide how best to act in light of the option, advice or directions received from the court.

Jones v. McLeod, 2017 BCSC 1478

- 3. The trust was created under the *Public Parks Act, 1876* as amended. That act provided an authority for the Province to transfer lands to municipalities for the purpose of public parks and imposed a trust on lands so conveyed:
 - 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 in 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 the power to hold the lands thereby conveyed, upon the trusts and for the purposes aforesaid.
- 4. The BHP trust has been subject to two judicial considerations since its creation in 1882:

- a. In 1884, Chief Justice Begbie issued an interim injunction restraining the City from alienating any part of the park to an agricultural association for construction of a permanent agricultural exhibition in BHP.

Anderson v. City of Victoria (1884), 1 B.C.R. 107

- b. In 1998, the City sought this Court's opinion, under section 86 of the *Trustee Act*, on whether or not the holding of a music festival with commercial sponsorship in BHP was permitted by the terms of the trust. Justice Wilson concluded that it was not permitted.

Victoria (City) v. Capital Region Festival Society (1998), 62 B.C.L.R. (3d) 143 (S.C.)

5. Under the 1882 Crown grant and the *Public Parks Act, 1876* as amended, the City is required to hold the land it received in trust "for the use recreation and enjoyment of the public" as a public park.
6. Neither the 1882 Crown grant nor the *Public Parks Act, 1876* expressly identify all the uses to which BHP may be put by the public – the only limitation is that land subject to the grant be maintained and preserved by the City as a public park or pleasure ground.
7. Conduct by members of the public in BHP is governed by the *Parks Regulation Bylaw* in the same manner as it is in all other public parks under the City's

jurisdiction. The trust does not contain any additional or special rules for the conduct of the public in BHP.

8. This Court has recognized that persons experiencing homelessness have a constitutional right to erect shelters in public parks when there is inadequate alternative shelter space available.

Adams, supra.; Abbotsford (City) v. Shantz, 2015 BCSC 1909

9. Therefore, temporary sheltering by unhoused members of the community in public parks is a recognized and legitimate public use of public parks.
10. Neither *Adams* nor any other subsequent court decision addressed whether the constitutional rights of unhoused members of the public are limited by trust terms imposed as part of a Crown grant of the land for a public park.
11. Therefore, the City requests this Court's opinion, advice or directions in respect of the question:

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?

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit of Shannon Perkins, sworn on March 1, 2021
2. Affidavit of Navdeep Sidhu, affirmed on February 26, 2021

The petitioner estimates that the hearing of the petition will take one day.

Date: March 1, 2021


Tom Zworski and Carrie Moffatt, lawyers
for The Corporation of the City of Victoria

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition
 with the following variations and additional terms:

.....
.....
.....

Date: _____

.....
Signature of Judge Master