IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Boys and Girls Club of Greater Victoria Foundation v. British Columbia (Attorney General)* ,
2024 BCSC 442

Date: 20240122
Docket: S-238667
Registry: Vancouver

Between:

Boys and Girls Club of Greater Victoria Foundation

Petitioner

And

His Majesty the King in Right of the Province of British Columbia, as represented by the Attorney General of British Columbia

Respondent

Before: The Honourable Justice Marzari

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner, appearing by videoconference:	A.A. Mortimore, K.C. P. Storey
Counsel for the Respondent Attorney General of British Columbia, appearing by videoconference:	E. Barchuk C.L. Pagé
Place and Date of Hearing:	Vancouver, B.C. January 16-17, 2024
Place and Date of Judgment:	Vancouver, B.C. January 22, 2024

BY THE COURT:

[1] In this petition, the Boys and Girls Club of Greater Victoria Foundation (the "BGC") seeks an order *cy-près* to alter the terms of the trust upon which they hold a 98-acre property in Metchosin (the "Property"), and two investment funds associated with that Property (the "Capital Funds"). In effect, the Foundation seeks to convert the specific charitable purposes pursuant to which it holds the Property and related Capital Funds, to something more akin to the Foundation's general charitable purposes, including to fund services and other infrastructure costs at other locations.

[2] The purposes of the Foundation include to promote and further the aims and interests of their sister Association, the Boy and Girls Club Services Society (the "Services Society"), including by receiving donations, managing assets, and disbursing funds in support of the Services Society. The Services Society is also a charitable society, providing services to youth and children on Southern Vancouver Island, such as:

a) licensed out-of-school community programs (before and after school, and during summer and school breaks);

b) providing nutritious breakfasts to children before school each week;

c) educational and support programs for parents of teens and pre-teens;

d) programs for young people facing specific challenges;

e) summer camps for children; and

f) supportive living through youth care homes.

[3] The Foundation argues that the programming that the Services Society provides on the Property is substantially waning in popularity and use, while the costs of running these programs and maintaining the Property have substantially increased. At the same time, other important programs run by the Services Society elsewhere in the southern Vancouver Island region are over-subscribed and have

waiting lists. The Foundation seeks to reallocate the considerable equity in the Property and in its related Capital Funds, to fund these more in-demand programs and services provided by the Services Society.

[4] The petition is opposed by the Attorney General in its *parens patriae* role as the protector of the objects of charitable purpose trusts in this Province. The Attorney General does not say that the Foundation could never sell the Property for bona fide reasons consistent with its trustee obligations, but says that the petition as it stands must be dismissed because:

a) First, the Foundation has not disclosed the full extent of its role as trustee in relation to the Property and Funds;

b) Second, the Foundation has proceeded in a rushed manner with limited disclosure; and

c) Finally, the Foundation has not established a level of impracticability that would allow it to slip its role as trustee of the specific charitable purposes for which it holds the Property (and the related Funds).

[5] Further, even if impracticability was established, the Attorney General says that the Foundation has not established that its proposal meets the requirements of upholding the specific purposes of the trusts upon which it hold the Property and the Capital Funds as closely as possible, pursuant to the doctrine of *cy-près*.

[6] I should note from the outset that the Foundation has admitted, for the purposes of this petition, that it holds the Property and its related funds subject to a charitable trust. Having reviewed the petition and affidavits in support, and heard submissions on this point, in my view, the Foundation has essentially admitted, for the purposes of this petition at least, that it holds the Property (and the related Capital Funds) for a specific purpose charitable trust, that is distinct from its general charitable purposes. If this was not the case, there would be no reason to apply for *cy-près* to change the specific charitable purposes for which the Foundation holds

the Property and the Capital Funds to something akin to the general purposes of the Foundation and the Services Society.

[7] Even without that admission, I find that the Petition and the affidavit evidence in support of it establishes that the Property was purchased, in part, by funds raised for the specific purpose of paying for the Property (or at least paying off the mortgage on the Property) and establishing an endowment fund to enhance, maintain and operate the Property as a camp for young people. The evidence before me for the purposes of this Petition also establishes that the Capital Funds were similarly raised for the specific purposes of supporting the capital maintenance and infrastructure of the Property.

[8] The evidence before me does not allow me to determine the specific purposes of the trust in any more detail, and there are no Board minutes and little evidence produced in this regard by the Foundation. The primary evidence establishing the purposes of the trusts in issue is a pamphlet setting out the goals of the capital campaign used to purchase and endow the Property, referred to as the Create a Ripple campaign (the “Campaign”), some of which describes clear purposes, and other aspects describe broader “visions” for the funds raised. What is established on the evidence was that this Campaign ran from 2004-2010 and related specifically to raising funds for the Property. It appears that the Foundation ran other fundraising drives in relation to other purposes, which I will assume included their general charitable purposes, during this period as well.

[9] The current Executive Director of the Foundation, Ms. Dixon, avers that over 600 individual donations specifically supported the purchase of the Property (or the payment of the mortgage and construction of facilities) between 2004 and 2010 through the Campaign. Overall, this affidavit supports the inference that the object of these donations were intended by their donors, and received by the Foundation, for the specific purposes of purchasing the Property and funding an endowment for capital maintenance and programming on the Property.

[10] With the assistance of these donations, the Foundation successfully paid off the approximately $1-million mortgage the Foundation took on when it purchased the Property in 2004. The admissions and evidence of the Foundation, and the inferences and findings I have been able to make from this evidence, establish the existence of a specific purpose charitable trust in relation to the Property of which the Foundation is the trustee.

[11] The evidence before me also establishes that the Campaign funds used to pay for the Property were kept separate, and that they successfully contributed to paying for the Property which has been held by the Foundation since then. The evidence also establishes that the funds remaining from the Campaign were kept in a separate investment account, and now constitute just over $300,000 in the Create a Ripple Capital Fund.

[12] While the Foundation has provided no evidence with respect to the formation of the Dining Hall Fund (which is just over $175,000), the evidence before me establishes that the Foundation has also treated these funds as separate specific purpose trust funds for the purposes of constructing a dining hall on the Property. They apply for *cy-près* in relation to these funds as well. I infer from the materials that this Fund is also a special purpose charitable trust fund.

[13] For the purposes of these reasons, I will refer to the specific purpose charitable trusts upon which the Foundation holds the Property and the related Capital Funds as the “Trusts”.

[14] I note that the Foundation seeks to make admissions without prejudice to any future arguments it may wish to make that it does not hold the Property and related Funds for a specific charitable purpose, particularly if it is not successful in this petition for *cy-près*. I will leave the question of whether this argument is open to the Foundation to future petitions or proceedings should this arise.

The Property and Funds

[15] The evidence before the Court establishes that the Property has been used by the Services Society to provide youth camp programming since the 1980's. It was originally owned by the Province, but the Foundation was given the option to purchase it for approx. $1.63 million when the Province declared it surplus to its needs in or about 2004. A portion of the purchase price was paid for by funds that the Foundation had from selling another property, though no information is provided as to whether those were general purpose charitable trust funds or specific purpose funds at the time. The other portion was paid for with a mortgage of approximately one million dollars.

[16] There is no evidence before me on this petition to suggest that the Province attached any trust conditions in relation to the sale of the Property to the Foundation.

[17] As noted above, the evidence before me establishes that the Foundation conducted the Campaign between 2004-2010 to raise funds to pay off the mortgage on the Property and to establish an endowment fund to maintain and operate the Property as a wilderness camp for young people. The mortgage was successfully paid and the Campaign currently holds over $300,000 in funds for the specific purpose of funding infrastructure or other capital costs on the Property.

[18] The Foundation also created the Dining Hall Fund specifically for the construction of a dining hall on the Property. It is not clear if this was part of a separate fundraising campaign, or at what time the initial funds were raised. Although the Attorney General raises concerns regarding the lack of disclosure to the court in this regard, I find that the evidence and admissions before me are sufficient to establish that these funds are held by the Foundation for the specific charitable purposes of constructing a centre and dining hall on the Property to benefit participants in programs on the Property.

[19] I also accept the evidence of Ms. Dixon that the funds in the Dining Hall Fund are currently insufficient to build a dining hall on the Property, although I note that

this evidence was (like much of Ms. Dixon's evidence) largely of a conclusory nature on a critical factual point. No construction budgets or evidence of the efforts made to realize the trust purposes of the Dining Hall Fund have been provided in evidence. Therefore, while I accept Ms. Dixon's evidence on this point, I find it inadequate to establish the impossibility, or even the impracticability, of a dining hall ever being constructed on the Property using these funds, perhaps in combination with the remaining Create a Ripple Capital Fund, which is available for capital projects on the Property.

[20] The same is true of the Create a Ripple Capital Fund, though with respect to that Fund the evidence indicates that there is plenty of capital maintenance work that could be done on the Property with these funds. In other words, there is no evidence of frustration of the specific purposes of the Create a Ripple Capital Fund.

[21] Overall, the Foundation has not established (or even sought to establish) that the purposes of these funds cannot be accomplished on the Property. Rather, their argument is that it is counter-productive to invest these Funds on the Property in accordance with their purposes, when the Foundation is seeking to sell the Property and repurpose the Funds for other pressing charitable needs.

THE CHANGES TO THE PROPERTY SINCE 2010

[22] In her evidence, Ms. Dixon discloses a number of significant changes to the Services Society's programming and funding on the Property since 2011. In particular she notes:

a) The loss of funding through a Provincial Government program called the Coastline Challenge for young offenders on probation. This program started in 1996 and operated year-round on the Property, serving approximately 100 youth annually up to 2010, and was funded by Youth Justice Services. Ms. Dixon avers that the funding for this program also subsidized the costs of maintaining and operating other programs on the

Property, and at other BGC properties. Funding for this program ended in 2016;

b) Although Ms. Dixon states that the average annual participation in that program was approximately 100 youth per year up to 2010, Ms. Dixon ascribes the loss of that funding and programing to a decline of 50% of participants in all programs at the Property after 2010: from 4,500 individuals per year between 1996-2010, to 2,100 per year from 2010-2016;

c) After 2016, Ms. Dixon avers that participation in programs at the Property further decreased, as did its sources of funding for other programs at the Property. As a result, the Foundation and Services Society were required to fundraise and use general charitable purpose funds to offer services at the Property in addition to charging fees for programs and rentals at the Property;

d) Since approximately 2020, Ms. Dixon avers that the Property has not been granted a tax exemption for property taxes, which Ms. Dixon projects as requiring $45,000 in the next year (though I note that property taxes are recorded in her affidavit tables as $36,000 in 2022 and 2023, and $0 in 2021 and 2020. The Foundation was also required to pay $11,000 in property taxes 2011 according to these tables);

e) Ms. Dixon also budgets $50,000 for insurance for the coming year for the Property, and $18,000 for utilities. It is not clear if this is a change or status quo.

[23] Overall, Ms. Dixon projects $171,500 in property-related costs to maintain the Property in the next fiscal year, up from net costs to maintain the Property varying from $75,000 in 2011, to $132,000 in 2022, with a low of $40,461 during the height of the pandemic in 2020.

[24] Key to the Foundation's application are a series of projections of 2024 costs and tables of past costs prepared by Ms. Dixon showing information with respect to the use, funding and expenses in relation to the Property since 2011. The Attorney General argues that the information in these projections and tables are unsourced, unsupported by documentation, and incomplete.

[25] I agree with the Attorney General that the evidence produced by the Foundation provides no documentation or financial statements in support of its projected 2024 costs. The Foundation does provide, however, a summary chart in the affidavit of Ms. Dixon, which it says I ought to accept at face value given the absence of any contradictory evidence in this respect.

[26] Given the lack of disclosure and supporting documentation, and the discrepancies between Ms. Dixon's projected costs for 2024 and the costs she records for 2023 and 2022, I have difficulty accepting Ms. Dixon's projection of 2024 costs without further support or disclosure of the information upon which it is based. It may be that she is counting in her projected costs expenses that were not counted in her summary of past property expenses, but the evidence required to substantiate these figures is lacking. Given that this is a petition in relation to the Foundation's specific charitable trust purposes, I do not consider that the Attorney General has an obligation to produce contradictory evidence as to the Foundation's conclusory statements and figures. The Foundation must provide transparent and fulsome disclosure of its costs, expenses and financial situation to the Court to support a *cy-près* application.

[27] For the purposes of this petition, I accept that the Foundation likely has property related costs similar to the past two fiscal years, which is when the Property stopped being granted a property tax exemption, and when the MCFD funding for the Foundation in relation to the Property (but not funding for programming at the Property) was no longer available. Those net costs are summarized by Ms. Dixon to be in the range of about $130,000 annually.

[28] The Foundation also provides a chart of capital projects and upgrades it says are needed on the Property, although in argument the Foundation concedes that this is just a table provided by the proposed purchaser of the Property in the negotiation of the sale of the Property. Given that it relates to a third party's proposed use of the Property, and not the Foundation's trust purposes, I find that I can give this table little weight.

[29] The Foundation also avers that "BGC" is projecting that it will need $190,000 to operate programs on the Property. Because the Foundation is largely a funding arm, and the Services Society is the programming arm of the BGC, I assume that Ms. Dixon is referring to projections made by the Service Society, not the Foundation. This projected budget is not provided, but Ms. Dixon's summary of these costs includes salaries and wages, liability insurance for the facilities in addition to the Property insurance, office expenses, vehicle expenses, and $4,628 in "program costs, including program supplies, food and equipment".

[30] Ms. Dixon avers that the BGC is projecting it will earn $170,500 for the running of the programs at the Property, including approximately $105,000 in participant program fees, $9,600 in funding through MCFD, $10,000 in Federal Grants, $24,000 in Provincial Government grants, $3,000 in donations and $18,000 in other grants. She therefore avers that there is a $20,000 shortfall for programming at the Property.

[31] When combined with the projected $170,000 in maintenance costs for the Property in 2024, the Foundation argues that there is projected to be an almost $200,000 shortfall in funding for the Property for which the BGC (which I again assume is the Services Society) will have to use general purpose charitable funds to operate the Property and its programming in 2024. This is the crux of their impracticability and *cy-près* application.

[32] With respect to the programming costs projected by Ms. Dixon, in the absence of supporting documentation, it is impossible to tell if the staff salaries and

office expenses are just a share of the Service Society's budget for operations that they are allocating to the Property, or costs that would disappear entirely if the Property was sold. Given their broad descriptions, and the lack of specificity or support, I am unable to conclude that the sale of the Property and the ending of its programming would save the Services Society all of the $190,000 ascribed by Ms. Dixon for the coming year to the Property's programming. Even if $20,000 of these costs were costs that would be incurred in any event, the evidence suggests that the Services Society will not come out ahead if the Property is sold by the Foundation.

[33] On the other hand, it is possible that all of the $170,000 revenues provided in relation to programming on the Property might be lost by the Services Society on the evidence before me. Certainly, that is true of the over $100,000 in participant fees for use of the Property.

[34] I do not have projected numbers of participants in 2024 for the Property that are the basis for the anticipated $100,000 in participant fees. Ms. Dixon provides an estimate of program participants at the Property since 2011 with a high of 2,100 in 2011, decreasing to 1,200 in 2017 and 2018, and then 800 in 2019. From 2020-2022 during COVID-19, the estimated number of participants dropped to 200 or so, but then climbed back up in 2023 to approximately 375. Despite a lack of supporting documentation in this respect, I am prepared to accept these figures for the purposes of the petition, and the Foundation's argument that the program use on the Property has dropped by over 80% from 2011 to 2023.

[35] I also accept at face value the evidence of Ms. Dixon that the Services Society has many other programs in Southern Vancouver Island that are currently oversubscribed and have waiting lists.

EFFORTS TO SELL THE PROPERTY

[36] The evidence is that starting in or about 2021, the Foundation began looking for options to sell the Property to a third party at market value (unencumbered by trusts).

[37] In or about 2022, the Foundation subdivided the 98-acre Property into two lots.

[38] In April 2023, the Foundation entered into a contract for purchase and sale of the Property for $5.75 million (the “PSA”).

[39] By or about October 2023, it appears that the buyer had removed most, if not all, of their subject conditions in the PSA. I am advised all such conditions have now been removed. However, the sale remains subject to the Court making an Order approving the sale. The PSA sets a deadline for this of September 30, 2023, but I understand that the current agreement with the buyer requires court approval of the ability of the Foundation to sell the Property prior to January 22, 2024.

[40] The Foundation says it has been speaking with the Attorney General through counsel since 2021 regarding the potential sale of the Property. However, the petition was only filed on December 20, 2023 and initially placed on the general chambers list in this Court in mid-January. It came before me for two days, January 16 and 17, 2024, with very little time before the Foundation was required to remove the condition of court approval.

[41] The Attorney General says that this rushed process was essentially designed to stifle public attention to the sale, and that there is evidence in the materials of public opposition to the Foundation proceeding with the sale. Furthermore, the Attorney General says that the PSA and the realtor’s affidavit were not filed in court so as to prevent members of the public from learning the details of the sale.

[42] I find it unnecessary to rule on the Attorney General’s concerns in this regard. Certainly, it would have been desirable for the Foundation to have brought this

Petition on well before September 30, 2023, as originally contemplated in the PSA. I have addressed the lack of filing the PSA and the realtor's affidavits through further orders during the hearing, including my ruling on the partial sealing of the realtor's affidavit.

[43] I turn then to the law of *cy-près*, upon which the Foundation seeks to alter the specific charitable trusts pursuant to which it holds the Property and the Funds.

[44] I note that the Petition is not brought pursuant to the *Charitable Purposes Preservation Act*, S.B.C. 2004, c. 59 [*Act*]. The Foundation says I need not and should not consider that *Act*, given that the petitioner does not rely upon it. After reviewing that *Act* and some of the case law pertaining to it (including *Lee v. Board of Education of North Vancouver School District No. 44*, 2011 BCSC 222*; Mulgrave School Foundation (Re)*, 2014 BCSC 1900*;* and *TLC The Land Conservancy of British Columbia (Re)*, 2014 BCSC 97 (later overturned on unrelated grounds) [*TLC*]) and hearing submissions from the Attorney General on this point, I am satisfied that the Property and Funds constitute "discrete purpose charitable property" under that *Act*, which I have been referring to as "specific purpose charitable property" in this case. However, I am also satisfied that my decision would not be different pursuant to that *Act* than it is pursuant to the doctrine of *cy-près*. I therefore turn now to the doctrine of *cy-près*.

Law of *Cy-Près*

[45] The starting point at law with respect to charitable trust property, is to recognize the distinction between the trustee and the beneficiary. In this case, the trustee is the Foundation. The beneficiary is, in essence, the Trusts, and in particular the specific purposes of the Trusts with respect to the Property and the Funds.

[46] The presumption under the *Land Title Act*, R.S.B.C. 1996, c. 250 that the owner of land owns the fee simple is displaced in the case of lands owned by a trustee for trust purposes. In this petition, the Foundation has admitted that it hold the Property and the Funds for trust purposes, but seeks to apply *cy-près* to change

the trust purpose from the specific purposes of the Trusts related to purchasing and maintaining the Property and funding capital projects including a dining hall thereon, to something more akin to its general charitable purposes to support the Services Society in its other programming and capital costs.

[47] A good summary of the nature of *cy-près* is found in the decision of Justice Dardi, *Sidney and North Saanich Memorial Park Society v. British Columbia (Attorney General)*, 2016 BCSC 589 [*Sidney*]:

> [47] *Cy-près* is a significant doctrine in the law of charities. It determines what happens when property that has been dedicated to charitable purposes cannot be applied in the manner intended by the donor: Haley & McMurtry, *Equity and Trusts*, 3d ed (London: Sweet & Maxwell, 2011) at 261. Where the purposes or objects of a charitable trust have become impossible or impracticable to achieve, the court, relying on its inherent jurisdiction, may intervene and alter the purposes of the trust, and in doing so, depart from the stated intention of the settlor. The courts may implement modernized or modified objects that are "as near as possible" (*cy-près*) to the original purposes: *Toronto Aged Men's and Women's Homes v. Loyal True Blue and Orange Home*, 2003 CanLII 32923 (ON SC), [2003] O.J. No. 5381, 68 O.R. (3d) 777 at para. 50 (S.C.J.) [*Stillman*].
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> [48] A *cy-près* order "must depart from the intentions of the [settlor] only to the extent required to remove the problem that has caused the future administration of the Trust to become impracticable." It is also imperative that the relative efficiency of the proposed amendments be considered: *Stillman* at para. 28.
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> [49] The threshold requirement for invoking the *cy-près* doctrine is a finding that carrying out the existing trust terms is either impossible or impracticable. In the absence of such a determination, the court must refuse to exercise its *cy-près* scheme-making jurisdiction. Despite the narrow ambit of the doctrine, courts have, at times, interpreted impossibility and impracticability broadly: *Waters* at 683. "Impracticability" is not to be construed as "absolutely impracticable": *In re Dominion Students' Hall Trust*, [1947] Ch. 183 at 186.

[48] In *Sidney*, Dardi J. adopts a modern or “contemporary” approach to *cy-près* that construes the Court’s jurisdiction more broadly than simply remedying failures in a trust purpose or object, and allows the court to consider alteration in terms of the administration of the trust where the original administrative terms have become impracticable.

[49] However, from my review of *Sidney*, and the many other cases before me, the doctrine of *cy-près* still requires proof of impossibility or impracticability in the carrying out of the Trust purposes. The Foundation concedes that there was and is no impossibility with respect to fulfilling the specific purposes of the Trusts in relation to the Property or the Capital Funds. Nor was this purpose impracticable at the time the Trusts were created. The Foundation relies on supervening impracticability.

[50] Donovan W.M. Waters, K.C. & Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada, 5th ed* (Toronto: Thomson Reuters Canada Limited, 2021) discussed supervening impossibility and impracticability at 877–884. In relation to public appeal funds (which I find characterizes the funds raised by the Campaign), *Waters* states as follows at 882:

> The authorities are agreed that an exclusive dedication to charity occurs in the case of a public appeal if the donor, whether anonymous or, it seems, otherwise, gives property absolutely for the specific charitable purpose, that is, reserving no interest of any kind for him- or herself or anyone else. The arguably errant authorities consider this has occurred because the intention to give absolutely can be construed as a general charitable intent. On it becoming clear that there is an initial impossibility or impracticability because, for example, the purpose can no longer be carried out, a general charitable intent is found to exist, and the fund is applied *cy-près*. This approach has led to the conclusion that, if a surplus remains after the purpose of an appeal has been carried out, this also must be an occasion for establishing an intent of the donor to give absolutely and therefore to possess a general charitable intent. If this view were correct, however, it could never be said, so long as any moneys remain unexpended, that in the case of public appeals and the consequent assembly of funds there is any notion of an exclusive dedication to charity distinct from the requirement of general charitable intent.
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> The difficulty which stems from this line of argument has relatively little practical effect when the problem is that of distinguishing initial general charitable intent from a subsequent exclusive dedication to charity, but it does have practical significance if the intention to give absolutely in response to an appeal is construed as also demonstrating a general charitable intent. If the public responds to an appeal for a specific charitable purpose, for instance to provide clothing, food, and shelter for flood or fire victims, it is only by a long stretch of the imagination that one can infer an intention on the part of anonymous donors to contribute for other purposes. The complaint is two-fold: first, that the inference of absolute gift when it is in response to a public appeal should be thought also to infer a general charitable intent. The latter inference is convenient as it permits the *cy-près* application of funds on an initial impossibility or impracticability occurring, but, even as far as anonymous donors are concerned, it may well be an incorrect deduction of

> the donor's true intent. Secondly, to extend this latter deduction to cases of surplus funds is both to overlook the fact that an exclusive dedication to charity has already occurred by the paying out of moneys for the specific appeal purpose, and also to extend unnecessarily a deduction which was already questionable.

[51] *Waters* describes the state of the law in Canada in relation to public appeals as follows at 882:

> In Canada there have been three cases on public appeals which allude to some of these difficulties, but the authority has yet to rise when these matters are discussed at length, though the potential for them to arise is clear. In *Re Young Women's Christian Assn. Extension Campaign Fund*, a case of initial impracticability, MacDonald J. was not only reluctant to regard the discharge of the association's operating deficit as too remote from the building of an extension to accommodate more members, he was also clearly impressed by the particularization of the object of the appeal, and by the fact that the purposes expressed by any general charitable intent would therefore be proportionately limited in scope. They would have to do only with "the enlargement or extension of the building or its facilities," and he therefore would not approve the proposed scheme. The court was evidently reluctant to find a sufficiently embracing general charitable intent that would permit significant departure from the specific object to which the members of the public admittedly had responded. Only one case concerns surplus funds. In *Re Northern Ontario Fire Relief Fund Trusts*, Middleton J. concerned himself only with the terms of the *cy-près* application. He obviously assumed that all donors intended to give absolutely for charity, and he rightly made no mention of general charitable intent. In this case the judicial silence is golden.

[52] The decision of Justice Ferguson of the Court of King's Bench of New Brunswick in *Évêque Catholique Romain de Bathurst v New Brunswick (Attorney General)*, 2010 NBQB 400 [*Bathurst*] further addresses the issue of *cy-près* in relation to surplus funds (though not from a public appeal). In *Bathurst*, the Court approved a *cy-près* scheme with respect to surplus funds from 21 separate trust funds that had been dedicated to the training of future priests over the course of a century. It was established that these funds now exceeded $4 million, but that the candidates for the use of these funds had substantially dwindled in preceding decades, despite the Diocese's efforts to find such candidates. The Diocese, as trustee, proposed to put aside $1.5 million of these funds that would generate sufficient ongoing income to meet the requirements of the trusts on an ongoing

basis, and to dedicate the remaining trust funds to settling claims of abuse, which threatened to bankrupt the Diocese altogether.

[53] With the apparent support of the AG of the Province in that case, the Court granted *cy-près* with respect to these surplus funds, noting that the very survival of the Diocese was at stake. In concluding comments relied upon by the Foundation, the Court stated the following regarding the granting of *cy-près* in that case:

> [77] The unique combination of circumstances that this Application presents warrant the granting of the Application that the proposed "*cy-près* scheme" be implemented. Central to that determination are:
>
> > 1) the intentions of the Diocese to use the Funds to pay just compensation in timely fashion to the victims of the malevolent priest(s) who perpetrated these crimes of heinous sexual abuse;
> >
> > 2) that the granting of the Application will substantially improve the prospects that the Diocese will be able to avoid a financial demise because of the sexual abuse scandal;
> >
> > 3) the primordial intention of those who created these trusts by gift of one sort or another to the Diocese was the perpetuation of the Diocese in its religious mission; and
> >
> > 4) that the granting of the Application will substantially improve the prospects that the Diocese will not have to download the financial responsibility of raising the funds necessary to pay all of the claims onto the backs of the members of the various parishes within the Diocese.

[54] The Foundation puts particular weight on the reference to the donor's "primordial intention" that the Diocese would be able to continue in its religious mission. It argues that this is essentially what it seeks in terms of using the funds from the sale of the Property and the Capital funds for other services provided by the Services Society.

[55] I would also note the following paras. of *Bathurst*:

> [47] It must be firmly born in mind when considering the application of "a *cy-près* scheme" that the public must continue to have confidence that when a charitable bequest or grant is made it will only be in limited and justifiable circumstances that a court will step in and alter what was intended by the person who created the trust. To do otherwise would threaten and likely damage the confidence the public have in the enduring nature of any charitable trust that might be contemplated for creation in the future.

> [48] For that reason, the law does not allow a judge to alter the specific objects of a trust except in such narrow circumstances. Those circumstances are limited to situations in which the specific objects of the trust are impossible to achieve, are illegal or are or have become impracticable. It is in those circumstances that the doctrine of *cy-près* can be applied to remedy the difficulties arising from the implementation of or continued accomplishment of the specific objects of the trust.

[56] The parties are agreed that “impossibility” and “impracticability” are not neatly defined, however, previous cases provide examples in which the common thread is that the application of the trust funds would not result in the benefit intended by the donor. In *TLC* this Court summarizes *Waters* on these points:

> [258] The courts have not given a definition of "impossibility" or "impracticability". However, *Waters* at 774 states what "impossibility" is not:
>
> > Impossibility does not mean that the trust cannot be carried into effect without the assistance of the court. It refers in most instances to situations where events have taken place between the writing of the instrument of gift and the instrument taking effect which prevent the object of the trust from being carried out at all.
>
> At 775, with respect to "impracticability", *Waters* refers to various authorities where the objects were held to be so, "in the sense that, though they still could be carried out, the whole intention of the donor has really been overtaken by events …".
>
> [259] Further, *Waters*, similar to *Tudor* above, states at 777 that the requirement of impossibility and impracticability and the narrow circumstances in which such they can arise remain important:
>
> > … the courts have refused to approve *cy-près* schemes which are based on the argument that the proposed objects better provide for contemporary needs than the objects the donor chose. Even if there is a general charitable intent which would continue to be furthered by proposed objects as well as by the original objects, English courts have taken the view that as long as the original objects can still be carried out, even if with more limited value than they once would have had, they cannot be interfered with. <u>That is to say, impossibility and impracticability have been kept within narrow limits, a restriction which has had particular significance in the handling of *cy-près* applications on the basis of supervening impossibility and impracticability</u>.
> >
> > [Emphasis in original.]

[57] The Foundation also relies on this Court's decision in *Lee*, where the Court authorized a trust to continue with a new trustee, on modified terms acceptable to that new trustee. In that case, the trust funds consisted of approximately $5,500 donated in the early 1980's to the North Vancouver School Board to fund a $500 annual scholarship, on terms prohibiting encroachment on the capital. However, when interest rates declined over time, the funds were incapable of generating $500 in income annually, and significant administrative barriers also arose to the School Board with respect to its administration of this fund. Although the trust allowed for smaller annual awards, the Court granted the School Board's application to be removed as trustee on the basis of the burdens of administering and accounting for such a small sum in accordance with trust principles.

[58] Despite efforts to find another trustee, the only trustee prepared to take on the burden of the trust was the North Vancouver High School Education Foundation, which would not accept the trust on terms that would prevent encroachment on its capital. The Court used its jurisdiction under the *CPPA*, and alternatively *cy-près*, to substitute the trustee, and to alter the terms of the trust, subject to a stay period during which another trustee might be found who would take the trust unchanged.

[59] The Foundation argues that this case illustrates that financial impracticability can be the basis for a *cy-près* order such as the one they seek. The trust in that case was not impossible to administer, but financially it was a losing proposition for the trustee, just as they say the Property and the Capital Funds are for them.

ISSUES

[60] The issues before me are as follows:

a) Has the Foundation established that it is impracticable for it to continue to hold the Property (and related Funds) for their specific charitable purposes?

b) If so, has the Foundation established that the sale of the Property (as contemplated in the existing PSA or a future sale), and its proposed use of

the Capital Funds, achieve the purposes of the specific purposes of the Property and Capital Funds as closely as possible pursuant to the doctrine of *cy-près*?

DETERMINATION

Impracticability

[61] I find that, on the evidence before me, the Foundation has not established that it is impracticable for it to continue to hold and maintain the Property for its specific charitable purposes. I make this finding for a number of reasons.

[62] First, I am not satisfied that the financial evidence presented establishes that the Foundation has insufficient funds to maintain and operate the Property. The fact that the maintenance of the specific purpose charitable trust over the Property is not a break-even proposition is not enough to establish impracticability. There is no rule that specific purpose charitable property, donated to a charity, should make no draws on the general charitable purpose resources of that charity for its ongoing maintenance.

[63] Even if I were to accept the highest projected Property related costs provided by the Foundation in terms of its annual costs to maintain the Property (which I have not) the evidence establishes that Foundation has more than $300,000 of specific purpose trust funds available to support capital infrastructure and maintenance costs at the Property as of this moment.

[64] Second, while the number of users of the Property has decreased since 2011, on the evidence before me close to 400 children and youths benefitted from programs on the Property in 2023, and the numbers appear to be increasing since the height of the pandemic. In *Bathurst*, the Diocese was not relieved of finding and funding candidates for the priesthood despite extremely low participant numbers over decades, and very pressing demands for the funds, including a threat to the continued existence of the Diocese itself. Only funds established to be in surplus of

demand for the specific purpose charitable trusts were allowed to be diverted for these pressing purposes.

[65] In this case, I have no evidence of the efforts made by the Foundation to maintain the programming at the Property, and this is not a case of surplus trust funds.

[66] Finally, the Foundation has not established, or even attempted to establish, that its financial existence is put in jeopardy if it must continue to act as trustee for the purposes of the Trusts in relation to the Property if it cannot encroach on the value of those Trusts for other purposes. The Foundation has provided no evidence as to its own financial situation, and there is no reason on the evidence to suspect that the Foundation is not capable of continuing to support the Property as trustee for the specific charitable purposes for which it holds the Property and the Capital Funds.

[67] In my view, the Foundation's petition relies on a concept of impracticability that is much broader than the law of trusts supports. As provided in *Bathurst, TLC, Lee* and others, impracticability requires more than a conviction by the trustee that the funds held pursuant to a specific purpose charitable trust could be used more productively for other charitable purposes. Impracticability also requires evidence of more than a decrease in usefulness or cost-effectiveness of trust property. In my view, the evidence presented in this petition, even taken on its face and at its highest regarding the decrease in enrollment and the increases in programming and property costs, does not meet the required threshold.

[68] Nor does the presence of other pressing needs not funded by the specific purposes of a specific purpose charitable trust weigh significantly in the *cy-près* analysis where the funds are not surplus to the original trust purposes.

[69] The public, who donated to the public appeal of the Create a Ripple Campaign, must continue to have confidence that the purposes for which they donated funds will only be altered by the Court in limited and narrow circumstances.

This is not only to protect the over 600 donors in relation to the Trusts in this case, but charitable giving and trusts more broadly: in an extreme example the case of *Mulgrave*. This requires proof of impracticability well beyond what is established by the evidence in this petition.

As Close as Possible to Original Specific Purpose

[70] I turn then to the second issue, which is whether or not the proposed remedy, even if impracticability is established, is as close as possible to the original specific charitable purpose.

[71] A charitable gift will not fail for want of a trustee: *TLC* at para. 277. Therefore, even if the Foundation had established that it no longer wishes to act as trustee of the Property or the Capital Funds as a matter of impracticability, a *cy-près* remedy must first consider whether there is another trustee willing to take on the Trusts, in including the Property and the Capital Funds, without alteration.

[72] The Foundation says that it should not have to offer the Property and the Capital Funds to other trustees to continue the specific purpose charitable trusts for which it holds the Property and the Capital Funds, because it used some of its “own” money to purchase the Property at the outset. In this regard, the Foundation’s evidence with respect to the funds it used to make a down payment on the Property are lacking, other than that these were funds from the sale of another property it held, presumably also for charitable purposes.

[73] More significantly however, I have not been provided with any caselaw or authority to suggest that the initial contribution of general purpose charitable funds to specific purpose charitable trust property waters down or eliminates the specific purposes for which the trustee holds that trust property.

[74] To the extent that the *Lee* decision could be read to apply *cy-près* to a situation where the trustee found it impracticable to continue to administer the trust on the basis that the costs of administering the trust exceeded its value (and I think *Lee* goes well beyond that), it is important to note that the *cy-près* remedy in that

case was not to convert the trust funds held by the School Board to its general revenues, but rather, to find a trustee willing to take on the trust on a basis that was as close as possible to the specific purposes for which the funds were donated.

[75] In *TLC* where the impracticability of maintaining trust property was established due to the imminent insolvency of the trustee in relation to the preservation of a heritage property, the Court still refused *cy-près* that would have allowed the value of the lands to be applied to the trustee's general charitable purposes. The Court was unable to conclude on the evidence that there would be no other trustee available to take on the terms of the specific purpose charitable trust—in that case requiring the preservation of a heritage property.

[76] I find that the Foundation's proposal to sell the Property, and to convert the value of that Property and the Create a Ripple Capital Fund and Dining Hall fund, to charitable purposes unrelated to operating a camp for children and youth on the Property, is not a purpose as close as possible to the original purpose of the donated funds.

[77] Should the Foundation conclude that it is no longer financially feasible for it to continue to fund and maintain the Property, the next appropriate step would be for it to find an alternative trustee willing to take on the Property and the Capital Funds to serve the Trusts' purposes. It must be remembered that, so long as the Foundation holds the Property pursuant to specific charitable purposes, the Foundation holds the Property as trustee, not as beneficiary, and it is required to administer the Property not just to service its general charitable purposes, but also the specific charitable purposes pursuant to which it raised funds for the purchase and endowment of the Property.

COSTS

[78] I therefore dismiss the Petition.

[79] The Attorney General seeks no costs in this Petition proceeding, and I therefore make no order for costs against the Foundation.

"Marzari J."