

**CITATION:** Mee et al. v. Y.M.C.A. Properties Inc., et al., 2022 ONSC 2621  
**COURT FILE NO.:** CV-22-537  
**DATE:** 20220429

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Robert Mee, Michael Clare, Stephen Cook, Douglas Simpson, Gordon Ball,  
Friends of Geneva Park, Applicants

**AND:**

Y.M.C.A. Properties Incorporated, YMCA of Simcoe/Muskoka, Clayton Smith,  
The Commercial Realty Group, The Public Guardian and Trustee, Respondents

**BEFORE:** Justice V. Christie

**COUNSEL:** David Lees and Taras Kulish, Counsel, for the Applicants

Doug Bourassa, Counsel for the Respondent, Y.M.C.A. Properties Incorporated

Lawrence Hansen and Christopher Statham, Counsel for the Respondent, YMCA  
of Simcoe/Muskoka

James Wortzman and Catherine Allen, Counsel for the Respondent, Clayton  
Smith and The Commercial Realty Group

No one appearing for the Public Guardian and Trustee

**HEARD:** April 28, 2022

**ENDORSEMENT**

**Overview**

- [1] The Applicants identify as members of the Geneva Park community located at 6604 Rama Road, Orillia, Ontario, which is said to include hundreds of individuals and families who have built, donated, laboured and contributed to the Geneva Park for generations. The Friends of Geneva Park (“FOGP”) is a recently incorporated organization formalizing the previous informal group comprised of families of this community.
- [2] This Application has been brought on an urgent basis, on extremely short notice (served on some, but not all, parties on April 26, 2022), stated to be pursuant to s. 10 of the *Charities Accounting Act*, R.S.O. 1990, c. C10, as amended, requesting various relief, including, but not limited to the following:
- a. A Declaration that YMCA Simcoe/Muskoka (“YSM”) hold in trust the property located at 6604 Rama Road, Orillia, Ontario (“the Property”), known as Geneva Park, by way of an implied trust, constructive trust, resulting trust or charitable

purpose trust for the members and community of Geneva Park, including the Friends of Geneva Park, as beneficial owners;

- b. An Order granting the Applicants standing pursuant to Section 10 of the *Charities Accounting Act* and an order for directions regarding the Property, or an order into the investigation into the sale of the Property;
  - c. An Order that YSM produce the agreement of purchase and sale with respect of the Property, with a closing date scheduled for April 29, 2022, with YSM as vendor and Clayton Smith and/or The Commercial Realty Group as the purchaser, and all associated documents;
  - d. An Order directing the Land Registrar of Land Registry Office #51 to register a Certificate of Pending Litigation against the title of the Property;
  - e. An interim injunction restraining the Respondent, YSM from closing the sale of the Property;
  - f. In the alternative, if the sale of the Property is completed, an order that the funds from the sale be set aside and paid into Court and an accounting provided of the donations made by the Applicants and other members of the Geneva Park family camp community for the benefit of Geneva Park, and such amount to be transferred to the FOGP for use in accordance with its charitable objects;
- [3] The Applicants argued that they became aware of the sale of Geneva Park to a private purchaser on April 4, 2022, including an awareness that the sale was due to close on April 29, 2022. The Applicants have serious concerns with the impending sale of Geneva Park and with the way in which YSM conducted the sale. The Applicants claim that YSM failed to keep its promise to fully inform stakeholders about the sale in a meaningful way. The Applicants oppose the sale to a private purchaser stating that it is completely incongruent with pre-existing and historical intentions of both Geneva Park and its stakeholders for the past 100 years, and the trust upon which the YSM held Geneva Park for the Geneva Park community and other stakeholders.
- [4] The Public Guardian and Trustee has taken no part in this urgent hearing. All other Respondents argued that this Application should be dismissed. In summary:
- a. Y.M.C.A. Properties Incorporated holds the land as trustee for YSM. At the time of this hearing, they had not been served and had no opportunity to file responding material. However, in oral argument, they submitted that the urgency in this matter has been manufactured, given that the plans to sell this property have been ongoing since January 2021. This Respondent argued that if the Applicants believed they were beneficial owners of the property, they had 14 months during which to bring an application to court seeking that declaration. Rather than doing that, this Respondent argued that the Applicants have “lain in the weeds” and exerted their “rights” at the last possible moment given that the sale is to close on April 29, 2022. This Respondent argued that bringing this Application at the last possible moment was a tactical decision of the Applicants who are bitter about the sale.

- b. YSM argued that the Applicants are seeking an extraordinary order from this court, and, in effect, are asking this court to interfere in a contractual relationship for the sale of property in exchange for \$16,000,000 where the Applicants are not a party, seeking a veto over the Board of Directors, and the production of confidential documents. The Applicants are asking this court to intervene to redirect YMCA assets to be used in a manner that the Applicants believe is appropriate, rather than those assets being used as the YMCA believes is appropriate. The Applicants seek to interfere in a process where the YMCA has done nothing wrong. This Respondent argued that a ruling by this court in favour of the Applicants would lead to an absurd precedent in the law of charities.
- c. Clayton Smith and The Commercial Realty Group are the proposed purchasers of this property. Mr. Smith intends to spend \$6 million to restore this property which is in serious disrepair. This Respondent argued that even if this sale does not close, the YSM has made it clear that they will not open this summer or next summer, as it is a “cash drain” that they cannot afford, therefore, the Applicants, even if successful, will not get the result they seek.

### **Background Facts**

- [5] The YMCA is a charity, created under Letters Patent of Amalgamation. Those Letters Patent also set out the objectives of the YMCA and include provisions that this is a without-profit organization, and its directors serve without remuneration. The organization has its own Board of Directors which is composed of members of the community. The Board is charged with the overall responsibility over the YMCA’s assets, programmes, and services. The YMCA prepares annual reports and posts them to its website. Each year, Grant Thornton conducts an audit and prepares an auditor’s report which is also posted to the YMCA’s web site.
- [6] Geneva Park is a property situated on a 150-acre peninsula surrounded by Lake Couchiching, in an ecologically sensitive area, located on the traditional territory of the Anishinaabe people, the Chippewas of Rama First Nation. On the property, there are 85 buildings, including 41 cabins, which are rented to the public. The property has been in the YMCA family since 1909. Some of the history of Geneva Park has been provided to this court as follows:
  - a. Geneva Park lies within the Williams Treaties Lands. The Chippewas of Rama First Nations were stewards of the lands for hundreds of years.
  - b. In the early 1900s, parts of Geneva Park were owned by William Thompson who used the estate as a summer retreat.
  - c. The YMCA first used this site as a summer school in 1907. At the time, C.J. Atkinson was leasing parts of Geneva Park, and he provided accommodations for the summer school.
  - d. In 1909, the YMCA of Ontario and Quebec agreed to take over Atkinson’s lease of the site.

- e. William Thompson transferred his ownership to the YMCA in 1919, which was financed in substantial part by charitable gifts.
- f. The full 150 acres, now Geneva Park, took shape through several land purchases ending in 1927.
- g. In the 1940s, Geneva Park expanded to include a young adult camp as well as rental cabins and recreational activities.
- h. In the 1950s, the original tennis courts in Geneva Park were built with a donation.
- i. Two major capital campaigns in the 1960s funded the creation of Geneva Court, the Lodge, and the Centennial Centre.
- j. In 2001, the Geneva Park property was appraised at a value of \$8.2 million.
- k. YMCA tried to sell the property on the open market but was unsuccessful in doing so. In 2004, YMCA transferred Geneva Park to the Barrie YMCA (one of the entities that was later amalgamated into the YSM) in exchange for an initial payment of \$1 million, and a promissory note of \$3 million. The relevant agreement sets out that the entirety of the beneficial interest in the property was being sold, however, Y.M.C.A. Properties Incorporated remained the registered owner and held the property in trust for YSM. The agreement makes no mention of the beneficial interest in the property being transferred in trust for anyone else. The agreement provides:

The Geneva Park Lands are not subject to any special interest or other similar form of trust or right owing by YMCA Properties or the Vendor to any Person, except the Permitted encumbrances and the lease right disclosed in Schedule 4.1 (f).

The transaction was structured to keep YMCA Properties as the registered owner because of litigation involving property tax.

- [7] Throughout the twentieth century, a tradition of family camping, leadership development, and not-for profit conferences and retreats grew at Geneva Park, supported by generations of donations. Cottages on the property were built by the family camping community. These cottages are not owned or assigned to anyone in particular, rather people apply to use the individual cottages, generally for one or two weeks in the summer. Families who have returned over the years are given preference. The dual role of Geneva Park as a conference centre and family camp evolved over the years, with milestones such as the construction in 1982 of ten lodge suites as an addition to the lodge with donations from the community. Despite changes to Geneva Park, the family camp has always been a mainstay.
- [8] Many families who visited Geneva Park donated money to the YMCA for the building and upkeep of Geneva Park infrastructure, and to support the family camp and leadership programs. The financial support is in the millions.

- [9] In 2002, Russ Davey, the Executive Director of Geneva Park from 1977 to 1991, wrote an Open Letter to Stakeholders. It stated in part as follows:

I am attempting to send this letter to those who I think have a continuing strong interest in the purpose, mission, and directions of the YMCA in Canada.

...

The role of Geneva Park in the YMCA has been under constant review and challenge from its earliest years. This I consider healthy, necessary, and appropriate. In the early years, the chief concern was that Geneva Park operated in a constant deficit position which detracted from its role as a national conference and training facility for the YMCA in particular, and many volunteer, government, and business groups as well. The deficits only got bigger when the Canada Youth Fund transformed it into a modern year round facility in 1963. From when I was appointed executive director in 1977 till the present there has been only two years with minor shortfalls, obliterated by a string of positive balances in all the other years.

Geneva Park's recent pattern is an annual income of approximately \$3,200,000 with operating expenses taking about \$2,600,000, transfer to National of \$450,000, and capital renewal of \$150,000.

It has paid for many capital additions and improvements out of its own programs and initiatives, including \$2,400,000 since 1989. It has paid over \$6,000,000 into YMCA Canada since 1977...Geneva Park still transfers that much to YMCA Canada's work in support of local associations and it has been in the \$450,000 range for each of the past three years. Compare this figure with the earnings on the \$1,500,000 to \$2,000,000 that the recent Royal LePage Study estimates might accrue from selling the property. Which line of action, then, best maintains and expands the capabilities of the YMCA Movement in Canada? If this property were sold, where in the whole country could a better setting, location, or value be found where the Y can hold conferences and training events, and deliver YMCA influence, programs and services to the many groups that only this kind of YMCA environment can render? Then factor in its potential!

- [10] In an email dated August 29, 2009, the overall YSM policy was explained by its CEO. This 7-year strategic financial plan included: 1) an additional \$3,000,000 was planned for capital improvements at Geneva Park from 2005-2012, with \$1,000,000 related to facilities used by the family program community; 2) the \$1,000,000 related to family program facilities was to be raised half from donations and half from operations; and 3) donations from the community would be spent at Geneva Park.

- [11] By 2011, the capital campaign had raised more than \$540,000 against the original \$500,000 target from seventy-six families; the total from this campaign reached \$590,000.
- [12] As of 2015, Geneva Park operations were about \$4,000,000 per year, and provided revenues above expenses of about \$780,000 per year.
- [13] In a Report entitled “Long Term Optimal Use Plan, Draft 1, My Y is Strong- My Y for Good”, dated February 21, 2015, there was a discussion of a 12-year development plan (2017-2029) which proposed \$15,000,000 in required funding, of which \$4,500,000 was targeted to come from donations from the family program community, \$4,500,000 from operations (revenues above expenses), \$4,500,000 from government grants, and \$1,500,000 from partnerships.
- [14] The following things are also of note:
- a. From 2012-2016, \$130,000 was donated by a family program member to build an extension to the existing swim dock and refurbish the government dock.
  - b. From 2017-2019, members of the family program community donated \$540,000 to initiate the building of new cottages to replace the aging infrastructure along the cottage line.
  - c. As of 2017, YSM had expended \$2 million on capital improvements at Geneva Park, which came either from donations from the family program community or from operations, to which the family program community was a key component by spending money at the property through rental fees.
- [15] Throughout the years, YSM engaged the stakeholders through a variety of focus groups, site reviews and surveys, as well as semi-annual work weekends to maintain infrastructure. There is no question that YSM has relied extensively on the hard-work, fundraising efforts and revenues from the family program community to contribute to Geneva Park.
- [16] On January 21, 2021, YSM announced that its Board was going to begin the process of selling Geneva Park. It was stated:

To our valued friends of Geneva Park,

Today we are sharing the news that, after careful consideration, our board of directors has decided to begin a process to sell Geneva Park.

...

We know this is very difficult news to hear. Like most Canadian charities, the YMCA of Simcoe Muskoka is experiencing financial pressures caused by COVID-19. This is not a decision our board undertook lightly, but the pandemic has caused conditions that are, quite simply, beyond our control.

We don't yet know what health regulations will bring in the coming months, but if possible, we will work within the sale process to be able to honor current bookings and run family camp this summer – again, if health authorities tell us it is safe to do so. We will also be working closely with our staff team to ensure they have the support they need and are kept up-to-date on the impacts of this decision.

...

We know you will have additional questions and we want to answer them. We've set up a dedicated resource on our website to keep stakeholders updated, including the opportunity to submit your questions to us...

[17] The family program community formed the Geneva Park Legacy Alliance (GPLA), with a domain name registered January 21, 2021, later incorporated as Friends of Geneva Park.

[18] On January 24, 2021, a further email from YSM stated in part as follows:

We are following up promptly after the announcement because we want to share with you additional insight into the process. We expect the RFP for realty services to be issued by January 29, 2021. Ultimately, a formal process, led by a real estate professional, will help ensure the process is fully transparent and fair to all involved.. We expect this to be completed by mid-February with a public listing for the property in March 2021. You can expect to hear from us again once the RFP is posted and as we move through this journey.

[19] A further email from YSM on January 29, 2021 stated in part as follows:

Specifically, we are excited to announce that we have initiated the Request for Proposal (RFP) to engage a real estate provider to help us gather and assess all possible community-based solutions for Geneva Park, before proceeding to an open market listing.

That is, we are inviting the community into a process that will first prioritize the long-term sustainability of our YMCA while seeking the best community use of the property and ways to continue the legacy of the Park.

[20] On April 1, 2021, YSM announced that they were hiring Colliers as their professional real estate advisor. The email of that date stated in part as follows:

Today, we are excited to announce that we have selected Colliers as our professional real estate advisor. A national multi-disciplinary team of real estate experts from Colliers, including Colliers' Not for Profit Advisory group, Unique Properties practice, and Strategy and

Consulting Group will work in partnership with the YMCA to evaluate proposed business cases for the future of the park.

With 32-years of not for profit real estate advisory experience, the Colliers' Not for Profit Advisory group has a proven track record in supporting the mission, vision and values of not for profit organizations like ours, and provides methodologies and solutions to fully engage non-profit sector teams and stakeholders in a way that goes deeper than a traditional real estate process.

Over the coming weeks, we will be working closely with the team at Colliers to establish the next phase of our process to seek the best community use of the property and ways to continue the legacy of the Park, while also looking at the long-term sustainability of our YMCA.

We expect to have a community proposal process confirmed and launched by late April/early May, and remain committed to a transparent process where all ideas and potential partnerships are considered equally and fairly.

[21] The structure of the process required parties to contact Colliers, enter into non-disclosure agreements, and access confidential information on site. Interested parties could then deliver an Expression of Interest.

[22] On June 16, 2021, YSM stated in an email:

Today we are sharing an update on the next steps in our real estate advisory process for Geneva Park. The process to market Geneva Park to potential partners has begun with a call for expressions of interest. Working with the Not-for-Profit Advisory and Unique Properties Groups of Colliers, we are seeking innovative solutions and partnerships to help ensure families and individuals can access this important place for generations to come.

[23] On August 4, 2021, YSM stated in an email:

To our valued friends of Geneva Park,

Since we announced the opening of the expression of interest process with Colliers, we've received a few questions from the community about the process. As part of our continued commitment to transparency, we're sharing our responses with you today.

Most of the questions centred around what happens after the expressions of interest process closes on September 15, and for us, this is really the beginning of the next stage of the process. Every



expression of interest will be reviewed. Proposals will be evaluated to determine if they meet the outcomes that we decided on at the beginning of this process, including:

- Potential for continued full or partial use by the YMCA including necessary investments to address immediate and future infrastructure and capital needs of the park,
- Facilitating the preservation of the local environment and waterways,
- Respecting the historical stewards of the land, including the Anishinaabe people, the Chippewas of Rama First Nation, on whose traditional territory Geneva Park is situated, and
- The generation of revenue to support the long term sustainability of the YMCA of Simcoe/Muskoka.

The most important message we want to reinforce is that this is not a typical offer and acceptance real estate process; it has been intentionally designed to allow YMCA of Simcoe/Muskoka to consider a variety of options for the park. That means the proposed solutions and outcomes are not predetermined and we don't know precisely what kind of solution we will be developing. But we do know that we are committed to this intentional process and are willing to take a more innovative or challenging path to get the best solution that is possible to meet our goals.

...

We are committed to connecting with our stakeholders throughout the process, including after September 15. We anticipate it will take some time to consider the proposals and connect with the proponents before we are ready to discuss the future of the park publicly.

We are committed to communicating at each step of this process, and will continue to do so as we move forward. Thank you for your interest in support of Geneva Park.

[24] In an email dated August 20, 2021, the YSM stated in part as follows:

As part of our commitment to the family community during our process to re imagine the future of Geneva Park, the YMCA of Simcoe Muskoka identified the Geneva Park Legacy Alliance (GPLA) as a key stakeholder.

The GPLA aims to broadly represent the needs of the family community and serve as a place for families to get involved, give feedback and participate in the reimagining process. As such, we're sharing a message from the GPLA about an upcoming town hall where you can hear more about and give feedback on the work we've been doing over the past 8 months.

[25] Friends of Geneva Park submitted an Expression of Interest in September 2021. There was no reference to a beneficial ownership or trust relationship existing in relation to this property.

[26] In an email dated December 16, 2021, the YSM stated in part as follows:

We know this has been a difficult time for everyone, and the uncertainty around the Park's long-term future has caused quite a bit of turmoil. The last thing we want to do is to promise you a summer and take it away.

We are actively working with the Geneva Park Legacy Alliance (GPLA) as representatives of your community, to think through the long-term future for the Park, as well as the more immediate plan for summer 2022. We'll continue to collaborate and remain optimistic that GP will once again welcome us all next summer.

[27] In early January 2022, FOGP submitted a revised Expression of Interest.

[28] On February 15, 2022, FOGP wrote an open letter to any potential buyer indicating its openness to collaboration and willingness to work together with a private buyer. This was delivered to YSM and posted on the FOGP website. The letter makes no reference to the property being held in trust for the Applicants or for anyone else. The letter makes no claim that there are any trust or other conditions forming part of the YSM's ownership of Geneva Park.

[29] Also on February 15, 2022, representatives of YMCA/YSM met with representatives of FOGP. Based on the discussion, the FOGP were aware that the Board of Directors would be considering whether to open up negotiations with a prospective purchaser on February 23.

[30] On February 22, 2022, FOGP sent a further revised Expression of Interest, which included a Memorandum of Understanding with financial terms and a suggested purchase price of \$4,000,000 payable as:

- a. \$500,000 fully refundable Good Faith Deposit with execution of the MOU;
- b. \$2,500,000 (less Deposit interest earned) on the agreed Closing Date (no later than June 30<sup>th</sup>, 2023);

- c. FOGP shall deliver to the YSM a Promissory Note in the principal amount of \$1,000,000.

[31] In February and March 2022, the FOGP asked YSM to provide assurances that the Park’s legacy and the future of its community would be protected, and that there would be transparency in proving that assurance. Specifically, they asked for assurance that the sale would include an agreement that protects the interests and long-term future of the charitable stakeholder community, and contain clauses to safeguard the park against a for-profit sale inconsistent with stated objectives of YSM. During this time, the FOGP/GPLA posted updates to their website to advise that FOGP continued to be in regular contact and in collaboration with YMCA, that it had submitted its own Expression of Interest, that it had unsuccessfully searched for partners with respect to the property, and it characterized itself as an “advocate” for its own community as the YMCA “navigates the conclusion of its own process”.

[32] On March 8, 2022, YSM wrote a letter to the FOGP, which stated in part as follows:

Thank you so much for the opportunity to discuss the interests of the Friends of Geneva Park with Jill and myself on February 15th and for your revised EOI submission on February 22nd.

As promised, the FoGP’s revised submission was presented to the Board of Directors on February 23rd in an in-camera confidential session and as such I am unable to share any further details of the conversation. We are continuing efforts to negotiate with our preferred option and we will provide an introduction at an appropriate time. Should the deal not go through we will revisit our process as a board and determine next steps. Negotiations and a conditional period will take some time and we must respect confidentiality and the process.

The Board understands and appreciates the passion for Geneva Park shared by all Park stakeholders, including our own YMCA staff, and we know that uncertainty around the property’s long-term future is difficult for everyone who loves the Park.

We also knew when we entered into a unique, community-focused request for proposal process that a good, fair and effective process would take time. Over the past 5 months, all options forwarded to us have been vetted according to the principles and commitments laid out in the process, and with our intention to balance the long-term sustainability of our YMCA with the best community use of the property and its continued legacy.

We are continuing to respect the process and work in close collaboration with our expert real estate advisors at Colliers and no final decisions or agreements have been made.

We understand our stakeholders are eager to hear the outcome of the process and we are also eager to share it, which we anticipate being able to do in the spring.

Thank you for your ongoing interest and support of Geneva Park and our YMCA. We look forward to connecting again soon.

[33] In an email on March 10, 2022, YSM stated in part as follows:

We understand and appreciate your passion and know that uncertainty around this summer season and the property's long-term future is difficult for everyone who loves the Park.

Unfortunately, we do not have news to share at this time, about this summer or the overall real estate advisory process; however, we promised a consistent and transparent communication process to all of our stakeholders and we will continue to fill our commitment to that.

About the process: we are continuing to respect the process and work in close collaboration with our expert real estate advisors at Colliers and no final decisions or agreements have been made.

[34] On March 20, 2022, the FOGP wrote a letter to YSM, which stated in part as follows:

Thank you for your letter of March 8, 2022, and acknowledgement that the Revised EOI of the Friends of Geneva Park, containing an offer to support and partner with YSM, was received and discussed at the YSM Board meeting on Feb. 23, along with our request to collaborate in crafting safeguards for the Geneva Park legacy, in the event that your preferred option is a private buyer. We understand from your letter that: (i) you will not provide a response to our proposal; (ii) you are currently pursuing the sale of Geneva Park to a private anonymous buyer (Mr. X); (iii) you will not introduce Mr. X to us; and (iv) you will not involve or inform the Stakeholder Community in the process of crafting an agreement for the sale of Geneva Park.

We remain deeply committed to finding a solution for the future of Geneva Park that can create a stronger financial footing, foster deeper and further reaching support for communities, and provide protection for the land – goals we understood you to share. On that understanding, we have put forward multiple ways that we could aid in your process and negotiations, bolstering your position, and providing added incentive to prospective partners. We have provided alternative solutions, answering what we understood to be your prime objectives. We have offered the services and skills of our

community members. Every way we can, we have tried to demonstrate our willingness to collaborate and support this transition. As such, we are hurt, baffled, and frustrated that the YSM has thus far prevented us from meaningfully contributing to and participating in this process.

It may be that Mr. X is offering a solution that meets the objectives of both YSM and the historic charitable stakeholder communities. However, given the events of the past year and the secrecy with which the process has been conducted, you will appreciate that it is difficult for our community to commit its trust. For the YSM to dispose of Geneva Park through a secret agreement with an anonymous private buyer is inconsistent with its charitable trust obligations to any community with historic ties to the Park. It is an affront to the reality that most of the infrastructure at Geneva Park was built largely with charitable donations and revenues from the donor community, and much of it by our actual labour. Just as we feel a responsibility to the land, to preserve that which has nourished us and to share that nourishment with others, we feel that the YSM has a debt of responsibility to us - those who have supported you on the property these last 15 years, and the National Y the seven decades prior – to ensure a sound future for the community and the land as you exit, founded in consultation and openness.

In this correspondence, the FOGP referred to a “charitable trust” and asked for several assurances from YSM.

[35] On March 31, 2022, YSM responded in a letter to FOGP, which stated in part as follows:

We would like to open by offering our sincere appreciation for your continued passion and commitment to Geneva Park. Our Board of Directors and Leadership Team share that passion and commitment, as well as your desire to ensure a solution that will help enable future financial sustainability, strengthen community connections and opportunities for use, and provide sound stewardship of the land on which the property sits.

In fact, it was with this deep commitment in mind and at your urging that we designed the unique, community-based request for proposal process that we are currently engaged in, as an alternative to a traditional real estate sale process.

Out of genuine respect for your community’s long history with Geneva Park, our connections with your group have been numerous and frequent, with approximately 40 total engagements over the life of this process, including regular monthly, and at times weekly,

meetings with one of our Vice Presidents for upwards of 14 months, weekly sessions at the Park this past summer, and a half day session in December to explore the potential of a “jigsaw puzzle” solution.

...

In conclusion, there are few that could reasonably doubt your group’s commitment to the Park or question your significant contributions to it - least of all, our Board or Leadership Team.

That said, as we continue to review and analyze all relevant considerations, we must make a decision that is in the best, long-term interest of our entire charitable organization and all of our stakeholders. Just as we have done for the past 110 years, our YMCA intends to be viable and sustainable for the long term so we can continue to support healthy, strong and inclusive communities across the region – whether that is children learning to swim, youth honing their leadership skills, or new Canadians seeking support to settle. Every individual and family across our association must be considered.

- [36] On April 4, 2022, representatives of YSM met with representatives of FOGP to advise them that the property was being sold and that the closing was scheduled for April 29, 2022. The YSM also made a written announcement as follows:

#### The Future of Geneva Park

There is great passion for Geneva park shared by all park stakeholders and we know that uncertainty around the property's long term future has been challenging for everyone who loves the park, including our own YMCA staff. With this in mind, we are sharing with you today that our board of directors has reached an agreement with a buyer committed to the restoration and rejuvenation of the park, and preserving the legacy of the property for years to come.

The new owner is a community minded entrepreneur with a history of revitalization projects in our region and that's why we feel so positive about what we have achieved with this agreement.

With a focus on building for the future and an appreciation for the history of Geneva Park, Clayton Smith of The Commercial Realty Group, is committed to the rejuvenation and restoration of the park. He has a genuine passion and a demonstrated history of breathing new life into iconic historical buildings in Toronto and destinations throughout the region, such as the nearby Orillia Rama Regional Airport (ORRA), Spirit Bay Harbor in Muskoka, Georgian Bay Airways in Parry Sound, and even the successful restoration of fish species too Shrigley Creek, Manitoulin Island. Clayton is actively

conducting due diligence on necessary site remediation and capital improvements.

Our unique, intentionally designed process has allowed us to establish this best outcome for the park's future. In April 2021 we shared that Colliers Not-for-Profit Advisory and Unique Properties group would be supporting our goal to seek the best community use of the property and ways to continue the legacy of the park, while also helping to ensure the long-term sustainability of our YMCA. The news we are sharing today is that the result of this process, which included engagement with a variety of stakeholders, meets this goal.

We are so thankful to all of the community members who participated throughout the process, and we're looking forward to working with all stakeholders to celebrate the Y's legacy at the park.

In addition to sharing about the long-term future of the park, we know everyone is eager to hear what's happening with Geneva Park this summer. The buyer is now taking the time to assess the property and clearly understand what work needs to be done to ensure many safe and fun summers at Geneva Park for years to come. Once the buyer has had time to complete their assessment, you can expect to hear news about a renewed Geneva Park. The YMCA will be moving into the role of transition support and collaborating with the community to celebrate the Y's legacy at the park to this point in time...

### **Legal Principles**

[37] The Court has an inherent jurisdiction in charitable matters which permits it to act in a supervisory role over charitable property, where necessary, and to make any order it considers just. See: *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation* (2011) ONSC 5684 at para 85-86

[38] The Court can also gain statutory jurisdiction from the *Charities Accounting Act*. In that Act, section 6 provides as follows:

6(1) 6 (1) Any person may complain as to the manner in which a person or organization has solicited or procured funds by way of contribution or gift from the public for any purpose, or as to the manner in which any such funds have been dealt with or disposed of. R.S.O. 1990, c. C.10, s. 6 (1).

(2) Every such complaint shall be in writing and delivered by the complainant to a judge of the Superior Court of Justice. R.S.O. 1990, c. C.10, s. 6 (2); 1999, c. 12, Sched. B, s. 1 (5).

(3) Wherever the judge is of opinion that the public interest can be served by an investigation of the matter complained of, he or she may make an order directing the Public Guardian and Trustee to make such investigation as the Public Guardian and Trustee considers proper in the circumstances. R.S.O. 1990, c. C.10, s. 6 (3); 2000, c. 26, Sched. A, s. 2 (4).

[39] The application of s. 6 of the *Charities Accounting Act* can be easily disposed of in this case. It has been held that charities are entitled to a presumption that they are complying with the law and they should not be quickly subjected to the disruption and expense of such an inquiry. See *Stahl v. OSPCA*, 17 A.C.W.S. (3d) 832, 35 E.T.R. 234, 70 O.R. (2d) 355 at para 11 (Ont. Dis. Ct.). In this case, there is simply no evidence that the YMCA/YSM has solicited or procured funds improperly. Funds were donated and used for the purposes intended. This went on for years and years. However, there came a time when those funds were simply not enough to maintain this property and the YSM had to do a cost benefit analysis in accordance with its mandate.

[40] Also, s. 10 of the *Charities Accounting Act*, as referenced by the Applicants in their Notice of Application, states as follows:

10 (1) Where any two or more persons allege a breach of a trust created for a charitable purpose or seek the direction of the court for the administration of a trust for a charitable purpose, they may apply to the Superior Court of Justice and the court may hear the application and make such order as it considers just for the carrying out of the trust under the law. R.S.O. 1990, c. C.10, s. 10 (1); 1999, c. 12, Sched. B, s. 1 (5).

(2) An application under subsection (1) shall be upon notice to the Public Guardian and Trustee who may appear and be represented by counsel at the hearing. R.S.O. 1990, c. C.10, s. 10 (2); 2000, c. 26, Sched. A, s. 2 (4).

(3) Where the court is of the opinion that the public interest can be served by an investigation of the matter alleged in the application, the court may make an order directing the Public Guardian and Trustee to make such investigation as the Public Guardian and Trustee considers proper in the circumstances and report in writing thereon to the court and the Attorney General.

[41] Clearly, this section should be used sparingly. This is a means by which an Applicant can seek relief when charitable property is being misused. There is no evidence that the charitable property in this case is being misused. The property is being sold because the YMCA/YSM can no longer maintain its upkeep while fulfilling its charitable objectives. Frankly, on this evidence, it would be irresponsible for the organization to continue to try to do so. It is a difficult decision that the YSM had to make to fulfill its mandate, and to



free up funds to put back into its charitable purposes. Section 10 of the *Act* does not assist the Applicant in this case.

- [42] The Applicant also argues that a trust has been created.
- [43] The creation of a trust requires two key components: 1) a declaration of a trust that has three certainties, including certainty of intention, certainty of subject-matter, and certainty of objects; and 2) the constitution of the trust, which requires transfer of title to the trust property to the trustee. See *White v. Gicas*, 2014 ONCA 490, at para 1.
- [44] With respect to the certainty of intention, in *Tillsonburg Scout Association v. Scouts Canada*, 2020 ONSC 747, the court stated:

[29] Determining certainty of intention is a matter of interpretation. There is certainty of intention where a person who owns the property (the settlor) transfers it to another (the trustee) with the intention that the trustee hold and manage the property for the exclusive benefit of others (objects or beneficiaries): *Angus v. Port Hope (Municipality)*, 2017 ONCA 566 at para 98.

[30] Whether the settlor intended to settle a trust is fact specific. Explicit trust language is not required, provided the settlor's words convey the requisite intention: *Belokon v. Krygyz Republic*, 2016 ONCA 981 at para 49. The alleged settlor must employ language that clearly shows his intention that the recipient should hold on trust: *Byers v. Foley*, 1993 CanLII 5506 (ON SC), 16 O.R. (3d) 641 (Gen. Div.) at 645.

- [45] As for certainty of subject matter, the court in *Tillsonburg* stated at paragraph 32 that this only requires that “the subject matter of the trust be ascertained or ascertainable” and referred to *Angus*.
- [46] Finally, as for certainty of objects, the court in *Tillsonburg* stated at paragraph 33:

[33] ... Certainty of objects is used to describe two concepts: 1. that a trust must be in favour of persons or a charitable purpose; and 2. that the class of beneficiaries must be described in sufficiently certain terms that the trust can be performed: *Gillese, supra* at p. 40.

- [47] There is absolutely no evidence in this case that YSM has held the Property in trust for the Applicants, or frankly for anyone. All of the evidence provided, which this court has carefully considered, would demonstrate the opposite. YSM treated the FOGP as a stakeholder, one of many. FOGP was certainly an interested party in the operations of Geneva Park, and ultimately in the sale process. However, that is where it ends. All of the evidence points away from the fact that YSM intended any such trust. The actions of

FOGP in their advocacy and in providing an Expression of Interest also supports the fact that they knew there was no trust.

- [48] A resulting trust will arise where property is gratuitously transferred into the name of another. See: *Goodfriend v. Goodfriend* [1972] S.C.R. 640 at para 14. The beneficial owner of the property has been described as the real owner of the property even if it is in someone else's name. *Pecore v. Pecore*, [2007] 1 S.C.R. 795 at para 4. The Applicants argue that the donations and contributions by the Geneva Park family camp community have been given to the YCMA and the YSM on the basis that they were holding the property in trust for the said community. This cannot possibly be so. There is nothing in the communication that indicates or even hints at this conclusion. The fact that FOGP advocated in relation to the sale and made an expression of interest in the property seems to contradict this proposition.
- [49] Constructive trusts arise in circumstances where equity and good conscience dictate that it is fundamentally unjust for one party to retain property or money or to use it to the exclusion of another's interest. The doctrine of constructive trusts is a broad, flexible and remedial concept capable of embracing diverse circumstances which necessitates its imposition. *Soulos v. Korkontzilas* [1997] 2 S.C.R. 217 at pp. 233-234, 239. The Applicants argued that YSM's behaviour, and the manner in which it has raised money and represented itself to the Geneva Park family community as well as the public, indicates it held Geneva Park in trust for the Applicants. This cannot possibly be the case. There is nothing in the evidence to support this contention. YSM is a recognized charitable organization. Charities solicit donations and assistance, which is exactly what YSM did in this case. The Applicants willingly and voluntarily provided assistance, and in turn, benefited from the use of Geneva Park, and benefited from tax receipts.
- [50] Where there is no explicit trust document, the court will consider other evidence to determine the intention of the settlor. Evidence of the use of property by trustees over a long period of time may assist in determining the intention of the settler. *Rowland v. Vancouver College Ltd.* [2001] BCCA 527 at para 63, affirmed [2000] 8 W.W.R. 85 at paras 83-84
- [51] There is certainly no documentation in this case that sets out the terms of a trust in favour of the Applicants. There is no reference to any trust beneficiaries for whom the YSM was to hold the property. One would think that something as significant as a beneficial trust in this type of property, at this value, would be documented. However, there is no such documentation. However, this is not determinative. The Applicants claim that all of YSM's conduct, words, and deeds demonstrate that the intended and exclusive beneficiary of Geneva Park, including related activities, programs, fund raising and cottage use, was for the Geneva park family community, including FOGP. It is the view of this court that this is simply not the case. While the YSM have certainly recognized the Geneva Park family community as a stakeholder and interested party, there is absolutely no demonstration that they would be exclusive beneficiary of the Geneva Park. It is the view of this court that the evidence demonstrates that the YSM never agreed or intended to hold the property in trust for the Applicants or anyone.

- [52] The Applicants also made an argument about conditional gifts. According to the Applicants, gifts of money or property can be made subject to conditions. If a condition precedent is not satisfied, the gift fails, and must then be returned to the party with original title. Where a condition subsequent is unsatisfied, a gift fails, and the property reverts to the original owner. The Applicants argue that, in this case, the transfer of money was made subject to a condition precedent, that the Applicants would provide financial and indirect contributions to ensure the continuity of Geneva Park. The Applicants also argue that a condition subsequent is in play, insofar as the Geneva Park family community would contribute to Geneva Park in a beneficial way in exchange for tenure at the cottages and involvement with respect to the functionality and progression of Geneva Park to ensure its continued longevity. The Applicant argued that YSM breached both of these conditions and, therefore, the real property must revert to the Applicants. Again, this argument is completely misplaced. Firstly, the courts have held that “when a gift is not expressed to be conditional at the time it is given, the fact that the donor comes to regret the gift based upon an unexpected turn of events cannot somehow cause an otherwise absolute gift to morph into a conditional one.” See *Griffith v Davidson*, 2017 ONSC 187 (CanLII) at para 37, citing *Madill v Leach*, 2010 CarswellOnt 4463, at para 7.
- [53] Further, the Applicants donated their time and money to the upkeep, improvement and maintenance of the Park. That is exactly how the money and time was used, at least there is no argument otherwise. This Court finds that YSM was truly committed to the longevity of Geneva Park and tried its best to ensure this occurred, however, there was no guarantee. The Applicants seem to be seeking an unreasonable guaranteed return on their donation of time and money.
- [54] As for the request for a certificate of pending litigation, section 103(1) of the *Courts of Justice Act* entitles a party who has commenced proceedings, in which an interest in land is in question, to obtain a certificate of pending litigation and to register it against the title to the land. The court must first consider whether there is a triable issue as to the interest in land. The Applicant does not need to demonstrate that they will likely succeed. In this court's view, there is no triable issue as to the Applicants having an interest in this land and the Responding parties have demonstrated so. Even further, in exercising its discretion in equity, and looking at all relevant matters between the parties, it would be most unjust in this case to grant leave to issue a certificate of pending litigation.
- [55] Finally, to succeed in obtaining an interlocutory injunction, the Applicant must meet the three-part *RJR-MacDonald* test: (1) is there a serious issue to be tried; (2) will the moving party suffer irreparable harm if an injunction is refused; and (3) does the balance of convenience favour granting an injunction. See: *RJR-MacDonald Inc. v Canada*, 1994 CarswellQue 120 (SCC) at paras 83-85. The law requires that the above three conditions be considered together and determine whether it is just and equitable in the circumstances to grant the injunction. In this case, such relief would not be just and equitable. There is no serious issue to be tried, as the Applicants claim for any beneficial ownership or trust ownership of this property is completely without merit. As for irreparable harm, the Applicants have stated, in the alternative, that \$2,000,000 be set aside from the proceeds of sale suggesting that their claim is quantifiable. The balance of convenience would not favour the granting of an injunction, given that Geneva Park will not be operating in the

foreseeable future under the present ownership and given that the potential purchaser has expended time, energy and substantial resources to improve this property.

### **Conclusion**

- [56] It is unfortunate that this application is being heard at this point in the process. The Applicants have clearly known since the end of February or early March that there was a private buyer. Instead of acting at that time, the Applicants served materials on the afternoon of Tuesday, April 26, for a hearing on the morning of April 28, in relation to a closing on April 29.
- [57] Clearly, YSM did not simply list Geneva Park for sale and seek the highest bidder. They worked with Colliers and consulted with stakeholders over many months. The proposed sale of this property has been ongoing since January 2021. The Applicants have been included in much of that process as interested members of the community. They made an offer for the property that was rejected. In itself, this would point to the conclusion that the Applicants knew they held no beneficial interest in the property.
- [58] This court has carefully considered the evidence presented. There is simply nothing to support or suggest a trust of any kind in favour of the Applicants. There is no question that this property holds a special place for these Applicants and that they and their families have used, supported and generously contributed to the betterment and maintenance of this property for over 100 years. However, this does not create a beneficial interest in their favour.
- [59] The Applicants believed that the Geneva Park would be there to benefit from for generations to come. This court is sure that the YMCA believed this when it was stated and had the same hope, however, things have changed. The pandemic has had a significant impact on many. As a charitable organization, the YMCA/YSM must look at the big picture and determine whether this property is a viable one for its purpose and mission.
- [60] In considering the *RJR MacDonald* test, the Applicants have not presented evidence of irreparable harm. Further, the balance of convenience consideration would be in favour of the sale closing as scheduled, given the amount of effort and money the purchaser has already put forward with the intention of completing this transaction. The reality is that the YMCA can no longer maintain this property and, therefore, even if forced to keep the property, they have no intention of having the property operating in the foreseeable future, in fact at any point in the future, and have no funds allocated for that purpose. It is said to be in a very bad state of disrepair – a situation that the purchaser intends to rectify. Therefore, if the sale does not close, the Applicants will still not be able to benefit from the property as they seek to do. However, if the purchase proceeds, the plan is to open a family resort at the property which will welcome the Applicants and others. Stopping this sale will not accomplish the Applicants stated goals but rather will deprive the YMCA/YSM of much needed money to continue to carry out their charitable purpose. The facility requires significant capital investment, something that would come at a cost to other YMCA programmes and which is not consistent with the Board's direction. If the sale does not close, there is a risk of significant loss to the YMCA, as indicated in their submissions.

- [61] In considering the *Charities Accounting Act*, there is no suggestion in this case that the YMCA/YSM has done anything wrong in relation to what was donated to them. The auditors have not suggested that there has been any misuse of funds or assets under the YMCA's care. Section 6 of the *Charities Accounting Act* gives the court jurisdiction where there is a complaint, however, in this case, there is no complaint that the YMCA did anything wrong in soliciting or procuring funds. There is no suggestion or reasonable conclusion to draw that they misused funds in anyway. The funds were used as designed. Those who made donations to the YMCA received tax receipts, allowing them to be used for a benefit. However, the funds simply are not enough to keep this property going long term given the current circumstances. Charities are entitled to a presumption that they are complying with the law and should not be subjected to an unnecessary inquiry. No inquiry is required here. The YMCA has done everything in their power to keep this property operating for many years despite challenges. It would no longer be responsible for them to continue to put money back into this property. If they chose to do so, and created substantial unnecessary expense, then it might be said that they were doing something improper. This sale, while unfortunate, is a reasonable solution to the problem. Any funds received as a result of this sale will be used in furtherance of the YMCA's charitable purposes.
- [62] A conclusion by this court that donating time and money to a charity could result in a trust relationship of this nature would be an absurd result. An order by this court in the nature of those sought by the Applicants would lead to an irrational precedent in relation to the law of charities in Canada.
- [63] The Applicants claims that they have a beneficial interest in this property are without merit and are inconsistent with the evidence presented. FOGP was identified as a stakeholder, not because they have the special rights they now seek, but because they have been active participants in the life of the Geneva Park. Their participation, however, does not entitle them to confidential sale documents, and certainly does not create a trust or other interest in the property.
- [64] Having considered the entirety of the circumstances, this application is dismissed.
- [65] If the parties are unable to agree as to costs of this Application, the court will accept written submissions on costs, which shall be no more than three pages in length, excluding supporting documentation, and which shall be provided to the court office electronically, and to Bev.Taylor@ontario.ca, no later than 4:30 p.m. on May 6, 2022.



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Justice V. Christie

**Date:** April 29, 2022