



No. **S09384**  
**COURTENAY REGISTRY**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

**TOWN OF COMOX**

**PETITIONER**

**AND:**

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

**RESPONDENT**

**PETITION TO THE COURT**

**ON NOTICE TO:** Attorney General of British Columbia

c/o Deputy Attorney General, Ministry of Justice, PO Box 9290 Stn  
Prov Govt, Victoria BC V8W 9J7

**This proceeding has been started by the Petitioner for the relief set out in Part 1 below.**

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, 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:	420 Cumberland Road, Courtenay, BC V9N 2C4
(2)	The ADDRESS FOR SERVICE of the Petitioner:	c/o Young Anderson 1616 - 808 Nelson Street Box 12147, Nelson Square Vancouver, BC V6Z 2H2
	Fax number address for service ( <i>if any</i> ) of the Petitioner:	604.689.3444
	Email address for service ( <i>if any</i> ) of the Petitioner:	Not applicable.
(3)	The name and office address of the Petitioner's lawyer is:	Michael Moll Young Anderson 1616 - 808 Nelson Street Box 12147, Nelson Square Vancouver, BC V6Z 2H2

### CLAIM OF THE PETITIONER

#### Part 1: ORDER(S) SOUGHT

1. The trust ("Trust"), particulars of which are set out in the Part 2 of this petition, be varied to better further both the intention of the will-maker and the best interests of the Petitioner, the Town of Comox (the "Town"), on the terms set out in Part 2 of this petition.
2. Such further and other relief as this Honourable Court deems just.

## Part 2: FACTUAL BASIS

### *The Parties*

1. The Town is a municipality under the *Community Charter*, S.B.C. 2003, c. 26 and has its municipal hall at 1809 Beaufort Ave, Comox, BC, V9M 1R9.
2. The Respondent, the Attorney General of British Columbia, exercises the *parens patriae* jurisdiction of the Government. The Respondent's address for service is: c/o Deputy Attorney General, Ministry of Justice, PO Box 9290 Stn Prov Govt, Victoria BC V8W 9J7.

### *The Trust*

3. The Trust consists of money received and held by the Town (the "Trust Funds") as a result of the bequest, in trust, of the residue of Hamilton Mack Laing's estate under his will probated on March 2, 1982 in the Supreme Court of British Columbia, Courtenay Registry (the "Will") for the purposes set out in the Will.
4. The amount of the bequest in the Will was \$45,000 in cash plus \$2,862.98 as proceeds from the sale of artwork, furnishings and other chattels. As result of interest accruing on the bequest minus deductions made by the Town, as at March 1, 2017 the Trust Funds amounted to \$78,169.00.

### *The Creation of Mack Laing Park*

5. Significant to the terms of the Will is the creation of a park known as "Mack Laing Park".
6. By an indenture dated September 19, 1973 (the "Indenture") Mr. Laing 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") to the Town under certain conditions, including that the Park Lands used "as a public nature park, for recreation and conservation purposes, and ... shall be left to the greatest extent possible in its natural state".
7. Also on September 19, 1973, the Town and Mr. Laing entered into a memorandum of agreement that Mr. Laing could continue to possess and use the Park Lands until his death. After the transfer, Mr. Laing continued to live in a single-family house known as "Shakesides" on the Park Lands and did so until his death.
8. The Town says that neither the Indenture nor the memorandum of agreement required that the Town retain Shakesides after Mr. Laing's death. The Town also says that the purpose of transferring the Park Lands was to create a natural setting within the Town's boundaries.

9. The Town has operated the Park Lands as a municipal park since 1983.

*The Will*

10. On May 6, 1981, Mr. Laing executed the Will, which includes the following term:
- (I) 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 of the cash realized 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 of the park, 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 those 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.

The Town accepted the bequest under the Will on or about March 31, 1982 and the Town says that it was at this time that the Trust was settled.

*Management of Trust Funds*

11. From March 31, 1982 to date the Town has kept the Trust Funds in one of the following: a term deposit, an interest bearing bank account, a guaranteed investment certificate or a bond fund of the Municipal Finance Authority of British Columbia.

*Shakesides*

12. The Town has not converted Shakesides into a natural history museum.
13. The Town says that at the time the Trust was created, the Trust Funds received were insufficient to convert Shakesides into a natural history museum.

14. Early in the 1980s the Council of the Town and the Town's Parks Committee posited the suggestion of converting Shakesides into a natural history museum or an education facility to operated in partnership with an established museum or post-secondary institution. No venture arose from this suggestion.
15. Upon receipt of the funds, or any time thereafter, the Council of the Town has not voted to commit general municipal funds raised from taxes imposed on local taxpayers in order to establish or operate a natural history museum at Shakesides.
16. From 1982 to 2014, the Town rented Shakesides to local residents in order to reduce the risk of vandalism to an unoccupied dwelling. The rent collected for Shakesides was not added to the Trust Funds.
17. On March 4, 2015, the Council of the Town resolved to demolish Shakesides as well as another dwelling known as "Baybrook" that the Town purchased in January 2011. Council found that the structures "are in poor condition" and resolved to "finalize the park use plan to return the property to a natural state for passive recreation use."
18. Baybrook, which incidentally was also once owned by Mr. Laing, was demolished on August 6, 2015.

*The Proposed Variation to the Trust*

19. Demolition of Shakesides did not occur, and on November 11, 2015, the Council of the Town established the Mack Laing Nature House Advisory Committee (the "Advisory Committee") to evaluate potential options for how Shakesides and the Trust Funds could be used.
20. In making its recommendation, the Advisory Committee also advised Council that the Committee did not recommend that the Town seek to operate Shakesides as a museum as contemplated by the Trust.
21. Council of the Town accepted the Advisory Committee's recommendation to disassemble Shakesides and further directed that an amendment to the Trust be sought, if necessary.
22. On July 20, 2016, the Council of the Town adopted the recommendation of the Advisory Committee that Shakesides be disassembled and its site be used to create a viewing platform to be incorporated into a walkway that is within the Park Lands.
23. On February 1, 2017, the Council of the Town by resolution found the Trust to no longer be in the best interests of the Town. The Council of the Town also

authorized an application to the Court to vary the terms of the Trust and to make a proposal as to terms of the variation.

24. The Town proposes that the Trust be varied as follows:
- (a) the Town may use the funds subject to the Trust for the purpose of constructing a viewing platform on the site of the dwelling, once that dwelling has been removed, that is located on those lands legally described as Lot 2, District Lot 87, Comox District, Plan 3387, except that part included within the boundaries of Plan 16654; or
  - (b) in the alternative, the Town be released of the obligations under the Trust upon the Town's transferring the Trust Funds to the Respondent.

### Part 3: LEGAL BASIS

1. Subsection 184(2) of the *Community Charter* permits a municipality to apply to the court to vary the terms applicable to money held in trust if a municipal council considers the terms or trust to no longer be in the best interests of the municipality.
2. Under subsection 184(3) of the *Community Charter*, the court may vary the terms or trust as the court considers will better further both the intention of the will-maker and the best interests of the municipality, and in considering an application to vary, the Town says that:
  - (a) a municipal council's determination as to what is in the best interests of the municipality should attract significant deference from the court (*Kuchma v. Tache (Rural Municipality)*, [1945] S.C.R. 234; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342); and
  - (b) where the will-maker's intention is to create a charitable purpose trust, the enforcement of such a trust is enforced by the Respondent (*Sidney and North Saanich Memorial Park Society v. British Columbia (Attorney General)*, 2016 BCSC 589).
3. Rule 2-1(2)(b) of the Supreme Court Civil Rules.
4. Rule 14-1 of the Supreme Court Civil Rules.

**Part 4: MATERIAL TO BE RELIED ON**

- 1. Affidavit #1 of Richard Kanigan made 30/MAR/2017.
- 2. Affidavit #1 of Donald Jacquest made 30/MAR/2017.

The Petitioner estimates that the hearing of the Petition will take 1 day .

Date: 30/MAR/2017  
[dd/mmm/yyyy]



Signature of  lawyer for Petitioner  
Michael Moll

**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:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dated: \_\_\_\_\_  
[dd/mm/yyyy]

\_\_\_\_\_  
Signature of  Judge  Master