

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Comox (Town) v. British Columbia*
(Attorney General),
2023 BCSC 551

Date: 20230411
Docket: S09384
Registry: Courtenay

Between:

Town of Comox

Petitioner

And:

Attorney General of British Columbia

Respondent

Before: The Honourable Madam Justice J. A. Power

Reasons for Judgment

Counsel for the Petitioner: M. Moll

Counsel for the Respondent: S.M.L. Kirkpatrick and S.A.E. Kay

Counsel for the Mack Laing Heritage
Society: K. Simonett

Place and Date of Hearing: Courtenay, B.C.
September 7 - 9, 2022

Place and Date of Judgment: Courtenay, B.C.
April 11, 2023

[1] The Amended Petition before the court relates to a charitable purpose trust (the Trust). Mack Laing a well known naturalist, who is now deceased, wanted to provide a natural history education space to be enjoyed by the public in the Mack Laing Park at the site of his home called “Shakesides”, near Comox, British Columbia.

[2] This matter has a long history since the events that give rise to this litigation occurred over forty years ago. The Town of Comox (the Town) is now, by a Petition originally filed in 2017 and amended, applying to vary the Trust so that the trust funds given by Hamilton Mack Laing (Mack Laing) in his will can be spent differently than on the terms described in the will. The Town is seeking to amend the Trust to permit the trust funds to be used to build a Nature Park Platform containing natural history education panels at the site of his home Shakesides. The Town says that the dwelling Shakesides was never suitable to be used as a natural history museum and that the proposal before the court will further the intentions of the will-maker, Mack Laing, and the best interests of the Town.

[3] The Respondent, the Attorney General of British Columbia, became involved in the matter several years ago. It argues that it represents the charitable purpose of the Trust and the public interest in ensuring that property dedicated to charity continues to be so dedicated. The Respondent is of the view that the variation sought by the Town will ensure that Mack Laing’s charitable intentions are realized. The Respondent has worked with the Town to structure an Order that both parties say is the best use of the trust funds provided in Mack Laing’s will. The Respondent agrees with the Town that Shakesides is unsuitable, both in structure and location, to be a museum, and the trust funds are not sufficient to overcome those unsuitable characteristics.

[4] The Intervenors, the Mack Laing Heritage Society (the “MLHS”), were granted Intervenor status on October 16, 2018. They argue that the Town has breached its obligations as trustee and allowed waste and neglect of a culturally valuable and irreplaceable trust object -- Mack Laing’s home Shakesides. They argue that the

Town has manufactured the very crisis it now claims as a justification to vary the Trust. The Intervenor claims that the Town has rejected repeated offers by the Intervenor to physically restore Shakesides to its original condition at no cost and by qualified contractors. The Intervenors seek a number of orders including a forensic accounting of trust funds and an independent assessment of the structural integrity of Shakesides.

[5] For reasons that I will now explain, I have concluded that I should accede to the Town's application, which is supported by the Attorney General, to vary the Trust. I have concluded that to accede to the Intervenors arguments, would only lead to even greater delay and litigation. For example, a forensic accounting would not serve a useful purpose, since I am satisfied that the original trust monies in 1982 were never sufficient to turn Shakesides into a museum, and in any event the Town has now roughly accounted for them. I have concluded that the Town's proposal, which accounts for the original trust monies, and adds additional Town funds for any construction shortfall, is well considered. I have concluded that the Nature Park Platform proposal is the best use of the trust fund monies and reflects the general intention set out in Mack Laing's will, relating to public education.

Background

[6] The background to this matter is helpfully set out in the Petitioner's materials. Before I refer to that background, I will note that many affidavits have been filed on the application by the MLHS. While the members of the society who have filed affidavits are interested and passionate for their cause, I have concluded that many of the affidavits go beyond admissible evidence on this proceeding, and go beyond the scope of the role of an intervenor. These affidavits contain hearsay and other submissions that are not admissible on a hearing of this sort. Accordingly, I have given these affidavits little weight.

[7] The Mack Laing Heritage Society (MLHS), is a not for profit organization whose mandate is to seek ways to fulfill the intentions of Mack Laing as expressed in his will. Specifically, the MLHS is concerned with realizing Mack Laing's vision that

his property, known as Shakesides, be converted to a “natural history museum” for the benefit of the people of Comox.

Cultural Significance and History of Hamilton Laing

[8] Before setting out to the background to the trusts, it is helpful to set out the significance and history of Mack Laing and of Shakesides. This is set out in detail in the MLHS’s submissions as follows:

11. Hamilton Mack Laing was a pioneering naturalist in British Columbia. Born in Hensall, Ontario in February, 1883, Laing served in WWI, travelled extensively, and moved to Comox in June, 1922.
12. Laing was a naturalist and was employed by the National Museum in Ottawa and was a prolific writer, illustrator, and photographer. He published over 1,000 scientific articles and magazine essays throughout his lifetime, and a number of books.
13. Laing married to [sic] Ethel Hart (“Ethel Laing”) on January 19, 1927. Together they built their first home, “Baybrook” in Comox. At Baybrook, they planted nut trees and ran a nut farm in conjunction with Laing’s work as a writer and naturalist. Ethel Laing died on July 23, 1944.
14. Ethel’s death was a heavy loss. Laing found the farm to be too much without Ethel. He sold their first house, Baybrook, in 1949.
15. In 1950, on land next to Baybrook, Mr. Laing built another home and named it “Shakesides.” He was in his late sixties and built the entire house and foundation by hand.
16. In Shakesides, his expedition days behind him, Laing returned to writing and publishing. Of his lifetime body of writing, most of it was done at Shakesides. He continued writing well into his nineties.
17. As stated in the Statement of Significance:

Shakesides is valued for being built and named by internationally prominent and respected teacher, author, ornithologist, naturalist, collector and illustrator of flora and fauna, photographer, farmer, sportsman and artist, Hamilton Mack Laing (1993-1982). Laing’s presence here attracted a resident community of ornithologists and naturalists to Comox starting in the 1920s, which put Comox on the map as a centre for bird watching to this day. Apart from ornithology, Laing’s participation in 10 major expeditions for the National Museum of Canada laid some of the important groundwork for today’s environmental science. His early concern for the local environment and the health of the Georgia Strait was reflected in one of the earliest studies on the impact of oil spills in the Strait. Laing’s continued importance lies in the strength of the friendships and professional connections made over his long

life, in his collections of birds, mammals, and plants housed in Canadian and American museums and universities, and in his influential nature stories published in newspapers and outdoor magazines.

1st Affidavit of Gordon Ralph Olsen Exhibit "E"

18. The Statement of Significance was created by the federal Historic Places Initiative as a succinct and consistent format to express heritage values of places that matter to Canadian communities.
19. The Historic Sites and Monuments Board of Canada is currently reviewing a nomination to designate Mack Laing as a national historic person.

[9] The MLHS was established in 2014 after members of the society noticed a demolition sign on Baybrook, which as outlined was Mack Laing's original house where he lived prior to building Shakesides. Baybrook, was ultimately demolished in 2015, but the demolition of Shakesides was delayed when the Attorney General became involved. As I have said, since that time the Attorney General has worked with the Town to develop terms of an Order that permit variation of the terms of the Trust if the court agrees.

[10] As set out above, (Hamilton) Mack Laing was a noted naturalist and long-time resident of Comox who lived to the age of 99.

[11] By an indenture dated September 19, 1973 (the Indenture), Mack Laing transferred the Park Lands to the Town in trust. At the time of the transfer, Mack Laing was residing in Shakesides on the Park Lands.

[12] The Indenture transferred land legally described as Lot 2, District Lot 87, Comox District, Plan 3387, except that part included within the boundaries of Plan 16654 (the "Park Lands") under certain conditions. Those conditions sought to preserve the Park Lands as a public nature park and directed that:

The (Park Lands) shall be used as a public nature park, for recreation and conservation purposes, and in accordance with the said use, the said property shall be left to the greatest extent possible in its natural state, the natural flora be left undisturbed and to be encouraged, additional plantings (if any) to be suited to and in keeping with the setting of a nature park; and the use of any buildings now constructed upon said property or any replacing present structures shall be restricted to the comfort and convenience of those

members of the public wishing to enjoy the quiet beauty of a nature park, and in every way possible, any building constructed upon the said property shall be of design and decoration to harmonize with the nature park setting; provided however that the Grantee at any time and from time to time may make use of the said property or any part thereof and of any building constructed thereupon for the enjoyment of a prescribed group of people, but in no event shall any such special use exclude the general public from the use for recreation and conservation purposes of the said property as a nature park or in any way whatsoever adversely affect such use.

[13] The Indenture did not require as a trust condition that the Town retain and maintain Shakesides. Furthermore, the Indenture provided that the Park Lands “shall be left to the greatest extent possible in its natural state”, although the document did contemplate new structures replacing existing structures so long as their use “shall be restricted to the comfort and convenience of those members of the public wishing to enjoy the quiet beauty of a nature park”.

[14] The Indenture also did not include any terms:

- (a) requiring the Town to construct a museum or fund any particular program;
- (b) providing that the gift in trust of the Park Lands was conditional on the Town's Council making any budgetary commitments; or
- (c) reserving, or purporting to reserve, any power under which the settlor could amend the Trust.

[15] Concurrent with the execution of the Indenture, the Town and Mack Laing entered into a memorandum of agreement under which Mack Laing was granted the “absolute and unfettered use” of the Park Lands for the rest of his life, rent free, and with the Town paying all property taxes that are imposed.

[16] Following the transfer of the Park Lands, Mack Laing continued to live in Shakesides despite the Indenture requiring the Park Lands be used as a public nature park.

[17] Mack Laing lived in Shakesides until his death in 1982.

[18] In 1983, the Town began operating the Park Lands as a municipal park known as Mack Laing Park or Mack Laing Nature Park. Mack Laing Park is a waterfront park located towards the Southern edge of the Town's boundaries. Mack Laing Park is one of the 25 parks and playing fields funded by the Town and maintained by the Town's staff.

[19] Mack Laing's will was executed on May 6, 1981. The will appoints his nephew and a friend as Executors and Trustees. The will provides for a number of specific requests including Mack Laing's original nature drawings and paintings to the Town of Comox (para. (b)).

[20] The relevant provision relating to the trust monies at issue in this Petition (the Will Trust) reads as follows:

(l) To pay or deliver over all the rest and residue of my estate to the Town of Comox, upon trust, so that the funds so bequeathed will be used for the improvement and development of my home as a natural history museum, twenty-five (25%) per cent of the cash realized to be used for capital improvements to the dwelling house, and the remaining seventy-five (75%) per cent to be invested by the Town, the income earned thereupon to be applied towards the annual operating expenses of a natural history museum, it being my desire, as I have indicated to Alderman Alice Bullen, that my home remain on the said property, in my belief that the upstairs could be renovated to provide accommodation for a resident caretaker for the park, that the present living area could be developed for use as a natural history museum, and the basement adapted as a museum storage area, craft shop or meeting place. Having these objectives in mind, I am hopeful that the said Town may be agreeable to retaining such of my art works and chattels as will contribute to the development of my home along such lines, the sale moneys realized from any items not so retained to be used towards adaption of the building as suggested aforesaid, or in the development of the nature park; and I particularly request that the Town confer with the said Alice Bullen in dealing with my dwelling and chattels to attain these objectives.

[21] Town records show that on or about March 31, 1982, the Town received \$45,000.00 from the executor of Mack Laing's estate. The Town says that this is the earliest date on which the Trust could have been settled. However, in the absence of a resolution of the Town's Council accepting the trust conditions applicable to the money, it is likely that the Trust was settled later.

[22] The Town later received \$2,887.98 from the sale of furnishings, Mack Laing art reproductions and books, and donations, which were added to the trust funds.

[23] Matt Laing died on the 15th of February of 1982. The evidence of the Town is given primarily through the Administrator of the Town of Comox, Richard Kanigan. Mr. Kanigan has been Administrator of the Town since 2003, and has been an officer or employee of the Town since 1996. He was not with the Town in the early 1980's when the events that give rise to the Trust arose, however, he has searched the Town records in order to outline the Town's response.

[24] As outlined above, the parklands related to the Indenture, have been operated as a municipal park, called Mack Laing Park since 1983. There is signage that recognizes Mack Laing and a photograph of the sign was included in the material filed. The plaque reads in part:

In 1973, he gave his home with this beautiful land to the Town of Comox, in trust, in perpetuity, for conservation and to encourage appreciation of nature.

[25] As noted, the Town received a bequest of \$45,000.00 under the will of Mack Laing. Added to that bequest, was the sum of \$2,887.98, which roughly represents the proceeds from the sale of furnishings, Mack Laing art reproductions and books.

[26] Mr. Kanigan, and the Director of Finance for the Town, have both filed Affidavits detailing the efforts the Town has made to review not only the financial records, but the Town records generally. During the period 1982 to 2015, the Town rented Shakesides to tenants. Since 2014, Shakesides has been unoccupied. The Town has had to deal with vandalism and break-ins and the photographs of Shakesides in the Petition materials show that it has been boarded up.

[27] The records indicate that there were some questions from the public about how the Town was using the trust funds in 2001 and 2002. From 2003 until 2014, the matters of the use of Shakesides or of the trust funds did not come before Council. As I have indicated, Shakesides was being rented until 2015.

[28] In 2014, the MLHS presented a proposal regarding Baybrook. In essence, the proposal suggested restoring Baybrook as a heritage destination to restore it as a nature interpretive center similar to the Swan Lake Nature Center in Victoria. The proposal was intended to address the portion of Mack Laing's will that suggested his home be used as a "natural history museum".

[29] The Town Council sitting as a whole, considered the proposal in early 2015. The Committee of the Whole recommended that the Town proceed with demolition of Baybrook and Shakesides.

[30] While Baybrook was ultimately demolished, the Town delayed the demolition of Shakesides which was set for the week of August 4, 2015 in response to enquiries from the Attorney General of British Columbia regarding the Trust.

[31] After these inquiries, an Advisory Committee of the Town was struck, and prepared a Report which was accepted by the Town.

[32] On July 20, 2016, the Town adopted the following resolutions:

That the Town receive the Mack Laing Nature House Advisory Committee provisional report and accept the recommended course of action of disassembling the Mack Laing House, and use the site and some materials to create a viewing platform in conjunction with the existing walkway.

That staff be directed to begin the process to modify, if necessary the terms of the Trust.

[33] Between that period of time and today, the Town has consulted with the community, with the MLHS, and with the K'omoks First Nation.

[34] The Town commissioned a redesign of the proposed Nature Park Platform in order to address the concerns expressed by the K'omoks First Nation and for the purpose of minimizing land alteration and disturbance within Mack Laing Park.

[35] The Town now seeks to vary the Trust to allow for construction of the viewing platform and to remove Shakesides above its foundation, specifically the portion above grade in order to construct the Nature Park Platform, on the foundation.

[36] On December 1, 2021 the Town Council adopted the following resolution:

THAT Further to the resolutions of Council made February 1, 2017, December 6, 2017, March 6, 2016 and May 15, 2019 in relation to the Town of Comox's application to vary the trust applicable to the money held by the Town of Comox pursuant to the will of (Hamilton) Mack Laing that was probated on March 2, 1982, the Council of the Town of Comox resolves THAT:

- (a) Council approve the design modification of the proposed viewing platform to minimize disturbance to the Great Comox Midden by removing the requirement for a foundation on the viewing platform and not constructing any new trails and paths;
- (b) Council receive the Preliminary Class D Construction Budget for the viewing platform prepared by Kinetic;
- (c) Council authorize a Town contribution towards the budgeted costs above the trust amount, house demolition, and landscape and trail restoration if the court varies the trust applicable to the money given by Mack Laing's will to allow for the construction of the proposed viewing platform; and
- (d) Council authorize the payment of any additional amounts towards capital costs for the project to ensure that at least \$25,000 from the Trust remains available to be transferred to the viewing platform reserve fund contemplated by the Town's proposed variation before the court.

[37] On December 12, 2021, the Town's Council passed the following resolution:

THAT Further to the resolutions of Council made February 1, 2017, December 6, 2017, March 6, 2016 and May 15, 2019, and December 1st 2021 in relation to the Town of Comox's application to vary the trust applicable to the money held by the Town of Comox pursuant to the will of (Hamilton) Mack Laing that was probated on March 2, 1982, the Council of the Town of Comox resolves That:

- (a) Council has received and approved the Preliminary Class D Construction Budget from Kinetic dated October 28th 2021 for a total estimate of \$326,281 to be included in the Town's application to vary the trust.

[38] As noted above, the estimate for the construction of the Platform is \$326,281.00. The Town's amended Petition details how the trust funds were dealt with by the Town. As noted at para. 24, as of December 15, 2017, as a result of the Town's repaying \$178,000.00 into the trust funds, the trust funds amounted to about \$256,305.98. As of December 31, 2021, the trust funds amounted to \$271,945.01. The Town proposes paying for the shortfall of construction costs.

[39] There are a number of steps that have to be completed before the Nature Park Platform can be completed. It is difficult for the Town to estimate when the Nature Park Platform can be completed, even with the Town acting diligently, given that many of these steps involve third parties.

[40] If the court permits the variation of the Trust, the steps that have to be completed are set out in the Town's submissions and include the following:

- (a) considering the adoption of a bylaw establishing a reserve fund for maintenance of the nature park platform;
- (b) commissioning of the design and content of the natural history education panels;
- (c) commissioning a final design of the Nature Park Platform, including incorporating any features or specifications arising from the order varying the Trust;
- (d) retaining one or more eligible consulting archaeologists to assist with permit applications to the Archaeology Branch and compliance with K'omoks First Nations' Cultural Heritage Policy;
- (e) applying for and obtaining permits, including *Heritage Conservation Act* permits, necessary to demolish a portion of Shakesides and construct the Nature Park Platform;
- (f) retaining a fabricator to build the natural history education panels;
- (g) retaining contractors and suppliers to perform the removal and construction work at the site of Shakesides; and
- (h) performing, through contractors, the removal, construction and panel installation work.

Legal Basis

[41] The Town is applying under s. 184 of the *Community Charter* to vary the Trust created by Mack Laing's will.

[42] The Town and the Attorney General both take the view that there are two trusts created by this background, the Park Trust created by the 1973 Indenture, and the Will Trust created by the 1982 will. It is the Will Trust that the Town applies to vary. As I have said, the total funds available to the Town when Mack Laing died were approximately \$48,000.00. These funds were never sufficient, even then, to convert Shakesides to the kind of museum that the provision in the will and the MLHS contemplate.

[43] I agree with the submissions of The Town and the Attorney General that there are two trusts created by two documents, the Indenture and the will. This application to the Court relates to the monies bequeathed as part of the residue under the will. These trusts are separated in time by almost ten years. As noted in submissions, by the time the Will Trust was created, the Town already owned the land and Shakesides.

[44] The Town's petition, seeking to vary the Will Trust, is an application authorized by s. 184(2) of the *Community Charter*. Section 184 of the *Community Charter* provides as follows:

184 (1) All money that is held by a municipality and is subject to a trust must be invested in accordance with section 183 until it is required for the purposes of the trust.

(2) If, in the opinion of a council, the terms or trusts imposed by a donor, settlor, transferor or will-maker are no longer in the best interests of the municipality, the council may apply to the Supreme Court for an order under subsection (3).

(3) On an application under subsection (2), the Supreme Court may vary the terms or trusts as the court considers will better further both the intention of the donor, settlor, transferor or will-maker and the best interests of the municipality.

(4) Section 87 [*discharge of trustee's duty*] of the *Trustee Act* applies to an order under subsection (3).

[45] The Town and the Attorney General agree and it is clear from the will that the Trust is a charitable purpose trust. A clear reading of the will provision makes it clear that Mack Laing intended to create a trust, the subject matter of the trust was the residue of his estate, and the trust was to provide the public benefit of a natural history museum.

[46] The recent decision of the Court in *West Vancouver (District) v. British Columbia (Attorney General)*, 2020 BCSC 966 is the leading case on applications to vary a charitable purposes trust under s. 184 of the *Community Charter*.

[47] Many of the background facts in *West Vancouver* are similar to the present case. The facts are summarized by Justice Edelman at paras. 1-4:

[1] Clara Brissenden died in 1990, leaving a will devising a property to the Corporation of the District of West Vancouver (the “District”) for use as a park. The District now seeks to sell a portion of the property to help finance the purchase of two other properties that will be added to Ambleside Park on the waterfront. The District takes the position that the proposed sale is consistent with the charitable purpose of the trust and seeks this Court's advice, opinion, or direction to that effect or a declaration under s. 86 of the *Trustee Act*, R.S.B.C. 1996, c. 464 authorizing the sale as part of an administrative scheme. In the alternative, the District seeks a variation of the trust under s. 184 of the *Community Charter*, S.B.C. 2003, c. 26.

[2] Charitable purpose trusts are enforced by the Crown, through the Attorney General, as part of its inherent *parens patriae* responsibility for charitable activities: *Rowland v. Vancouver College Ltd.*, 2001 BCCA 527 at para. 54. The Attorney General opposes the petition, taking the position that the proposed course of action would be contrary to the purpose of the trust. The Attorney General also seeks an accounting by the District in respect of money collected from the rental of a house on the property and a ruling as to whether that money is held in trust.

Factual Background

[3] The late Pearley and Clara Brissenden had a residence on some 2.4 acres of land adjacent to the Upper Levels Highway in West Vancouver, BC (the “Brissenden Property”). Aside from the house, the Brissenden Property was largely undeveloped and covered by mature second growth forest. Mr. Brissenden predeceased his wife, who died in June 1990. Ms. Brissenden's will devised the Brissenden Property to the District, which took possession of it in December of that year.

[4] Between December 1990 and 2018, the District did not develop the Brissenden Property aside from renting the house to a caretaker and naming it “Brissenden Park”, although no sign was erected on the Brissenden Property identifying it as a park.

[48] There are distinguishing features in this case from *West Vancouver* including that the Trust before this court relates to money, in *West Vancouver* the District sought to sell off portions of the lands, whereas in this case the Town seeks to enhance the use of the Mack Laing park lands by constructing a Viewing Platform on the foundation of Shakesides.

[49] In *West Vancouver*, the Court explained that s. 184 of the *Community Charter* provides a remedy that is more flexible than the administrative scheme remedy that may be sought by Trustees generally under the *Trustee Act*. Justice Edelman explained commencing at para. 80:

[80] Section 184 of the *Community Charter* itself is composed of four subsections under the heading “Property accepted in trust”. The first and last subsections clearly frame the section in the context of the law of trusts. Subsection 184(1) requires money held in trust by a municipality to be invested in a manner that would appear consistent with the obligations of a prudent trustee. Subsection 184(4) makes direct reference to the *Trustee Act*:

(4) Section 87 [*discharge of trustee's duty*] of the *Trustee Act* applies to an order under subsection (3).

[81] Section 87 of the *Trustee Act* protects trustees who act on the “opinion, advice or direction” of the court:

87 (1) The trustee, executor or administrator, acting on the opinion, advice or direction given by the court, is deemed, so far as regards his or her own responsibility, to have discharged his or her duty as trustee, executor or administrator in the subject matter of the application.

(2) This Act does not extend to indemnify a trustee, executor or administrator in respect of an act done in accordance with the opinion, advice or direction referred to in subsection (1) if the trustee, executor or administrator has been guilty of fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

[82] The application of s. 87 of the *Trustee Act* to an order under s. 184(3) of the *Community Charter* frames the order in the context of the well-established obligations and protections of a trustee. Given the context in the provision itself, the legislator would presumably have been aware of the mechanism under s.86 of the *Trustee Act* and chose to create a different mechanism. The use of the word “order” in s. 184(3) of the *Community Charter* further confirms that the mechanism is intended to be distinct from the “opinion, advice or direction” described in s. 86 of the *Trustee Act*.

[50] Section 184(2) of the *Community Charter*, requires, as a pre-condition to an application to the Court, that the Town’s Council form an opinion that the terms imposed by the will-maker are no longer in the best interests of the municipality. In *West Vancouver* Justice Edelmann said:

While I agree that the Court is not sitting in judicial review of the Council's opinion that the trust is “no longer in the best interests” of the District, I do not accept that the legislator's framework can simply be ignored. Although the temporal wording of s. 184(2) is not imported into s. 184(3), in my view the nature of the change of circumstances is a valid consideration in the exercise of the Court's discretion under s. 184(3). There is an implicit assumption in the wording of the statute that the trust was, at some point in the past, in the interests of the municipality. It is indeed not unreasonable for the legislator to presume that at the time the municipality accepted property in trust, the trust was perceived to be in its best interests.

[51] As Justice Edelman also noted, the role of a municipality as trustee differs from other trustees since a municipality, by its very nature, is tasked with representing the best interests of the community. In *West Vancouver*, Justice Edelman allowed a variation to the terms of the trust as proposed by West Vancouver, and found that the proposed plan demonstrated sufficient respect for the intentions of the will-maker (para. 124).

Analysis

[52] The background circumstances here make it clear that the municipality did make some efforts to fulfill the wishes of Mack Laing as expressed in his will. In 1983, when the Town first received the funds from Mack Laing's estate, the Town's Council directed the Park's committee to prepare a report on the future use of the Park Lands and the issue of a small museum in Shakesides.

[53] Around the same time, the Town used some of the funds to erect a cairn memorializing Mack Laing. As I have said, the trust funds at inception totalled approximately \$48,000.00.

[54] By 1984, it is clear that the Parks committee of the Town had concluded that the funds were insufficient to establish a museum in Shakesides.

[55] As I have said, it is clear to me that the Town's decision in that regard was reasonable. As noted in the Attorney General's submission, the cost of repairing the roof at Shakesides in 1982 was \$3,261.00, or almost a quarter of the amount that the will suggested could be used to turn Shakesides into a museum.

[56] While the Town could use Town funds to supplement the trust funds in order to pursue the museum, the Town has never chosen to pursue such a course notwithstanding interested members of the community who have advocated such a course. In that regard, of course, the elected members of the Town are tasked with balancing many considerations in determining the Town's interests.

[57] While it is clear that the current application before the court could have been made many years ago, the application that is brought now is intended to address a longstanding problem: the money Mack Laing gave to the Town has always been insufficient to establish and maintain a natural history museum on the Park Lands. As noted, those lands are already owned by the Town and are subject to a different trust.

[58] Section 184(3) of the *Community Charter* requires the Court to consider a variance to the Trust that would also further the intention of the will-maker. As Justice Edelman explained in *West Vancouver*:

[97] The “intention of the [settlor]” is a clear reference to well-established principles in the law of charitable trusts. The established approach to identifying the settlor’s intentions are set out in the first portions of these reasons. There is no reason to believe the legislator intended any derogation from that approach.

[59] The Town has admirably fulfilled the wishes of Mack Laing related to the Park Trust. It appears from all of the evidence presented on the hearing, that the Park is maintained for the enjoyment of the community in a natural state as Mack Laing intended. The issue that I must determine relates to the Will Trust, and the use of the trust monies. As noted in a 2001 Town internal memo, “... No natural history museum has been established to date because the house is old, inadequately powered and subject to flooding in the basement.”

Conclusion

[60] It is clear that the trust funds were never sufficient to turn Shakesides into a natural history museum as Mack Laing wished in his will. However, it is also my view that the last portion of the will clause in question recognized that some variation to his wishes may have to be made by Council. In that regard Mack Laing asked that Alderman Bullen be consulted. It does appear that in the early 1980’s there was some consultation.

[61] In my opinion, the proposal before that court, that a nature viewing platform built on the foundation of Shakesides, admirably reflects the general wishes of Mack

Laing respecting the Park Lands and the role of Shakesides relative to the land. The proposal enhances the current Mack Laing Park, and allows Mack Laing's role as a pioneering naturalist to be respected and honoured. As noted in argument, members of the public will be able to stand on the Nature Park Platform when it is constructed, and enjoy the same views and vistas that Mack Laing enjoyed when he lived at Shakesides.

[62] Although community-minded members have indicated they are willing to volunteer services to evaluate and refurbish Shakesides, I have concluded that such an approach would prolong the litigation and in any event, does not recognize fundamental problems with the original concept of Shakesides as a museum. I am persuaded that Shakesides, with many structural limitations in size and by virtue of its basement being prone to flooding, was never suitable to be a museum. In that regard, the will of the community, as reflected by the Town, must be respected.

[63] In my opinion, as part of the information panels, the history of Shakesides including photographs, along with some of the drawings of Mack Laing, should comprise at least three of the information panels.

[64] As I expressed, in the hearing, I am concerned that Shakesides should not be demolished to its foundation, until all preliminary steps to construction of the Nature Platform have been completed and there is certainty that the Platform will in fact be constructed. In that regard, I am ordering that construction, when it does start, should be completed within eighteen months of the construction start.

[65] With these variations, the Order sought by the Town, and supported by the Attorney General is granted.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power