

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.



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

Supreme Court of British Columbia, Marzari J, 22 January 2024

An application for a cy-près order to sell trust property and contribute it to the trustee's general charitable purposes.

Key words: Charity, British Columbia, Canada, Cy-près, Boys and Girls Club, Impracticability, As Close As Possible

1. The Boy and Girls Club Services Society (the Society) is a charitable society that provided services to youth and children on Southern Vancouver Island.
2. It had also conducted activities on a 98-acre property in Metchosin (the Property) since the 1980s. The Province owned the Property, but in 2004, it was declared surplus to its needs and sold for \$1.63m.
3. The Boys and Girls Club of Greater Victoria Foundation (the Foundation) purchased the Property with a \$1m mortgage and the proceeds of another property sale. The Property was associated with the Society by receiving donations, managing assets, and disbursing funds in support of the Society.
4. The Foundation conducted a campaign from 2004 to 2010 to raise funds to pay off the mortgage on the Property and establish an endowment fund to maintain and operate the Property as a wilderness camp for young people.
5. The Foundation paid off the mortgage, and held over \$300,000 in funds to fund infrastructure or other capital costs on the Property (Ripple Capital Fund).
6. The Foundation also held a Dining Hall Fund specifically for constructing a dining hall on the Property, which amounted to \$175,000, but was insufficient to build a dining hall.
7. In 2021, the Foundation began looking for options to sell the Property to a third party at market value (unencumbered by trusts).
8. In 2023, the Foundation entered into a contract to sell the Property for \$5.75 million and required court approval to sell it free of trusts by 22 January 2024.
9. The Foundation applied to the Court in December 2023 for a cy-près order to alter the terms of the trust upon which they held the Property and the two investment funds. In effect, the Foundation sought to convert the specific charitable purposes under which it had the Property and related funds to something more akin to the Foundation's general charitable purposes, including funding services and other infrastructure costs at different locations.

10. The Foundation argued that government funding for the operation of the Property had ceased, and there were mounting running costs and requirements of capital maintenance, together with a decrease in program participation at the Property. On the other hand, the Society was experiencing significant demand for its services and programs external to the Property.
11. The Attorney General took issue with the proposal by the Foundation as it :
 - had not disclosed the full extent of its role as trustee about the Property and Funds;
 - had proceeded in a rushed manner with limited disclosure; and
 - had 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.
12. The Attorney General added that the rushed process was essentially designed to stifle public attention to the sale, and that there was evidence in the materials of public opposition to the Foundation proceeding with the sale. Further, the Attorney General noted that the sale contract was not filed in court in order to prevent members of the public from learning the details of the sale.
13. The Court had difficulty determining the terms of the trusts for the Property and the other funds based on the evidence presented to it. There were no trust deeds or relevant board minutes, so the court had to examine flyers and inferences from the conduct of donors.
14. The Foundation did not bring the application under the [Charitable Purposes Preservation Act, S.B.C. 2004, c. 59](#) (Act), but under the doctrine of cy-près. The Court was of the view that the matter fell within the Act, but the result would be no different if the doctrine of cy-près were applied.
15. The Foundation conceded that fulfilling the specific purposes of the trusts regarding the Property or the other funds was not impracticable now or in the past. Nor was this purpose impracticable at the time the trusts were created. The Foundation relied on supervening impracticability.
16. The Foundation argued that financial impracticability could be the basis for a cy-près order, and this was their situation.
17. The Court, on the evidence before it, found that the Foundation had not established that it was impracticable for it to continue to hold and maintain the Property for its specific charitable purposes. This was because:
 - The Court was not satisfied that the financial evidence presented established that the Foundation had insufficient funds to maintain and operate the Property.
 - The Foundation had not established that its financial existence was jeopardised if it had to continue to act as trustee for the purposes of the trusts about the Property if it could not encroach on the value of those trusts for other purposes.
18. The Court explained that (at [67]):

... impracticability requires more than a conviction by the trustee that the funds held under a specific purpose charitable trust could be used more productively for other charitable purposes. Impracticability also requires evidence of more than a decrease in the usefulness or cost-effectiveness of trust property.

19. And (at [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.

20. The Court then turned to whether impracticability was established, and whether the proposed alternative use was as close as possible to the original specific charitable purpose.

21. The Court found that the Foundation's proposal to sell the Property and to convert the value of that Property and the other funds to charitable purposes unrelated to operating a camp for children and youth on the Property was not a purpose as close as possible to the original purpose of the donated funds.

22. The Court concluded with the statement that (at [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.

23. The application was dismissed.

COMMENT



This case can be contrasted with cy-près style restructuring under Australian state statutes in [Housing Choices Australia Limited v Attorney General for the State of Victoria](#) [2024] VSC 107. In that case, the newly appointed trustee (HCAL) was faced with 1960s housing stock badly in need of renovation and was promised state government funding conditional upon a cy près order to vary the purposes of the trust to include social and affordable housing not restricted to 'aged deserving or infirm' persons as specified in the original Trust Deed. What is notable in the decision is that the company HCAL was to hold Baxter Homes, together with all other property and funds of the trust, for its general purposes and objects, for the benefit of the inhabitants of the State of Victoria.

In [Northern NSW Helicopter Rescue Service Limited v Attorney General of New South Wales](#) [2023] NSWSC 515, the Supreme Court allowed a company limited by guarantee with a trust embedded in its constitution to benefit from a cy-près scheme in order to qualify for a government funding tender, again pursuant to statute.

In England and Wales, these cases can be compared with [Shirland v Charity Commission of England and Wales](#) [2024] UKFTT 187, which was an appeal from consent to change the objects of a corporate housing charity so it could qualify for government funding.

VIEW THE CASE



This case may be viewed at: <https://www.canlii.org/en/bc/bcsc/doc/2024/2024bcsc442/2024bcsc442.html>

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Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

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