

CANADA / JUDGMENT

## West Vancouver (District) v. British Columbia (Attorney General)

2020 BCSC 966

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 966 West Vancouver (District) v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

West Vancouver (District) v. British Columbia (Attorney General),

2020 BCSC 966

Date: 20200629

Docket: S177029

Registry: Vancouver

Between:

The Corporation of the District of West Vancouver

Petitioner

And

Attorney General of British Columbia

Respondent

Before: The Honourable Justice Edelmann

Reasons for Judgment

Counsel for the Petitioner:

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Place and Date of Hearing:

Vancouver, B.C.

January 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 29, 2020

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## Overview

- [1] Clara Brissenden died in 1990, leaving a will devising a property to the Corporation of the District of West Vancouver (the "District") for use as a park. The District now seeks to sell a portion of the property to help finance the purchase of two other properties that will be added to Ambleside Park on the waterfront. The District takes the position that the proposed sale is consistent with the charitable purpose of the trust and seeks this Court's advice, opinion, or direction to that effect or a declaration under s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464 authorizing the sale as part of an administrative scheme. In the alternative, the District seeks a variation of the trust under s. 184 of the Community Charter, S.B.C. 2003, c. 26.
- [2] Charitable purpose trusts are enforced by the Crown, through the Attorney General, as part of its inherent *parens patriae* responsibility for charitable activities: *Rowland v. Vancouver College Ltd.*, 2001 BCCA 527 at para. 54. The Attorney General opposes the petition, taking the position that the proposed course of action would be contrary to the purpose of the trust. The Attorney General also seeks an accounting by the District in respect of money collected from the rental of a house on the property and a ruling as to whether that money is held in trust.

## Factual Background

- [3] The late Pearley and Clara Brissenden had a residence on some 2.4 acres of land adjacent to the Upper Levels Highway in West Vancouver, BC (the "Brissenden Property"). Aside from the house, the Brissenden Property was largely undeveloped and covered by mature second growth forest. Mr. Brissenden predeceased his wife, who died in June 1990. Ms. Brissenden's will devised the Brissenden Property to the District, which took possession of it in December of that year.
- [4] Between December 1990 and 2018, the District did not develop the Brissenden Property aside from renting the house to a caretaker and naming it "Brissenden Park", although no sign was erected on the Brissenden Property identifying it as a park.

[5] The District has very prominent public parks along the waterfront in the Ambleside area of West Vancouver. The District began acquiring this land in the 1970s as part of its "Argyle Acquisition Policy". At that time, there were 32 privately-owned waterfront lots along Argyle Avenue. Over the years, the District has acquired 30 of the waterfront lots, but the recent acquisitions have been expensive due to rising land values. Acquiring the last two lots on Argyle Avenue remains an objective of the District.

[6] On January 9, 2017, the Council of the District of West Vancouver (the "Council") resolved to proceed with public consultation on the proposed strategy of selling or leasing a portion of the Brissenden Property to fund the purchase of the last two Argyle Avenue properties.

[7] On June 19, 2017, the Council resolved:

THAT Council considers that the terms of the trust with respect to Brissenden Park are no longer in the best interests of the municipality;

THAT Council considers that the land at Brissenden Park is not currently, and unlikely in the future, to be well used as a public park due to, among other things, its location and topography;

THAT Council considers a variation of the trust would allow the land at Brissenden Park to be put to a better use to serve the interest of the overall community; and

THAT pursuant to section 184(2) of the Community Charter, Council commence a Court application to vary the terms of the trust with respect to Brissenden Park, in order to:

- retain the northern approximate 50% of the property as park, and allow disposition of the southern approximately 50% of the property;
- use all of the proceeds of disposition to purchase the waterfront properties at 1444 and 1448 Argyle Avenue as additional more accessible waterfront park land for the community; and

THAT the name "Brissenden Park" be retained at the existing location, that the District further recognize the contribution of the Brissendens by naming the area of the Argyle properties "Brissenden Waterfront Park", and by installing signage and plaques at both the existing Brissenden Park and at the future Brissenden Waterfront Park.

[8] In July 2017, the District filed a petition with the court seeking a variation of the terms of the trust under s. 184 of the Community Charter.

[9] In January 2018, following communications with the Attorney General, the District indicated that it would commit to various actions to develop the Brissenden Property as a park. This included plans to remove the house, create a walking trail, and put up signage. The District was not able to take some of the steps to develop the Brissenden Property as a park until the caretaker vacated the house in mid-July 2018.

[10] In July 2018, the Council adopted an Action Plan in relation to the Brissenden Property, and in October 2019, Council approved a revised Action Plan. The revised Action Plan and the affidavit evidence before the Court indicates that the District's proposed course of action includes the following:

- Approximately 43 percent of the Brissenden Property would be disposed of, rather than the 50 percent originally proposed. The southern portion of the Brissenden Property would be subdivided into three residential lots of a size and configuration consistent with the neighbourhood.
- The new residential lots would have a tree protection covenant so that no trees would be removed from the northern 10 feet of each lot without permission of the District.
- The District would retain a statutory covenant over a portion of one of the three lots to maintain an entrance to the park and build a walking trail to connect the remaining portion of the Brissenden Property to Rosebery Avenue.
- The District would take steps to add a nearby unused road allowance to the remaining portion of Brissenden Property. The land in question borders the Brissenden Property and remains in its natural treed state.
- The proceeds of the disposition of the southern portion of the Brissenden Property would be used to fund the development of Brissenden Park and the acquisition of the two remaining private lots on Argyle Avenue (1444 and 1448 Argyle Avenue). These two Argyle Avenue lots (approximately 8,600 square feet) would be formally dedicated as a park, named "Brissenden Waterfront Park", and added to the assets subject to the trust.

[11] On July 19, 2018, the District filed a Reference Plan with the Land Title Office formally dedicating the northern portion of the Brissenden Property as a park.

[12] On August 1, 2018, the District filed an amended petition, attaching its Action Plan and proposing that it be incorporated in an order from the court under the s. 184 of the Community Charter.

[13] Starting around September 2018, the District began to implement its plan to develop the northern portion of the Brissenden Property as a park. The house was demolished, walking trails were created, and a sign was put up identifying the location as "Brissenden Park".

[14] In June 2019, the District installed a trail counter on the trail near the entrance on Rosebery Avenue. Between June 5 and October 2, 2019, about six people per day, on average, entered Brissenden Park at this location.

- [15] On October 7, 2019, the Council passed a further resolution about Brissenden Park and approved the revised Action Plan. The resolution indicated that the Council would seek a determination that the District has the power to dispose of some or all of the Brissenden Property. The revised Action Plan provides that "the properties at 1444 and 1448 Argyle Avenue will remain as green space with no buildings."
- [16] In December 2019, the District filed a further amended petition, which is before the Court. The further amended petition seeks a declaration that the District can dispose of a portion of the Brissenden Property and in the alternative seeks a direction under s. 86 of the Trustee Act or relief under s. 184 of the Community Charter.
- [17] The District has provided estimates of the approximate size of the various lots of land in question, with which the Attorney General has not taken issue. Under the current proposed plan, the total area of the Brissenden Property devised to the District would be reduced from 104,397 square feet to 67,441 square feet. This estimate includes the 5,800 square feet from the road allowance that would be added to the park, the 2,880 square feet that would be covered by the statutory covenant for right of way, and the 2,900 square feet that would remain subject to tree covenants. In addition, another 8,600 square feet would become "Brissenden Waterfront Park".
- [18] Between December 1990 and 2018, the District collected a total of \$498,219.60 in rental income from the house on the Brissenden Property. Taking into consideration the operating and capital expenses in relation to the Brissenden Property as well as the interest that would have accrued over time had the District accounted for the money separately, the parties appear to agree there is a surplus of some \$206,869.23.
- [19] On January 10, 2020, the Attorney General filed an application seeking a determination as to whether the money collected by the District in relation to the Brissenden Property is trust property and an order for the accounting of the money in question.

## Issues

- [20] There are four issues to be decided:
- i. Are the funds that were collected from the rental of the house on the Brissenden Property held in trust by the District?
  - ii. Would the disposition of the southern portion of the Brissenden Property be consistent with the existing purposes of the trust?
  - iii. Should the Court authorize the disposition of the southern portion of the Brissenden Property as part of an administrative scheme?
  - iv. Should the Court vary the terms of the charitable trust under s. 184 of the Community Charter?

## Analysis

### Is the Rental Income Held in Trust?

- [21] It is common ground that, under the terms of Ms. Brissenden's will, the Brissenden Property is held in trust by the District. Taking accumulated interest and expenses into consideration, there is a surplus of some \$206,869.23 in the money collected by the District as rental income from the house on the Brissenden Property. There is disagreement about whether this is trust money.
- [22] The Attorney General argues that it is trust money that must be treated and accounted for as such. In *Can. Aero v. O'Malley*, [1974] S.C.R. 592 at 607-608, the Supreme Court of Canada referred to the duty of a trustee to account as a "basic principle" of trust law that was summarized by Viscount Sankey in the following terms in *Regal (Hastings) Ltd. v. Gulliver* [1942] 1 All E.R. 378 at 381 (H.L.):

The general rule of equity is that no one who has duties of a fiduciary nature to perform is allowed to enter into engagements in which he has or can have a personal interest conflicting with the interests of those whom he is bound to protect. If he holds any property so acquired as trustee, he is bound to account for it to his cestui que trust.

- [23] The District takes the position that it has complied with the terms of the trust by utilizing the net rental funds as part of its parks operating budget. The District relies on the decision of Justice Morrison in *Save Our Waterfront Parks Society v. The City of Vancouver et al.*, 2004 BCSC 430 for the proposition that the use of the Brissenden Property to generate profit was not contrary to the trust.
- [24] I find the District's reliance on *Save Our Waterfront Parks Society* is misplaced, as Morrison J. was not considering the question of whether the profit to be generated was money held in trust. The issue before her was whether it was consistent with the purposes of the charitable trust to allow profit-generating businesses to operate in the park in a manner ancillary to the public use of the park. In assessing the context of the particular trust, Morrison J. concluded:
- [48] Based on the affidavit and historical evidence before me I do not construe the trust agreement between the parties so as to prohibit a restaurant from being established in Kitsilano Beach Park. In my view, a restaurant would have been a use ancillary to a "park purpose" at the time the deed was signed.
- [25] The question before me, however, is not whether renting out the house on the Brissenden Property was consistent with the purposes of the trust. I do not understand the Attorney General to take the position there was anything inappropriate in the decision to do so. The question before me is whether the revenue generated by the activity in question is subject to the terms of the trust. I find no foundation in *Save Our Waterfront Parks Society* or elsewhere for the proposition that revenue generated using trust property should belong to the trustee, no matter how laudable the purposes to which that money might be directed.

[26] The District only had the ability to rent the house on the Brissenden Property because it was given to the District in trust. Any rent money received was revenue generated from the trust property and should have accrued to the trust.

Is the Proposed Plan Consistent with the Purpose of the Trust?

[27] The District seeks a declaration from this Court that executing the proposed plan would be consistent with its obligations as a trustee. The right of a trustee to seek the opinion, advice, or direction from the court in relation to its obligations is a well-established principle of equity. It has been codified in s. 86 of the Trustee Act:

86 (1) A trustee, executor or administrator may, without commencing any other proceeding, apply by petition to the court, or by summons on a written statement to a Supreme Court judge in chambers, for the opinion, advice or direction of the court on a question respecting the management or administration of the trust property or the assets of a will-maker or intestate.

[28] Justice Pearlman undertook a review of the authorities in this area in *Jones v. McLeod*, 2017 BCSC 1478, outlining the scope of what may be asked of the court in an application under s. 86(1) of the Trustee Act:

[30] The authorities provide some assistance on the scope of the questions which may be asked of the court on an application under s. 86(1).

[31] In *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071, rev'd on other grounds, 2014 BCCA 227, Madam Justice Loo said this at para. 116:

[116] The seeking of legal advice on legal issues arising in connection with the trustee's obligations is an appropriate category of application under s. 86 of the Trustee Act...

[32] In *Mansbridge and Roulston (In the Matter of)*, 2004 BCSC 1605, Madam Justice Loo also discussed s. 86 of the Trustee Act. At para. 51 she said this:

[51] On an application for directions under s. 86 of the Trustee Act, the court should not exercise the trustees' powers, but rather confine itself to advice on any legal issues that arise in connection with the trustees' obligations. [ ]

[33] What I take from these authorities is that an executor or trustee may seek the advice, opinion or directions of the court on a legal question and then act on that advice.

...

[36] While on the hearing of an application for directions under s. 86(1) the court may have to make some findings of fact in order to provide its opinion or directions on a legal question put to it, a petition proceeding is not suitable for the determination of contested issues of fact on questions relating to the trustee's liability.

- [29] As noted above, there is agreement between the parties that the Brissenden Property is held in trust by the District and that the purpose of the trust falls into a well-established charitable purpose relating to public parks. The main point of contention between the District and the Attorney General is in how to characterize the nature of the gift. The District submits that the gift should be interpreted in the broad sense of a contribution of the value of the Brissenden Property into the public parks system. The Attorney General submits 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.
- [30] In *Victoria (City of) v. Capital Region Festival Society* (1998), 62 B.C.L.R. (3d) 143 (S.C.), the court addressed the question of whether Beacon Hill Park, which the City of Victoria held in trust, could be used for a music festival. Justice Wilson found that the first step in the analysis is to define the trust asset in question:
- [23] The opponents argue that the City has only such ability to utilize the park as may be found in the terms of the trust. I think that is right.
- [24] The duty imposed on the trustee is to maintain and preserve the asset. There is a correlative right in the beneficiary to a maintained and preserved asset.
- ...
- [30] In my opinion, the first step in applying this principle is to define the asset. The greater the precision in defining the asset, the greater the precision in defining the duty of the trustee and the right of the beneficiary.
- [31] The asset here is not a "public walk or pleasure ground", as in *Sunderland*. It is not an amusement park, as seems to be the characterization applied in *Springbank (Municipal District) v. Calgary (City)*. It is not the abstract notion of "park" referred to in *Winnipeg (City) v. St. Vital (Rural Municipality)*. It is not "mere ornamental pleasure grounds". It is not a "wilderness" or category 1 or 2 park, as defined in section 12 of the *Park Act*.
- [32] The most apt descriptive adjective which comes to my mind, in this case, is the word "nature". That was the emphasis urged by the opponents. It is also consistent with the park objectives defined by the City[.] From the festival society's perspective, important characteristics are - "...natural shade, grass and spectacular beauty...".
- [33] I define the park therefore, as a nature park and ornamental pleasure ground, with playing fields. The enjoyment and recreation contemplated by the trust terms is the enjoyment and recreation of the trust asset in its physical state as a nature park and ornamental pleasure ground, with playing fields. To achieve the trust objects, the trustee is under a duty to maintain and preserve that "physical state as such".

[Footnotes omitted.]

- [31] As will be seen below, there are a number of indicators, both within Ms. Brissenden's will and in the larger context, that indicate her intention was focused on the specific site becoming a local park.

## Interpretation of the Will

- [32] Writing for the majority of the Supreme Court of Canada, Justice Ritchie set out the general approach to the interpretation of wills in *National Trust Co. Ltd. v. Fleury*, [1965] S.C.R. 817 at 829 in the following terms:

In the construction of wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills.

- [33] A subsequent passage endorsed the observations of Lord Birkenhead L.C. in *Lucas-Tooth v. Lucas-Tooth* [1921] 1 A.C. 594 (H.L.):

Indeed, in approaching a problem of this kind it is important never to lose sight of the true principle of construction in such cases--that it is the duty of the Court to discover the meaning of the words used by the testator, and, from them and from such surrounding circumstances as it is permissible in the particular case to take into account to ascertain his intention. For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause.

Unless this is done, there is a grave danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case, may produce consequences contrary to that intention.

- [34] Justice Dardi outlined the contextual approach to interpretation in *Thiemer Estate*, 2012 BCSC 629:

- [48] In keeping with contemporary judicial thinking, the courts of this province have favoured the subjective approach to interpreting wills, wherein the objective is to ascertain the actual meaning the testator ascribed to the words he or she used in the will. In determining the testator's intention the courts have endorsed the analytical approach commonly described as the "armchair rule". The rule requires that the court put itself in the position of the testator at the point in time when he or she made the will, and from that vantage point construe the language in the will in light of the surrounding facts and circumstances known to the testator.

- [35] The most cogent indication of Ms. Brissenden's intention is found in the following provision of her will:

... 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.

[Emphasis added.]

- [36] The provision quite clearly refers to the specific property itself being "used", "maintained", and "developed" for public park purposes. Even if one could arguably give a broad interpretation to the term "public park purposes", the clause contains a very specific direction with respect to the trees and natural growth on the property that indicates a focus on the Brissenden Property itself.
- [37] Viewing the clause in the context of the will as a whole, I find that a focus on the Brissenden Property itself is consistent with Ms. Brissenden's detailed instructions in relation to many of her possessions. There are numerous specific bequests of jewellery, artwork, and furniture that indicate considerations beyond the monetary value of the objects in question and that are consistent with her specific directions in relation to the Brissenden Property and the trees and natural growth on the site. In my view, both a plain reading of the provision in question and the context of the will as a whole indicate an intention for the Brissenden Property itself to be preserved as a park and, in particular, a concern in preserving the trees and natural growth on the Brissenden Property.
- [38] This interpretation is consistent with the context leading up to the preparation of the will and, in particular, the communications in July 1987 when the Brissendens met with the then Mayor of the District. In an undated "Memorandum for West Vancouver Archives", the Mayor described discussions with the Brissendens about a bequest of their property in the following terms:
- [Mr. Brissenden] explained that they had no close heirs to whom it would be appropriate to bequeath the property and asked whether or not the municipality would find it suitable as a neighbourhood park. Mrs. Brissenden offered the view that it could be the beginning of a municipal park that would ultimately extend east to include Marr Creek and Shamrock Place. . .
- ... Consultations were promptly held with senior staff, i.e. Manager, Terry Lester, Municipal Clerk, Doug Allen and Director of Parks, Frank Kurucz. Kurucz and myself actually inspected the property. These consultations produced the unanimous view that the property would be appropriate as a neighbourhood park and would fill a need in the area bounded by Rodgers and Marr Creeks and lying between Marine Drive and the Upper Levels Highway. This area was devoid of parks.
- [39] The Mayor wrote a formal letter to Mr. Brissenden dated July 30, 1987, indicating that after review by senior parks management:

. . . they have advised me that it would be highly appropriate for a neighbourhood park and would certainly become a treasured community asset. The design and use of such a park would reflect its neighbourhood character and undoubtedly would emphasize pedestrian access in order to minimize increase in automobile traffic.

[40] Ms. Brissenden executed her will three weeks later on August 20, 1987.

[41] The "District of West Vancouver Parks Master Plan" dated July 2012, identifies several different types of parks and outlines their defining features.

Destination Parks regularly draw visitors from the entire municipality and beyond, attracting those who specifically travel to spend time "in the park". People may visit these parks due to the natural features such as beaches or important forests, or the facilities and opportunities offered, such as major walkways, trail systems, and large picnic areas. Major urban parks are also considered destination parks due to the high use. . . . Urban parks may accommodate social functions or provide the visual features that add character to core areas.

[42] Ambleside Park is explicitly listed as an example of a destination park in the Parks Master Plan. The document goes on to define "Neighbourhood Parks" as follows:

Neighbourhood Parks (minimum optimal size 2 [hectares], sometimes 1 [hectare]) generally serve the catchment area of an elementary school, or 2,000 to 4,000 population. Neighbourhood park development may include play equipment, hard court, pathways, open grass, and seating. These parks are meant to form the visual, physical and social focus of the neighbourhood. Some sites that are planned for future development may be called undeveloped neighbourhood parks. Neighbourhood parks have important benefits in relation to health, fitness, walkable community and families.

[43] There does not appear to be any dispute that Brissenden Park is a "Neighbourhood Park" as defined by the Parks Master Plan. I note the description is consistent with the former Mayor's memorandum. Based on the maps provided to the Court, it would appear that Brissenden Park remains the only park in the area described in the former Mayor's memorandum.

[44] I find that Ms. Brissenden's intention was for the Brissenden Property to become a neighbourhood park, preserving the mature trees and natural growth for the use and enjoyment of the community. In my view, the disposition of a portion of the Brissenden Property to be developed as residential lots with the removal of a substantial number of trees is not consistent with the purposes of the trust. I therefore decline to provide the declaration sought by the petitioner.

Should the Court Authorize the Disposition as Part of an Administrative Scheme?

- [45] The District seeks the exercise of this Court's inherent jurisdiction in making an administrative scheme to better serve the purposes of the trust. There has been some debate in Canadian jurisprudence around the scope of the court's inherent power to create administrative schemes in circumstances where the cy-près doctrine is not applicable.
- [46] Historically, courts of equity have had the power to vary a charitable purpose trust under the doctrine of cy-près if the charitable purpose had become impossible or impracticable to carry out under the existing terms of the trust. The doctrine was summarized by Justice Dardi in *Sidney and North Saanich Memorial Park Society v. British Columbia (Attorney General)*, 2016 BCSC 589 in the following terms:
- [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] O.J. No. 5381, 68 O.R. (3d) 777 at para. 50 (S.C.J.) [Stillman].
- [47] Justice Dardi went on to discuss the court's inherent jurisdiction for administrative scheme-making in the following terms:
- [56] The jurisprudence establishes that, even absent a finding of impracticability or impossibility, the court retains the inherent jurisdiction for administrative scheme-making with respect to charitable trusts. An administrative scheme addresses the inadequacy of the administrative terms of a trust to achieve its charitable objects: *Waters* at 807-08. Pursuant to this jurisdiction, the court has the power to supply administrative terms or to alter the administrative machinery of a charitable trust when necessary for the effective operation of the trust. The court directs a scheme in order to secure a more complete attainment of the charitable purposes. This is in keeping with a long-standing recognition by the courts that the dedication of property to charity through a trust involves special rules. The jurisdiction to regulate the administration of charitable trusts should be exercised sparingly.
- [57] Historically, the courts in England have relied on their inherent jurisdiction to supply administrative terms when the trust instrument is silent, or to vary administrative terms including trustee powers, such as the investment power, when those terms have become obsolete: *In re Royal Society's Charitable Trusts*, [1956] Ch. 87.
- [48] Justice Dardi noted the uneven reception of the English jurisprudence and went on to review the decisions in Canadian courts on the scope and application of the power. She described the divergence in the following terms:

- [73] The central conflict that emerges from the Canadian authorities is not whether, in the absence of a determination that the trust purposes have become impracticable or impossible, the court retains the inherent jurisdiction for administrative scheme-making. That jurisdiction is judicially acknowledged for the most part. Rather, the conflict turns on the boundaries of that jurisdiction and the extent to which the doctrine permits a variation to the expressed intent of the settlor. Distilled to its essence, Canadian authorities are at odds about whether a "total return" investment and distribution policy can properly be approved pursuant to the administrative scheme-making jurisdiction.
- [49] In conclusion, Dardi J. found that she did not need to resolve the conflicting jurisprudence in the case before her and confirmed the relevant scope of jurisdiction:
- [76] I conclude that I have inherent jurisdiction for administrative scheme-making for charitable trusts. In cases where it cannot be said that the requirements to achieve the purposes of a charitable trust have become sufficiently impracticable or impossible so as to engage the cy-près doctrine, the courts may nonetheless, pursuant to this administrative scheme-making jurisdiction, vary the administrative terms of a trust for the furtherance of charitable purposes. As this case does not involve an endowment trust, it is not necessary to resolve the conflict in the Canadian authorities I have described.
- [50] In the present case, the District does not seek to invoke the cy-près doctrine, accepting that it is neither impossible nor impracticable for the Brissenden Property to continue being used as a neighbourhood park. Rather, it seeks to have this Court authorize the disposition of a portion of the Brissenden Property as part of an administrative scheme as the proposed plan would better serve the residents of the District.
- [51] The District relies on the decision of the English Court of Appeal in *Oldham Borough Council v. Attorney General*, [1993] Ch. 210, [1991] 2 All E.R. 432, which found that a court had the power to authorize the sale or exchange of a property held in charitable trust as part of an administrative scheme. The settlor had given land to the Oldham Borough Council in trust for use as playing fields. The council wanted to sell the land to developers for a substantial sum and use the proceeds of the sale to buy a new site for playing fields with much better facilities.
- [52] The applicable legislation did not permit variation of the "original purposes of the trust" in the circumstances, and so the decision turned on the question of whether the variation was consistent with the original purposes of the trust. The Court of Appeal concluded that it was:

There are, of course, some cases where the qualities of the property which is the subject-matter of the gift are themselves the factors which make the purposes of the gift charitable - e.g. where there is a trust to retain for the public benefit a particular house once owned by a particular historical figure or a particular building for its architectural merit or a particular area of land of outstanding natural beauty. In such cases sale of the house, building, or land would necessitate an alteration of the original charitable purposes and therefore a cy-pres scheme because after a sale the proceeds or any property acquired with the proceeds could not possibly be applied for

the original charitable purpose. But that is far away from cases such as the present, where the charitable purpose - playing fields for the benefit and enjoyment of the inhabitants of the districts of the original Donees, or it might equally be a museum, school or clinic in a particular town - can be carried on on other land.

[53] The distinction between the administrative machinery and the charitable object of the trust set out above is consistent with the distinction outlined by Dardi J. in *Sidney v. North Saanich Memorial Park Society*, and she noted that what was before her was not an application to vary the objects of the trust.

[54] The District's application before me turns on the characterization of the plan and whether the very specific directions from Ms. Brissenden in her will should be considered the object or charitable purpose of the trust, or whether they are merely administrative in nature.

[55] As set out above, in my view both the will itself as well as the context of its drafting indicate that the purpose of the trust was to preserve the Brissenden Property, with its trees and natural growth if practical, for use by the community as a park. It is clear from the terms of Ms. Brissenden's will that she felt the Brissenden Property itself, and in particular the mature trees on the Brissenden Property, had an inherent value for the community that warranted protection. The representatives of the District around the time of the gift appear to have explicitly agreed with that assessment. The proposed plan would be contrary to this direction from Ms. Brissenden, as a significant portion of the trees and natural growth would be removed for development, and the proposed "Brissenden Waterfront Park" would appear to have neither mature trees nor substantial natural growth. I do not find that the direction to preserve the trees and natural growth is a mere administrative matter, and in my view, it is much more appropriately characterized as part of the charitable purpose of the trust.

[56] The District is of the view that the value of the land in the Brissenden trust could be better deployed elsewhere in the municipal parks system. There is no reason to doubt that view is held in good faith and has taken into consideration the multiple factors that converge in managing a park system for a large urban community. Be that as it may, I do not accept that the charitable purpose of the gift was simply a contribution to the parks system writ large. Therefore, even accepting that this Court has the inherent power to order the disposition of trust property as part of an administrative scheme, I decline to exercise that power in the circumstances.

Should the Disposition be Authorized under Section 184 of the Community Charter?

[57] In the alternative, the District seeks the exercise of this Court's statutory power to vary the trust under s. 184 of the Community Charter, which reads as follows:

## 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).

[58] A similar provision can be found in a number of other British Columbia statutes:

- Local Government Act, R.S.B.C. 2015, c. 1 (s. 282)
- Vancouver Charter, S.B.C. 1953, c. 55 (s. 152)
- University Foundations Act, R.S.B.C. 1996, c. 471 (s. 11)
- First Peoples' Heritage, Language and Culture Act, R.S.B.C. 1996, c. 147 (s. 9)
- Museum Act, S.B.C. 2003, c. 12 (s. 23)

[59] It would appear that neither s. 184(3) of the Community Charter nor similar trust variation provisions in other statutes have been considered by this court. No judicial consideration of similar provisions in other jurisdictions has been brought to my attention. The following sections will outline the relevant context and elements of statutory interpretation before applying the statute to the case at bar.

[60] The basic principles of contemporary statutory interpretation are well established: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21, citing Elmer Driedger in Construction of Statutes (2nd ed. 1983) at 87). The legislature has provided similar guidance in s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238:

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[61] In addition to establishing that every enactment is remedial, s. 8 of the Interpretation Act "reinforces the importance of taking a comprehensive approach to interpretation" of legislative provisions (R. v. Tannhauser, 2020 BCCA 155 at para. 26).

- [62] The following sections will begin with an outline of the legislative history leading to the inclusion of the trust variation provision in the Community Charter and the other pieces of legislation in which it is found before engaging in more detail with the overall context of the Community Charter and the provision.

### Legislative History of the Trust Variation Provision

- [63] Local government legislation in British Columbia dates back to the mid-1800s. The Municipality Act, S.B.C. 1872, c. 35 was the first general municipal enabling legislation enacted by the newly-formed province. The name "Municipal Act" was first used in 1911, and over the years, there were a number of reforms to the Municipal Act as the province grew and local governments were afforded more powers and responsibilities. The Vancouver Charter, S.B.C. 1953, c. 55 was enacted in 1953, granting the City of Vancouver particular powers.
- [64] In the late 1990s and early 2000s, there were a number of significant reforms to the local government legislation. The Local Government Statutes Amendment Act, 2000, S.B.C. 2000, c. 7 changed the name of the Municipal Act to the Local Government Act and made a number of other consequential amendments. This series of reforms culminated in the enactment of the Community Charter in 2003, which came into force on January 1, 2004. The Community Charter provides the statutory framework for most municipalities in the province and sets out fundamental municipal powers and responsibilities, complementing and supplementing the Local Government Act.
- [65] The predecessor to s. 184 of the Community Charter was first enacted in 1928 as part of An Act to amend the "Municipal Act", S.B.C. 1928, c. 32. It allowed a municipal council to accept real property subject to any trusts. There was no mechanism in the Municipal Act by which a municipality could apply to the court to vary a trust term. The section was amended, and in 1958 read as follows:
466. The Council of a city, town, district, or village municipality may accept and receive any real or personal property devised, bequeathed, conveyed, or transferred to the municipality, subject to the trusts (if any) upon which the same is devised, bequeathed, conveyed, or transferred. Where the sale of any property so accepted or received is necessary in order to carry out the terms of any trust, the Council may sell the same, notwithstanding any limitations or restrictions in this Act contained. All moneys held by any municipality subject to any trust shall, until required for the purposes of the trust, be invested in the manner provided for the investment of sinking funds.
- [66] The section was subject to minor changes and became s. 531 of the Municipal Act in 1979.
- [67] The next consequential change to the section was in 1994 with the enactment of the Heritage Conservation Statutes Amendment Act, 1994, S.B.C. 1994, c. 43. It was at this point that municipal councils were given the express authorization to apply to the court for an order varying the terms of a trust. The language introduced in 1994 is virtually identical to the

language that is found in s. 184(2) and (3) of the Community Charter today. The Heritage Conservation Statutes Amendment Act, 1994 also amended the Vancouver Charter to include the same provision.

- [68] The first time such a provision would appear to have been enacted in British Columbia was as s. 10(2) [now s.11(2)] of the University Foundations Act when the legislation was enacted in 1987. The section read as follows:
- (2) Where, in the opinion of a board, the directions, terms or trusts imposed by a donor, settlor, transferor or testator are no longer in the best interests of the corporation, the board may apply to a judge of the Supreme Court for an order authorizing such variation of the directions, terms or trusts as the court, having the intent of the donor, settlor, transferor or testator in mind, considers will better further both that intent and the best interests of the corporation.
- [69] Section 9 of the First Peoples' Heritage, Language and Culture Act was present in its current form when the legislation was enacted in 1990, with only minor changes in wording in subsequent years. There does not appear to be any substantive discussion of s. 10(2) of the University Foundations Act or s. 9 of the First Peoples' Heritage, Language and Culture Act in the legislative record from the time those provisions were enacted.
- [70] The Heritage Conservation Statutes Amendment Act, 1994 was introduced as Bill 21 on April 6, 1994. In a sitting of the Committee of the Whole House studying the bill, there was some discussion about the role of the court anticipated by legislators:

C. Tanner: If we go to page 38, section 52 is very simple. It says: "Section 531 is repealed and the following substituted: Power to accept property..." Municipalities can, as I understand it, appeal to the Supreme Court for changes to terms by which property has been deeded or donated by a person. This gives municipalities the ability to change the will of a person making a deed, and that concerns me somewhat. If I want to leave my property to my city, why should the city change the terms under which I left it to them?

Hon. B. Barlee: Section 531 is amended to enable local governments to apply to the Supreme Court for authority to vary the terms of trusts or bequests of property in consideration of changing needs. Subsections (4), (5) and (6) are added to provide greater latitude in varying the terms of trusts. The court must consider the intent of the donor, settlor or testator as well as the best interests of the municipality. The court must consider the original agreements as well. So I think that's relatively well covered.

C. Tanner: In that case, is the court strictly an adjudicator between the terms of the will and the needs of the municipality?

Hon. B. Barlee: I believe that is the case.

(British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 35th Parl, 3rd Sess., Vol 17, No 8 (5 July 1994) at 12785.)

[71] When the Community Charter was enacted, it contained s. 184 largely in its current form, and s. 314 [formerly s. 531] of the Local Government Act was amended to restrict the grant of power in that Act to regional districts only. Section 184 of the Community Charter differed slightly from s. 314 of the Local Government Act, but the process by which a municipality could apply to the court remained the same. The only amendment since has been to change the word "testator" to "will-maker".

## Community Charter

[72] 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 purposes of the Community Charter are set out in s. 3 as follows:

3 The purposes of this Act are to provide municipalities and their councils with

- (a) a legal framework for the powers, duties and functions that are necessary to fulfill their purposes,
- (b) the authority and discretion to address existing and future community needs, and
- (c) the flexibility to determine the public interest of their communities and to respond to the different needs and changing circumstances of their communities.

[73] As will be seen below, the purposes of the Community Charter are clearly a relevant consideration in assessing the scope and application of s. 184(3).

[74] The District argues that the Court should also take into consideration s. 4 of the Community Charter, which mandates a broad interpretation of the powers granted to municipalities. It will be helpful to look at s. 4 in full:

4 (1) The powers conferred on municipalities and their councils under this Act or the Local Government Act must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

(2) If

- (a) an enactment confers a specific power on a municipality or council in relation to a matter, and
- (b) the specific power can be read as coming within a general power conferred under this Act or the Local Government Act,

the general power must not be interpreted as being limited by that specific power, but that aspect of the general power that encompasses the specific power may only be exercised subject to any conditions and restrictions established in relation to the specific power.

[75] It is not clear to me that the court's power to make an order under s. 184(3) of the Community Charter is a "power conferred on a municipality" as that term is understood in s. 4. Subsection 184(3) is clearly framed as a power the court "may" exercise. To the extent there is a power conferred on the municipality under s. 184, it is the ability under s. 184(2) to make an application to the court for an order under s. 184(3). However, while s. 4 may not directly apply to the exercise of the court's power under s. 184(3), it does emphasize the intent of the legislature to confer broad powers on municipalities.

### The Role of a Municipality as Trustee

[76] The role of a municipality as a trustee is somewhat different than that of many other trustees, as the municipality by its very nature is tasked with representing the best interests of its community. This is illustrated in the structure of the Community Charter, which in s. 1 sets out a series of "Principles of municipal governance", which include the following:

1 (1) Municipalities and their councils are recognized as an order of government within their jurisdiction that

- (a) is democratically elected, autonomous, responsible and accountable,
  - (b) is established and continued by the will of the residents of their communities, and
  - (c) provides for the municipal purposes of their communities.
- (2) In relation to subsection (1), the Provincial government recognizes that municipalities require
- (a) adequate powers and discretion to address existing and future community needs,
  - (b) authority to determine the public interest of their communities, within a legislative framework that supports balance and certainty in relation to the differing interests of their communities,

...

[77] The purposes of a municipality are outlined in s. 7 of the Community Charter:

7 The purposes of a municipality include

- (a) providing for good government of its community,
- (b) providing for services, laws and other matters for community benefit,
- (c) providing for stewardship of the public assets of its community, and
- (d) fostering the economic, social and environmental well-being of its community.

- [78] The purposes of a municipality are largely consistent with the types of charitable purposes that have been recognized by courts in the context of charitable trusts. In *Save the Heritage Simpson Covenant Society v. City of Kelowna*, 2008 BCSC 1084 at paras. 118 to 120, Justice Bruce concluded that land that was to be held for "municipal purposes" connoted a purpose that is charitable in nature.
- [79] Although they are not at issue in the present case, the other pieces of legislation containing provisions similar to that in s. 184 of the Community Charter also involve trustees with general mandates that appear consistent with recognized charitable purposes.

### The Structure of s. 184

- [80] Section 184 of the Community Charter itself is composed of four subsections under the heading "Property accepted in trust". The first and last subsections clearly frame the section in the context of the law of trusts. Subsection 184(1) requires money held in trust by a municipality to be invested in a manner that would appear consistent with the obligations of a prudent trustee. Subsection 184(4) makes direct reference to the Trustee Act:
- (4) Section 87 [discharge of trustee's duty] of the Trustee Act applies to an order under subsection (3).
- [81] Section 87 of the Trustee Act protects trustees who act on the "opinion, advice or direction" of the court:
- 87 (1) The trustee, executor or administrator, acting on the opinion, advice or direction given by the court, is deemed, so far as regards his or her own responsibility, to have discharged his or her duty as trustee, executor or administrator in the subject matter of the application.
- (2) This Act does not extend to indemnify a trustee, executor or administrator in respect of an act done in accordance with the opinion, advice or direction referred to in subsection (1) if the trustee, executor or administrator has been guilty of fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.
- [82] The application of s. 87 of the Trustee Act to an order under s. 184(3) of the Community Charter frames the order in the context of the well-established obligations and protections of a trustee. Given the context in the provision itself, the legislator would presumably have been aware of the mechanism under s.86 of the Trustee Act and chose to create a different mechanism. The use of the word "order" in s. 184(3) of the Community Charter further confirms that the mechanism is intended to be distinct from the "opinion, advice or direction" described in s. 86 of the Trustee Act.
- [83] The procedural foundation for an application to vary terms or trusts is an opinion of the municipality under s. 184(2) of the Community Charter:

- (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).
- [84] The subsection is framed as a precondition for bringing an application before the court. In this case, the Council has passed a resolution expressing the required opinion. I agree with the District's submission that this Court is not sitting in judicial review of the Council's opinion or the decision to make an application for an order under s. 184(3) of the Community Charter. The Attorney General accepts that the petition under s. 184 of the Community Charter is properly before this Court.
- [85] The District takes the position that the wording "no longer in the best interests of the municipality" under s. 184(2) of the Community Charter is not relevant to the exercise of the court's discretion under s. 184(3). While the phrase in question clearly implies a change in circumstances, the District takes the position that the focus of the analysis should be on the best interests of the municipality in the present.
- [86] While I agree that the Court is not sitting in judicial review of the Council's opinion that the trust is "no longer in the best interests" of the District, I do not accept that the legislator's framework can simply be ignored. Although the temporal wording of s. 184(2) is not imported into s. 184(3), in my view the nature of the change of circumstances is a valid consideration in the exercise of the Court's discretion under s. 184(3). There is an implicit assumption in the wording of the statute that the trust was, at some point in the past, in the interests of the municipality. It is indeed not unreasonable for the legislator to presume that at the time the municipality accepted property in trust, the trust was perceived to be in its best interests.

## Section 184 and the Common Law

- [87] The Attorney General submits that, to the extent that s. 184 of the Community Charter modifies the common law for the variation of charitable purpose trusts, it should be interpreted no more broadly than necessary. This is consistent with the approach outlined by the Supreme Court of Canada in *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19:
- [29] . . . [W]here the legislature expressly creates a statutory exception to a common law principle, that exception should be narrowly construed, as the legislature is assumed not to have intended to change the common law unless it has done so clearly and unambiguously. In *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39, Iacobucci J., writing for the majority, stated:

To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610, at p. 614, for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of

the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed". In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077, Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".

- [30] Professor Sullivan also takes the view that to displace a common law rule, the legislation must show a clear intention to do so. Quoting Halsbury's Laws of England (3rd ed. 1961), vol. 36, at p. 412, para. 625, she writes that, "[e]xcept in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law or to change any established principle of law" (p. 538).
- [88] In my view, the wording of s. 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. 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.
- [89] The derogation from the common law of trusts is consistent with commentary on the limitations of administrative schemes and the cy-près doctrine. Issues with the application of the cy-près doctrine, for example, are discussed in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th Ed., (Toronto: Thomson Reuters, 2012) at 823 in the following terms:

Despite these more relaxed applications of the impossibility or impracticability test, the shortcoming has remained that 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 the 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.

- [90] As noted earlier in these reasons, the application of an administrative scheme does little to alleviate this issue, as an administrative scheme cannot be used to vary the purpose of the trust itself.
- [91] I conclude that the intention of the legislature in enacting s. 184(3) of the Community Charter was to allow greater flexibility in varying trusts for which a municipality is the trustee.

### Subsection 184(3)

- [92] Subsection 184(3) of the Community Charter is at the heart of the decision this Court is called upon to make. It will be helpful to examine the wording of the section more closely:

- (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.
- [93] The first segment frames the clause in the context of the precondition of an application under s. 184(2) of the Community Charter. As noted above, this places the application in the context of the municipality's opinion that there has been a change in circumstances since the time when it became a trustee. This is consistent with the remainder of the wording in the section.
- [94] The second segment states that on the application, the court "may" vary the terms or trusts. Section 29 of the Interpretation Act directs that the use of the term 'may' "is to be construed as permissive and empowering". However, while in the overall context I conclude that the power of the court to vary the terms or trusts is discretionary, the court must take guidance from the statute and the common law in exercising its discretion judicially.
- [95] The use of the words "vary the terms or trusts" is consistent with a legislative intention that the mechanism have a broader application than the existing mechanisms in the law relating to charitable trusts. While a variation of the "terms" might be consistent with the court's administrative scheme-making power, the reference to varying the "trusts" is more consistent with an intention that the court have the discretion to vary the purposes of the trust itself rather than simply the mechanisms of implementation.
- [96] The final portion of the clause is the crux of the assessment the court is expected to undertake, which is whether the variation "will better further both the intention of the [settlor] and the best interests of the municipality".
- [97] The "intention of the [settlor]" is a clear reference to well-established principles in the law of charitable trusts. The established approach to identifying the settlor's intentions are set out in the first portions of these reasons. There is no reason to believe the legislator intended any derogation from that approach.
- [98] In my view, the petitioning municipality will generally be well-placed to establish its own best interests. In the case before me, the District has presented detailed and cogent evidence that the best interests of the municipality have been considered following extensive consultation. Without precluding the possibility, I find it difficult to imagine a case in which the court would not defer to a municipality's assessment of its own best interests.
- [99] I agree with the District's submission that the clause read in context implies a conflict between the intention of the settlor and the best interests of the municipality. There are at least two indications of this. First, if the variation independently furthered the "intention of the settlor", there would not appear to be any impediment to its implementation by the municipality as trustee under existing trust mechanisms. Secondly, an application can come before the court only in circumstances where the municipality is of the opinion there is a conflict between the "terms or trusts" and the best interests of the municipality.

[100] The question of whether the variation is one "the court considers will better further both" the intention of the settlor and the best interests of the municipality would therefore indicate an assessment of both elements together rather than independently. Ultimately, this Court must consider the impact of the proposed variation for both the intention of the settlor and the interests of the municipality.

### Application of s. 184(3)

[101] Taking into consideration the interpretative principles set out in the preceding sections, I conclude that the intention of s. 184(3) of the Community Charter is to allow a greater scope to vary trusts when a municipality is the trustee, while at the same time ensuring that the intentions of settlors are respected. The following sections will outline some of the factors relevant to exercising the court's discretion under s.184(3) of the Community Charter as it relates to the variation of a charitable trust. Each factor will be discussed in turn before being applied to the circumstances of the present case. While each of these factors may inform the exercise of the court's discretion, they are not meant to be exhaustive. In the end, the question is whether the court considers the variation will further both the intention of the settlor and the best interests of the municipality.

What were the intentions of the settlor in relation to the trust?

[102] The intentions of the settlor and the purpose of the trust are clearly central factors to be considered. While this requires identifying the precise nature of the trust and intentions of the settlor, it will also be helpful to distinguish between the broader charitable purposes of the trust and the more specific intentions or wishes that relate to the implementation of those broader purposes.

[103] As I stated earlier, I find Ms. Brissenden's specific intention was for the Brissenden Property to become a neighbourhood park, preserving the mature trees and natural growth for the use and enjoyment of the community. Without considering the issue in the context of the best interests of the municipality, I have found that the impact of the proposed plan on the Brissenden Property would not be consistent with this specific charitable purpose.

[104] In my view, Ms. Brissenden's intentions can also be framed more broadly in terms of the development of park space in which residents of the District will have access to a more natural environment. The purchase of the Argyle properties and the creation of the "Brissenden Waterfront Park" is consistent with this broader charitable purpose.

What impact will the variation have on the assets of the trust?

- [105] The impact of the variation on the trust assets is an important consideration. In the context of a charitable trust, this would include not only the depletion of trust assets, but, in particular, any depletion or allocation of trust assets in a manner inconsistent with the purposes of the trust. Allocation of trust assets to non-charitable purposes would be of particular concern, although given the general purposes of a municipality, such a proposed allocation would presumably be unlikely.
- [106] With respect to the depletion of trust assets, there are two aspects to be assessed. One is obviously the monetary value of the trust assets. The monetary value of the trust cannot, however, be the only consideration in relation to the assets of the trust. As is clear in the excerpts from *Victoria (City of) v. Capital Region Festival Society* discussed earlier in these reasons, the nature of the assets in a trust may not be most effectively described in monetary terms.
- [107] In this case, the variation is likely to increase the monetary value of the assets subject to the trust. Under the current plan, the proceeds of the disposition of the three residential lots, along with a further contribution from the District, would be used to purchase the two Argyle properties. The two Argyle properties would become "Brissenden Waterfront Park" and be added to the assets of the trust. In addition to the new Brissenden Waterfront Park and the remaining Brissenden Park, the unused road allotment would be added to the assets subject to the trust. The tree covenants and right of way on the existing Brissenden Property would also be to the benefit of the trust and its purposes. The monetary value of the trust would be likely to increase significantly following the requested order.
- [108] As noted above, the monetary value of the trust cannot be the only consideration in relation to the assets of the Brissenden Property. The asset of greatest relevance in this case is the mature second growth forest and, in particular, the trees currently on the Brissenden Property, which contribute to its value as a neighbourhood park. While there is not an inventory of the trees in evidence, I accept that the proposed variation would substantially reduce not only the overall area protected by the trust, but also the number of trees.
- [109] However, while the overall number of trees would be reduced, there are a number of elements in the proposal that would limit the impact on the trees and the value of the remaining portion of the Brissenden Property as a neighbourhood park. These include the tree covenant, right of way, and addition of the treed road allotment to the trust.
- [110] The addition of the proposed "Brissenden Waterfront Park" to the trust assets is not, in my view, merely of monetary value either. The waterfront park would provide highly valuable park land in an area where it would benefit many thousands of people every year in a manner that goes beyond the dollar value of the land in question.

How will the variation further the best interests of the municipality?

- [111] The best interests of the municipality are clearly a central factor to be considered. As I noted earlier, there are compelling reasons for the Court to defer to the municipality's assessment of its own best interests. However, that does not mean this Court should not consider the specific nature of the interests being articulated and the ways in which they purport to benefit the municipality in question.
- [112] A substantial amount of documentation was placed before the Court indicating that the current proposal was developed following extensive consideration and consultation by the District. There is no dispute that the waterfront parks surrounding the Argyle properties are regularly used by many thousands of residents of the District. The parks in question are a destination for visitors from the surrounding region and beyond. As noted earlier in these reasons, I accept that the proposed plan takes into consideration the multiple factors that converge in managing a park system for a large urban community. It is a well-documented plan that has been subject to extensive study and consultation, taking into consideration the other park space available to residents in the various parts of the District. I accept that the proposed plan is in the best interests of the District and its residents.

Has the municipality's conduct as trustee had an impact on the situation before the Court?

- [113] The Attorney General argues that the Court should consider the actions as trustee of the municipality seeking the variation, suggesting that s. 184 of the Community Charter should not be used to vary trust terms upon which a municipality has failed to act diligently as trustee in the past. It is not clear to me that an application under s. 184 of the Community Charter is the appropriate forum for a general accounting of the past conduct of a trustee. The relevant considerations must remain the intention of the settlor and the best interests of the municipality at the time of the application. However, I accept that the past conduct of the trustee may be relevant in assessing the current situation before the Court—for example, where the conflict between the purposes of the trust and the interests of the municipality have been caused by bad faith or a failure to act diligently on the part of the trustee.
- [114] In this case, the Attorney General argues that the District accepted the Brissenden Property but did not develop, maintain, or use it as a park for more than 25 years after acquiring it. It is reasonable to assume that recent changes such as adding signage and a walking trail will increase the usage of Brissenden Park by the members of the community the trust was intended to benefit. While the low usage of the park may well be a reflection of the limited development of the park by the District prior to 2018, I accept the District's submission that, given its geographical location and topography, Brissenden Park would likely have had a relatively small number of users even if it had been developed earlier. I therefore conclude that, regardless of whether a more diligent trustee might have behaved differently, the District's conduct is of limited relevance to the issue to be decided here.

How are the terms or trusts no longer in the best interests of the municipality?

- [115] This factor involves a more precise articulation of the conflict between the intention of the settlor and the best interests of the municipality, including how the circumstances have changed since the property was originally accepted in trust. As noted above, the Court is not sitting in judicial review of the opinion of the municipality that the terms or trusts are "no longer in the best interests of the municipality". However, in my view, the nature of the change in circumstances between the time the property was accepted in trust and the time of the petition is a relevant consideration in the exercise of the court's discretion.
- [116] The application before me is not one of direct conflict between the intention of the settlor and the best interests of the municipality. The underlying rationale for the District's application is that the resources of the trust could be better allocated elsewhere in the park system by prioritizing the development of a waterfront park rather than maintaining the entirety of the neighbourhood park that currently exists.
- [117] I accept that there have been relevant changes in the circumstances since the time when the District had discussions with the Brissendens about donating their property. In addition to the substantial increase in the cost of acquiring waterfront property, which has limited the ability of the District to pursue the Argyle Acquisition Policy, there have also been significant changes in the population of the District that would inevitably impact the usage of the park system. It is in the context of the current circumstances that the District is of the opinion that strict adherence to the terms of the trust are no longer in its best interest.
- [118] Should the variation be denied, the District would need to find resources elsewhere to pursue the acquisition of the Argyle properties, and it is not clear those resources are currently available. Given the increase in the cost of acquisition of the Argyle properties, those resources would be substantial and presumably would be deployed at the expense of other municipal objectives.

Will allowing the variation have a chilling effect on charitable giving in the future?

- [119] The threshold for variation using the statutory mechanism in s. 184(3) of the Community Charter should not be so low as to discourage charitable donations in trust to municipalities. As pointed out by the Attorney General, municipalities should take the responsibility of accepting property in trust and of being a trustee seriously. 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. The court should consider whether allowing the variation would have a chilling effect on charitable giving in the future.

- [120] In my view there is an important distinction to be made between the broader chilling effects of a low threshold for s. 184(3) variation, such that it would discourage charitable gifts to any municipality in trust, and the chilling effect in relation to the specific municipality before the court. In my view, the petitioning municipality is in a position to consider the chilling effect of the variation it is seeking on the future gifts it might receive in trust, and deference should be afforded to that assessment.
- [121] With regard to the broader chilling effect, there is presumably some risk inherent in varying the terms of a trust in a manner that deviates from settled law such that potential donors may consider the terms of their gifts less secure. However, if the legislature's intention to expand the scope of possible variations is to be given effect, that inherent risk cannot be an impediment to any variation outside of existing trust law principles. The court should seek to strike an appropriate balance in demonstrating respect for the terms and trusts established by the settlor in the context of an expanded scope for variation.
- [122] The District in this case has engaged in the process in a reasonable manner that demonstrates consideration for the intentions of Ms. Brissenden, albeit sometimes at the prompting of the Attorney General. While not without dissent, broad public consultation has shown extensive support for the proposed plan. I note, in particular, a letter from five former law partners of Mr. Pearly Brissenden who state they knew the Brissendens quite well and express the view that the Brissendens would have been supportive of the proposed plan. I have not taken this letter into consideration in my findings about Ms. Brissenden's intentions in creating the trust, but I accept it as relevant to assessing the process the District has undertaken in seeking a variation before the Court.
- [123] I find in the circumstances of this case that a reasonably informed person would not be unduly deterred from leaving a gift in trust to a municipality if the proposed variation were ordered. As set out above, there are a number of ways in which the intentions of Ms. Brissenden have been taken into consideration in the variation, and the overall impact of her contribution will benefit a much larger portion of the community in a manner largely compatible with her charitable intentions.

## Conclusion

- [124] In conclusion, taking all the factors set above into consideration, I find that this 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.

## Proposed Order

- [125] The terms of the trust will be varied as set out in the following paragraphs, subject to submissions from the parties should be they be unable to come to agreement on the wording of an order in accordance with these reasons.
- [126] The District may subdivide and dispose of the three proposed residential lots from the southern portion of the Brissenden Property.
- [127] Each residential lot will have a tree protection covenant such that no trees would be removed from the northern 10 feet of each lot without permission of the District (as trustee), including any trees on the boundary of the covenant.
- [128] The District would retain, subject to the terms of the trust, a statutory covenant over one of the three lots for a walking trail connecting the remaining portion of the Brissenden Property to Rosebery Avenue.
- [129] Prior to disposing of any of the residential lots, the District will close the unused portion of the existing 25th street road allowance, adding it to Brissenden Park and making it subject to the terms of the trust.
- [130] The proceeds of disposition shall be used to fund the acquisition of the two remaining privately-owned lots on Argyle Avenue. The two lots (1444 and 1448 Argyle Avenue) will be named "Brissenden Waterfront Park". The two Argyle lots (approximately 8,600 square feet in total) will be added to the assets subject to the trust.
- [131] Brissenden Waterfront Park will be subject to a trust condition in relation to "green space", which is to be more specifically and clearly defined, subject to submissions from the parties if needed. While "green space" is a useful shorthand for an area that presumably will have some form of plant life, in my view the intention of Ms. Brissenden to ensure community access to a natural environment would benefit from the type of clarity that she included in the directions relating to the Brissenden Property. This would likely include some indication of the types of plant life to be fostered in Brissenden Waterfront Park and a description of the types of development or facilities that would or would not be appropriate.

## Costs

- [132] The Attorney General has asked for no costs and that no costs be awarded against it. Given the nature of the Attorney General's role and the context of the application in this case, it would appear appropriate for each party to bear their own costs, but should either party wish to make submissions on this issue, they may make arrangements to do so within 30 days of the release of these reasons.

"Edelmann J."

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