

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MICHAEL BENTLEY, ETHEL MARION CAMPBELL, PETER CHAPMAN,
ZENIZ CHENG, SIMON CHIN, KRISTA FRIEBEL,
R. PATRICK GREENWOOD, MARIE CHRISTINE KLUKAS,
JOHNNY LEUNG, DAVID LEY, RUTH LIN, LANNY JAMES REEDMAN,
LINDA SEALE, ANNE SHECK, DAVID KENNETH SHORT,
TREVOR HOWARD WALTERS and SHIRLEY WIEBE

PLAINTIFFS

AND:

ANGLICAN SYNOD OF THE DIOCESE OF NEW WESTMINSTER,
and MICHAEL INGHAM in his capacity as the Anglican Bishop of the Diocese of
New Westminster

DEFENDANTS

AND:

No. S087230
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ERIC LAW, STEPHEN WING HONG LEUNG, ANNIE SHEUNG KAN
TANG, STEPHEN CHI HIM YUEN, and WINSOR WING TAI YUNG

PLAINTIFFS

AND:

ANGLICAN SYNOD OF THE DIOCESE OF NEW WESTMINSTER,
and MICHAEL INGHAM in his capacity as the Anglican Bishop of the
Diocese of New Westminster

DEFENDANTS

General Introduction

The incomplete exchange of affidavits makes any comprehensive introduction to the case inappropriate. Accordingly this document is restricted to a discussion of the general legal principles and a summary of the affidavits delivered to date.

To this point it appears that the principal disagreements between the parties concern:

- (a) The existence and terms of the religious purpose trusts governing the use and benefit of the properties controlled by the Plaintiff Trustees; and
- (b) Whether the division between the congregations represented by the Plaintiffs and the Defendant Bishop and Diocese establishes a *cy près* occasion in that the trust established can no longer be practicably carried out and whether the Court may or should make an order to preserve the charitable purpose upon which the lands are held.
- (c) Whether the juridical character and authority of the Anglican Church of Canada (the "ACC") hierarchy as expressed through the Bishop, the Diocese and other constitutional bodies of the ACC affords an answer to the Plaintiffs' claims in their entirety.

The Plaintiffs seek a declaration that the Parish Corporations of each of St. John's (Shaughnessy), St. Matthew's, St. Matthias & St. Luke, and Church of the Good Shepherd ("Good Shepherd"), (collectively, the "Parish Corporations"), or in the alternative the Trustees of the Parish Corporations, hold the Parish property in trust for their congregations for the purpose of ministry consistent with historic, orthodox Anglican doctrine and practice, and that the original purpose of those trusts is unalterable and requires the Diocese of New Westminster (the "Diocese") and its members to be in full communion with each other, and with other Anglicans throughout Canada and throughout the world.

In the alternative, the Plaintiffs seek a declaration as to the terms of the trusts on which the Parish property is held, a declaration that the actions of the Bishop and Synod are inconsistent with the trusts, and a declaration that events since 2002 have rendered impracticable the carrying out of the purpose of the trust, and in particular the condition of the trust requiring full communion within the Anglican Church. As a result, the Plaintiffs submit that this is an appropriate situation for the Court to exercise its *cy près* jurisdiction to order a scheme to fulfil the general charitable intent of the trusts.

In the alternative, the Plaintiffs seek a declaration that the terms of the trusts are inconsistent with the requirement that the Parishes accept and receive episcopal jurisdiction and oversight from the Bishop of the Diocese, and that the realignment of the Parishes to receive episcopal oversight from Bishop Donald Harvey under the primatial jurisdiction of Archbishop Gregory Venables, is consistent with the terms of the trusts, and that the trusts must be applied to the use and benefit of the congregations who continue to adhere to the original purposes of the trusts.

Finally, in respect of Good Shepherd, the Plaintiffs seek a declaration that the Parish Corporation or, in the alternative, its Trustees, holds the proceeds of the property bequeathed by Ms. Chun

(the “Chun Bequest”) in trust for the congregation for the purpose of purchasing or constructing a new church to carry on the ministry of Good Shepherd to the ethnic Chinese community. In the event that this Court finds that it is impracticable to carry out the purpose of the Chun Bequest, then the Plaintiffs seek an order establishing a *cy près* scheme to fulfil the testatrix’s charitable intent, and if necessary, an order pursuant to the *Trustee Act* appointing the Plaintiffs as trustees of the Chun Bequest for the purposes set out above.

Applicable Legal Principles

1. It is clear from a line of authorities stretching back to the 16th century that the courts exercise an inherent supervisory jurisdiction over charities and thus over charitable purpose trusts stemming from the original jurisdiction of the Court of Chancery. The jurisdiction arose because purpose trusts were in principle invalid at common law as having no particular beneficiary to enforce them. The Courts of Equity developed principles to preserve trusts that had a charitable purpose, as it was in the public interest that charitable intentions not be defeated. This jurisdiction has been accepted in British Columbia.

Rowland v. Vancouver College Ltd., 2000 BCSC 1221, aff’d 2001 BCCA 527

Tudor on Charities, 9th ed. (Thomson, Sweet & Maxwell, 2003) at 371

2. Under its inherent jurisdiction, the court can deal with both the validity of a charitable trust, and matters arising in the course of its enforcement and the administration of trust property. As will be discussed below, the court may also invoke its scheme-making jurisdiction to rescue a trust that is otherwise doomed to fail under the principle of *cy près* by amending the terms of the trust to give effect to the general charitable intentions.

Tudor, supra at 372

U.K., Charitable Trusts Committee, “Report of the Committee on the Law and Practice relating to Charitable Trusts”, Cmd. 8710 (1952) at 20 (“Nathan Report”)

3. A trust for a “charitable” purpose seeks the welfare of the public and is not concerned with the conferment of a private advantage. Under the law, an activity for the purpose of the “advancement of religion” will be presumed to be charitable unless the contrary is shown. The law does not prefer one religion to another in finding the existence of a charitable trust for the advancement of religion.

Commissioners for Special Purposes of the Income Tax v. Pemsel, [1891] A.C. 531 at 583 (H.L.) (“Pemsel’s Case”)

Waters’ Law of Trusts in Canada, 3rd ed. (Thomson Carswell, 2005) at 679-680

Gilmour v. Coates, [1949] A.C. 426 at 446(H.L.) at 458-459

4. With respect to the Chun bequest, it is a matter of construction of a bequest in trust for a charitable purpose whether the bequest is for the general purposes of the charity or for a specific or restricted purpose. Bequests for specific purposes are distinct from and may not be used for the general purposes of the charity, but must be applied for their particular

purpose. In order to determine whether a bequest gives rise to a specific charitable purpose trust, the courts will look to the intention of the testator, the subject matter of the trust, and its object, or purpose.

Rowland, supra

5. The doctrine of *cy près* was developed essentially as a device for preserving a gift to charity so that it may continue in the benefit of the public from generation to generation, while abiding by the principle that the founder's or testator's wishes must be respected and must not be disregarded.

Nathan Report, supra at 16-17

6. In England, the scheme-making power of the courts was rendered statutory; however, in Canada the common law continues to apply. In the case of a charitable purpose trust that was initially achievable, the *cy près* jurisdiction of the court is triggered where the applicant can establish that due to a supervening event or change in circumstances, the general charitable intention can no longer be carried into practical effect on its existing terms of the trust. The event or circumstance is sometimes referred to as a *cy près* occasion. Impracticability does not mean "absolute impracticability", and arises where adherence to a subject or condition of the trust would defeat the carrying out of the essential charitable purpose.

Re Dominion Students' Hall, [1947] Ch. 183

Hubert Picarda, The Law and Practice Relating to Charities, 2nd ed. (Butterworths: 1995) at 281, 285

7. If an applicant succeeds in showing that to carry out the original charitable purpose was initially practicable, but by a supervening event, has now become unworkable, the court will inquire further to determine whether there is any reasonable prospect that the purpose will become viable again at some point in the future.

Canada Trust Co. v. Ontario (Human Rights Commission) (1990), 74 O.R. (2d) 481 (C.A.)

Re Lysaght, [1966] Ch. 191

8. If there is no reasonable possibility of future fulfillment of the charitable purpose, then at that point, the court's *cy près* power allows it to rescue the trust, which charitable purpose would otherwise be defeated, by directing the application of the trust property to a new purpose which falls within, or as near as possible, the original charitable intention. For example, if an offending condition to practical fulfillment of the charitable purpose is subsidiary to the general charitable intention, then it is open to the court to amend the terms of the trust by severing that condition.

Varsani v. Jesani, [1999] Ch. 219 (C.A.)

Canada Trust Co. v. Ontario (Human Rights Commission) (1990), 74 O.R. (2d) 481 (C.A.)

9. In the context of a church property dispute, where the members of a religious charity became divided on theological grounds, the court has exercised its *cy près* jurisdiction to divide church assets between the two groups so as to facilitate the effective carrying out of two new charitable purposes that were as near as possible in nature to the original intent of the founder. In that case, it had been a condition of the trusts on which the property was held that the members of the church would remain unified in their faith and did not contemplate such a division. Although the court in question was exercising a statutory *cy près* power, it is the Plaintiffs' position that this division of assets would be equally available under the common law *cy près* jurisdiction.

Varsani v. Jesani, supra

10. The courts have also exercised their inherent jurisdiction to intervene in a church property dispute to effect the removal and appointment of trustees where it was proper that trust property should be administered by trustees holding the opinions of those for whose benefit the trust was intended.

Brewster v. Hendershot, [1900] O.A.R. 232 (C.A.)

11. When a religious institution is formed for the purpose of practicing certain fundamental doctrines of religious faith then expressed, any property acquired is held on a charitable trust to carry out the original purposes of the institution. A majority cannot divert the trust property of a religious institution to another purpose. Also, it is not in the power of the religious institution to alter the fundamental terms of the trust on which the institution's property is held, thus changing the identity of the institution from what was originally intended.

A.G. v. Pearson (1817), 3 Mer. 351

Dorland v. Jones (1886), 12 O.A.R. 543, aff'd (1888), 14 S.C.R. 39

General Assembly of Free Church of Scotland v. Overtoun, [1904] A.C. 515 (H.L.)

12. A secular court will intervene in a church property dispute based on its jurisdiction under trust law, and will examine the fundamental doctrines of the institution underlying the terms of the trust to determine its original purpose. If the original purpose of the trust can be determined, the court will enforce it by ordering that the property be appropriated to the use and benefit of those members the court identifies as adhering to those original principles.

A.G. v. Pearson, supra

Free Church, supra

Chong v. Lee (1981), 29 B.C.L.R. 13 (S.C.-Ch.)

State of the Case – May 8, 2009

- February 24, 2009 First Case Management Conference before Kelleher J.
- February 27, 2009 Pleadings closed
- April 30, 2009 Notices of Trial and Trial Records filed
- May 5-6, 2009 Plaintiffs' conducted Cross-Examination of the Defendant, Bishop Michael Ingham

The Plaintiffs have delivered 26 affidavits in chief. Further affidavits will be by way of Reply once the Defendants have completed delivery of their affidavits:

- 5 Trustees of the Parish Corporations (*Anne Sheck, Linda Seale, Eric Law, Michael Bentley and Peter Chapman*)
- 5 Clergy (*the Reverend Stephen Leung, the Reverend Sean Love, the Reverend Simon Chin, the Reverend Dr. Trevor Walters, the Reverend David Short*)
- 6 Parishioners (*Rebecca Fraser, George Egerton, Kirstie Glasgow, Gail Stevenson, Peter Pang, Raymond Kwan*)
- 4 Experts (*John Stackhouse, Edith Humphrey, J.I. Packer, Christopher Sugden*)
- 3 Anglican Network in Canada ("ANiC") leadership (*Bishop Ron Ferris, Bishop Donald Harvey, Cheryl Chang*)
- 3 regarding the Chun Bequest (*Robert Leung, Michael Chun, Stephen Leung #2*)

The Defendants' have delivered 24 affidavits as of Friday, May 8. Defendants' counsel advises that we can expect a further three to five affidavits including one from the Chancellor of the Diocese, George Cadman Q.C., and one from the Archdeacon Ronald Harrison:

- 6 Diocesan clergy (retired and current) (*the Reverend John Marsh, the Reverend Sarah Tweedale, the Reverend Christine Rowe, the Reverend Kevin Dixon, the Reverend Randolph Bruce and the Reverend Peter Y.C. Pang*)
- 4 Experts (*Marilyn McCord Adams, Richard Leggett, Wiliam Crockett and Alan Perry*)
- 10 Parishioners/former parishioners (*Robyn Woodward, Christine Trendell, Dennis Lou-Hing, Carole Keighley, David MacMillan, Sylvia Beech, Monte Worthington, Theodore Strocel, Douglas MacAdams, Steven Schuh*)
- 3 Diocesan representatives (present and former Bishops, former Chancellor) (*Bishop Michael Ingham, John Spencer and retired Archbishop Douglas Hambidge*)
- 1 from the General Synod of the Anglican Church of Canada (*Michael Pollesel*)

Trial Arrangements

The Plaintiffs propose to call in person: John Stackhouse, Bishop Ronald Ferris, Bishop Don Harvey, the Reverend David Short, the Reverend Simon Chin, Linda Seale, Peter Pang and Gail Stevenson. This list may require change depending on the ongoing review of the Defendants' affidavits.

The Defendants' in person witnesses have not been disclosed.

The parties ought to have a document agreement for some of the church documents. The terms of that are not yet agreed upon.

We expect a significant number of parishioners will wish to attend the trial and ask that arrangements be made for a suitable Courtroom to accommodate the public.

FASKEN MARTINEAU DuMOULIN LLP

Per:

Dated: May 11, 2009

Solicitors for the Plaintiffs