



SUPREME COURT OF CANADA

CITATION: S.A. v. Metro Vancouver Housing Corp.,
2019 SCC 4

APPEAL HEARD: April 25, 2018
JUDGEMENT RENDERED: January 25, 2019
DOCKET: 37551

BETWEEN:

S.A.
Appellant

and

Metro Vancouver Housing Corporation
Respondent

- and -

**Attorney General of British Columbia, Canadian Association for Community
Living, People First of Canada, Council of Canadians with Disabilities,
Income Security Advocacy Centre, HIV & AIDS Legal Clinic Ontario and
Disability Alliance BC Society**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 74)

Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis,
Gascon and Martin JJ. concurring)

REASONS DISSENTING IN PART:
(paras. 75 to 94)

Rowe J. (Brown J. concurring)

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S.A. v. METRO VANCOUVER HOUSING CORP.

S.A.

Appellant

v.

Metro Vancouver Housing Corporation

Respondent

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**Attorney General of British Columbia,
Canadian Association for Community Living,
People First of Canada,
Council of Canadians with Disabilities,
Income Security Advocacy Centre,
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2019 SCC 4

File No.: 37551.

2018: April 25; 2019: January 25.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Social law — Affordable housing — Rental assistance program — Application for means-tested rent subsidy — Disclosure of assets — Henson trust — Landlord offering discretionary rental assistance to tenants who have less than \$25,000 in assets — Tenant refusing to disclose balance of Henson trust established for her care and maintenance in application for rental assistance — Whether trust should be treated as tenant's asset for purpose of determining eligibility for rental assistance.

Contracts — Tenancy agreement — Rental assistance program — Landlord offering discretionary rental assistance to tenants — Whether landlord has contractual obligation to consider complete application for rent subsidy by tenant — Whether tenant's application was complete when it did not include value of her Henson trust — If so, whether landlord breached contractual obligation — Appropriate remedy — Availability of declaratory relief.

The respondent, Metro Vancouver Housing Corporation (“MVHC”), is a non-profit corporation that operates subsidized housing complexes. It also offers means-tested rental assistance in the form of rent subsidies to eligible tenants on a discretionary basis. Tenants wishing to receive rent subsidies must demonstrate, on an annual basis, that they meet the eligibility criteria by completing and submitting an assistance application. MVHC limits eligibility for rental assistance to tenants who have less than \$25,000 in assets.

The appellant, A, a person with disabilities, has resided in one of MVHC's housing complexes since 1992 and received rental assistance from MVHC every year until 2015. The terms of her tenancy were set out in a tenancy agreement, which required that she provide an income verification statement to MVHC once a year.

A also has an interest in a trust that was settled for her benefit in 2012. The terms of the trust provide that the two co-trustees — A and her sister — together have the discretion to pay so much of the income and capital as they decide is necessary or advisable for the care, maintenance, education, or benefit of A. The structure of this kind of trust, commonly known as a *Henson* trust, means that A cannot compel the trustees to make any payments to her and that she cannot unilaterally collapse the trust. In 2015, MVHC requested that A disclose the balance of the trust. A refused, taking the position that her interest in the trust was not an “asset” that could affect her eligibility for rental assistance. MVHC advised her that it was unable to approve her application, as in its view, her trust was an asset and its value was required for it to determine her eligibility for rental assistance.

Both A and MVHC filed petitions in the Supreme Court of British Columbia, seeking a determination as to whether A's interest in the trust is an asset for the purpose of considering her application for rental assistance. The chambers judge held that the meaning of the word “assets” as used in the tenancy agreement was broad enough to encompass A's interest in the trust, and therefore that MVHC

was entitled to require that A disclose the value of the trust before it would consider her application for rental assistance. The Court of Appeal dismissed A's appeal.

Held (Brown and Rowe JJ. dissenting in part): The appeal should be allowed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, **Côté**, and Martin JJ.: As A has no actual entitlement to the trust property under the terms of the trust, her interest in the trust is not an asset that could disqualify her from being considered by MVHC for a rent subsidy. Accordingly, A was eligible to be considered by MVHC for rental assistance in 2015.

The interpretation of the word "asset" as it is used in the assistance application is a justiciable issue that falls within the jurisdiction of this Court. Although A does not have a contractual entitlement to a rent subsidy even if she satisfies the eligibility criteria for rental assistance, the dispute between the parties is fundamentally contractual in nature. It turns on whether MVHC had a contractual obligation to consider any complete assistance application received from A, and, if so, whether the assistance application that A submitted for the year 2015 was in fact complete so as to trigger MVHC's obligation.

The tenancy agreement imposes an obligation on MVHC to consider a complete application for rental assistance submitted by A. Individual tenants of MVHC properties have no contractual entitlement to receive rental assistance and the

amount, if any, that eligible tenants might be granted is determined by MVHC on a discretionary basis. However, the tenancy agreement imposes on MVHC an obligation to consider whether a tenant's rent will be adjusted in accordance with the terms of and information provided on the assistance application. The existence of this obligation is rooted in cl. 5(a) of the tenancy agreement and in the tenancy agreement's definition of the term "unit rent". Both provisions provide that rent to be paid includes a possible decrease in rent determined in accordance with the terms of a "rental assistance agreement". Since the expression "rental assistance agreement" is not defined in the tenancy agreement, it is necessary to look at the factual matrix surrounding the formation of that contract. It is clear from the factual matrix that MVHC decides whether an applicant will be accorded a rent subsidy, that is, whether it will enter into a rental assistance agreement with a tenant, on the basis of the information provided on the assistance application. Upon entering into the tenancy agreement, the parties must therefore have understood that MVHC would determine whether to provide rental assistance to A in accordance with the terms of and information provided on the assistance application if A chose to submit one.

A's interest in the trust does not form part of her assets for the purpose of determining her eligibility to be considered for a rent subsidy from MVHC. First, the trust has the essential features of a *Henson* trust: the trustee is given ultimate discretion with respect to payments out of the trust to the person with disabilities for whom the trust was settled, the effect being that this person cannot compel the trustee to make payments to him or her, and is prevented from unilaterally collapsing the

trust. As a result, A has no enforceable right to receive any of the trust's income or capital. Her interest in the trust is akin to a mere hope that some or all of its property will be distributed to her at some point in the future. Trust arrangements such as these cannot be treated as actually enriching the person with disabilities for whom they were settled, because they are structured in a way that puts the trust property beyond that person's control.

Second, the word "assets" must be given its ordinary and grammatical meaning in light of the specific context in which it was used. A reasonable person who interprets the assistance application objectively would understand the word "assets" to mean an applicant's property or interests in property that can actually be used to discharge his or her debts and liabilities, including monthly rent. This meaning aligns with the overall purpose of the rental assistance program, which is to provide rent subsidies to tenants who are in significant financial need.

The word "assets" as it is used in the assistance application is therefore not broad enough to encompass A's interest in the trust, because this interest on its own is not something that A can use to pay her rent or to discharge her other debts or liabilities. Her financial circumstances are only ameliorated if and when the trustees actually decide to make distributions to her. For this reason, the value of the trust is not pertinent to the determination of A's eligibility to receive rental assistance and there was thus no basis for MVHC to require that A provide information regarding the value of her trust before considering her assistance application. MVHC therefore

breached its obligation to determine whether A would receive a rent subsidy in accordance with the terms of the assistance application.

All of the criteria for issuing declaratory relief are met in this case. The interpretation of the word “asset” is a justiciable issue that is real, and one in which both parties clearly have a genuine interest. Moreover, a declaration would have practical utility, as it would settle the live controversy between the parties. Accordingly, it is declared that A has a right to have her application for a rent subsidy considered by MVHC in accordance with the terms of the assistance application, and that her interest in the trust is not an “asset” for the purpose of such a determination. A may also be entitled to a monetary remedy for MVHC’s failure to consider her application. However, there is insufficient evidence in the record before the Court make a determination as to the amount of such a remedy. This issue should be remitted for determination by the court of original jurisdiction for it to analyze the evidence and grant an award of damages that would put A in the position that she would have been in had MVHC not breached its obligation. The declarations made by the Court of Appeal are set aside.

Per Brown and **Rowe** JJ. (dissenting in part): The appeal should be allowed in part and the declaratory relief granted to MVHC by the Court of Appeal should be set aside. While there is agreement with the majority’s analysis with respect to *Henson* trusts, there is disagreement with the analysis relating to MVHC’s rental assistance program. There is no legal basis on which a court can make an order as to

the operation of this discretionary program, as there is no contractual obligation requiring MVHC to consider any rental assistance application nor is MVHC bound to a particular framework for the determination of who is to receive rental assistance.

The availability of declaratory relief is premised on the actual or potential infringement of an applicant's rights. Absent a legal entitlement to anchor a declaration, one cannot be granted. In this case, A has no contractual entitlement to rental assistance under the tenancy agreement. The assistance application is a document designed to assist MVHC in running its discretionary program, and simply provides a means for MVHC to determine which applicants meet the asset cut-off it has established. The choice of who receives assistance from among individuals who satisfy the basic eligibility requirements is MVHC's to make. MVHC's discretion is not limited to consideration of the information provided in the assistance application or by the manner it distributed assistance in the past.

Furthermore, MVHC has no contractual obligation to consider A's assistance application. Clause 5(a) of the tenancy agreement and the definition of the term "unit rent" contemplate the possibility of a tenant receiving additional rental assistance, but those provisions do not impose on MVHC an obligation to consider whether a tenant should receive rental assistance. That a decrease in rent may occur does not mean that MVHC has an obligation to consider whether for any tenant it will occur. For tenants who have merely applied for rental assistance, there is no rental

assistance agreement, and therefore no contract, until it has been determined that they will in fact receive rental assistance

As the decision by MVHC of whether to provide rental assistance is not justiciable, then neither A nor MVHC can receive declaratory relief concerning that decision. Just as A does not have a right for her application to be considered, MVHC does not have a right to compel A to apply for rental assistance, nor a right to receive any information from A that will help it determine whether she should receive any assistance.

Cases Cited

By Côté J.

Applied: *Ontario (Director of Income Maintenance Branch of the Ministry of Community and Social Services) v. Henson* (1987), 26 O.A.C. 332, aff'd (1989), 36 E.T.R. 192; **referred to:** *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129; *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973; *Stoor v. Stoor Estate*, 2014 ONSC 5684, 5 E.T.R. (4th) 207; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Ewert v. Canada*, 2018 SCC 30; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44;

Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331.

By Rowe J. (dissenting in part)

Kaiser Resources Ltd. v. Western Canada Beverage Corp. (1992), 71 B.C.L.R. (2d) 236.

Statutes and Regulations Cited

Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41.

Family Benefits Act, R.S.O. 1980, c. 151, s. 1(1)(a) [rep. & sub. 654/82, s. 1(a)].

R.R.O. 1980, Reg. 318 [made under the *Family Benefits Act*, R.S.O. 1980, c. 151], s. 3(2)(a).

Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 2-1(2)(c).

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Sarna, Lazar. *The Law of Declaratory Judgments*, 4th ed. Toronto: Thomson Reuters, 2016.

Waters’ Law of Trusts in Canada, 4th ed., by Donovan W.M. Waters, Mark R. Gillen and Lionel D. Smith, Toronto: Carswell, 2012.

APPEAL from a judgment of the British Columbia Court of Appeal (Smith, Bennett and Goepel JJ.A.), 2017 BCCA 2, 410 D.L.R. (4th) 198, [2017] B.C.J. No. 70 (QL), 2017 CarswellBC 87 (WL Can.), amending a decision of Steeves J., 2015 BCSC 2260. Appeal allowed, Brown and Rowe JJ. dissenting in part.

Michael A. Feder, Patrick D.H. Williams and Connor Bildfell, for the appellant.

Eileen E. Vanderburgh and Pauline Storey, for the respondent.

Kate Hamm and Graham J. Underwood, for the intervener Attorney General of British Columbia.

Brendon Pooran and Jennifer Macko, for the interveners Canadian Association for Community Living and People First of Canada.

Dianne Wintermute and Luke Reid, for the intervener Council of Canadians with Disabilities.

Ewa Krajewska, Amy Wah and Jackie Esmonde, for the interveners
Income Security Advocacy Centre and HIV & AIDS Legal Clinic Ontario.

Geoffrey W. White, Amy A. Mortimore and David P. Taylor, for the
intervener Disability Alliance BC Society.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and
Martin JJ. was delivered by

CÔTÉ J. —

I. Introduction

[1] At issue in this appeal is whether the interest that the appellant, S.A., has
in a trust that was set up for her care and maintenance should be treated as an “asset”,
which would negatively affect her eligibility to participate in a rental subsidy program
offered by her landlord, the respondent, Metro Vancouver Housing Corporation
(“MVHC”).

[2] Resolving this issue requires this Court to consider, for the first time, the
nature of a specific type of trust — commonly known as the “*Henson* trust” — settled
for the benefit of a person with disabilities who relies on publicly funded social
assistance benefits (see: *Ontario (Director of Income Maintenance Branch of the
Ministry of Community and Social Services) v. Henson* (1987), 26 O.A.C. 332

(Div. Ct.), aff'd in (1989), 36 E.T.R. 192 (Ont. C.A.)). The central feature of the *Henson* trust is that the trustee is given ultimate discretion with respect to payments out of the trust to the person with disabilities for whom the trust was settled, the effect being that the latter (a) cannot compel the former to make payments to him or her, and (b) is prevented from unilaterally collapsing the trust under the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482. Because the person with disabilities has no enforceable right to receive any property from the trustee of a *Henson* trust *unless and until* the trustee exercises his or her discretion in that person's favour, the interest he or she has therein is not generally treated as an "asset" for the purposes of means-tested social assistance programs (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at pp. 572-73). The *Henson* trust therefore makes it possible to set aside money or other valuable property for the benefit of a person with disabilities in a manner that jeopardizes that person's entitlement to receive social benefits as little as possible.

[3] S.A. is a person with disabilities for whose benefit a *Henson* trust was settled in 2012 (the "Trust"). She resides in a housing complex operated by MVHC. In addition to providing affordable housing in the Greater Vancouver area, MVHC offers rental assistance in the form of rent subsidies to certain eligible tenants on a discretionary basis. An "eligible tenant" is one who, among other things, has less than \$25,000 in assets. At issue in this case is whether S.A.'s interest in the Trust should be treated as an "asset" for the purpose of determining whether she is eligible to be

considered by MVHC for a rent subsidy. Both of the courts below answered this question in the affirmative. S.A. appeals to this Court.

[4] I would allow the appeal. In my view, S.A. has no actual entitlement to the trust property under the terms of the Trust. Although she is a co-trustee, she has no independent, concrete right to compel any payments to be made to her or for her benefit, and cannot unilaterally terminate the Trust. Her interest in the trust property therefore amounts to a “mere hope” that the trustees will exercise their discretion in a manner favourable to her (Waters, Gillen and Smith, at p. 1204, note 155). For this reason, I conclude that her interest in the Trust is not an asset that could disqualify her from being considered by MVHC for a rent subsidy.

II. Facts

[5] S.A. is a middle-aged person with disabilities. Because her disabilities prevent her from working, she derives her income from benefits paid to her under the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41 (“*EAPDA*”).

[6] MVHC is a non-profit corporation that is wholly owned by the Metro Vancouver Regional District. Its mandate is to provide affordable housing in the Greater Vancouver area. To this end, it operates a number of subsidized housing complexes.

[7] S.A. resides in one such complex (the “Housing Complex”). MVHC’s operation of the Housing Complex is governed by two agreements with the British Columbia Housing Management Commission: an agreement on Assistance to Non-Profit Corporations (the “Operating Agreement”), which was entered into in 1982 (R.R., at pp. 8-14), and an Umbrella Agreement, which was entered into in 2013 (R.R., at pp. 21-25). These agreements impose several obligations on MVHC in managing certain properties in its portfolio. In particular, the Operating Agreement provides that persons wishing to enter into tenancy agreements with MVHC must first demonstrate that they meet certain eligibility requirements pertaining to income, number of occupants, health, and other similar criteria. Both the Operating Agreement and the Umbrella Agreement require that MVHC verify the income of tenants at the time of their initial occupancy, and annually thereafter.

[8] The Umbrella Agreement also requires that MVHC provide rent subsidies to at least 15 percent of the tenants of the Housing Complex. In order to satisfy this obligation, MVHC offers rental assistance on a discretionary basis to tenants who meet a separate set of eligibility criteria (the “Rental Assistance Program”). Tenants wishing to receive rent subsidies must demonstrate, on an annual basis, that they meet these criteria by completing and submitting an application form entitled “Additional Rent Assistance Application” (the “Assistance Application”). Given MVHC’s financial limitations, however, not all eligible applicants will actually be granted rental assistance. In other words, MVHC tenants do not have a universal entitlement to rent subsidies. The amount, if anything, that may be granted to an *eligible* tenant is

determined by MVHC on the basis of such factors as financial considerations and public housing needs.

[9] In order to “ensure that limited rental assistance funding is preserved for those who need it most”, MVHC has decided to limit eligibility for rental assistance to applicants who, among other things, have less than \$25,000 in assets (A.R., at p. 105). A document entitled “Asset Ceiling Policy” includes the following non-exhaustive definition of the word “assets”:

Assets include, but are not limited to:

- Stocks, bonds, term deposits, mutual funds, bank deposits and cash
- Real estate equity, net of debt
- Assets in which you have a beneficial interest
- Business equity in a private incorporated company including cash, GICs, bonds, stocks, real estate equity, or equity in any other tangible asset
- Significant personal assets such as collector or luxury vehicles.

Assets that may be excluded include:

- Personal [e]ffects such as a household vehicle, jewelry and furniture
- Bursaries or scholarships from educational institutions for any household member that is a current student
- Registered Education Savings Plans (RESPs), and Registered Retirement Savings Plans (excluded to preserve the intent of these investments)
- Trade and business tools essential to continue currently active employment, such as equipment, tools and business use vehicles
- Assets derived from compensatory packages from government, for example, Indian Residential Schools Settlements and Japanese Canadian Redress.

(A.R., at pp. 105-6)

[10] The Assistance Application requires that applicants disclose whether they have assets in excess of \$25,000, although the definition of “assets” from the Asset Ceiling Policy is not incorporated into the form. The Assistance Application indicates that complete applications will be processed within one week to thirty days, but makes clear that incomplete applications will not be considered at all. Applicants must also agree to provide MVHC with any materials that may be requested to support the information provided on the form.

[11] S.A. has resided at the Housing Complex since 1992. The terms of her tenancy at all material times were set out in a tenancy agreement dated January 5, 2015 (the “Tenancy Agreement”). The Tenancy Agreement required that S.A. provide an income verification statement to MVHC once a year, or at any time if there was a change in her annual income or in the composition of her household (cl. 8(a)). She has complied with this obligation every year since her tenancy began.

[12] After S.A. began residing at the Housing Complex in 1992, she received rental assistance from MVHC every year until 2015 (A.R., at pp. 68 and 77). The last time rental assistance was accorded was on May 24, 2014, when MVHC granted her \$629 in monthly subsidies, thereby reducing her rent from \$894 to just \$265 per month (A.R., at p. 92). As I will explain below, however, MVHC has not provided her with rental assistance since June 2015.

[13] After S.A.'s father passed away, the terms of his will — to the effect that S.A. was to inherit one third of the residue of his estate — were varied by a court order in 2012 pursuant to the *Wills Variation Act*, R.S.B.C. 1996, c. 490. The court order directed that S.A.'s share of her father's estate be placed in a trust for her care and maintenance.

[14] The terms of the Trust (which are reproduced as Appendix A to these reasons) provide that the two co-trustees — S.A. and her sister (the "Trustees") — have the discretion to pay so much of the income and capital as they "decide is necessary or advisable for the care, maintenance, education, or benefit of [S.A.]" (art. 1(a)(iv)(A)). Should anything remain in the Trust upon S.A.'s death, that remainder is to pass to the person(s) designated by S.A. in her will or, if she failed to make such a designation, to those who would have inherited S.A.'s estate if she had died intestate. However, S.A. cannot appoint either herself or any of her creditors as a remainder beneficiary. The terms of the Trust also confer on S.A. the power to appoint someone to replace her sister as co-trustee, should her sister be unwilling or unable to act in that capacity (art. 1(a)(ii)).

[15] In a letter dated February 13, 2015, MVHC requested that S.A. disclose the current balance of the trust fund, together with details of all disbursements that had been made since it was established. This request was made as part of MVHC's 2014 annual income review. S.A.'s reply, in a letter dated March 11, 2015, reads as follows:

In your letter dated February 13, 2015 (attached), you requested information about the current balance of the [Trust]. As Metro Vancouver Housing Corporation (MVHC) is aware, this is not an asset which could affect my eligibility for a housing subsidy. I am not aware of any rationale for MVHC requiring this information from the trustees. I can confirm that no disbursements have been made to me from the [Trust] since it was established. This information has previously been provided to Ms. Lynn LeNobel, counsel for the MVHC.

(R.R., at p. 1)

[16] S.A. submitted her Assistance Application for 2015 along with that letter. In response to the question of whether she had assets in excess of \$25,000, she ticked the box labelled “No”, and wrote: “None that affects my eligibility. Please see my letter to you dated March 11, 2015 & previous correspondence from my legal representatives” (A.R., at p. 108).

[17] In a letter dated April 13, 2015, MVHC advised S.A. that it was unable to approve her application because she had failed to provide specific information regarding her eligibility under the Rental Assistance Program. The relevant portion of that letter reads as follows:

Pursuant to MVHC’s Asset Ceiling Policy, assets include “assets in which you have a beneficial interest”. Your discretionary trust is an asset in which you have a beneficial interest and is not one of the types of assets listed in the policy as excluded for the purposes of the asset limit. As MVHC has previously advised, further information regarding the trust, including the value of the trust, is required in order for MVHC to make a determination as to whether the asset should nevertheless be excluded in determining your eligibility for Additional Rent Assistance from MVHC.

MVHC has allowed an exceptionally long period of time for you to provide this information, both to respect the grieving period following the

loss of your father and to enable you to seek advice from advocates and advisors regarding the Additional Rent Assistance program requirements. Indeed, your 2014 Additional Rent Assistance Application review remains open and outstanding; although MVHC has nevertheless continued to provide Additional Rent Assistance on the understanding that the requisite information would ultimately be provided. As we understand that information on the value of the trust will not be provided, MVHC is unable to approve your current application for Additional Rent Assistance. [Emphasis added.]

(A.R., at p. 98)

[18] S.A. ceased receiving rental assistance as of June 1, 2015, and since then she has been paying her full rent under protest. Her payments in June and July 2015 were assisted by a “crisis supplement” granted to her under the *EAPDA*. Counsel for S.A. advised this Court that payments from the Trust have helped S.A. in covering all other rent shortfalls (Transcript, at pp. 23-24).

III. Judicial History

A. *The Petitions*

[19] In July 2015, S.A. commenced proceedings against MVHC under rule 2-1(2)(c) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which provides that a petition may be filed where “the sole or principal question at issue is alleged to be one of construction of . . . [an] oral or written contract or other document”. The core of S.A.’s case, as laid out in her amended petition, was that her interest in the Trust is not an “asset” within the meaning of that word as it is used in either the Tenancy Agreement or any agreement created by the completion of the Assistance

Application — the implication being that MVHC had no right to demand that she provide information regarding the value of the Trust or to refuse to consider her 2015 Assistance Application when that information was not forthcoming (A.R., at p. 70). By way of remedy, S.A. sought, among other things, declaratory relief and an order directing MVHC to refund S.A. “the difference between the market rent of \$894 per month [that was] paid by [S.A.] or on [her behalf] for the months of June and July 2015 and the subsidized rent of \$265 for those months” (A.R., at p. 67).

[20] MVHC filed a petition of its own in August 2015, also under rule 2-1(2)(c) of the *Supreme Court Civil Rules*, in which it sought a declaration to the effect that the Rental Assistance Program “requires [the] disclosure of the value of assets in which the applicant for rent assistance has a beneficial interest, including any type of discretionary or non-discretionary trust” (A.R., at p. 48). It also sought an order that S.A. disclose the value of the Trust if she wished to be considered by MVHC for rental assistance.

B. *Supreme Court of British Columbia (2015 BCSC 2260)*

[21] The two petitions were heard together on October 9, 2015. Steeves J. (the “Chambers Judge”) dismissed S.A.’s petition and denied the order that she sought therein. He allowed MVHC’s petition and ordered that S.A. was required to disclose the value of the Trust if she wished to qualify for rental assistance.

[22] The Chambers Judge was of the view that the issue in this case turned on the interpretation of the word “assets” as used in the Tenancy Agreement. After determining that the Asset Ceiling Policy did not form part of the Tenancy Agreement, he went on to hold that the meaning of the disputed word was broad enough to encompass S.A.’s interest in the Trust. On this basis, the Chambers Judge concluded that MVHC was entitled to require that S.A. disclose the value of the Trust before it would consider her application for rental assistance.

C. *British Columbia Court of Appeal (2017 BCCA 2, 410 D.L.R. (4th) 198)*

[23] The British Columbia Court of Appeal dismissed S.A.’s appeal. In the view of Goepel J.A., writing for a unanimous panel, the fundamental issue in the appeal was whether MVHC could require S.A. to provide additional details regarding the Trust’s value to determine whether she was eligible for rental assistance and, if so, how much (if anything) she should receive. He also took the position that the Chambers Judge had erred in analyzing this issue through the lens of the Tenancy Agreement, observing that the issue instead turned on the interpretation of the word “assets” as used in the Assistance Application. In light of the definition of “assets” in the Asset Ceiling Policy, Goepel J.A. held that the Trust should be characterized as S.A.’s asset. On that basis, he concluded that “MVHC is entitled, pursuant to the provisions of the Assistance Application, to the further information it requested concerning the Trust to assist it in determining whether to provide rental assistance” (para. 56).

IV. Analysis

A. *Does This Appeal Raise a Justiciable Issue?*

[24] The main issue in this appeal is the characterization of S.A.'s interest in the Trust, and specifically whether MVHC can treat that interest as her "asset" for the purpose of determining whether she meets the eligibility criteria for the Rental Assistance Program. S.A. submits that it cannot do so, and on that basis takes the position that MVHC had no right to demand that she provide further information as to the value of the Trust, or to refuse to consider her 2015 Assistance Application when she did not provide the requested information. MVHC submits that the Asset Ceiling Policy defines the term "assets" as including assets in which an applicant for rental assistance has a beneficial interest. It therefore says that S.A.'s interest in the Trust is indeed an asset and that the value of the Trust therefore ought to have been disclosed on her 2015 Assistance Application. Because S.A. did not provide that information either on the form or upon MVHC's subsequent request, MVHC contends that S.A.'s 2015 Assistance Application form was not in fact complete, and that it thus had no obligation to consider her request for rental assistance.

[25] As a preliminary matter, however, MVHC submits that S.A. has not identified a legal basis that would justify awarding her either the declaration or the monetary order that she seeks. Put simply, its position is that S.A. has not demonstrated that she has either a contractual entitlement to receive rental assistance

or a right to seek judicial review of MVHC's decisions respecting the administration of the Rental Assistance Program.

[26] This case was not brought as an application for judicial review (A.R., at p. 47; Transcript, at pp. 13-14), and I agree that S.A. does not have a contractual entitlement to a rent subsidy *even if* she satisfies the eligibility criteria for the Rental Assistance Program. That being said, I am nevertheless of the view that the dispute between the parties is fundamentally contractual in nature, as it turns on (a) whether MVHC had a contractual obligation to *consider* any complete Assistance Application received from S.A. in accordance with the terms of that application, and (b) whether the Assistance Application that S.A. submitted for the year 2015 was in fact complete and in compliance with the applicable terms, so as to trigger MVHC's obligation. I will address both of these issues, in turn, below.

B. *Does MVHC Have an Obligation to Consider a Complete Application for Rental Assistance Submitted by S.A.?*

[27] On this first issue, I am of the view that the Tenancy Agreement imposes an obligation on MVHC to determine whether an adjustment will be made to S.A.'s base rent in accordance with her current income and the terms of a rental assistance agreement. The existence of this obligation is rooted in cl. 5(a) of the Tenancy Agreement, which requires that S.A. pay MVHC a pre-set amount in monthly rent. That clause reads as follows:

5. Rent and Security Deposit

(a) The Tenant agrees to pay rent calculated as follows:

- (i) Unit Rent in the amount of \$ 894.00;
- (ii) less the decrease in rent determined in accordance with the Tenant's current income and the terms of a Rental Assistance agreement, being at the time of this Tenancy Agreement the amount of \$ 629.00;
- (iii) plus Adjustments for a parking fee of \$ 0. [Emphasis added.]

(A.R., at p. 80)

The Tenancy Agreement defines the term “Unit Rent” as “the monthly rent for the Rental Unit before any increase or decrease in rent determined in accordance with the Tenant’s income and the terms of a Rental Assistance [A]greement” (cl. 2(a)(xii) (A.R., at p. 80)).

[28] Taken together, these provisions indicate that MVHC has a contractual obligation to determine whether an adjustment will be made to S.A.’s monthly base rent. This is consistent with the Umbrella Agreement, which requires that MVHC provide rent subsidies to a minimum of 15 percent of the tenants residing at the Housing Complex (R.R., at pp. 23-24).

[29] It is equally significant that whether S.A. will get a rent decrease, under cl. 5(a)(ii) of the Tenancy Agreement, is to be determined by MVHC “in accordance with [her] current income and the terms of a Rental Assistance [A]greement” (emphasis added) (A.R., at p. 80). The expression “Rental Assistance [A]greement” is

not defined in the Tenancy Agreement, although cl. 2(a)(vi) defines “Rental Assistance” as “a rent supplement provided by or through [MVHC] to a Tenant who meets eligibility criteria related to income, the number of occupants, or other criteria” (A.R., at p. 79).

[30] In order to appreciate what was meant by “the terms of a Rental Assistance Agreement”, it is therefore necessary to look beyond the four corners of the Tenancy Agreement, and at the factual matrix surrounding the formation of the contract. As this Court explained in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the factual matrix — which includes relevant background facts that the parties clearly knew or ought to have known when they entered into the agreement — can assist in ascertaining what the parties understood the words used in the agreement to mean (paras. 46-47, 58; see also G.R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 29). Since contractual interpretation is an objective exercise, the factual matrix consists only of those facts and circumstances that were or “reasonably ought to have been within the knowledge of both parties at or before the date of contracting” (*Sattva*, at paras. 49 and 58; Hall, at p. 29). Evidence of one party’s *subjective* intention therefore “has no independent place” when considering the circumstances surrounding the formation of a contract (*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at para. 54).

[31] Since 1992, S.A. has successfully applied year after year for tenancy at the Housing Complex. In addition to her tenancy application, S.A. has applied for

rental assistance each year by filling out an Assistance Application. The Assistance Application that she filled out in 2015 — which is identical to the form pursuant to which she had been granted rental assistance in 2014 — requires that tenants provide information about, among other things, their income and assets. It specifically asks that they confirm that the value of their assets does not exceed \$25,000. In completing the Assistance Application, tenants are also required (among other things) to confirm the accuracy of the information provided in it, to agree to provide MVHC with any supporting documents that may be requested, and to sign the bottom of the form. A key portion of the Assistance Application reads as follows:

Please complete this form if you are already an MVHC Tenant or Occupant and you wish to apply for additional rent assistance.

INCOMPLETE APPLICATIONS WILL BE RETURNED TO THE APPLICANT UNPROCESSED.

Please note that it can take from one week to thirty days to process a form and that **MVHC will not process incomplete forms.**

[32] There is also a section at the end of the Assistance Application in which an MVHC staff member is to indicate the amount, if any, of rental assistance for which the tenant qualifies. It is clear from this that MVHC decides whether an applicant will be accorded a rent subsidy on the basis of the information provided on the Assistance Application. The Assistance Application is thus the means through which MVHC obtains the necessary information in relation to “income, the number of occupants [and] other criteria” (Tenancy Agreement, cl. 2(a)(vi)) for the purpose of determining which tenants will receive rental assistance pursuant to cl. 5(a) of the

Tenancy Agreement. This is evidenced by the fact that the monthly rent subsidy that S.A. was granted in accordance with the information that she provided on her 2014 Assistance Application was directly incorporated into the calculation of her rent under cl. 5(a) of the Tenancy Agreement signed in 2015. Upon entering into the Tenancy Agreement, the parties must therefore have understood that MVHC would have determined whether to make adjustments to S.A.'s base unit rent *in accordance with the terms of and information provided on the Assistance Application*, should S.A. have chosen to submit one that year.

[33] It is common ground that individual tenants of MVHC properties do not have a contractual entitlement *to receive* rental assistance and that the amount, if any, that eligible tenants might be granted is determined by MVHC on a discretionary basis. However, I am of the view that the Tenancy Agreement imposes on MVHC *an obligation to consider* whether a tenant's rent will be adjusted in accordance with the terms of and information provided on the Assistance Application. In this way, the provision of rent subsidies in accordance with the administration of the Rental Assistance Program forms part of the overall contractual relationship between MVHC and tenants residing at the Housing Complex. The Chambers Judge appears to have found as much in his reasons, stating that “[t]here is no real dispute that the agreement between the parties includes the tenancy agreement itself as well as the additional rent assistance application” (para. 35).

C. *Does S.A.'s Interest in the Trust Form Part of Her “Assets” for the Purpose of Determining Her Eligibility to Be Considered for a Rent Subsidy from MVHC?*

[34] As I stated above, the central issue in this appeal is whether S.A.’s interest in the Trust is an “asset” that can negatively affect her eligibility to be considered by MVHC for rental assistance. If her interest does not fall within the meaning of the word “assets” as used in the Assistance Application, then there was no basis for MVHC to require that S.A. provide information regarding the *value* of the Trust before considering whether she was eligible for additional rental assistance in 2015.

(1) What is the Nature of S.A.’s Interest in the Trust?

[35] The Trust at issue in this case has the essential features of a *Henson* trust. The terms of the Trust do not confer any fixed entitlements on S.A., and instead provide the Trustees with ultimate discretion over any distributions that might be made out of the Trust’s income or capital for S.A.’s care, maintenance, education or benefit (art. 1(a)(iv)(A)). Importantly, they specifically provide that the Trustees, in exercising their discretion, can decide not to make any distributions to S.A. at all: art. 1(a)(iv)(B) requires that “any income not paid in any year” be added to the capital of the trust fund, and arts. 1(a)(iv)(C) and (D) — which specify how any amount that remains in the trust fund upon S.A.’s death is to be distributed — contemplate the possibility that S.A might not receive all, or even any, of the trust property.

[36] It is thus clear that, although the Trustees have an obligation to *consider* whether to make distributions out of the Trust for S.A.’s care and maintenance, they are not actually required to distribute any of the Trust’s assets either to her or for her

benefit. Unlike the beneficiary of a fixed trust (i.e. a trust where the trustee has no discretion as to distributions to the beneficiaries), S.A. therefore does not have an enforceable right to receive anything *unless and until* the Trustees decide to exercise their discretion in her favour.

[37] I would pause at this point to note that S.A.'s status as co-trustee is irrelevant to the determination of the nature of her interest in the Trust. In this capacity, she is required to reach decisions unanimously with her co-trustee, and must exercise her discretion independently, in accordance with the terms of the Trust and in compliance with her fiduciary obligations.¹ Moreover, the terms of the Trust provide S.A. with the power to name a new co-trustee in the event that her sister is unwilling or unable to act in that capacity (which is distinct from her sister's being unwilling to actually make distributions to S.A.) — and therefore make clear that this office cannot remain vacant: there *must always* be two trustees who exercise their discretion independently of one another (art. 1(a)(ii)). These limitations effectively prevent S.A. from unilaterally ordering payments out of the Trust to herself as she may please. Therefore, S.A. has no greater access to the Trust's assets than does any person with an interest in a *Henson* trust who is not simultaneously a trustee thereof. For this reason, I would not attach any significance to S.A.'s status as a co-trustee (see: Chambers Judge's Reasons, at paras. 47-48).

¹ While courts have supervisory jurisdiction over the trustee's exercise of discretion (or failure to exercise discretion), they generally do not have the authority to compel the trustees to exercise their discretion in any particular manner (Waters, Gillen and Smith, at pp. 1172-73; A.H. Oosterhoff, R. Chamber and M. McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials* (8th ed. 2014), at p. 972).

[38] Another key aspect of the Trust is that it is structured so that it cannot be unilaterally collapsed by S.A. under the rule in *Saunders v. Vautier*, according to which a beneficiary of a trust (or multiple beneficiaries acting jointly) can terminate the trust and demand that the trustee convey legal title over the corpus of the trust to him or her — but only if the beneficiary has capacity and is absolutely entitled to all the rights of beneficial ownership in the trust property (see: *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, at para. 21; Waters, Gillen and Smith, at pp. 1235-1236; A. H. Oosterhoff, R. Chambers and M. McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials* (8th ed. 2014), at pp. 334-335). Analyzing this rule in the context of the present appeal, it is important to observe that under the terms of the Trust, any remainder of the trust fund must pass to some third party upon S.A.’s death: art. 1(a)(iv)(C) and art. 1(a)(iv)(D) specifically prohibit her from appointing either herself or her creditors as remainder beneficiaries. The effect of this “gift over” is that S.A.’s interest in the Trust is not absolute, and therefore prevents her from terminating the Trust on her own in accordance with the rule in *Saunders v. Vautier* (see: *Stoor v. Stoor Estate*, 2014 ONSC 5684, 5 E.T.R. (4th) 207, at paras. 7 and 51-52).

[39] The foregoing analysis makes two things clear. First, the terms of the Trust provide the Trustees with exclusive discretion as to whether payments should be made to S.A. While the Trustees must periodically consider whether distributions should be made, they are not obliged to exercise this discretion in any particular manner. Second, the structure of the Trust prevents S.A. from terminating the Trust

on her own under the rule in *Saunders v. Vautier*. As a result, S.A. has no enforceable right to receive any of the Trust's income or capital: unless and until the Trustees exercise their discretion in her favour, S.A.'s interest in the Trust is akin to a *mere hope* that some or all of its property will be distributed to her at some point in the future.

(2) How Should the Word “Assets” As Used in the Assistance Application Be Interpreted?

[40] The next issue that must be addressed is the meaning of the word “assets” as it is used in the Assistance Application, which is the source of S.A.'s obligation to supply MVHC with information supporting the valuation of her assets if she wishes to be considered for rental assistance. To be clear, the issue in this appeal is not the meaning of the word “assets” *in the abstract*, but rather how that word should be understood in the specific context of MVHC's Rental Assistance Program. In this respect, I agree with the Court of Appeal that the Chambers Judge erred in analyzing this issue at least in part through the lens of the Tenancy Agreement: “[t]he critical document to determine whether to grant rental assistance is the Assistance Application” (para. 52).

[41] Ascertaining the meaning of the word “assets” as used in the Assistance Application is essentially an exercise of contractual interpretation. The objective of such an exercise is to give effect to the agreement struck by the parties, having regard to both “the words selected by the parties to set out their agreement, and the context

in which those words have been used” (Hall, at p. 9). As this Court recently explained in *Sattva*, this exercise requires that the “decision-maker . . . read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract” (para. 47).

[42] The Assistance Application requires applicants to indicate whether they have assets in excess of \$25,000, but does not specify what exactly is encompassed within the meaning of the word “assets”. However, a non-exhaustive definition of that word is instead set out in a separate MVHC document: the Asset Ceiling Policy. MVHC says that the Asset Ceiling Policy is the document that establishes the eligibility criteria for the Rental Assistance Program, and submits on that basis that the word “assets” should be interpreted as including “assets in which [the applicant has] a beneficial interest” (R.F., at paras. 51, 63).

[43] The Court of Appeal accepted that the Asset Ceiling Policy could be useful in interpreting the Assistance Application, stating that the former “establishes eligibility criteria for the [Rental Assistance Program]”, and therefore “provides context for the information sought in the Assistance Application” (para. 53).

[44] It is important to note, however, that the Assistance Application does not refer at all to the Asset Ceiling Policy. In particular, it does not purport to import the definition of the word “assets” set out in the latter. As S.A. pleaded in her petition, the Asset Ceiling Policy “is not incorporated into the [Assistance] Application, and the

[Assistance] Application does not advise the applicant to have regard to the [Asset Ceiling Policy] in completing the [Assistance] Application” (A.R., at p. 68. See also S.A.’s response to MVHC’s petition, A.R., at p. 73). I agree: nowhere does the Assistance Application signal to applicants that they should refer to the Asset Ceiling Policy’s definition of the word “assets” in calculating whether the value of their assets exceeds \$25,000.

[45] As explained above, the scope of the relevant factual matrix consists “only of objective evidence of the background facts at the time of the execution of the contract”, or in other words “knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting” (*Sattva*, at para. 58 (emphasis added)). In the case at bar, there is no indication that both MVHC and S.A. understood the word “assets”, as used in the Assistance Application, to have the same meaning as in the Asset Ceiling Policy.

[46] If the definition in that policy does not apply, what should the word “assets” be understood to mean? The words in the Assistance Application must be given their ordinary and grammatical meaning in light of the specific context in which they were used (*Sattva*, at paras. 47-48; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 27). With this in mind, I would observe that the word “asset” is ordinarily used to denote valuable property that a person can use to discharge debts and other liabilities. One of the definitions of the word “asset” in the Oxford English Dictionary (online) is “an

item of value owned; *spec.* an item on a balance sheet representing the value of a resource, right, item of property, etc., placed under an appropriate heading. Frequently coupled with *liability*". Similarly, Merriam-Webster (online) defines the plural word "assets" as "the entire property of a person, association, corporation, or estate applicable or subject to the payment of debts" and the singular word "asset" as "an item of value owned". The Chambers Judge referred to a similar definition from *Black's Law Dictionary* (6th ed. 1990), at p. 117 (Chambers Judge's Reasons, at para. 50):

Property of all kinds, real and personal, tangible and intangible, including *inter alia*, for certain purposes, patents and causes of action which belong to any person including a corporation and the estate of a decedent. The entire property of a person, association, corporation, or estate that is applicable or subject to the payment of his or her or its debts.

[47] This common usage of the word "asset" aligns with the overall purpose of the Rental Assistance Program — which, according to MVHC, is to provide rent subsidies to tenants who are in significant financial need. The idea is that tenants who cannot pay their rent without depleting whatever limited resources they have will be eligible for additional assistance, while tenants who have the means to pay rent will not be eligible. Therefore, the eligibility criteria associated with the Rental Assistance Program are intended to assist MVHC in identifying as potential recipients of rent subsidies those tenants for whom paying non-subsidized rent is especially burdensome because they do not have access to other financial resources to meet their monthly obligations.

[48] For this reason, a reasonable person who interprets the Assistance Application objectively and without reference to the Asset Ceiling Policy would understand the word “assets” to mean an applicant’s property or interest(s) in property that can *actually be used* to discharge his or her debts and liabilities, including the monthly rent that the applicant owes to MVHC. Given the purpose of the Rental Assistance Program, there is no reason why MVHC would concern itself with a financial resource — like a contingent interest in a trust — that an applicant cannot use in order to pay his or her monthly rent.

(3) Does S.A.’s Interest in the Trust Fall Within the Meaning of the Word “Assets” As Used in the Assistance Application?

[49] Can it therefore be said that S.A.’s interest in the Trust — which, as explained above, is akin to a *mere hope* of receiving some or all of the Trust property at some future point — falls within the meaning of the word “assets” as it is used in the Assistance Application? My view is that it cannot. Because she is unable to compel the Trustees to make any distributions to her or for her benefit, and is prevented from unilaterally collapsing the Trust under the rule in *Saunders v. Vautier*, S.A.’s interest in the Trust is entirely contingent upon the exercise of the Trustees’ discretion. Unless and until distributions are made in her favour, this interest is therefore not something she can use to pay the monthly rent that she owes MVHC, or to discharge her other debts and liabilities. In short, the mere fact that she has an interest in the Trust does not mean that her financial situation is ameliorated in any meaningful way before distributions are actually, if ever, made for her benefit.

[50] The Ontario Divisional Court's decision in *Henson*, to which the courts below referred, is instructive in this regard. The respondent in that case — Ms. Henson — was a person with disabilities who was receiving an allowance under the *Family Benefits Act*, R.S.O. 1980, c. 151. Before her father passed away, he had settled around \$82,000 into trust for Ms. Henson's benefit. Under the terms of the trust, the three trustees had the "absolute and unfettered" discretion to pay so much of the trust's income and capital to Ms. Henson as they considered advisable from time to time. Any remainder existing upon Ms. Henson's death was to be transferred to the Guelph and District Association for the Mentally Retarded, to be used for its general purposes.

[51] A regulation made under the *Family Benefits Act* (the "Regulation") provided that a recipient, like Ms. Henson, would not be eligible for an allowance under that statute if he or she had liquid assets that exceeded \$3,000 in value (Regulation 318, R.R.O. 1980, s. 3(2)(a)). The expression "liquid assets" was defined in the Regulation as "cash, bonds, stocks, debentures, an interest in real property, a beneficial interest in assets held in trust and available to be used for maintenance, and any other assets that can be readily converted into cash" (s. 1(1)(a) [rep. & sub. 654/82, s. 1(a)]). At issue in the Divisional Court was whether Ms. Henson's interest in the trust settled for her benefit fell within the definition of "liquid assets" so as to disqualify her from receiving an allowance under the *Family Benefits Act*. The unanimous panel held that it did not, reasoning as follows:

In our view, the provision of the will, set out above, gives the trustees absolute and unfettered discretion; the respondent could not compel the trustees to make payments to her if there were not funds available to her under the *Family Benefits Act*, sufficient to meet her needs. Therefore, in our view, Miss Henson does not have a beneficial interest, as that term is used in the definition of liquid assets.

(*Henson*, at p. 334)

[52] The Divisional Court's reasoning is highly applicable here, given the similarities between the definition of "liquid assets" in the Regulation and the meaning of the term "assets" as used in the Assistance Application, as well as between the structure of Ms. Henson's trust and that of the Trust at issue in this appeal. In my view, this is true despite the fact that the expression "liquid assets", as defined in the Regulation, included a beneficial interest in assets that were "available to be used for maintenance". As I mentioned above, the use of the word "assets" in the Assistance Application must likewise be understood to refer to financial resources on which the tenant can rely in order to pay the rent. In short, trust arrangements such as these cannot be treated as actually enriching the person with disabilities for whom they were settled, because they are structured in a way that puts the trust property beyond that person's control. This explains why both Ms. Henson and S.A. were entitled to receive social assistance benefits (under the *Family Benefits Act* and the *EAPDA*, respectively) despite the fact that each of them had a contingent interest in a trust set up to provide for her care and maintenance. This outcome is precisely the reason why the structure of the *Henson* trust is used as a means of setting money aside for persons with disabilities.

[53] In the case at bar, the Chambers Judge arrived at the opposite conclusion: that the meaning of the word “assets” is broad enough to include S.A.’s interest in the Trust, and that *Henson* does not “[support] a conclusion that [S.A.’s] interest in the [Trust] is not an asset under her agreement with MVHC” (para. 57). According to the Chambers Judge, S.A.’s circumstances are unlike those of Ms. Henson — who did not have the power to “compel the trustees to make payments to her” — because S.A.’s status as a co-trustee empowers her, with her sister’s agreement, “to pay herself discretionary funds from income and capital” in accordance with the terms of the Trust (paras. 47-48). This appears to be the basis for his conclusion that S.A.’s interest in the Trust amounts to “more than a mere possibility” (para. 53).

[54] With respect, I am of the view that the Chambers Judge’s understanding of S.A.’s interest in the Trust represents an error of law. As explained above, S.A.’s status as a co-trustee does not change the fact that under the terms of the Trust, she has no fixed entitlement to the assets settled therein, and is precluded from unilaterally collapsing the Trust for her benefit (see para. 39 of these reasons). Given that the Trust only provides her with what is essentially akin to a mere hope of receiving some or all of the property at some point in the future, the Chambers Judge’s conclusion that S.A.’s interest in the Trust is “more than a mere possibility” — such that it falls within the meaning of the word “assets” as used in the Assistance Application — cannot stand.

[55] I would add that these reasons should not be taken to suggest that the interest of a person with disabilities in a properly constituted *Henson* trust can *never* be treated as an “asset” for any purpose whatsoever. As the Court of Appeal observed, “[w]hether benefits from a discretionary trust must be taken into account will vary from program to program and depend upon the rules and regulations that govern eligibility for any particular program” (para. 47). The eligibility criteria associated with any social assistance program must be analyzed on their own terms to determine whether and, if so, how an interest in a *Henson* trust factors into any applicable means test.

[56] A careful reading of documents relevant to the resolution of this appeal leads me to conclude that the word “assets”, as it is used in the Assistance Application, is not broad enough to encompass S.A.’s interest in the Trust. Given that the discretion over distributions lies exclusively in the Trustees’ hands, S.A.’s interest in the trust property is in the nature of a mere hope of receiving some or all of that property in the future. Unless and until the Trustees actually decide to make distributions in S.A.’s favour, that interest is not in practice something on which she can rely to pay the rent (or to offset other debts and liabilities).

[57] In the circumstances of this case, there is no question that MVHC can ask S.A. for information concerning the structure of the Trust in order to determine whether her interest in it can be characterized as an asset within the meaning of the Assistance Application. S.A. has in fact already provided MVHC with the court order

creating the Trust. What she refuses to give MVHC is instead information on the *value* of the Trust. If her interest in the Trust could be construed as an asset, such information would need to be disclosed, as it would be relevant to the determination of whether the cumulative value of her assets exceeds the \$25,000 ceiling. Having found that S.A.'s interest in the Trust cannot be so construed, however, the value of the trust fund is not at all pertinent to the determination of her eligibility to receive rental assistance.

[58] It follows, therefore, that MVHC was not entitled to require that S.A. provide information regarding the value of the Trust or to refuse to consider her 2015 Assistance Application when that information was not forthcoming.

D. *What Is the Appropriate Remedy?*

[59] Having found that MVHC breached its obligation to determine whether S.A. would receive a rent subsidy in accordance with the terms of the Assistance Application when she refused to disclose the value of the Trust, I turn now to the question of remedy. In this Court, S.A. seeks both declaratory and monetary orders, and I will consider each in turn.

(1) Declaratory Relief

[60] S.A. requests, among other things, that this Court issue a declaration that the assets in the Trust are not hers for the purpose of the Assistance Application.

Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought (*Ewert v. Canada*, 2018 SCC 30, at para. 81; see also *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46).

[61] In my view, all of these criteria are met in this case. As I explained above (in Part A of the analysis), the interpretation of the word “asset” as it is used in the Assistance Application is a justiciable issue that falls within the jurisdiction of this Court. Moreover, that issue is real, and is one in which both parties clearly have a genuine interest. I am therefore unable to accept MVHC’s submission that no legal purpose would be served by the declaratory relief sought by S.A. In these circumstances, a declaration that the assets in the Trust cannot be treated as S.A.’s assets for the purpose of the Rental Assistance Program would clearly have practical utility, as it would settle a “live controversy” between the parties (see: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 457; *Daniels*, at paras. 11-12; and *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 833). Accordingly, I would declare that S.A. has a right to have her application for a rent subsidy considered by MVHC in accordance with the terms of the Assistance Application, and that her interest in the Trust is not an “asset” for the purpose of such a determination.

(2) Monetary Order

[62] In addition to declaratory relief, S.A. seeks an order requiring MVHC to refund her the difference between the rent that she has paid (or that has been paid on her behalf) since June 2015 and the rent that she would have paid (or that would have been paid on her behalf) had she continued to receive rental assistance, and asks that this amount be paid into a trust on the same terms, for the same beneficiaries and with the same trustees as the Trust. She submits that a monetary order to this effect would put her in the position that she would have been in had MVHC properly determined whether she should receive a rental adjustment in accordance with the terms of the Assistance Application.

[63] The interpretation to the effect that the word “assets” as used in the Assistance Application does not encompass S.A.’s interest in the Trust means that she was in fact eligible to be considered by MVHC for rental assistance in 2015. Although she may therefore be entitled to a monetary remedy for MVHC’s failure to consider her 2015 application, there is lingering uncertainty as to whether it would be appropriate for this Court to award such a remedy to S.A.

[64] As a factual matter, it is important to acknowledge that MVHC does not guarantee that eligible tenants will *actually receive* rent subsidies. As I mentioned above, how much, if anything, an eligible tenant will be granted is determined by MVHC on a discretionary basis. Indeed, the Chambers Judge made no finding as to what S.A. might have had to pay in rent since June 2015 had she continued to receive

rental assistance, and in my view, there is insufficient evidence in the record before this Court to make such a determination. Which applicants will receive rental assistance, and how much they will receive, is determined by MVHC on a discretionary basis and having regard to, among other things, financial considerations and public housing needs. I would also point out that MVHC *did not actually exercise* its discretion not to grant S.A. a rent subsidy: it simply *declined to consider* her 2015 application in response to her refusal to disclose the value of the Trust.

[65] Given the content of the factual record, the most appropriate course of action would be to remit this issue for determination by the court of original jurisdiction (i.e. the British Columbia Supreme Court). Doing so will allow both parties to point to specific evidence relating to the amount in subsidies that S.A. could have expected to receive since June 2015. And while there is no evidence in the record that S.A. applied for rental assistance in 2016, 2017 or 2018, I note that since June 2015, after MVHC made clear that it would not grant her any rental assistance unless and until she provided details about the value of the Trust, she has been paying her unit rent *under protest*.

[66] Contrary to what my colleague Justice Rowe seems to suggest at paras. 77, 86, 87, 88 and 93 of his reasons, this does not mean that the British Columbia Supreme Court can deal with this issue by simply substituting its view of what S.A. ought to have received for that of MVHC. To be clear, it cannot exercise its discretion in place of MVHC by awarding her an amount commensurate to what *it*

thinks S.A. should have received. Rather, the court at this stage must analyze the evidence and grant an award of damages that would, as far as possible, put S.A. in the position that she would have been in had MVHC not breached the obligation it owed to her. While the amount that any eligible applicant will receive by way of rent subsidies is decided by MVHC on a discretionary basis, the existence of such discretion does not mean that the court is incapable of determining, on the basis of the evidence, the proper amount to be awarded in damages for MVHC's breach of contract.

V. Costs

[67] In addition to declaratory and monetary orders, S.A. seeks special costs, calculated on a solicitor-and-client basis, in this Court and in the courts below. She submits that such a departure from the usual rule on costs is justified both by the public interest nature of this appeal and by her limited means. According to S.A., her case “unexpectedly brought about [a] change in the law” in British Columbia, and she now asks this Court to affirm the decision in *Henson* for the benefit of persons with disabilities across Canada (A.F., at para. 79). MVHC counters that the issues raised in this case are not sufficiently exceptional to meet the stringent test for an award of special costs in public interest litigation.

[68] In *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, this Court identified two considerations that can help to guide the exercise of a judge's discretion on a motion for special costs in a case involving the public interest:

First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

[Emphasis added; para. 140.]

[69] In my view, neither of these considerations supports the awarding of special costs to S.A. in the circumstances of the instant case. With respect to the first, the issue raised in this appeal is not “truly exceptional”, as it does not have a sufficiently significant or widespread societal impact. While this case has provided this Court with an opportunity to consider the nature of a *Henson* trust for the first time, it concerns one particular social program that is available only to certain tenants of MVHC properties. The issue considered above is whether S.A.’s interest in the Trust can be characterized as an “asset” *as that term is used in the Assistance Application*; whether other social assistance programs may define that term differently for the purposes of administering their own means tests is not at issue in this appeal (see para. 55 of these reasons).

[70] As to the second consideration, it cannot be said that S.A. has “no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds”. The issue raised in her petition relates directly to

her right to be considered by MVHC for rental assistance so as to reduce the amount that she owes MVHC in monthly rent in accordance with cl. 5(a)(ii) of the Tenancy Agreement. Moreover, her pecuniary interest in the litigation is evident in the fact that she seeks an order that MVHC pay the difference between the rent she paid in 2015 and the rent she would have paid had she continued to receive rental assistance.

[71] On the basis of *Carter*, therefore, I am not persuaded that it would be appropriate to grant S.A.'s request for solicitor-and-client costs. However, my view is that S.A., as the successful party, should be awarded her costs on a party-and-party basis in this Court and in the courts below.

VI. Motion to Strike

[72] MVHC brought a motion to strike several paragraphs from the factums of two interveners. First, it submits that the Canadian Association for Community Living and People First of Canada violated the terms of their intervention order by introducing new evidence, since their joint factum referenced affidavit evidence that was filed in their joint motion for leave to intervene. Those interveners have satisfactorily responded to MVHC's objection by filing an amended joint factum that no longer references the affidavits in question. I would therefore dismiss this portion of MVHC's motion to strike. MVHC also submits that the Disability Alliance BC Society ("DABC") inappropriately adduced new evidence, raised new issues and argued the merits of the appeal in its factum. DABC has conceded that certain statements and references in its factum with respect to new evidence, or evidence

lying outside the record, should be struck, and has amended its factum accordingly. In my view, Section E of Part III of its factum (paras. 24-34) should also be struck because it constitutes argument going to the merits of the appeal. I would therefore grant this portion of MVHC's motion to strike.

VII. Conclusion

[73] For all of these reasons, the appeal is allowed with costs to S.A. in this Court and in the courts below. I would set aside the declarations made by the Court of Appeal, and declare that S.A. has a right to have her application for a rent subsidy considered by MVHC in accordance with the terms of the Assistance Application, and that her interest in the Trust is not an "asset" for the purpose of such determination. The issue of S.A.'s request for monetary relief is returned to the British Columbia Supreme Court. I would also accede to S.A.'s request that MVHC pay the costs award into a trust on the same terms, for the same beneficiaries and with the same trustees as the Trust (A.R., at p. 21).

[74] I would also grant MVHC's motion to strike in part, and order that Section E of Part III (paras. 24-34) of DABC's factum be struck accordingly.

The reasons of Brown and Rowe JJ. were delivered by

I. Overview

[75] I agree with the majority's statement of the facts and with their analysis with respect to *Henson* trusts. I also agree with their disposition relating to MVHC's motion to strike portions of DABC's factum. However, I respectfully disagree as to their analysis relating to MVHC's Rental Assistance Program. In my view there is no legal basis on which a court can make an order as to the operation of this program, as there is no contractual obligation requiring MVHC to approve or even to consider any particular application, *a fortiori* to do so on the terms that the majority indicates. Accordingly, I would allow the appeal in part, setting aside the declaratory relief granted to MVHC by the British Columbia Court of Appeal. I would decline to grant the other relief sought by S.A.

[76] This appeal initially arose from two petitions heard at the Supreme Court of British Columbia. The relief that S.A. seeks has not fundamentally changed. S.A. asks for a declaration that her *Henson* Trust is not an asset for the purpose of her Assistance Application. She also seeks an order the effect of which would be that MVHC provide rental assistance to her. In particular, S.A. seeks an order that MVHC pay "the difference between (1) the rent paid by or on behalf of S.A. since June 2015 and (2) the rent that would have been paid by or on behalf of S.A. since June 2015 if she had continued to receive additional rent assistance" (A.F., at p. 82). Even though MVHC informed S.A. on April 13, 2015, that it was "unable to approve" her

Assistance Application, she asks this Court to compel MVHC to provide rental assistance to her (A.R., at p.98). MVHC seeks an order dismissing the appeal. Thus, the key issue in this case is whether a court can make an order or a declaration as to the operation of MVHC's discretionary Rental Assistance Program.

[77] The majority states that the main issue before this court is whether S.A.'s interest in the Trust can be treated as her "asset" for the purpose of determining whether she meets the eligibility criteria associated with the Rental Assistance Program. In the view of S.A. and the majority, an award of damages is in principle available once it is clarified that "asset" as it is used in the Assistance Application, does not include a discretionary trust like S.A.'s. While the majority has declined to make an award due to the lack of evidence on the record, they indicate that another court, with this clarification and further evidence, can determine how MVHC ought to have distributed its funds. The majority's position rests on two related propositions. First, that MVHC has a contractual obligation to consider S.A.'s Assistance Application, and second, that it must do so in accordance with the terms of the Assistance Application. I differ in my view as to both propositions. This is the nub of our difference.

[78] Whether declaratory relief is available is central to the disposition of this appeal. S.A. seeks it by way of r. 2-1(2)(c) of the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The availability of this relief is premised on the actual or potential infringement of an applicant's rights (*Kaiser Resources Ltd. v.*

Western Canada Beverage Corp. (1992), 71 B.C.L.R. (2d) 236 (S.C.), at para. 32). A court has “no jurisdiction to issue a declaration where there exists no right in jeopardy nor in procedural provision for the relief sought” (L. Sarna, *The Law of Declaratory Judgments*, (4th ed. 2016), at p. 87). Absent a legal entitlement to anchor the declaration — like a contractual entitlement to rental assistance — one cannot properly be granted. The majority says that MVHC has a contractual obligation to consider S.A.’s Assistance Application. But there is no provision of the Tenancy Agreement to this effect. As to what is referred to as a Rental Assistance Agreement, that is a reflection of an arrangement entered into by MVHC and a tenant only *after* MVHC has decided, in its discretion, to make a grant to an eligible tenant under its Rental Assistance Program; in short, it follows from but does not give rise to an obligation on the part of MVHC to determine whether any tenant should receive rental assistance.

II. Analysis

[79] It is important to recall the scheme by which MVHC operates. As a non-profit corporation with a mandate to provide affordable rental housing in the Greater Vancouver region, MVHC provides two forms of “means-tested” assistance to tenants. First, MVHC provides rental units to eligible tenants at favourable rates. Second, eligible tenants may apply for rental assistance to further reduce their favourable monthly rent. Both components are means-tested in that the disclosure of financial information is required for each (on separate forms). There is also an asset

“cut-off” for the Rental Assistance Program. At the time S.A. applied for rental assistance in 2015, the asset cut-off was set by MVHC at \$25,000 (A.R., at p. 105). As noted, it is MVHC that decides who among eligible applicants will receive rental assistance. While drawing on some of the same information about applicants, MVHC determines eligibility for tenancy and for rental assistance separately. Those tenants who wish to apply for rental assistance must fill out and submit an Assistance Application. Individuals who are offered rental units are not required to apply for additional rental assistance; and, even if they do and they meet the basic eligibility requirement of not exceeding the \$25,000 asset “cut-off”, they are not *entitled* to rental assistance.

[80] The discretionary nature of the Rental Assistance Program is evident upon reviewing the Tenancy Agreement and the Assistance Application. The latter is not part of the Tenancy Agreement. Under the Tenancy Agreement, S.A. has no contractual right to this additional rental assistance. Filling out an application for such assistance does not guarantee that it will be provided. The application itself states that “MVHC also offers, but cannot guarantee, additional rent assistance to eligible Tenants” (A.R., at p. 89). Further, the application does not state anything to the effect that all completed applications will be considered, nor does it specify how MVHC will take the information provided by applicants into account in determining whether rental assistance will be provided.

[81] MVHC's discretion in respect of its Rental Assistance Program is limited only by its agreements with British Columbia Housing Management Commission ("BC Housing"). The Umbrella Agreement provides that MVHC must offer rental assistance to a minimum of 15 percent of the units in each of MVHC's housing projects, and to 37 percent of the units in MVHC's entire portfolio (R.R., at p. 23). The Umbrella Agreement further requires that MVHC verify the asset and income information of individuals receiving assistance to ensure that they do not exceed the limits set by BC Housing or MVHC. MVHC is allowed to set its own asset policy as long as the asset limits it chooses do not exceed the limits set by BC Housing (R.R., at p. 29). This has the effect of setting basic eligibility requirements for rental assistance. While BC Housing could have insisted on further criteria or rules for the operation of the Rental Assistance Program, the Umbrella Agreement is otherwise silent on how MVHC may exercise its discretion. For example, it does not outline factors that MVHC is precluded from taking into account when determining which eligible tenants will receive rental assistance.

[82] In this respect, the Assistance Application, which asks for information about income and assets, is a document designed to assist MVHC in running its discretionary Rental Assistance Program. It enables MVHC to collect information that is relevant to its determination of whether any applicant meets the *basic* eligibility requirements for its assistance scheme, something that it is required to collect per its agreement with BC Housing. MVHC's request of information relating specifically to income and assets does not bar it from taking other factors into

consideration in deciding how to distribute rental assistance. At most, the terms of the application can be said to provide a means to determine which applicants meet the \$25,000 asset cut-off established by MVHC. The majority makes the fundamental error of conflating “eligibility” to be considered with “entitlement” to be awarded rental assistance. In so doing, it negates the discretionary nature of MVHC’s decision that it purports to acknowledge.

[83] In this way, individuals who satisfy the basic eligibility requirements are tenants from among whom MVHC may choose to provide additional rental assistance. The Tenancy Agreement and Assistance Application are both silent as to how MVHC is to utilize its funds. Simply put, the choice of who receives assistance is MVHC’s to make. Indeed, within the bounds of applicable human rights legislation, it is open to MVHC to determine who will receive assistance in whichever way it chooses, so long as at least 15 percent of the tenants in a given project receive assistance, and all tenants receiving assistance meet the basic eligibility requirements set out by BC Housing. In short, not being limited by contractual obligations to applicants, MVHC can proceed as it sees fit.

[84] The Rental Assistance Agreement marks the conclusion of this discretionary process. MVHC only enters into an agreement with tenants in relation to its Rental Assistance Program once it has determined that it will provide assistance to them. No contractual obligations in respect of the Rental Assistance Application or agreement exist prior to this conclusion.

A. *There is No Contractual Obligation To Consider S.A.'s Assistance Application*

[85] My colleagues concede that S.A. does not have a contractual entitlement to receive rental assistance, but they take the view that MVHC has an obligation to consider S.A.'s Assistance Application, and to do so without reference to her Trust. They go on to say that if S.A.'s assets are less than \$25,000 then a court can order that she be compensated for rental assistance that, in their view, she ought to have received. The rationale for this seems to be that it is open to a court to make determinations about how MVHC's discretion should have been exercised and that this is to be arrived at via the Assistance Application (majority reasons, at para. 33). I note that the majority expresses the point differently. In their view, a court would not decide what MVHC *should* have done, but what MVHC *would* have done. I fail to see a meaningful difference in the circumstances. Even in conjunction with evidence about other applicants, the direction that an application is to be considered "in accordance with the terms of the Assistance Application" does not reveal what MVHC would have done. If one accepts, as I do, that MVHC is not limited to consideration of the information provided in the Assistance Application or by the manner it distributed assistance in the past, then any compensatory order effectively imposes a court's view of how its mandate ought to be pursued.

[86] My colleagues rely on clauses 5(a) and 2(a)(xii) of the Tenancy Agreement to support the proposition that MVHC had a contractual obligation to consider whether to adjust S.A.'s rent in accordance with the Assistance Application.

Clause 5(a) of the Tenancy Agreement sets out the way in which the tenant's rent will be calculated: a Unit Rent amount "less the decrease in rent determined in accordance with the Tenant's current income and the terms of a Rental Assistance [A]greement" (A.R., at p. 80). "Unit Rent" is defined as "the monthly rent for the Rental Unit before any increase or decrease in rent determined in accordance with the Tenant's income and the terms of a Rental Assistance [A]greement" (clause 2(a)(xii))(A.R., at p. 80). Although these clauses contemplate the possibility of a tenant receiving additional rental assistance, respectfully, I do not see how the foregoing provisions impose on MVHC an obligation to consider whether a tenant should receive rental assistance. That a decrease in rent *may* occur does not mean that MVHC has an obligation to consider whether for any tenant, it *will* occur. At most the Tenancy Agreement states that where individuals have entered into a Rental Assistance Agreement with MVHC — that is, have been selected for receipt of rental assistance — MVHC has a responsibility to adjust their rent in accordance with *that agreement*.

[87] Building on their finding that S.A. is entitled to have her application considered, the majority goes on to conclude that this implies a specific framework binding on MVHC for the exercise of its discretion in deciding whether to grant rental assistance. In their view, MVHC is limited to consideration of the information collected in the Assistance Application. The result seems to be that if S.A. meets the basic eligibility criteria then, unless MVHC can demonstrate to a court's satisfaction why S.A. should not have received assistance, she should be granted it, as she received rental assistance in the past. But is it not for MVHC to set its own priorities

in distributing rental assistance? On what basis would a court substitute its view for that of a private entity exercising its discretion? It seems to me that MVHC, within the bounds of its agreements with BC Housing and applicable human rights legislation, is free to pursue its mandate as it sees fit.

[88] This highlights a further problem with granting declaratory relief in the circumstances. This is that contrary to the suggestion of the majority, a declaration as to the meaning of the word “asset” does not settle the “live controversy” between the parties (majority reasons, at para. 61). While the parties have disagreed about the meaning of the word “asset” throughout these proceedings, resolution of this point does not settle the matter of S.A.’s entitlement to rental assistance, the reason for which declaratory relief is sought by S.A. and seemingly granted by the majority. This is because it is not for the courts to decide how MVHC utilizes its resources. A declaration as to the meaning of the word “asset” only settles the live issue between the parties if one also accepts that, in addition to having a contractual obligation to consider completed applications, MVHC is bound to a particular framework for the determination of who is to receive rental assistance. For the reasons I have set out above, I differ from the majority on the contractual obligation issue.

[89] The situation would be different if MVHC had agreed to provide S.A. with rental assistance for a given year. If upon learning of her Trust, MVHC sought to terminate its agreement with S.A. and cease providing rental assistance to her for that term on the basis that she no longer met the basic eligibility requirements, the

definition of “asset” would settle the matter. In that case, a declaration would relate to the meaning of a term in a contractual agreement, namely the Rental Assistance Agreement. The facts here are, of course, different, as no such agreement exists.

[90] For any tenant who has merely applied for rental assistance, there is no Rental Assistance Agreement, and therefore no contract, until it has been determined that they will in fact receive rental assistance. The fact that the Tenancy Agreement refers to the Rental Assistance Agreement does not thereby incorporate into the Tenancy Agreement a particular way that applications for rental assistance are to be considered, or that they must be considered at all. In the absence of any contractual entitlement for tenants to receive rental assistance or any obligation (arising from, for example legislative direction) for MVHC to “determine whether S.A. would receive a rent subsidy in accordance with the terms of the Assistance Application” (majority reasons, at para. 59), there is no basis to grant the relief that S.A. seeks.

B. *Is MVHC Entitled to Declaratory Relief?*

[91] With the foregoing in mind, I turn to the question of whether MVHC is entitled to the declaratory relief that it was granted in the courts below. If the decision by MVHC of whether to provide rental assistance is not justiciable, then neither S.A. nor MVHC can receive declaratory relief concerning that decision.

[92] Again, any declaratory relief must be anchored in an applicant’s legal entitlements. Initially, MVHC sought declaratory relief on the basis that it was

entitled to consider information about S.A.'s Trust as part of its discretionary application process. I note that the Chambers Judge granted the declaratory relief sought by MVHC in part on the basis that the additional rental assistance application was within the agreement between the parties (paras. 35 and 57). However, absent a finding that the assistance application process and obligations pursuant to it are part of an agreement, I fail to see such an anchor. Just as S.A. does not have a right for her application to be considered, MVHC does not have a right to compel S.A. to apply for rental assistance, nor a right to *receive* any information from S.A. that will help it determine whether, in its view, she should receive any assistance. The circumstances preclude declaratory relief for both S.A. and MVHC.

[93] There are potential implications of the majority's rationale that extend beyond the facts of this case. On the basis of what seems to be an implied contractual entitlement to have one's application considered — an entitlement which I do not find to exist — the majority opens the door for another court to make an award to S.A. if that court is of the view that MVHC ought to have exercised its discretion in a particular fashion. It seems to me that this has far-reaching implications. In the future, if a claimant persuades a court, first, that a charitable or other voluntary organization has set criteria and called for applications, would this imply that the organization has an obligation to consider the applications in accordance with the criteria? and, second, if the claimant's application meets the criteria, then might not a court order the organization to provide the benefit or fund the proposed project that was the subject of the application? *A fortiori*, might not a court do so if the claimant shows there was

some “unfairness” on the part of the organization in the application of its criteria? To grant relief in such circumstances, including declaratory relief, would expand the boundaries of what is justiciable to include discretionary decisions taken by charitable and other voluntary organizations, which would be unwise. I know of no basis in law to do so.

III. Conclusion

[94] In conclusion, I would allow the appeal in part and would set aside the declaratory relief granted to MVHC by the British Columbia Court of Appeal. I would decline to grant the other relief sought by S.A. I would make no order as to costs.

Appendix A

ON THE APPLICATION of the Plaintiff, [S.A.], and on hearing counsel for the Plaintiff, Lauren Blake-Borrell, and on reading the materials filed;

THIS COURT ORDERS that:

1. the share of the Deceased's estate left to the Plaintiff be placed in a discretionary trust, and in particular, an order that paragraphs 3(a) and 3(d) of the Last Will and Testament of [J.A.], signed May 11, 2004 and admitted to probate by this Court on October 18, 2010 be varied as follows:

Paragraph 3(a)

"[S.A.]'s Discretionary Trust"

- (a) if my daughter [S.A.] survives me:
 - (i) I appoint [S.A.] and my daughter [J.W.] as the trustees (the "[S.A.] Discretionary Fund Trustees") of [S.A.]'s Discretionary Fund (as defined below);
 - (ii) if [J.W.] is unwilling or unable to act or continue to act as a [S.A.] Discretionary Fund Trustee, I appoint such person or corporate trustee as [S.A.], in writing, appoints to fill the vacancy in the office of [S.A.] Discretionary Fund Trustee;
 - (iii) any reference to "[S.A.] Discretionary Fund Trustee" or "[S.A.] Discretionary Fund Trustees" includes all genders and the singular or the plural as the context requires;
 - (iv) I direct my Trustee to transfer the balance (the "[S.A.] Discretionary Fund") of my bank account, #XXXX-XXX at Bank of Montreal, 4395 Dunbar Street, Vancouver, B.C. to the [S.A.] Discretionary Fund Trustees to be held by the [S.A.] Discretionary Fund Trustees as follows:
 - A. pay so much of the income and capital of [S.A.]'s Discretionary Fund as the [S.A.] Discretionary Fund Trustees decide is necessary or advisable for the care, maintenance, education, or benefit of [S.A.];
 - B. add any income not paid in any year to the capital of [S.A.]'s Discretionary Fund;

- C. on the date (the “Material Date”) of [S.A.]’s death, give what remains of [S.A.]’s Discretionary Fund to the person or persons in such proportions, on such trusts, and subject to such terms and conditions as [S.A.] may by [S.A.]’s Will appoint, provided that the power of appointment may not be exercised by [S.A.] in favour of [S.A.] or [S.A.]’s creditors;
- D. if the power of appointment in paragraph 3(a)(iv)C has not been exercised before the Material Date or to the extent that the power of appointment does not extend or take effect, the [S.A.] Discretionary Fund Trustees will pay the [S.A.] Discretionary Fund (or that part of the [S.A.] Discretionary Fund to which the power of appointment does not extend or take effect) among those persons who would have inherited [S.A.]’s estate if [S.A.] had died leaving only the [S.A.] Discretionary Fund (or that part of the [S.A.] Discretionary Fund to which the power of appointment does not extend or take effect) in her estate, and leaving no creditors, except under no circumstances shall the [S.A.] Discretionary Fund be considered to form part of [S.A.]’s estate;
- E. the provisions of paragraphs 4 and 5 inclusive of this Will, included the powers given to my Trustee in those provisions, apply to the administration by the [S.A.] Discretionary Fund Trustees of [S.A.]’s Discretionary Fund and when being applied, references in those paragraphs to “my estate” and “my Trustee” will be read as being to [S.A.]’s Discretionary Fund and the [S.A.] Discretionary Fund Trustees respectively;”

Paragraph 3(d)

“(d) to divide the residue of my estate into three (3) equal shares, one share for each of my children, [S.A.], [M.A.] and [J.W.], and I direct my Trustee to transfer the share for [S.A.] to the [S.A.] Discretionary Fund Trustees to be added to [S.A.]’s Discretionary Fund and dealt with as part of it;”

2. The Plaintiff’s special costs of this application be paid from her share of the Estate of [J.A.]

Appeal allowed, BROWN and ROWE JJ. dissenting in part.

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*Solicitors for the respondent: Alexander Holburn Beaudin & Lang,
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*Solicitors for the intervener Attorney General of British
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*Solicitors for the interveners Income Security Advocacy Centre and HIV
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