Trusts & Equity – Law 463
Fall Term 2024

Lecture Notes No. 10

INFORMAL PUBLIC APPEALS

Based on the ULCC *Uniform Informal Public Appeals Act (2012)*, Saskatchewan has enacted *The Informal Public Appeals Act*, S.S. 2014, I-9.0001. Essentially the court is provided with a jurisdiction to settle the funds collected into a suitable trust. It is a very useful statute.

The following case is not required reading:

Re Humboldt Broncos Memorial Fund Inc.
2018 SKQB 341 (Sask. Q.B.)

This was the first case considering the new statute.

N.G. Gabrielson J.*:*

1 It is a rare occasion that from great tragedy comes great generosity. Such was the genesis of the money raised by the Humboldt Broncos Memorial Fund Inc. [HBMFI].

2 The fund was created to remember and honour the 29 persons who, in April of 2018, were involved in a horrific bus crash on a highway between Tisdale and Nipawin, Saskatchewan. Sixteen persons lost their lives and 13 survived with various injuries that will affect them for the rest of their lives.

3 Sylvie Kellington, a Humboldt resident, started a GoFundMe Campaign for the players and their families. In the 12 days that followed, there was raised a total of $15,172,948.00 from donors around the world. The generosity of persons wanting to help in this time of tragedy was truly amazing.

4 The money raised by the GoFundMe Campaign led to the creation of a non-profit corporation in June, the HBMFI, to distribute the funds to those on the bus at the time of the crash.

5 An application was made to the court by the HBMFI. I was appointed by the Chief Justice of our court to supervise the fund.

6 Fortunately, we had an Act in Saskatchewan, *The Informal Public Appeals Act*, SS 2014 c I-9.0001 [*IPAA*], a new statute which was enacted in 2015 based upon legislation developed by the Uniform Law Conference of Canada. Saskatchewan, for some reason, was the only province in Canada to enact the legislation. In any event, through good government management or good fortune, this *Act*laid out the framework by which the monies raised by the GoFundMe Campaign could be dealt with.

7 The HBMFI was approved as trustee of the fund. Darrin Duell, Robert Eichorst, Dalyn Graf, Kevin Garinger, Randolph Maclean, Kathleen Keen and Jay Fitzsimmons were its first directors. The HBMFI obtained legal advice and counsel from MLT Aikins were appointed and who I am told acted on a *pro bono* basis.

8 HBMFI applied to the court for directions in August of 2018. At that time, an interim distribution of $50,000.00 was made to each of the individuals who were on the bus. As well, an Advisory Committee consisting of five prominent, experienced and respected individuals from Saskatchewan, Alberta and Manitoba was approved. The five were The Honourable Dennis Ball of Regina, a retired justice of the Court of Queen's Bench, Kevin Cameron of Lethbridge, Alberta, Mark Chipman of Winnipeg, Manitoba, Hayley Wickenheiser of Calgary, Alberta and Dr. Peter Spafford of Saskatoon, Saskatchewan. Information Resource Persons were tasked with providing the Advisory Committee with personal information concerning the 29 individuals on the bus, their spouses, families or next of kin. The Information Resource Persons were Sandra Boswell of Saskatoon, John Gabrysh of Tisdale and Penny Lee of Humboldt.

9 The Advisory Committee filed its recommendation to the HBMFI November 10, 2018. In a 17-page report the Advisory Committee recommended that the funds held by the Humboldt Broncos Memorial Fund Inc. be allocated as follows:

> (a) in addition to the initial payment of $50,000.00 made to each of the families of the 16 persons who died in the accident, to pay the sum of $475,000.00 to each such family for a total of $525,000.00.
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> (b) in addition to the initial payment of $50,000.00 made to each of the 13 surviving claimants, to pay the sum of $425,000.00 to each claimant; and
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> (c) to distribute any remaining funds in trust to the 13 surviving claimants in equal shares, share and share alike.
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> 10 HBMFI accepted the recommendation of the Advisory Committee and applied to the court for approval of a final order under the *IPAA*.

11 I have decided to accept the recommendation of the Committee. The Committee went through in detail the options they faced and made thoughtful recommendations. They took into account the fact that the survivors of the crash may have available to them insurance under *The Automobile Accident Insurance Act*, RSS 1978, c A-35, *The Workers' Compensation Act*, *2013*, SS 2013, c W-17.11, Hockey Canada, the Western Hockey League and other insurance sources. They took into account the wishes of the survivors that they all benefit equally no matter what their medical condition so as to not create any rift between them by the allocation of funds. Finally, they explained their reasons for the slight difference in the allocation as to those who died in the crash and those who survived as follows:

> [57] Finally, we have considered the logic and fairness of our recommendations by asking two simple questions. First, would any of the 13 survivors and their families trade places with any of the other 16 members in return for any amount of money? Of course, they would not. Second, would any of the 16 families who have lost a loved one forego any amount of money

> if they could have their sons, daughters or partners back? Of course they would, in a heartbeat.

12 The simplicity and the reasonableness of the recommendation appeals to me and I adopt the reasons for the distribution recommended.

13 I therefore approve the draft order as to the final distribution and the other matters covered by it.

> 14 I would like to commend counsel for their work in coming to this final order. I also appreciate the comments of Ms. Gellrich who spoke to an equal distribution of funds to everyone but I have decided to follow the recommendations of the Advisory Committee for the reasons stated. I also commend the members, directors and officers of the HBMFI, the members of the Advisory Committee, the Information Resource Persons, Sylvie Kellington, who started the GoFundMe Campaign, and the persons in the global community who made contributions to the Campaign. I would finally recognize the 29 persons who were on the bus, as well as their family and friends. Everyone has proven that together we can face adversity and move forward if we remain "Humboldt Strong".

CY-PRÈS

Like all doctrines of a certain vintage, the development of cy-près in equity has some interesting moments. One particular case is a favourite of mine, and serves to prove two principles directly relevant to the law of charities.

In 1717, Sir George Downing made a Will which set up a complex settlement including a wish to give land and make an endowment gift of £100,000 to create a college in the name of the Downing family. Sir George died in 1749 and, after a number of other relatives had the good manners to die, the estate then passed to Sir Jacob Downing. Sir Jacob died in 1764. Although technically only having an income interest in the estate, Sir Jacob willed his interest to his widow, Lady Margaret Downing. There began almost 40 years of court cases regarding the disposition of the estate. Along the way, the matter involved consideration of the cy-près doctrine as there was insufficient funds in the estate to found the college which Sir George had desired to establish. In ***Attorney- General v Lady Downing*** **(1769), Amb 571**, Wilmot CJ considered the matter and set out what he perceived to the primary reason why equity had the power to restructure failed settlements such as the one before the court. A resettlement scheme was necessary not for the benefit of the public, but to aid in the expiation of late donor's sins - 'the merits of the charity ought not to be lost to the testator.' Eventually the litigation was resolved and Downing College, Cambridge was established in 1800. Instead of the new college beginning with the Downing estates and a £100,000 initial endowment, Downing College began with a capital legacy of a £9,780.18s. 6d.

The first lesson one can take from the case is that charitable giving is a considered a benefit to all, even the donor.

The second lesson is that primary beneficiaries of any trust, even a charitable one, are always the lawyers.

(A) CY-PRÈS: THE CONCEPT

Gifts are often made to charities during the lives of donors, and quite often such gifts are made through a will to take effect on the testator's death. However, circumstances may have changed during the period from when the donor decided to make the gift and the time that the gift was to take place. The designated charity may have ceased to exist. The purpose of the charity might have been accomplished already, or the functions taken over by the government rendering it without any role. The original purpose might now not fit contemporary morals or public policy, or might even be contrary to law. Even if the gift did take place, the same considerations may intervene at a later stage. In all these cases, the law has developed doctrines to allow courts to rescue the funds and re- apply them for new charitable purposes.

The term cy-près is itself a source of some confusion. It is traditionally translated as 'near-to' and thought to derive from an Anglo-Norman corruption of the Middle French terms *si-pres ('as* near') or *ici-pres* (near here). One contemporary definition reads:

If property is given on trust to be applied for a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and is the settlor manifested a paramount intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the paramount charitable intention of the settlor.

However defined, cy-près is a rather simple concept: **a court of suitable jurisdiction has the power to keep in existence gifts made for charitable purposes so that the public might continue to benefit into the future where the original terms of the gift are impossible or impracticable or unlawful to be carried out.** In other words, the gift was one given for charitable purposes and should remain dedicated to charitable purposes – it should not be diverted to other uses.

While the rationale for the court's power may have been one which had ecclesiastical overtones in earlier times, it is now decidedly secular. The gift is saved to benefit the public, and the court here acts consistent with one of equity's long-standing maxims – *Charity is Always Favoured by Equity.*

At the same time, one must take care not to regard the power of the court for more than it is - **the doctrine fills a preservative function only, and cy-près is not available merely to structure the settlement in some better way;** *Re Baker* (1984), 47 O.R. (2d) 415 (Ont HCJ).; *Weninger Estate v Canadian Diabetes Association* (1993), 2 E.T.R. (2d) 24 (Ont Gen Div).

It is not an aid to resolving problems with the gift, it is an aid to preventing failure of charitable gifts. In other words, expediency is not enough to allow the court to invoke its powers under the cy-près doctrine; *Re St George's Hospital* (1859), 27 Beav 107; *Re Baker* (1984), 47 O.R. (2d) 415 (Ont HC).

The *cy-près* doctrine is within the general equitable jurisdiction of the court to supervise trusts. Thus, whether the application has been made by the Public Guardian and Trustee or another trustee under the Trustee Act RSO 1990, s.60(1) or by any two people under the Charities Accounting Act RSO 1990, s.10(1) or by any other procedure contemplated by the Rules of Civil Procedure, a court of superior jurisdiction may exercise its equitable jurisdiction and invoke the cy-près doctrine where circumstances so permit.

Sidney and North Saanich Memorial Park Society v. British Columbia (Attorney General) 2016 BCSC 589 (B.C.S.C.); cb, p.470

A trust of land was settled in 1922. The land was used as a recreational facility, a memorial, and, over the years, was subject of both expropriations and additions through purchase by the trustees. The machinery of the trust was outdated and the trustees sought an order allowing them to be freed from certain restrictions respecting use of the land and its exploitation while preserving the general nature of the use of land and preservation of a cenotaph. The application was allowed, but it's importance to us is in respect of the nature of the court's jurisdiction.

per Dardi J.:

> **c. Proposed Amendments to the Trust Deed**
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> **Legal Framework**
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> Charitable Purpose Trusts
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> [45] A charitable trust is an instrument for furthering the dedication of property to charity. It will not fail for uncertainty if its objects are purposes and not persons. The charitable purpose stands in the place of what ordinarily would be a beneficiary. It is, however, essential that the purposes be exclusively charitable. Charitable purposes are generally perceived as enduring to the benefit of the public and, accordingly, the law recognizes that this type of trust may operate in perpetuity: Waters at 664; Rowland at para. 55.
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> [46] It has long been settled that the court has the inherent jurisdiction to supervise the establishment and administration of charitable purpose trusts. The court's inherent jurisdiction was historically exercised in the courts of equity in England. This equitable jurisdiction was assumed by and vests in the courts of British Columbia: Kenney v. Loewen, [1999] B.C.J. No. 363 at para. 19.
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> Cy-près Jurisdiction
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> [**47] Cy-près is a significant doctrine in the law of charities. It determines what happens when property that has been dedicated to charitable purposes cannot be applied in the manner intended by the donor**: Haley & McMurtry, Equity and Trusts, 3d ed (London: Sweet & Maxwell, 2011) at 261. **Where the purposes or objects of a charitable trust have become impossible or impracticable to achieve, the court, relying on its inherent jurisdiction, may intervene and alter the purposes of the trust, and in doing so, depart from the stated intention of the settlor. The courts may implement modernized or modified objects that are "as near as possible"** (cy-près) to the original purposes: Toronto Aged Men's and Women's Homes v. Loyal True Blue and Orange Home, 2003 CanLII 32923 (ON SC), [2003] O.J. No. 5381, 68 O.R. (3d) 777 at para. 50 (S.C.J.) [Stillman].
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> [48] A cy-près order "must depart from the intentions of the [settlor] only to the extent required to remove the problem that has caused the future administration of the Trust to become impracticable." It is also imperative that the relative efficiency of the proposed amendments be considered: Stillman at para. 28.

[49] The threshold requirement for invoking the cy-près doctrine is a finding that carrying out the existing trust terms is either impossible or impracticable. In the absence of such a determination, the court must refuse to exercise its cy-près scheme-making jurisdiction. Despite the narrow ambit of the doctrine, courts have, at times, interpreted impossibility and impracticability broadly: Waters at 683. "Impracticability" is not to be construed as "absolutely impracticable": In re Dominion Students' Hall Trust, [1947] Ch. 183 at 186.

[50] Earlier lines of authority endorsed the notion that cy-près orders should be restricted to cases where there has been a failure of the purposes or objects of a charitable trust as distinct from the malfunction of the directions from the settlor for implementing those objects.

[**51] However, the modern Canadian jurisprudence, as articulated by Mr. Justice Cullity in Stillman at paras. 31-33 and subsequently applied by the court in Fenton Estate, 2014 BCSC 39, establishes that the doctrine extends beyond remedying the failure of objects. It goes further and empowers the court, without amending the purposes, to introduce or adjust administrative trust machinery to accommodate contemporary conditions, so that the charitable purposes can be sustained. The rationale is found in the judicial recognition that the charitable objects should not be frustrated by the trust's administrative provisions.**

[52] Stillman is instructive of the point. There, the will-maker directed the trustees to invest the residue of the estate and to pay out the annual net income to certain charities. There was no power in the will for the trustees to encroach on the capital. The trust was registered as a private foundation under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). At that time, the applicable disbursement quota for a charitable trust was 4.5% of the average fair market value of its investment property. In the years from 1997 to 2002, the trust had been unable to meet the quota, as the annual income had been in the range of only 3.4% to 4.1%.

[53] Mr. Justice Cullity found the administrative terms of the trust had become impossible, or at least impracticable, in the circumstances. The "impracticability" arose out of the entitlement of the Minister of Customs and Revenue to revoke the charitable registration, giving rise to liability for a revocation tax and subsequent taxation on its realized capital gains. Those statutory consequences were sufficiently serious that the court concluded that it was no longer practicable to administer the testamentary trust in accordance with the provisions of the will that limited the trustee's power to limit distributions to "income only".

[54] Mr. Justice Cullity's distillation of the animating principles, at para. 33 of Stillman, is instructive:

Where the directions of the donor have become impracticable, as here, I do not think it matters whether they are to be characterized as relating to the purposes of the Trust or merely to the mode by which they are to be achieved. The jurisdiction to substitute other directions will exist in either

case and in each case the court will fashion a scheme that will as nearly as possible reflect the intentions of the donor.

[55] I prefer and adopt the contemporary judicial approach. The administrative terms of a trust support the advancement and achievement of the charitable purposes. If, as a result of the existing administrative terms, impracticability in achieving those charitable purposes has arisen, it is open to the court to invoke its cy-près jurisdiction to amend the administrative terms in order to formulate a scheme that facilitates the continued administration of the charitable purpose trust.

Administrative Scheme-Making

[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.

[58] The doctrine has received a somewhat uneven reception in Canada.

[59] Killam Estate (Re) (1999), 185 N.S.R. (2d) 201 [Re Killam], a decision of Chief Justice Kennedy of the Nova Scotia Supreme Court, involved a charitable endowment trust that permitted distribution of income only for charitable purposes. There was no suggestion that it had become impracticable to achieve the testator's purposes and the issue of the applicability of the court's cy-près jurisdiction is not addressed in the reasons. However, the court approved an amendment pursuant to its administrative scheme-making jurisdiction, permitting the trustees to implement a total return investment and distribution policy. A total return investment policy is one that seeks to achieve the best return in terms of income and capital gains without distinguishing between them.

[60] At paras. 81-83, the court in Re Killam reasoned:

[81] Having concluded that both the method of investment and the distribution level sought to be maintained by the applicants are reasonable and prudent, I

conclude that this Court should use its inherent jurisdiction to approve and enable "the agreement" to be accomplished.

[82] Although the result will be contrary to the expressed, unequivocal direction of Mrs. Killam to distribute "income only", I am influenced by the cases cited, such as: re J.W. Laing Trust, [1984] 1 Ch. 143, re Dominion Students' Hall Trust, [1947] 1 Ch. 183 and re Lysaght, decd. Hill and Another v. The Royal College of Surgeons and Others, [1966] 1 Ch. 191 in which the courts have varied trusts and thereby contradicted the original intentions of the makers when they determined that the alterations were in the best interests of the beneficiaries and for the better administration of the trust.

[83] I am convinced that the variations accomplished by "the agreement" are in accord with the "spirit of the gift".

…

[75] Dr. Waters summarized the nature of the conflict in the jurisprudence regarding the contours of this administrative scheme-making jurisdiction: Waters at 810:

While these courts agree that a scheme can be approved that would introduce "total return", the limits of administrative scheme-making in the light of the English Chancery precedents are differently conceived. With the move from a prescribed perpetual income distribution to the percentage trust one court sees a perpetuation of the testator's intent in a discerned continuity between "income" and "capital", while another sees the issue as an invasion of capital contrary to expressed intent.

[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.

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The Basic Operation of the Doctrine

In general terms, there are three stages of the process: qualification of the gift, failure of the gift, and resettlement of the gift via a judicial cy-près scheme. To be more precise:

1. *There must be a gift for a charitable purpose.* The cy-près doctrine cannot convert an invalid private purpose trust into a valid charitable trust. The original objects of the gift must fall within the traditional definitions of charity or any statute that deems such objects to be charitable.

2. *There must be a 'cy-près occasion'.* There must be an event that the court recognizes as sufficient for it to invoke its jurisdiction and resettle the gift. There are two main categories:

i. The charitable purpose designated is *impossible* to carry out;
ii. It is *impracticable* to carry out the charitable purpose.

3. In some cases, the donor must have had a 'general charitable intent' when making the gift to allow the court to act. Where the cy-près occasion prevents the gift vesting in the charity at all ('initial failure'), it must be shown that the donor had a 'general' or 'paramount' charitable intention' in making the gift. Where the gift fails *after* the gift has vested ('subsequent failure'), a general charitable intention need not be shown.

4. The new objects should be close to the failed objects of the gift. The terms of the resettlement – the new charitable purposes substituted by the court – should be as near as possible to the original purposes of the trust so as to respect the will of the testator; see *Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre* (2001) 8 C.P.C. (5th) 329 (Ont Sup Ct).

(B) 'CY-PRÈS OCCASIONS'

A word of caution: One should note that care is required as not all situations that would appear to be failures are really failures at all. Sometimes, a careful inquiry will reveal that a charity thought to be no longer in existence has just hidden itself under a different name or that a defect in the trust instrument can be cured to reveal the identity of the donee as was intended by the donor.

For example, where a charity is consolidated with other charities with similar purposes, it may be that the charity has not ceased to exist at all but that it remains in existence – only the 'machinery of the institution' has changed; *Re Faraker* [1912] 2 Ch 488. The matter is not always quite so simple in practice though. In one case, amalgamation was held to be a cy-près occasion; see *Avalon Consolidated School Board v. United Church* (1984), 47 Nfld. & P.E.I.R. 261 (Nfld CA). In such a case, the change was not sufficient to constitute failure. It might be that the charity is mis-named rather than never having existed – this is not properly cy-près but more a matter of discerning the true intent of the donor; *Re Buchanan* (1995), 11 ETR (2d) 8 (BCSC).

Traditionally, a court of equity would have jurisdiction to invoke its jurisdiction where there was a sufficient 'cy-près occasion'. Usually this meant that the gift was *impossible* to perfect (for example, the donee had ceased to exist or the money left was insufficient for the purpose) or the gift was *impracticable* (for example, the a scholarship with discriminatory provisions unacceptable to the donee).

(i) Impossibility

It would be impossible to define with precision those occasions in which it would be impossible for the gift to be made. A few of examples will suffice:

- ***Re Spence's Will Trusts,*** **[1979] Ch. 483; cb, p.482:** The testatrix gave a gift for the benefit of residents at a retirement home that existed when the Will was executed but had ceased to exist when she died; there was a specific charitable intention so the gift failed.
- *AG v London Corporation* (1790), 3 Bro CC 171: A religious trust to propagate 'the Christian religion amongst the infidels of Virginia' was impossible as the Court determined that there were no infidels in Virginia.
- *Re Rymer* [1895] 1 Ch 19: A specific seminary was left a gift, but the seminary did not exist anymore (although it once had). The gift failed, as the testator had a specific and not a general charitable intent, there was a resulting trust.
- *Re Harwood* [1936] Ch 285: This was a gift to the "Peace Society" in Belfast. The charity never existed but there was a general charitable intent so that the gift could be applied cy-près.
- *Re McSweeney* (1982), 41 NBR (2d) 419 (NBQB): The Will contained a residuary bequest for the establishment and maintenance of a home for aged men and women. After the distribution there was approximately $176,000 in the estate. The executor felt that the money was not sufficient to establish a home for the aged, but it was held that the gift was not impossible to carry out in view of financing options open to the donee.
- *Johnston Estate v. Ganaraska Woods Retreat Centre* [2002] O.J. No. 1079 (Ont Sup Ct): Testator left gifts to two schools for retarded children which were no longer in existence; gifts resettled on cy-près for similar purposes.

Discriminatory Provisions

Aside from the simple situation where the donee has ceased to exist, it might also be the case that carrying out the gift would contravene the law in some way. A simple illustration is gifts made with discriminatory provisions that limit the class of beneficiaries in a manner which would violate human rights or other equal access provisions. For example, in *Re Ramsden Estate* (1996), 139 DLR (4th) 746 (PEI SC), a gift to a university was made for scholarships to go to Protestant students only. Such a gift violated the provincial statute respecting universities and was thus impossible to carry out as stipulated by the settlor. In ***Canada Trust Co. v. Ontario Human Rights Commission*** **(1990), 74 OR (2d) 481 (Sup Ct); cb, p.494,** the Will provided for a scholarship fund to exclude 'all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual' (amongst other restrictions). The Court struck out the provisions which ought not be enforced on policy terms and ordered a scheme accordingly.

(ii) Impracticability

Like impossibility, impracticability covers a wide field. Courts in the past have used this ground narrowly and broadly. In the narrow use, it is the circumstances of the case which dominate the analysis- for example, a gift to establish a church is impracticable where a similar church was already established in a small locale; *Re Schneckenburger* (1931) 40 OWN 210 (Ont SC). More broadly, courts sometimes can use this ground to determine the issue on public policy grounds, in effect allowing the gift to be

saved from a condition which might otherwise cause it to fail; *Re Dominion Students' Hall Trust* [1947] Ch 183.

(C) INITIAL AND SUBSEQUENT FAILURE

An *initial failure* occurs where the property fails to vest in a donee; for example, where the charity ceases to exist before the testator/donee dies. The gift is then never effective. **For the court to invoke its jurisdiction, it must be satisfied that the donor wished to give to charity as a paramount intent (and secondarily to this charity)** rather than giving a gift to the institution specified and only that institution.

A *subsequent failure* takes place after the original gift has vested in the original donee; for example, the terms of the donee's existence are satisfied and the institution is wound up accordingly. In such cases, the money has already been used for charitable purposes and **the court will not require the showing of a general charitable intent – the presumption is that the gift, once dedicated to charity, is fully and forever dedicated to charity from the moment it vests.** If, however, the donor had provided conditions (a gift-over in such circumstances as caused the failure), it is of course the donor's intent which prevails absent any statutory authority to the contrary. One should note that the court will not entertain the cy-près application before the actual failure – so, for example, the fact that the institution still exists even though its future might be precarious makes the application premature.

***Re Fitzpatrick* (1984), 4 DLR (4th) 644 (Man QB); cb, p.488** is an example of subsequent failure. The testatrix left the residue of her residue of her estate to her executors on the following terms:

> I DIRECT my Executors to hold the balance of the monies in my estate in a fund to be known as 'The Kathleen Fitzpatrick Fund', and to invest such monies in such investments as in its sole discretion shall be appropriate and from the principal and interest of such fund to pay for the musical education of any boy or boys who are under the care of St. Joseph's Vocational School of Winnipeg, and resident there, and who shall show musical talent, the selection of such boy or boys to be made by a committee consisting of the Rev. Sister Superior of St. Joseph's Vocational School, the President of the Manitoba Registered Music Teachers Association Incorporated, and the head of the music department of St. Mary's Academy, of Winnipeg.

The school was closed ten years after the death of the testatrix. No one had received benefit from the fund. The executors applied for an order for advice and directions concerning the legacy. Simonsen J held:

> The principles were expressed by the author Donovan Waters in an article [Case comment: *Re Hunter; Genn v. A.G.B.C.]* (1974), 52 Can. Bar Rev. 598, at pp. 598-99:
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> The law in this area is not easy, but it is fairly well laid down. Before the court can approve a cy-près scheme, it must be shown that the testator's charitable purpose was impossible to carry out or impracticable, and that he did not have only that particular charitable purpose in mind, but a general intent to give to charitable work of that kind. It is because the testator had this so- called general charitable intent that the court will assist his intention by seeing that the property is applied to some similar purpose. If he only wanted to further the particular named charitable purpose, but impossibility or impracticability has occurred, the court will not intervene, and the property in question will revert to his estate.

> However, these rules only apply when the expressed charitable purpose is impossible or impractical on the instrument of gift taking effect, and in the case of a will, of course, this is the moment of the testator's death. It does not matter whether the charitable gift is to take place immediately or only after the completion of a prior interest. If there is a so-called initial impossibility or impracticability, the rules mentioned apply.
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> These rules do not apply when impossibility or impracticability occurs *after* the instrument of gift has taken effect. It does not matter whether the purpose is being carried out when the impossibility or impracticability subsequently occurs, or if either of those events occurs during the time of a prior interest, while the purpose or charity is awaiting the end of that interest. When impossibility or impracticability occurs after the instrument has taken effect, a so-called supervening impossibility or impracticability has occurred.
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> In these circumstances the court now looks to see whether the instrument of gift has given the property in question exclusively to the charitable purpose. That is to say, if there is a gift over of any kind, then there is no so-called exclusive dedication to the charitable purpose. However, if there is an exclusive dedication, and the purpose can no longer be carried out because of impossi bility or impracticability, the property is regarded as dedicated to charity, and passes to the Crown in right of the province as the ultimate protector of charity and charities. By long custom the Crown will now agree to the drawing up of a cy-près scheme for the approval of the court.
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> In the circumstances of supervening impossibility or impracticability no general charitable intent is required. This is because the purpose or charity was possible and practicable when the instrument of gift took effect, and whatever the scope of the donor's intent he has dedicated his property to charity. All that is required, as I have said, is an exclusive dedication.
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> ...
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> In the present case, St. Joseph's Vocational School was in existence at the time of the testatrix' death and there were potential candidates in existence at that time. In my view, that was the critical date because the objects of the charity were in existence at the time of death. It can therefore be said the charity vested in perpetuity for the stated charitable purpose. This was not a case of initial failure but rather of supervening impossibility. In the circumstances, it is not necessary to find a general charitable intent in the legacy to permit the ordering of a cy-près scheme.

'Paramount Charitable Intent'

This is really a matter of fact and impression; the court must determine whether the donor intended, primarily, to give to charity or whether she gave to *this* charity and *only* this charity. Thus, in *Re Taylor* (1888), 58 LT 538, Kay J said that:

> ... if upon the whole scope and intent of the will you discern the paramount intention of the testator was to benefit not a particular institution, but to effect a particular form of charity independently of any special institution or mode, then, although he may have indicated the mode in which he desires that to be carried out, you are to regard the paramount intention chiefly...

[See Cartwright J (in dissent) in *Re Cox* [1953] 1 SCR 94]

Because the issue is essentially one of fact, it is difficult to come up with precise guidelines as to whether such a paramount intention exists in any one case. It is usually a matter of inference from the scheme settled in the trust instrument rather than a matter of direct evidence, and the court must consider whether “the specific formulation of the purpose of the bequest is not exhaustive of the intention of the testator” - so, for example, a gift for the paying of a church debt where matching funds are made available is not indicative of a general charitable intent [Re *Harding* (1904), 4 O.W.R. 316 (Ont H.C.)], nor was a gift to a particular orphanage [Re *Allendorf,* [1963] 2 O.R. 68 (Ont H.C.)]. These were more consistent with a specific charitable intent for the named institution and only the named institution.