

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



WEST VANCOUVER (DISTRICT) V. BRITISH COLUMBIA (ATTORNEY GENERAL), 2020 BCSC 966

Supreme Court of British Columbia, Edelmann J, 29 June 2020

Donor left a property to the local council for a park and the Council applied to sell the property to finance other park property purchases.

Key words: Charity, British Columbia, Charitable Purpose, Legislative Intervention to Allow Variation of Trust

1. The deceased in her will left a property to the Corporation of the District of West Vancouver (the District) for use as a park. The clause stated:

I DEVISE my said dwelling-house and premises to The Corporation of the District of West Vancouver free of all duties estate taxes and probate fees to be used and maintained by it for public park purposes and I express the wish that in developing the said Amended Lots as a public park the trees and natural growth be preserved as far as may be practical.

2. It was agreed that this created a charitable trust as the purpose was for the provision of a public park.
3. The District sought to sell a portion of the property to help finance the purchase of two other properties to add to an existing park. It claimed that the proposed sale was consistent with the charitable purpose of the trust and sought the court's advice to that effect, or a variation of the trust under section 184 of the *Community Charter*, S.B.C. 2003, c. 26.
4. The Attorney General opposed the District's proposal as being contrary to the purpose of the trust. Further, the Attorney General sought a ruling that rental income from the house on the property was held in trust.
5. The court approached the matter by examining four issues:
 - i. Were the funds that were collected from the rental of the house on the property held in trust by the District?
 - ii. Would the disposition of the southern portion of the property be consistent with the existing purposes of the trust?
 - iii. Should the court authorize the disposition of the southern portion of the property as part of an administrative scheme?

- iv. Should the court vary the terms of the charitable trust under section 184 of the Community Charter?

Rental

6. There was a surplus of some \$CA200,000 collected by the District from rental of a house on the property. The Attorney General submitted that the funds were trust moneys. The District submitted that it had complied with the terms of the trust by utilizing the net rental funds as part of its parks operating budget.
7. The court decided that any rent money received was revenue generated from the trust property and should have accrued to the trust as a function of the basic fiduciary responsibility of a trustee of the property.

Sale of part of property consistent with the Trust

8. The District sought the advice of the court as to whether disposing of part of the trust property to finance another park would be consistent with its trust obligations. The District submitted that the gift should be interpreted in the broad sense of a contribution of the value of the property into the public parks system. The Attorney General submitted that the gift was for the use of the specific site as a neighbourhood park, with the explicit intention that the trees remain as part of the park if practicable.
9. The court examined the language of the bequest clause as well as discussions with the District prior to the will's preparation and came to the conclusion that selling part of the trust property as residential lots with removal of a substantial number of trees was not consistent with the purposes of the trust.

Should an Administrative Scheme be Approved?

10. The District sought the exercise of the court's inherent jurisdiction in making an administrative scheme to better serve the purposes of the trust where the cy-près doctrine was not applicable. It was agreed that cy-près was inapplicable as it was neither impossible nor impracticable for the property to continue being used as a neighbourhood park.
11. The court acknowledged that whether it had inherent power in the absence of a cy-près situation was not clear in Canadian jurisprudence. It did not decide the legal issue, but rather that the trust purpose was clear, and even if the court had the power to devise a scheme, it was not appropriate in this situation.

Section 184 of the Community Charter

12. The Community Charter is a comprehensive piece of legislation that confers broad powers on municipalities in relation to the present and future needs of their community. The District sought the exercise of the court's statutory power to vary the trust under section 184 of the Community Charter, which provides:

Property accepted in trust

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

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

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

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

13. The Court examined the legislative history of the section and found that the court was not sitting in judicial review of the Council's opinion that the trust is "no longer in the best interests" of the District.

14. It further found that the wording of section 184(3) of the Community Charter clearly shows an intention on the part of the legislature to alter the common law as it relates to the variation of trusts held by municipalities. It noted that at ([88]):

While the reference to the "the intention of the [settlor]" reflects a core consideration in the law of charitable trusts, the direction to the court to consider "the best interests of the municipality" in conjunction with the settlor's intention clearly derogates from the established common law.

15. The question before the court was whether the proposed variation is one that will better further both the intention of the donor and the best interests of the municipality. Thus, the court must consider the impact of the proposed variation for both the intention of the donor and the interests of the municipality.

16. The court, in reaching its conclusion, examined several factors including:

- the intention of the donor;
- the impact of the variation on the trust assets;
- whether the variation would further the best interests of the District;
- past conduct of the trustee in relation to the trust;
- whether the trust terms were no longer in the best interest of the District; and
- whether the variation would deter a future donor's trust in the District as a trustee.

17. The court concluded that in this situation (at [124]):

[T]aking all the factors set out above into consideration, I find that this is an appropriate circumstance for the Court to allow a variation of the terms or trusts under s. 184(3) of the Community Charter. There are compelling public policy grounds to allow a municipality to consider the best interests of its community in managing trust

assets under its charge. With some minor clarifications, I am satisfied that the proposed plan demonstrates sufficient respect for the general intentions of Ms. Brissenden.

IMPLICATIONS



It is commonly assumed that if potential donors are not confident that the terms or trusts to which their gifts are subject will be respected, they may be less likely to engage in this form of charitable giving. It may have a chilling effect on charitable giving in the future. For this reason, the common law takes the alteration of the purposes of a charitable trust seriously.

Many legislatures have decided that the common law *cy-près* is not flexible enough to redirect charitable assets and legislated for the courts and in some instances regulators to be able to sanction new purposes and trust conditions.

VIEW THE CASE



This case may be viewed at <http://canlii.ca/t/j8gbd>

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