

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Rand v. The Anglican Synod of the  
Diocese of British Columbia,***  
2008 BCSC 668

Date: 20080528  
Docket: S082415  
Registry: Vancouver

Between:

**David A. Rand, Sharon Hayton  
and Andrew Hewlett**

Plaintiffs

And:

**The Anglican Synod of the Diocese of  
British Columbia and the Bishop of British Columbia**

Defendants

Before: The Honourable Madam Justice Allan

## **Reasons for Judgment**

Counsel for the Plaintiffs

D. Geoffrey Cowper, Q.C.,  
W. Stanley Martin  
& Martha von Niessen

Counsel for the Defendants

George K. Macintosh, Q.C.,  
Tim Dickson & Ludmila B. Herbst

Date and Place of Hearing:

May 7, 2008  
Vancouver, B.C.

[1] The plaintiffs seek an interlocutory injunction restraining and enjoining the defendants from interfering with them and the parishioners they represent in respect of their “continued access to and exclusive use, occupation and enjoyment” of the Anglican Church of St. Mary of the Incarnation, located in Metchosin, in the City of Victoria.

### **Background**

[2] The Anglican Church of Canada is one of 38 Provinces that comprise the worldwide “Anglican Communion”. The General Synod is the legislative body for the Anglican Church of Canada. Within the Anglican Church of Canada, there are four Ecclesiastical Provinces, including British Columbia and the Yukon. Within the British Columbia and the Yukon Ecclesiastical Province, there are six Dioceses, each with its own Synod. The Bishop of the Diocese of British Columbia, one of those six Dioceses, is the Right Reverend James Cowan (the “Bishop”).

[3] St. Mary’s Parish is one of 56 Parishes in the Diocese of British Columbia. St. Mary’s Parish (the “Parish”) contains St. Mary of the Incarnation, built in 1991, (the “New Church”) and St. Mary the Virgin (the “Heritage Church”).

[4] The plaintiffs, the Reverend Andrew Hewlett and the Venerable Sharon Hayton, are former clergy at the New Church. The plaintiff David A. Rand is a parishioner and former churchwarden there. The defendants are the Bishop and the Anglican Synod of the Diocese of British Columbia.

[5] On February 17, 2008, at an Extraordinary Vestry Meeting, the plaintiffs and others, comprising the majority of the Parish, voted to realign themselves to come under the jurisdiction of Archbishop Venables, the Primate of the Province of the Southern Cone, which encompasses much of South America. The vote was 105 in favour, 14 opposed, and 3 abstentions. The majority of the Parish and other like-minded parishioners across Canada have associated themselves with the Anglican Network in Canada (the “Network”) under the Episcopal oversight of Bishop Harvey, a retired Bishop of the Anglican Church of Canada, who is now under the jurisdiction of Archbishop Venables.

[6] After the vote on February 17, the Bishop (through his Commissary) allowed the Network supporters to continue to use the New Church on a temporary basis while discussions regarding the employment of the plaintiffs Hayton and Hewlett took place. During the initial 12-day “pause”, beginning on February 20, to allow the parties to “cool off”, the Bishop said that he would not prohibit Network-related activities at the New Church.

[7] Subsequently, on March 2, the Metropolitan, the senior bishop of the Ecclesiastical Province of British Columbia and the Yukon, Archbishop Terry Buckle, offered to meet with the parties to try to mediate a solution. That meeting ultimately took place on March 15.

[8] After March 15, the Network continued to use the New Church and the plaintiffs Hayton and Hewlett continued to lead worship there. The defendants say the Diocese did not immediately reassert control over the New Church for several

reasons. First, the Bishop was in Burma, then Easter intervened, and then the Bishop consulted with the Diocesan Council. During that time, the remnant of St. Mary's Parish elected new wardens and other officers to establish the organization required to operate the Parish.

[9] On April 4, the Bishop had the locks changed at the New Church and an alarm system installed. He provided everyone with an opportunity to remove personal property from the building.

[10] On April 5, the plaintiffs commenced this action by an endorsed writ and sought and obtained an *ex parte* injunction enjoining the Diocese "from interfering with the Plaintiffs and the other parishioners they represent in respect of their continued access to and exclusive use, occupation and enjoyment of [the New Church]". The order of Mr. Justice Sigurdson permitted the plaintiffs to continue to use the New Church temporarily and gave them 28 days to bring on this application for an interlocutory injunction.

[11] As a result of those events, the parishioners associated with the Network have used the larger New Church since the vote on February 17, 2008, and the other parishioners have used the smaller, older Heritage Church, which seats about 90 people. The Diocese holds legal title to both properties upon which the Churches sit.

[12] The parties filed extensive material regarding the plaintiffs' allegation that there is an irreparable division within the Anglican Church of Canada. However, this application is not the forum for a lengthy discussion of the theological issues. The

heart of the plaintiffs' position is that they are committed to conservative, orthodox Anglican doctrine and practice. They characterize the dispute between the parishioners as part of "an ongoing dispute among Anglicans worldwide as to what it means to be truly Anglican."

[13] The plaintiffs assert that there is a strong factual and legal basis for the proposition that the Church property is held on trust for the congregation. They say that there is a legitimate legal argument as to who are the proper and legitimate beneficiaries of that trust.

[14] Mr. Cowper, counsel for the plaintiffs, submits that it is a well established principle of law that the property of a religious institution is held on trust for the original purposes of that religious institution. When a dispute arises as to whether the majority in the congregation are adhering to the original tenets, the court will consider the tenets at the time the trust was created, and whether the tenets in question were originally considered as distinctive marks of the religious institution: e.g. ***General Assembly of Free Church of Scotland v. Lord Overtoun***, [1904] A.C. 515 (H.L.).

[15] In response, Mr. Macintosh, counsel for the defendants, asserts that the general rule in ***Free Church of Scotland*** is subject to any canons of the religious institution that allow it to control the use of the property, or otherwise change the terms on which the trust is held. He cites Professor M.H. Ogilvie who explained the ***Free Church of Scotland*** case in *Religious Institutions and the Law in Canada*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2003) at p. 293:

The trust is that imposed upon the property by the founders of the religious institution, including the doctrinal principles to which the institution subscribes, and may only be changed in accordance with that institution's practices and formal procedures for changes in doctrine, polity and liturgy.

[Emphasis added]

[16] Mr. Macintosh submits that in ***Free Church of Scotland***, the court found no evidence that the church's constitution permitted it to change its doctrine or faith. Therefore the terms of the "original trust" included an unchangeable doctrine. Here, he points out that the Canons and Regulations of the Anglican Church of Canada provide processes by which its doctrines and purposes may be changed and the General Synod has instituted many changes since the Church's inception.

[17] Michael Pollesel, the General Secretary of the General Synod, deposes that the level of controversy within the Anglican Communion caused by the issue of same-sex unions is not new to Anglicanism:

The Anglican Church has always included serious and deeply-held theological differences, beginning with the conflict between Catholics and Puritans in the sixteenth century, through the conflicts of Evangelicals and Ritualists in the nineteenth century, to conflicts over the marriage of divorced persons, to conflicts over the ordination of women and liturgical change in my own lifetime.

The current dispute over the blessing of same-sex unions is another expression of the kinds of tensions Anglicanism has known through history.

[18] The defendants say that the rules and structures of the Anglican Church of Canada and the Diocese, which are set out in their respective incorporating statutes, constitutions and canons, are inconsistent with the plaintiffs' alleged trust claim. For instance, Regulation 5.16.a. of the Canons of the Diocese states: "All lands and

buildings are held in the name of the Anglican Synod of the Diocese of British Columbia.”

[19] The defendants assert that, in any event, there has been no breach of any trust. They say that in recent years, the Anglican Communion has been engaged in debate over certain doctrinal issues, primarily homosexuality, and that in both the United States and Canada, there is serious debate over the blessing of same-sex unions. Although such blessings have occurred in the Diocese of New Westminster (which covers the Lower Mainland), such blessings have not been condoned and have not occurred in the Diocese of British Columbia. They say that the General Synod has voted not to give dioceses the option of performing such rites. The Bishop of the Diocese of British Columbia, who is a member of the General Synod, voted against giving dioceses the option to approve such blessings. The members of the Diocese have been advised that any clergy in the Diocese who blessed a same-sex union would be disciplined.

[20] Mr. Macintosh says that there is a small evangelical minority of Anglicans in Canada who are so disaffected with the debate over same-sex blessings that they are attempting to leave the Anglican Church of Canada. They have joined the Network which has organized votes in a number of parishes across Canada, in which parishioners have purported to remove the parishes from the Anglican Church of Canada and place them under the jurisdiction of the Province of the Southern Cone. The plaintiffs organized the vote in St. Mary's, which took place on February 17, 2008.

[21] The plaintiffs deny that the crisis is about the question of same-sex blessings, although that issue has received the most attention in the media. Cheryl Chang, a lawyer and a Director of the Network, deposes that the crisis for most orthodox Anglicans in the global Anglican Communion and in the Anglican Church of Canada is one of authority and interpretation of the Bible:

There are currently two competing and diametrically opposed views of the bible which have resulted in the presenting issue of the day. On the orthodox side, we believe that the bible is the inspired word of God and that it cannot be changed or amended. It is unchangeable for all time. The competing or opposite view is that [the] bible is a book that was written at a time in history by fallible people and it can be changed and “interpreted” to suit changing times.

[22] After describing the history of the same-sex blessings dispute in the Church in Canada, Ms. Chang states that the core issues underneath the surface of the dispute are foundational and theological. She describes those core issues as “sex (i.e. not limited to the narrow issue of the blessing [of] same sex unions), creation, marriage, authority, and most importantly, Scripture and the Gospel of Jesus Christ.” She says that the intention of the Network in Canada is to seek restoration and unity within the Anglican Church. She lists a number of churches in Ontario and B.C. that voted overwhelmingly in February 2008 in favour of accepting the authority of the Primate of the Southern Cone.

[23] The defendants say that the General Synod has authority and jurisdiction over the definition of the doctrines of the Church. In fact, it has exercised this jurisdiction over the course of the Church’s history to effect many significant doctrinal changes, which include permitting the marriage of divorced persons and the ordination of women and divorced persons. They say that the dioceses are

responsible for pastoral care within their territories, and for control of their property. The Bishop and the Diocesan Synod control the licensing of clergy within the Diocese (who swear oaths of obedience to the bishop), the establishment and disestablishment of parishes, and the building or renovating of churches. When a bishop decides that a parish should be disestablished, all of the assets not already held by the diocesan synod are transferred to it and are dealt with as a commission established by that synod sees fit.

[24] Parishes have no identity in the Anglican structure beyond being a constituent of a diocese and, again, the bishop can choose to disestablish them. Parishioners may choose to leave the parish but have no power to determine that the parish will leave the Anglican Church of Canada and join another Anglican Province or take Church property with them.

[25] The defendants say that when the vote discussed above took place in St. Mary's, the plaintiffs Hayton and Hewlett were ordered by the Bishop (through his agent or "Commissary", Archdeacon Bruce Bryant-Scott) to rule the motion out of order. After they refused to do so, disciplinary proceedings were commenced and they were "inhibited" from presiding over any services in the Diocese.

[26] As noted earlier, the plaintiffs resist the suggestion that blessings of same-sex unions are at the core of their dissatisfaction. They frame the dispute in a more subtle fashion; they say the authority of the scripture is in issue. In their view, the defendants are not expanding the true faith – they are going outside or beyond the faith. They fear that the Diocese and the Anglican Church of Canada is moving

away from historic and scripturally based Anglican doctrine and practice and, instead, by adapting to the secular forces of culture, pluralism and democracy, harming their mission.

[27] The plaintiffs say that the distinctive character of the doctrine and practice of the Anglican Church of Canada is set out in the Solemn Declaration of 1893, which is the foundational document of the national Church. It provides, *inter alia*:

WE declare this Church to be, and desire that it shall continue, in full communion with the Church of England throughout the world...

... And we are determined by the help of God to hold and maintain the Doctrine, Sacraments, and Discipline of Christ as the Lord hath commanded in his Holy Word, and as the Church of England hath received and set forth in The Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the Church according to the use of the Church of England; together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches; and the Form and Manner of Making, Ordaining and Consecrating of Bishops, Priests and Deacons and in the Thirty-nine Articles of Religion; and to transmit the same unimpaired to our posterity.

[28] The plaintiffs assert that this founding trust, which mandates that the Church adhere to orthodox creeds and doctrine, is at risk today. In order to remain in full communion with the Anglican Church and remain true to historical Anglican biblical teaching and practice, they found it necessary to move their allegiance to the Primate of the Southern Cone.

[29] It is clear that same-sex blessings have long been a “hot button” issue for the dissident majority. As early as February 1996, a majority of St. Mary’s passed the following statement:

Believing our theological positions to be framed under the authority of the Scripture and the tradition of the ecumenical, historical Church, we will not accept synodical decisions which make possible the blessing of same-sex unions, or the ordination of non-celibate homosexual and lesbian persons; nor will we accept revisions of theological language that erode the historical understanding of God existing in Trinity of Persons: Father, Son and Holy Spirit. Should the Church seek permission to move in such directions, we will no longer feel compelled to support the present Anglican Church of Canada.

[30] It is also clear that the Bishop is sympathetic to the Church embracing and praying with gay and lesbian couples. In a letter to the members of the Diocese dated July 15, 2007, he stated that he was convinced that the blessings of same sex unions is an acceptable move within Anglicanism. However, he has specifically directed that, at present, there are to be no nuptial blessings or exchange of vows in the Diocese. He does not believe that the blessing of same-sex unions is a matter for the local diocese to decide; rather it is a matter for the whole Church, at the level of the General Synod, to decide upon. He also noted in his letter that “there needs to be protection for those who, in conscience, cannot accept the blessing of same sex unions.”

[31] On February 13, 2008, the Canadian Primate, Archbishop Fred Hiltz, wrote a letter to the members of the Anglican Church of Canada setting out the Church’s position and its attempts to accommodate the dissatisfied parishioners:

I am very concerned that there are a few parishes that may be considering a motion to withdraw from the fellowship of the Anglican Church of Canada, and to place themselves under the jurisdiction of another Province of Anglican Communion. It is not necessary for any parish to consider such action. The House of Bishops has designated a model for Shared Episcopal Ministry. This model enables a diocesan Bishop to share his or her Episcopal oversight with another Bishop for parishes finding themselves in conscientious disagreement with the Bishop and Synod over the matter of the blessing of same sex unions.

With this provision in place there is no need for pastoral interventions by bishops from jurisdictions outside of the Anglican Church of Canada. Such interventions in fact are inappropriate. Indeed the Archbishop of Canterbury in a recent letter to me said he cannot “support or sanction” such actions.

In our Anglican tradition, individuals who choose to leave the Church over contentious issues cannot take property and other assets with them. My hope is that no parish will take action that would compel parish or diocesan leaders to resolve property disputes in the civil courts. Such actions would not only be costly in terms of financial resources but also destructive of the witness of the Church in the world.

[32] Immediately before the February vote, the Bishop of the Diocese of British Columbia also wrote to the Clergy of the Diocese, Churchwardens, and Members of Parish Councils stating that he had consulted with the Chancellor and that any motion to transfer Episcopal and synodial jurisdiction to another Province of the Anglican Communion was *ultra vires* or beyond the power of any parish. Promoting such a move, which would be schismatic, would be grounds for immediate termination of employment without notice or severance. The chairs of such meetings were obliged to rule such motions out of order. The plaintiffs dispute the Bishop’s right to terminate clergy on those grounds. They believe that he is trying to intimidate those who he perceives as disputing his dignity and authority.

[33] The plaintiffs also assert a constructive trust to the New Church on the basis that the dissident group made the greater contributions to the acquisition of the property upon which the New Church sits and its construction. However, that assertion is vehemently denied by the defendants who say that the New Church was built with the contributions of various people including many persons and institutions who have never been parishioners, parishioners who remain faithful to the Diocese,

and persons who have left the New Church since its construction or died. They say that the New Church was not built for any particular “brand” of Anglicanism.

**The test for an interlocutory injunction**

[34] The plaintiffs submit that, in addition to determining the balance of convenience (into which irreparable harm has become conflated), the Court need only consider whether they have raised a serious issue to be tried: ***RJR-MacDonald Inc. v. Canada (Attorney-General)***, [1994] 1 S.C.R. 311.

[35] The defendants suggest that the test in this case should be whether the plaintiffs have established a strong *prima facie* case. They cite ***Canwest Pacific Television Inc. v. 147250 Canada Ltd.*** (1987), 14 B.C.L.R. (2d) 104 (C.A.) for the proposition that that is the appropriate threshold where the relief sought on the injunction is basically the same relief as that sought in the action. On this application, the plaintiffs seek occupation of the New Church pending the resolution of the theological issues at trial; in their writ of summons they claim an actual entitlement to that property. They seek, *inter alia*:

A declaration that the Church is held on trust or on constructive trust for the Plaintiffs and the other parishioners of the Church for the purpose of continuing conservative, orthodox Anglican ministry, consistent with the doctrines and practices held by orthodox Anglicans throughout the Anglican Communion, and in particular to the religious doctrines and practices referred to in the Solemn Declaration of 1893 of the Anglican Church of Canada (the "Trust").

[36] The defendants also suggest that because the plaintiffs cannot point to an actual breach of any trust, they are in effect seeking a *quia timet* injunction. In ***Operation Dismantle v. The Queen***, [1985] 1 S.C.R. 441 at para. 34, the Court

considered the problems inherent in granting injunctive relief on the basis of future events and cited Sharpe, *Injunctions and Specific Performance* (1983) at pp. 30-31;

All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered .... Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here the plaintiff sues *quia timet* – because he fears – and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of the harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

[37] The Court noted at para. 35 that the general principle with respect to such injunctions was that there must be a high degree of probability that the harm predicted will occur.

[38] In that case, the onus is on the plaintiffs to establish a strong case: *Snell's Principles of Equity*, 30<sup>th</sup> ed. (London: Sweet & Maxwell Limited, 2000) at pp. 719-720.

[39] Here, the defendants assert that because the plaintiffs' real concern is that the Diocese will impose same-sex blessings on the parishioners, they are seeking a *quia timet* injunction and cannot at this time establish a real probability of grave harm in the future.

[40] I do not agree that the plaintiffs are seeking a *quia timet* injunction. The "harm" of which they complain on this injunction relates to the fact that they were locked out of, and prohibited from using, the New Church on April 4, 2008.

[41] I conclude that with respect to the first part of the test for injunctive relief, the plaintiffs need only satisfy the Court that there is a serious question to be tried. I find that their assertion satisfies that test: i.e., as a result of doctrinal and creedal divisions that have so ruptured the Church, the parishioners who have joined the Network represent the “true” Anglicans for whom church property is held in trust.

**The balance of convenience**

[42] Mr. Cowper submits that the parties decided on an appropriate use of the Parish facilities when they “parted ways”: the larger congregation aligned with the Network has used the New Church since that time and the smaller congregation under the jurisdiction of the Bishop meets in the Heritage Church. He suggests that the appropriate order would be one that continues that arrangement.

[43] There are a number of unique factors in this case. There is no question that this litigation will be lengthy. The issues relating to the theological debate are profound and resonate provincially, nationally and internationally. Parishioners who wished to join the Network organized numerous votes across Canada in mid-February. The outcome of this and other interlocutory applications will have profound and far-reaching consequences for the Church.

[44] I consider the determination of the status quo to be of paramount importance in this case. The plaintiffs suggest that the present “sharing” of the two properties is the status quo. I do not agree. In my view, by taking the vote, in opposition to the Bishop’s clear directions, the plaintiffs altered the status quo. The parishioners who elected to join the Network are the dissidents and will remain so unless and until

they can establish that the Church property is held in trust for them either beneficially or constructively.

[45] In hopes of resolving the plaintiffs' concerns peacefully, the Bishop agreed that the Network could use the New Church until March 15 when Archbishop Buckle attempted to mediate a solution. Mr. Macintosh says that no further agreement was ever made between the parties in respect of the use of the New Church, and the plaintiffs were aware that the Diocese considered itself free to reassert control of the New Church after that meeting.

[46] Clearly the plaintiffs' use of the New Church immediately after the February vote was on a "without prejudice" basis while the Bishop's emissaries attempted to mediate the dispute peacefully. When those efforts failed, the plaintiffs immediately obtained an *ex parte* injunction. In my opinion, an order obtained on such an application cannot establish the status quo. I find the status quo to be the situation that existed before the plaintiffs voted to leave the Diocese and come under control of the Southern Cone.

[47] Both sides referred to ***The Synod of the Diocese of Niagara v. Bales***, [2008] O.J. No. 1755 (Sup. Ct. Just.) (Q.L.). In that case, it was the defendants who had aligned themselves with the Network and the plaintiffs took the position that the three church properties in question should be shared between the parties until the ultimate resolution of the larger issues. The defendants objected on the basis the vast majority of the parishioners had voted to leave the Diocese and that sharing the

property would be unworkable, disruptive and difficult and sought exclusive possession.

[48] Justice Milanetti recognized that there were live property issues as well as theological issues. There, too, the parties who had affiliated themselves with the Network argued that the church properties were held in trust for them as the true keepers of the Anglican faith. However, the court concluded that the Synod of the Diocese of Niagara owned all three church properties. Although Justice Milanetti stated that the trust argument advanced by the defendants was for another forum, she opined at para. 55 that a trust seemed inconsistent with the wording of the statute and the Canons. Mr. Cowper takes issue with that conclusion, arguing that the issue of ownership could not or should not have been determined on an interlocutory basis.

[49] In my view, the beneficial ownership of Church property is indeed an issue for future determination. However, the legal ownership – clearly vested in the Diocese – is a factor to be weighed in the balance of convenience.

[50] The strength or weakness of the case is also a factor to be considered in determining the balance of convenience. Both parties claim to be truly in communion with the Anglican Communion. The plaintiffs believe that the Archbishop of Canterbury supports their views. Dr. J.I. Packer, an Anglican theologian, prepared an affidavit for the ***Niagara*** injunction application. In it, he deposed:

In my opinion, and I believe this opinion to be shared with the Archbishop of Canterbury based on what he has said and written on several occasions, congregations who are in unresolvable disagreement and thus in impaired communion with their diocesan bishop and who seek alternative episcopal oversight from another Anglican bishop, but who remain committed and loyal to the Anglican heritage and purpose, and in continuing communion with the see of Canterbury, retain their status within the Anglican communion unimpaired by their differences with the diocesan bishop.

Far from leaving the Anglican communion, in my view, congregations which have voted to seek episcopal oversight from Bishop John Harvey and the Primate of the Southern Cone are seeking to preserve their identity as Anglicans and their relationship with the global Anglican communion. In my view, those congregations which support the efforts of the diocesan bishop are doing so at the risk of impairing their communion with the global Anglican communion and the determination of many of the Canadian bishops to pursue this course will, in my opinion, very likely produce a dramatic realignment in the global Anglican communion, the form and shape of which cannot presently be predicted.

[51] On the other hand, Michael Pollesel points out that the Anglican Communion, a voluntary association of churches who come together in solidarity, is held together by four “instruments of Communion”: the Archbishop of Canterbury (the notional head of the Communion), the decennial Lambeth Conference, the Anglican Consultative Council, and the Primates’ Meeting. None of the Instruments has any legislative authority and any recommendation from one of the Instruments has effect only when it is adopted by the chief legislative body of a Province. The only constitutional body of the Anglican Communion is the Anglican Consultative Council. Apparently the Anglican Communion is engaged in a process of developing a Covenant Proposal, which Provinces will be invited to sign and “that will more clearly define Anglican life at the global level.”

[52] Mr. Pollesel deposes that the only official recognition of bishops is the Archbishop of Canterbury's invitation to attend the Lambeth Conference of Bishops which is held every 10 years. The Lambeth Conference is scheduled to meet this year and all of the bishops of the Anglican Church of Canada have been invited to attend; however, Donald Harvey, the head of the Network, has not. As recently as February 4, 2008, the Archbishop of Canterbury stated that he regards the Anglican Church of Canada as being in full communion.

[53] Further, regardless of the merits of the plaintiffs' case, there is no question that the act of certain parishes leaving the Anglican Church of Canada to join another Anglican Province, that of the Southern Cone, is unprecedented in the history of the Church.

[54] The plaintiffs also suggest that the public interest will be advanced by granting the injunction. They say that they use the New Church for extensive mission work in the community as well as pastoral work and counselling. They provide pastoral care to numerous community groups including aboriginal youth, street people, single mothers, and young offenders. A move from the New Church would require them to re-evaluate all of their ministries and community activities.

[55] In reply, the defendants say that an injunction would pose an impediment to the work of the Church in the Parish. Metchosin is one of the fastest growing areas on Vancouver Island and without the use of the New Church building, the Parish would be physically unable to attract and accommodate more members and build the parish back up.

[56] They say that the New Church was built precisely because the Heritage Church, to which the Diocese is presently relegated, and the parish hall on the site were inadequate in the 1980s and offered no room to feasibly expand. The Heritage Church itself is surrounded by the cemetery; there is limited parking; and it has no running water (although there is running water in the Parish Hall to which it has access). Further, the Heritage Church now has a heritage designation which further restricts the use of the property on which it sits.

[57] Apparently, the Heritage Church is too small to be a forum for parish activities or dinners and the clergy appointed by the Diocese have nowhere to meet with people privately, other than in individuals' homes.

[58] Arguably, either party will suffer irreparable harm if they do not succeed on this application. However, by being restricted to the physically smaller and inadequate Heritage Church for an indefinite period of time, the defendants stand to lose much more than the plaintiffs.

[59] In ***Niagara***, the Court found that the Diocese would suffer irreparable harm if they were forced to leave the properties that they owned. At para. 62 Justice Milanetti noted that:

The original structure of the Diocese, its rules and systems, would be very much undermined. Other dissidents would feel empowered to break away knowing that they could expect to call their own, the properties at least notionally owned by or in trust for the Diocese. Such affront to the fundamental structure and hierarchy of the church could not be compensable in damages – much more is at stake than the costs referable to finding alternative accommodation, for instance. Conversely, I have no difficulty finding that the Defendants might be adequately compensated by damages should they succeed at trial.

[60] On the other hand, she concluded that the dissident parishioners would not suffer irreparable harm if they were forced to leave and, indeed there they had been invited to share those properties. Milanetti J. stated at para. 54:

Although I am mindful of the trust argument waged by the Defendants for proprietary stake in these churches; at this interlocutory stage it is my preliminary view that a group who chooses to leave the association they voluntarily joined and then take the property with them (without even the possibility of sharing the property) is unreasonable. I note that it is the Defendants who refuse to share the properties while the Plaintiffs are willing to share.

[61] The Court noted at para. 57 that parishioners leave a church for many reasons including differing philosophies and doctrines, as well as practical considerations such as a career change or a personal move and noted that the composition of a parish changes as does society.

[62] The alternatives before the Court in that case were to oust the Diocese from the church property and give the dissident majority exclusive possession of the property or implement the Diocese's offer to share the property, with arbitration to resolve any disputes, pending resolution of the theological issues.

[63] In this case, the defendants say that if the injunction is denied, the plaintiffs will be welcome to attend the New Church for services and other activities and that no one will ever be denied communion. The Bishop is currently looking for a conservative-minded priest to become the permanent Incumbent. However, in my opinion, it is unrealistic to suggest that the plaintiffs would be prepared to take advantage of that situation, particularly where the services are led by clergy selected by the Bishop.

[64] The defendants also say that “Adequate Episcopal Oversight” is an existing and viable alternative. While the Bishop would retain jurisdiction, parishioners who feel they cannot in all conscience receive pastoral care could receive that care from another bishop within the Anglican Church of Canada who is more sympathetic to those parishioners. The Panel of Reference, set up by the Archbishop of Canterbury, apparently weighed that scheme, which was devised by the House of Bishops, against the Network’s desire to be part of the Province of the Southern Cone. The defendants say that the Panel unequivocally supported the House of Bishops’ scheme and rejected the Network’s. The Panel’s recommendations included the following:

1. The Panel of Reference cannot recommend the proposals of the applicants for transfer of jurisdiction either to the [Network] ....

...

3. Such a scheme should be achieved within the Anglican Church in Canada itself, at national or provincial level. The bishop of diocese is subject to the general ecclesiastical law of the church or province concerned, and one would look to the Anglican Church of Canada for action to be taken in the first instance. The provision of a scheme of Shared Episcopal Ministry [SEM] by the Canadian House of Bishops in 2004 offers a model which we believe to be appropriate, with some additional safeguards designed to take account of the special circumstances prevailing in this case, given the protracted and deep divisions which exist.

[65] Finally, I agree with the defendants that those parishioners who are unable to accept either of these alternatives have the option of seeking other facilities until the trial of this action. The Network has held meetings in other facilities, and the Special Vestry Meeting of February 17, 2008 was held in a nearby Pentecostal Church.

## **Conclusion**

[66] The issues that have arisen in the Anglican Church are global in nature and will take substantial time to resolve. To grant the injunction and vest control of the Church property in those who have elected to leave the jurisdiction of the Anglican Church of Canada in favour of allying with the Primate of the Southern Cone would strike a blow to the authority of the Bishop of the Diocese of British Columbia and pose a serious threat to the hierarchical structure of the Anglican Church of Canada. It would accelerate the schism by adding legal complexity to the theological debate.

[67] The plaintiffs have not, at this stage, established a strong case that they and their fellow parishioners who have elected to join the Network are the beneficial owners of Church property because they represent the true Anglicans and the remaining parishioners in the Diocese do not. In all of the circumstances, and particularly because the balance of convenience overwhelmingly favours the defendants, I conclude that it would be unjust to grant them exclusive occupation of the New Church following their voluntary secession from the Diocese and to relegate the remaining parishioners to the smaller and older Heritage Church.

[68] The plaintiffs' application is dismissed. It will be a term of the order that the defendants give an undertaking not to sell or encumber the Church property that comprises St. Mary's Parish pending the resolution of these issues by trial or agreement between the parties.

[69] Costs will be in the cause.

“M. Allan J.”

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The Honourable Madam Justice Allan