

New Westminster Appeal - September 16, 2010

The courtroom gallery was less than half full for the final day of argument. Stanley Martin spoke on the Chun bequest, Geoff Cowper closed the appellants' case and George Macintosh spoke briefly in reply to the Chun bequest issues raised by Mr. Martin. The hearing was completed by 12:30 pm.

Mr. Martin made it clear that the matter of the Chun bequest only had to be addressed as a separate asset if the diocese wins the case on the main claim. Otherwise, the bequest funds will go with the rest of the assets to the ANiC Church of the Good Shepherd. The bequest was to the building fund of the parish of the Church of the Good Shepherd – defined as a parish for the Chinese community in the Greater Vancouver Regional District.

He reviewed the evidence at trial which showed all the substantially Chinese congregations had left the diocese and there was only ½ of a small congregation that was Chinese. Of those who left, some gave evidence they could not go back to the diocese because of the conscience issue. There was a complete lack of any evidence showing a need for a building for a Chinese congregation, while the ANiC Church of the Good Shepherd had a great need, having outgrown their church which is currently leased to another (non-Anglican) church. The 2 congregations leased each other's property under a "church swap". The evidence supported the trial judge's finding that Dr. Chun wanted to benefit the Church of the Good Shepherd that was her home congregation.

Mr. Martin reviewed the case law showing how the evidence clearly met the test for a cy pres order in light of the trial judge's finding of Dr. Chun's charitable intention. In his view, the diocese was trying to overturn a finding of fact by the trial judge (which is rarely done). The diocese was seeking to take the money and keep it in the bank in case they had a need down the road, but that was very far from the original need Dr. Chun was trying to benefit, which was the Good Shepherd ministry.

Mr. Cowper replied to Mr. Dickson's and Mr. Macintosh's submissions from the previous day and he said he wanted to focus on the differences between the two sides. Mr. Cowper took exception to a number of submissions from the diocese and I will outline only some of the points below.

- When something is held on trust, it is "not a legally recognizable submission" to say "you don't get to the trust" (as stated by Mr. Macintosh). You can't ignore the existence of a trust and just rely on the corporate governance model.
- It has never been the law that you need to establish a breach of the trust to access the court's cy pres jurisdiction (as submitted by Mr. Dickson). You only need to show that the carrying out of the trust purposes has become impossible or impracticable. The court's supervisory jurisdiction over trusts can go from the trivial to the profound, as can a cy pres administrative order. Insisting on a breach seeks to confine the court's inherent jurisdiction and is profoundly at odds with its supervisory jurisdiction.

- The two sides differ on the interpretation of the Varsani case and they are in stark contrast. We say the court, in the case of a division, can properly access the cy pres jurisdiction without determining a breach of trust as long as the court can determine you have two groups of faithful followers of the religion.
- Entirely honest Trustees (“and”, he said, “you have them before you”) can come to court and say “I don’t know what my duties are and I come to the court so you can tell me my duties and how to perform them, and if I can’t perform them, how do I cease to be a Trustee?” In fact, Trustees are encouraged to do this when there is a total deadlock and they can’t honestly perform the trust.
- While the diocese says the court can’t make an order inconsistent with section 7 of the Act (to Incorporate the Diocese of New Westminster), he submitted that the proper legal question is: does the statute exclude the power to make a cy pres order? S. 7 does not preclude the court from appointing new Trustees. It says the Trustees can’t sell or dispose of property without the consent of the Executive Committee and bishop, but that does not mean the court cannot order a sale or deal with the property without the bishop’s consent.

If we have asked the right question, there is a compelling case for relief, Mr. Cowper said, the details of which would be dealt with in the drafting of a cy pres scheme.

Madam Justice Garson asked about how the corporate structure and the trust intersect and were they being asked to ignore the corporate structure. Mr. Cowper answered that the trust “overhangs” the corporate structure. As an example, if the majority used the rules and voted to become Unitarians, the court could stop that. You can’t use the rules to change the purpose.

Contrary to Mr. Macintosh’s suggestion the appellants should have proceeded by way of Canon 20 of the General Synod Canons, the evidence at trial was that Canon 20 was not an appropriate way of proceeding.

In response to the evidence of Marilyn McCord Adams that the Church of England is held together by “geography and establishment”, Mr. Cowper said that a church starts with a common faith or common view of spiritual issues. Even Bishop Ingham in his evidence agreed that the purpose of the church structure was to advance the mission of the church.

He stressed the unprecedented nature of many events happening in the Communion and the number of attempts to resolve the problem without success. He said the outcome of the Communion processes is unknown and it is possible that 10 years down the road, the ACC and TEC could end up being out of the Communion, and ANiC and ACNA are in the Communion. To expel the plaintiffs/appellants from their properties and take away all their assets – the Communion solution would be too little, too late. The bishop doesn’t want the dissenters around pending the outcome of the international issues. The appellants simply want to preserve their ministry pending the outcome of the Communion debate.

Mr. Justice Lowry asked what kind of an order the appellants were seeking at the end of the day as that was not specifically stated in the materials. Mr. Cowper made some suggestions for a cy pres order or a process for the judges to consider.

Mr. Macintosh made a brief reply to Mr. Martin's comments on the Chun bequest and the hearing ended.

I thank God for our excellent legal counsel we have had throughout this hearing. They did an outstanding job and we could not have asked for more. I pray their careful and truly dedicated service will bear fruit for the kingdom.

Please continue to pray for the three Court of Appeal judges, Mr. Justice Peter Lowry, Madame Justice Mary Newbury and Madam Justice Mary Newbury, as they review the material, do their research and write the judgment. Pray for the wisdom of Solomon and that their work will proceed quickly. For the congregations involved, pray for patience and peace which passes all understanding.

I will update the summary of the first day within the next week. Please check back for the final report.

¹Therefore, since we have been justified through faith, we have peace with God through our Lord Jesus Christ, ²through whom we have gained access by faith into this grace in which we now stand. And we rejoice in the hope of the glory of God. ³Not only so, but we also rejoice in our sufferings, because we know that suffering produces perseverance; ⁴perseverance, character; and character, hope. ⁵And hope does not disappoint us, because God has poured out his love into our hearts by the Holy Spirit, whom he has given us. (Romans 5:1-5)

In His Service,

Cheryl Chang

Chancellor
Anglican Network in Canada