

## Day 11 – ANiC Parishes v Diocese of New Westminster – June 11, 2009

*Counsel for the diocese continued their closing argument, followed, in the mid-afternoon, by counsel for the ANiC parishes offering a partial reply to the end of the day and submitting a more complete written reply by the following Monday morning.*

### **Counsel for the diocese**

George Macintosh, Q.C. began the day by handing up to the judge a copy of the Anglican Consultative Council's process to apply to be a new province, noting it had been mentioned yesterday. He said it references the mechanisms they employ to initiate a new province and highlighted S. 12 for Mr. Justice Kelleher.

Mr. Cowper, Q.C., agreed to allow it to be marked as an Exhibit on the understanding there is debate in the Communion, and between the parties in particular, on whether there are other processes available, and that the ACC is considered an advisory body only; it is – as its name denotes - “consultative”. (Note: it is highly unusual to submit further evidence during closing argument, but this “Expedited Trial” has allowed many unusual processes by agreement)

Mr. Macintosh also handed up a case that was decided two days earlier in the Court of Appeal in the State of California .

He referred to Mr. Cowper's comment yesterday that the deferential approach is not the law in Canada. The purpose of that submission, he said, would be to urge the court not to consider the American cases. He said he took issue with Mr. Cowper's view that the U.S. law developed differently in Canada. “It may well be that U.S. constitution took the court into the same place, but it is clear in my submission that courts in both countries defer to internal church rules and . . . defer to the church on theological issues.” He referred to a paragraph in Mr. Cowper's argument that quoted a 1979 case in which the U.S. Supreme Court specifically said the neutral principles of law approach (NPA) was “mandated by the First Amendment”, to which Mr. Macintosh said “ I say fair enough.” However, he respectfully disagreed with the next paragraph, which says the courts in Australia and Canada have noted the NPA but have not adopted it, .

It was Mr. Macintosh's submission that an alleged trust gives way to a statutory or contractual regime that is inconsistent with it. In conclusion, he made three counter points:

1. Both in Canada and the U.S., the same 2 principles are employed:
  - (i) Questions of theology will be left to the church to resolve by its internal mechanisms, and
  - (ii) The court will employ contractual and structural rules of the church to ascertain whether they are provided for in that structure.
2. One reason the courts do so in both countries, is because a statutory provision prevails. If the legislature has spoken, and in his submission, “it has spoken in s. 7 of the Act (which incorporated the diocese) – a parish can't dispose of property without the bishop's consent”.

3. The parishes became party to the canons of the diocesan synod and the general synod as a matter of contract.

He said there are 2 seminal cases, *Dorland* and *Itter v Howe*, which rely predominantly on U.S. case law. Half the cases cited are U.S. authorities he said. He quoted from Professor Ogilvie who said “*In determining church property disputes, courts rely on two basic legal categories, contract and trust. Religious organizations are treated in law as voluntary associations whose legal basis is the multipartite contractual consent of all members to the doctrine, practices, and discipline of the organization. When property disputes arise, they are equally subject to the doctrine, practices, and discipline, in relation to such disputes, unless they simply leave*”. He cited *Craigdallie v Aikman* and *Hofer v Hofer* in support.

He said the US’s neutral principal of law approach is the same as s. 2 of our Charter. He highlighted *Dorland*, and *Itter v Howe* again, and the underlying principles of voluntary associations. He said that when the right of property is decided by doctrine, and the highest body has decided by the highest adjudicators, then the legal tribunal must defer to them. He made a reference to a Pennsylvania decision and some further references by Canadian courts explicitly adopting the neutral principal of law approach, *Balkou v Gouleff* and *Wolfe*.

“My point this morning is that the US approach and the Canadian approach is the same, albeit the American approach may have been driven by their constitution”, he said.

He again stressed that his next argument was *in the alternative* because it’s in respect of the trust, saying, “The trust which the plaintiffs allege is simply not one that is countenanced by the cases on which they rely. The *Free Church* line of cases and those following, make very clear that a religious purpose trust will only be upheld if the trust alleged goes to the heart, to the core, to the centre of that church. It has to undermine what that church is about”. He said that was “hardly surprising when you look at what is sought is to disassemble, to take the four churches from the ACoC. Not surprising, the courts have said, just because you sincerely believe a different viewpoint, it is by no means enough to allow you to break away and take the property. If your view of scripture will not allow you to stay, of course you are free to leave. In order to take the property with you, you have to demonstrate it is at the core of the church.”

He said this was “central” before a valid religious purpose trust is established. He said the line of case law from *Free Church* shows it must relate to “fundamental doctrines”. “Just because you have a sincere different view of the bible – that’s not enough.” “I say with the greatest respect, the plaintiffs’ opposition to same-sex blessings is completely well founded, completely within their religious freedom to interpret the bible that way. I don’t endeavor to minimize what the plaintiffs hold dear. The courts say, before you can leave and take the property, you have to prove it undermines” the fundamental doctrines.

Reading from *Dorland* [my inserts are to show the parallel in this case], he said “the whole burden rests on the [parishes] to show beyond a reasonable doubt, that the [diocese] has “so far departed from the fundamental principles of the society or have so far departed from its discipline and worship. . . to cause them to be no longer members of the society. Such a departure . . . is so deep and radical as to destroy its identity. . . a suicidal destruction of the body itself, leaving its property derelict.”

He said the trust and abuse of it must clearly be established. He then referred to *Chong v Lee*, which described the principle in relation to a church being “formed for the purpose of promoting certain *defined doctrines*”, and how they must be ascertained. He referred to *Anderson v Gislason*, saying in that case (involving a proposed merger of Lutherans and Unitarians), Unitarian doctrine denied the divinity of Christ, whereas for Lutherans, the divinity of Christ was a core tenet of the church. “The purpose of the trust goes to the very identity of the church”, he said.

He said that in *Itter v Howe*, (Ontario) Chief Justice Hagerty approved U.S. law, saying the courts will only interfere where an abuse of trust involves fundamental doctrine. Mr. Macintosh said that was not the case here. He noted the St. Michael’s Report (SMR) says it is not a matter of core doctrine, it is not addressed in any of the creeds, they did not believe it was a communion breaking issue, and that the 2007 General Synod accepted the report and determined it was not “core”. He said same-sex blessings are not addressed anywhere, including the Solemn Declaration, which doesn’t embrace and define doctrine. In his submission, the parishes have not in any way linked this issue to the tenets or principles of the Anglican Church.

He said any trust alleged is not sufficiently core, but if Mr. Justice Kelleher did find it is sufficiently core, then he submitted the trust alleged does not pass the test required. He said there is no evidence supporting the terms of the trust that the parishes allege. “The Solemn Declaration upon which they rely is not a trust as it does not speak of trust or property. No other document links the Solemn Declaration to property.”

Referring again to *Dorland*, which he said resorted again to American law, “it must be a plain and palpable abuse of trust” for the court to interfere.

He said the jurisdiction to define doctrine is left to the General Synod and pointed out that the consecration of churches involves a rite from the 1962 BCP that says the bishop is “to consecrate and set apart . . . according to the rites and ceremonies of the ACoC”.

He said the phrase of “full communion with the Church of England throughout the world” is inconsistent with principle of autonomous provinces. Quoting from Principle 12 of *The Principles of Canon Law Common to the Churches of the Anglican Communion*, he read 7 points regarding self-governance, including that the

Provinces are autonomous, able to order and regulate their own affairs, the validity of any act is governed by the law of that church, etc.

He said the trust plead by the diocese is for “promulgation of the Christian faith, as defined by the ACoC, and according to the Constitution and Canons of the Anglican Church of Canada” and submitted there are various rationales for that interpretation of the trust.

He again referenced *Principles of Canon Law* and asked are the parishes part of the Communion?

Mr. Justice Kelleher asked where the *Principles of Canon Law* came from. After the morning break, Mr. Macintosh replied that it was a report appended to George Cadman’s affidavit, written by Chancellors and others from the Anglican Provinces of Ghana, U.S., Hong Kong, Canada, Indian Ocean, West Indies, and England. Mr. Macintosh said it includes a forward by the current Archbishop of Canterbury and there is a Disclaimer in it saying that it is not law. He added, “this is not surprising because they don’t have the power to bind the Provinces.”

He also referred to section 7 of the Act which incorporated the Diocese of New Westminster and said the trust the diocese has plead is consistent with the history of how property is held by the diocese.

He referred to the “Dennis Canon” of the Episcopal Church, (which essentially says parishes hold property in trust for the national church) to say “the courts have stated that the Dennis Canon merely states expressly what is plainly implied”.

Mr. Macintosh said that although the parties may have very sincere differences over the issue, it is important to note that while the ACoC is not being sued and is not joined in this case, the General Synod determined in 2007 that same-sex blessings are not core doctrine.

Mr. Macintosh then referred to a section of his written argument that he did not intend to speak to, but noted that section was important. Mr. Justice Kelleher remarked somewhat jokingly (referring to both counsel), “I appreciate that neither of you have said I commend it to you “at your leisure”.

As Mr. Macintosh began his argument on Cy Pres, he reiterated his starting point that there is not a trust to begin with which the Cy Pres analysis can get to. He said all the Cy Pres cases, including *Varsani*, began with a trust declaration or a trust deed which is not the case here.

He highlighted two points from *Varsani*, as “obvious but fundamental”:

1. The ruling turned on the Charities Act; and
2. We don’t have comparable legislation.

He said this distinction is recognized by Picarda in *The Law and Practice Relating to Charities*. The Charities Act didn't replace the common law but supplemented it and the common law had rigorous standards.

He submitted that if the case was decided on a trust, the diocese's evidence supports a trust for the diocese. Any Cy Pres scheme is to be "as close as possible" and that means the property belongs to the diocese. It is not impossible to perform the trust, he said, so the Cy Pres impossibility doesn't arise. This stems from the fact the diocese's main case is grounded on the statute and they have constructed a trust that echoes the structure of the church.

The parishes have deeply felt religious beliefs and they can choose to leave, he said. "The Archbishop of Canterbury's Panel of Reference (POR) has weighed the submissions of both sides and they said there is nothing here that cannot be handled by the bishop. The POR, in my submission, should be followed closely." He said the POR determined, even from the parishes' viewpoint, it's not impossible to stay in the church because Episcopal Oversight is the correct way to proceed on the issue.

He recalled "the Tweedale evidence" and said there are tens of thousands of conservatives that don't find it impossible to carry on within the church. On the evidence, it is not impossible and Cy Pres doesn't arise. He said a number of dioceses are at various stages of proceeding with same-sex blessings and that "obviously" Episcopal Oversight is an acceptable option. He said the parishes don't meet the strictness for Cy Pres under the Common law. His "main point" was that "you don't have to come to Cy Pres because its so *pres*" – or so *close to* the original intention (to leave the property with the diocese) that it doesn't require adjustment.

He then referred the judge to a number of paragraphs in his written submission on the issues relating to the broader ramifications of Cy Pres and freedom of religion, though he did not address them orally.

He concluded by summarizing his main points:

1. The statute, canons and bylaws resolve the matter fully.
2. The case upon which parishes depend does not come close to the stature that is called for under *Free Church* analysis as being fundamental and central to the church.
3. The parishes have not satisfied what is called for under trust law to establish the trust they claim.
4. If a trust is found on the evidence, it's the one expressed by the diocese.
5. Cy Pres at common law does not come into play here because a Cy Pres analysis is not justified. If there is a trust, there is not the impossibility of performance.
6. Cy pres must be as close as possible to the original trust and the parishes' proposal is as far away from the true original trust as is possible. The parishes have left the ACoC, gone outside of the Anglican Communion worldwide, and they are trying to take their churches to a place back in 1893, which is not the way Anglicanism has been (implying it has "moved on" in its

doctrine and is not “fixed” in doctrinal development by the Solemn Declaration of 1893).

Ms. Ludmilla Herbst, also counsel for the diocese, then stood to speak to the parish histories and the Chun Bequest held by the Church of the Good Shepherd.

On the facts respecting the parishes, she said she would only highlight examples from her compendium “to provide examples of how the statutes and canons have infused the life of the parishes at issue.” She pointed to paragraphs in the written argument relating to the appointment of clergy, diocesan connection and said the “parish histories illustrate the diocese and ACoC are engrained in the fiber of these churches.”

She said reviewing the parish histories was important “to get a grip on where the Solemn Declaration fits into this” since the parishes “refer to the Solemn Declaration in the absence of a written declaration of trust.” She said the parishes “claim the Solemn Declaration flows through to the parish level in the front of the prayer book, but the evidence has been that the 1962 BCP is the first BCP that included the Solemn Declaration in the front cover. Prior to that, no others had.” She also noted that the Solemn Declaration is not in the BAS.

She said 1962 (when that edition of the BCP came out) is more than 60 yrs after each of the parishes of Good Shepherd, St Luke’s, and St. Matthew’s were established, 40 or so years after St. John’s was established, and 2 yrs after St. Matthias was established. She noted that Good Shepherd uses the BAS.

She said parish histories show the diversity and flux of the congregations including the theological basis, but “the objective constant in these parishes is the connection with the diocese and ACoC”.

She pointed Mr. Justice Kelleher to parts of the written argument on the history of the parish of St. John’s. She discussed Bishop de Pencier and s. 7 of the Act which incorporated the synod, to argue the parish corporations are inherently part of the diocese. She reviewed when the current building was built (1950’s) and the consecration service from the BCP at the time, saying “While it is not a trust declaration, it is certainly more so than the Solemn Declaration.”

She reviewed some statements of their witnesses, made in affidavits, including Rev Tom Anthony, Christine Trendell, daughter of Canon Trendell, Robin Woodward and Nancy Southam, regarding monies raised for the building of the church and contributions made by their families and others, claiming they were for ACoC purposes. In terms of the statute and canons, she said approval was sought and obtained by diocesan council when they renovated in the 1980s.

She referred to evidence about Harry Robinson “transforming the parish” in some ways, saying Mrs. Stevenson referred to his “changing the church’s culture”. “The idea that the congregation has been uniform throughout is not there”, she said.

She briefly referred the judge to various paragraphs of her written argument and mentioned diocesan involvement in the other parishes with some comments, including:

- St. Matthias and St. Luke's land was originally intended for a diocesan office
- St Luke had quite a bit of diocesan involvement and "diocesan connected priests"
- Rev Randolph Bruce, former incumbent of St. Luke, said "when he came, it was a liberal parish"
- Good Shepherd was a mission parish in 1889
- The current church was built in the 1990's
- St Matthew's was established in 1900 and the current building was built in 1997 by a priest sent by the bishop to establish a church in a new location

### **RE: The Chun Bequest**

Ms. Herbst said the diocese's position is that the monies should continue to be held in the building fund of the incorporated parish in the diocese of New Westminster, whether it is held pursuant to statute or canons or a trust. She argued the intent was to bequeath to the building fund of Church of the Good Shepherd. She disagreed with the parish's submission that if they don't succeed on the whole, there should be an order for the ANiC congregation. "That's not what the will said. Until this litigation, everyone referred to the parish corporation".

She said there is evidence of people at the parish, the executor of the will and the diocese, treated the fund as affiliated with the corporation. The parish sought diocesan council permission for the Hong Kong property to be sold, pursuant to section 7 of the Act which incorporated the Synod, which "deals with real and personal property", she said. Permission for the sale was given by the bishop and diocesan council. "The Executor of the will also seems to have been under no confusion as to the gift (being given to) a parish that was incorporated under the Synod act." She said that "Church of the Good Shepherd or parish of the Church of the Good Shepherd is the name of the corporation" and that the correspondence between the Hong Kong solicitors and the Diocesan solicitor acting on behalf of the parish all referred to the parish corporation and included a certificate of incorporation.

She referred to her written argument saying, "This is an illustration of statute and canons providing a framework for dealing with property." Given the clarity of the language and the way the parties have conducted themselves, "this is not a congregational church", she said. There is a history of diocesan involvement and it was a mission of the diocese,

She said that Dr. Chun wouldn't have contemplated the funds would be given to an ANiC congregation, saying a review of the will shows that Dr. Chun didn't give along denominational lines.

She said that Rev Pang (former priest at Good Shepherd) is described as “very orthodox” in the parish affidavits, but he said he doesn’t know what this means (in his affidavit). He is one of the people who opposes leaving the diocese she said, and he broke with St. Matthias and St. Luke where he attended after retirement “because he didn’t like them breaking with the diocese.”

She said the parish was making “a gross over-generalization for establishing a trust in any event.” Rev Pang said even if there is cultural conservatism in the Chinese community, that doesn’t necessarily mean theologically. Ms. Herbst suggested that because Dr. Chun was a successful physician in Hong Kong around or just after the time women were first ordained in Hong Kong in 1943, and that she “led the way on some issues”, she seemed to have a “more forward view” and would quite likely be more liberal. When Mr. Justice Kelleher questioned her on the evidence to support that suggestion, she said “Well, I am taking some liberty with that”. She then said it was clear from the will that the parish corporation was the beneficiary of the building fund.

She said there was no basis for a finding of impracticability should the diocese get the building fund. The declaration that established the parish said the limits of the parish are the Chinese community and the suggestion the diocese doesn’t have enough Chinese members was another over-generalization she was “trying to chip away at”.

In response to Rev Stephen Leung’s comments regarding the Chinese being a more conservative culture, she said that there are Chinese people who do attend the parish of St. Chad’s in the diocese. The priest of St. Chad’s said ½ of the parishioners are Chinese. She admitted it is a “small parish. . .but so was Good Shepherd for many years. The fact there is a small congregation now. . .there is no evidence that the Chinese will stay away.” Referring to Rev Pang, she said that not all have been driven out.

She said the congregation at St. Luke’s had an interesting history, and it grew when Rev Randolph Bruce, who is not Chinese, was the incumbent. She said Ms. Cheng said he was theologically liberal on homosexuality, but it was quite clear he was a much loved priest while he was there.

She concluded her remarks by saying, “Whether there will be an immediate need for the building remains to be seen, (but) that’s not the test for Cy Pres”.

Mr. Macintosh then stood and spoke to Mr. Justice Kelleher regarding a correction of some of his morning remarks regarding Cy Pres. He wanted to make clear that his comments were addressing the trust alleged by the parishes saying that trust does not meet the test of impossibility or impracticability.

He again quoted the POR report which said, “The argument that in order to remain “in full communion with the Church of England throughout the world” it is necessary for dissenting clergy and parishes to separate themselves from the

diocese of New Westminster . . . cannot be sustained. The Church of England itself remains in full communion with the Diocese of New Westminster and Bishop Ingham.”

He reiterated that it was by no means impossible to have these beliefs and stay in the ACoC, citing “the Tweedale evidence”, the POR approved Episcopal Oversight without jurisdiction, and the conscience clause.

He also reiterated a second point against Cy Pres saying the parishes’ trust cannot be as near (as possible) to the original trust. The parishes “scheme - what they are proposing – is totally contrary to the polity of the Anglican Communion and how they govern themselves and resolve disputes”, he said. “It has them taking four parishes away from the Anglican Communion and it’s unreasonable to say that is close to original purpose.”

He read from *Attorney General v Governors of Christ’s Hospital* [1896] where Mr. Justice Chitty said, “in a word, I cannot under the guise of executing the trusts cy-pres, upset the constitution of the present body, reduce them to the position of bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General, nothing less than an Act of Parliament would suffice.”

He said his second point of why the parishes’ trust is not as near as possible to the original purpose was due to their uncertain status within the Anglican Communion. “They’ve taken the congregations out of the Anglican Communion. It cannot be the case that it is as close as possible to the original trust”, he said.

### **Counsel for the ANiC parishes**

Mr. Cowper then had an opportunity for Reply beginning around 2:50 p.m. He explained to Mr. Justice Kelleher that he had agreement from Mr. Macintosh, and with his Lordship’s permission, he would use the rest of the day for oral reply and would submit a more complete written reply by Monday (which he would submit to Mr. Macintosh first for any concerns or comments) and the trial would end today. Mr. Justice Kelleher agreed.

Mr Cowper said that it was important for the judge to know and for him to state clearly, “that Cy Pres applies no matter what the trust. It would just apply *differently*.” You ought to apply a doctrinal trust, it’s just a different doctrinal trust affecting the promulgation of the Christian faith. (The question is - is it a faith as defined in the Solemn Declaration, or is it as defined by the ACoC?)

He said if a trust is found from the parishes’ perspective, then it is the actions of the bishop and diocese that are contrary to the constitution or the internal rules. He said he heard Mr. Macintosh speak on the premise that *Itter v Howe* said “leave it to internal governance”. He said one of the important points he wanted to make is – “Where is the decision here?” Mr. Macintosh said the internal rules should be

applied. In fact, he said, there has been a lot of action and advice, which have been contrary to the internal rules, but those related to the decisions of the bishop.

Mr Cowper also pointed out that the POR was only an advisory body and that its advice was almost entirely rejected by the body it reported to. The POR advised the Primates and they essentially said “thank you for your work, but we reject it”. They then proposed something stronger which was rejected by the diocese.

Mr. Macintosh relied heavily upon the Legal and Canonical Commission, the General Synod Task Force on Jurisdiction and the *Principles on Canon Law* writers, which were all only advisory. These advisory bodies were elevated to decisional bodies in the Defendant’s argument and the judge was being urged by the diocese to accept that certain processes are concluded. In fact, he said, there has been no decision by the General Synod on the question. He said the decisions and actions of the bishop and the refusal to accept a moratorium were relying on these advisory decisions, but there has been no resolution removing the Solemn Declaration from the constitution of the ACoC.

There is no resolution of the General Synod which departs from the doctrine, and the bishop acknowledged the teaching of the church has been consistent with the position taken by the parishes. We’re content to remain in the internal rules if that is appropriate (since the parishes view, it is the bishop and diocese have breached those internal rules).

He said this is not a church whose constitution, whose own definition of itself, says “forget the rest of the world, and only worry about what happens here.” In fact, they say, “We will not exercise our freedom in a way that ignores the rest of the world.” In applying the internal rules, it is important to remember that you don’t stop at the boundary of Canada. He highlighted that the diocese has been utterly silent on the division here and around the world.

After the afternoon break, Mr. Cowper began by pointing out what deep differences existed between counsel, not only about what the law is, but also its application. “We are far apart and in final argument, we have grown farther apart”, he said.

First, he said, Mr. Macintosh sees the legal structure radically different from his own view.

Referring to parts of the diocese’s submission, he said it was “a complete rejection of the law of Canada with respect to religious purpose trusts”. He said the courts *start* by implying a trust as to religious purposes. Mr. Macintosh submits that the court should not imply a trust until *after* application of the Neutral Principles of Law Approach and reference to relevant statutes, constitutions, canons, rules and regulations, and *only if* that fails to resolve the issue. Mr. Cowper said that is exactly contrary to all the cases before the courts. He said Mr. Macintosh was essentially adopting an American approach.

He said the internal rules (of the ACoC) are drenched in doctrinal principles. General Synod can deal with doctrine, but “in harmony with the Solemn Declaration”. He said it is a false neutrality, contrary to Canadian law, to ignore the doctrinal foundation.

Mr. Macintosh says its wrong to presume a religious trust, but that’s essentially the modern foundation of charitable law, he said. “In my respectful submission, he (Mr. Macintosh) asks you to adopt a radically different approach”.

He said that the Mr. Macintosh’s written submission describing the parishes’ legal theory and use of Cy Pres was “a straw man”, saying, “it erects a position we’ve never taken. I don’t know who said that.”

He said Mr. Macintosh submits that the law implying a trust relating to doctrine can only apply to a small church. In doing so, Mr. Macintosh was not only rejecting the law with respect to religious purpose trusts generally, but also the laws of charity.

On the American law, he said it was important to identify their terms of departure. Where Mr. Macintosh said the analysis was identical, Mr. Cowper entirely disagreed. What you have in the U.S. is 2-3 principles which flow from the constitution. They will not imply a religious purpose trust on a property given to a church because it violates the First amendment. In a hierarchical church, it’s the same, but this is exactly opposite to Canadian law. One exception is where someone gives on an express trust for religious purposes and the courts say “we have no choice if it’s an express trust.”

Mr. Macintosh’s argument was that the parishes signed on to something and when they signed on, they were to take the good and the bad, and then leave; they signed on to structure – a bishop, diocese and synod. This, Mr. Cowper said, was a very incomplete statement. The very first consideration when one signs on to a church is adherence to its faith – that is what they sign on to. The diocese says everything that is secondary is all you have to take into account. But, he said, it is no coincidence that the phrase in the documents is the “doctrine and discipline” of the Church, even according to the diocese’s witnesses and documents. “Indeed the vows of obedience explicitly refer to the 39 Articles of Religion – a thoroughly conservative and thoroughly religious document also reflected in the Solemn Declaration”, he said.

Mr. Cowper said the law of charitable corporations is not a defense but merely an appropriate route to equitable relief. Charitable corporations may hold on trust or beneficially for their stated purposes and objects. This case is tricky because the parish corporations do not have stated purposes and objects, nor are they supplied by statute, so they must be implied. He said that unless an express statutory provision or agreement excludes the court’s jurisdiction, the courts have the jurisdiction. He said charitable corporations can and often do hold property in trust, and it’s clear there has to be a trust.

The diocese relies on the 8-10 U.S. cases where parish corporations were found to hold on trust for the national church. The Episcopal Church's Dennis canon stipulates a trust for the national church. In our case, there are many examples that show the Canadian church has pushed the trust "down" rather than "up".

On general principles of trusts, Mr. Macintosh suggested Cy Pres only applies when there is a trust document. However, Mr Cowper said, there is no authority for that proposition. It is "deeply flawed" because trust law doesn't require an instrument to have a trust.

In the *Ullverston* case, both anonymous and identifiable donors put money in a building fund that never happened. The identified donors got their money back and the other money was distributed using Cy Pres.

Mr. Cowper reminded the judge that the test was "impracticability" and not only "impossibility" which Mr. Macintosh stated several times during argument. He said the references to the strictures of the 19<sup>th</sup> century have to be tempered by the development of the impracticability doctrine – based on the spirit, intention, efficacy, etc. – partly developed in the Charities Act.

He pointed out some correction on points respecting the Solemn Declaration, saying there were differences as to method and evidence. He said that on any construction of the church's constitution, it shows the Solemn Declaration's character, first and foremost, by its place in the constitution. It's a question of evidence.

He said Mr. Macintosh became enthusiastic about how the Solemn Declaration was used as a "litigation device" and the centrality of the Solemn Declaration in the parishes' case is something the lawyers dreamed up. However, Mr. Cowper said, aside from the constitution, the Montreal Declaration of Essentials expressed it prominently in 1994. Former Archbishop of Canterbury, George Carey referred to it in the context of keeping the communion together. To suggest it came up in the context of litigation is wrong.

He said that the diocese takes the liberal view that the Solemn Declaration and the 39 Articles don't bind them anymore and takes them out of their place in the church. Those statements "are really wishful thinking for constitutional changes which have not happened." Furthermore, the Task Force on Jurisdiction report refers to the Solemn Declaration twice, and the Galilee Report starts with the Solemn Declaration. So, saying lawyers dreamed this up is not faithful to the record.

Although it was introduced by Mr. Cadman [Chancellor for the diocese], the *Principles of Canon Law* is a document with no standing at this time, since it is only a draft document submitted by a drafting committee; it is not an authoritative statement.

Mr Cowper acknowledged that General Synod has some authority in terms of internal processes. However, he pointed out that the POR report, the SMR, and the

Legal and Canonical Commission Report did not have any authority. He said the diocese's position is that General Synod decided it was not core doctrine and not communion breaking. However, on numerous occasions, he dropped the words from the resolution not core "*in the sense of being creedal*". That statement is absolutely true as there is nothing in the creeds about this.

Mr. Cowper pointed out that no one before had ever made a distinction between doctrine and "core" doctrine. For him to say there is a determination that it is not core doctrine is not accurate.

The issue is, have the parishes made out a case of sincere and genuine doctrinal division?

Mr Cowper pointed out that the diocese has taken the position that there has been a decision that this is not a communion breaking issue. This is fundamentally flawed because the majority cannot decide that. For example, if the General Synod decided by majority vote to drop "thou shall not commit adultery", it is clearly doctrinal. If they dropped it, they could not then say that all ACoC parishioners had signed on to this new doctrine.

On the re-marriage of divorced Anglicans, there are many questions that Anglicans have worried about and had many debates back and forth over. However, the most telling point, he said, was that previous questions have not resulted in large numbers of Anglicans saying that this is so flawed that they will no longer remain in communion with you.

When Mr. Justice Kelleher questioned him about Bishop Harvey having said women's ordination was prohibited by scripture and inconsistent with the Solemn Declaration, Mr. Cowper pointed out it was a different conversation with scripture – it's about church order vs conduct specifically proscribed by scripture.

"What is your role as a judge?" he asked. "You can't inject your own view as to what is fundamental to Christianity. The proper approach is to recognize the debate and disagreement about the fundamentals that have produced impracticability. It is vastly preferable to recognize the division rather than engage the debate as to who is right or wrong." He said, if there is division, you can't serve the purpose. That is by definition, impracticability.

Although Mr. Macintosh did not speak to Canon 20, Mr. Cowper noted his argument on this point at the end of his written submission. Mr. Cowper pointed to the entire absence of any mention of Canon 20 in the record (the affidavit and oral evidence), saying there was no mention of Canon 20 in the Statement of Defence, nor in any of the correspondence between the parties, nor was there any mention of it in any of the meetings with the bishop, and there was nothing in the Handbook.

He said there is a precedent of a "stated case" under Canon 20, to the Ecclesiastical Supreme Court of the ACoC, where an individual sued the Church and General Synod

agreed to state the case to stop the lawsuit. Suggesting that failing to “appeal” the bishop’s decision using Canon 20 was a failure to follow the internal processes, and that this would be a bar to the court’s exercise of its equitable jurisdiction, Mr. Cowper said it was important to note there was no reference to Canon 20 in the record. Mr. Justice Kelleher asked if Mr. Cowper was suggesting that lawyers made up the argument for this litigation, and this brought chuckles from some of the observers.

Mr. Cowper concluded his remarks by flagging an issue for the judge, and asking him to consider if the diocese’s written argument on Canon 15 even addressed the alleged basis on how that canon could legally direct an independent corporate body, in this case, the parish corporations.

Mr. Justice Kelleher expressed his thanks to counsel, saying he appreciated their mutual cooperation and that he never had to make a ruling on how this case was run. He acknowledged this was a difficult case and said the court has benefited greatly from the way they had worked things out in the best tradition in their work as barristers. And, with that, the trial ended.

---

### **Cheryl’s comments**

I also want to say that our legal counsel were absolutely outstanding and that we could not have asked for a more dedicated, hard-working, and godly team of lawyers, including their staff and students. We are proud of the work they have done and how they represented us. I feel we could not have presented this case any better.

I also want to say that I don’t think we could have asked for a better judge in this case. Mr. Justice Kelleher was clearly engaged throughout, although he looked very tired at the end of what was a very difficult case. I believe he appreciated the trial ending a day early, as we all did. It was clear he was reading the material each night and he asked very good questions which showed he grasped the issues and appreciated the complexity. He still has much more reading to do before he will be in a position to write a judgment. We do not expect a judgment before Thanksgiving and have no other guesses as to when he will be able to render his decision. Please uphold him in prayer for the coming months and pray that justice will be done.

In His service,

Cheryl Chang