SUPERIOR COURT OF JUSTICE
JUSTICES' CHAMBERS

ONTARIO

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PAGES (INCLUDING COVER SHEET) 21 **DATE** May 5/08

TO Mr. John Page, Mr. Gerald Aggus, Ms. Eunice Machado (416) 640-3038

[redacted] Mr. Peter Jervis and Mr. Stanley Martin (416) 867-2410

FROM Madam Justice J-A. Pitanetti

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RE: The Synod of the Diocese of Niagara and Reverend Susan Wells et al. and Ron Bates et al.
Crt. # 08-01105 - (Reasons for Judgment)

Angela McLean (905) 645-5292
Judicial Secretary

COURT FILE NO.: 08-01105
DATE: 20080505

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
THE SYNOD OF THE DIOCESE OF NIAGARA	Mr. John Page, Mr. Gerald Aggus, and Ms. Eunice Machado, counsels for the Plaintiffs (Moving Party)
-and-	
REVEREND SUSAN WELLS, ADMINISTRATOR OF THE PARISH OF ST. GEORGE'S LOWVILLE IN THE DIOCESE OF NIAGARA	
- and -	
THE REVEREND CANON DR. BRIAN RUTTAN, ADMINISTRATOR OF THE PARISH OF ST. HILDA's OAKVILLE IN THE DIOCESE OF NIAGARA	
Plaintiffs	
-and-	Mr. Peter Jervis, and Mr. Stanley Martin counsels for the Defendants (Responding Party)
RON BALES, NEIL DENISON, MARTIN JONES and JEFF KENDALL	
Defendants	
	HEARD: March 20, 2008

MILANETTI J.

REASONS FOR JUDGMENT

[1] I have been asked to decide on the interim use of three Anglican churches – St. George's Parish Lowville ("St. George's"), St. Hilda's Parish Oakville ("St. Hilda's"), and the Church of the Good Shepherd St. Catharines ("Good Shepherd").

[2] The original Notice of Motion sought declarations that administrators have been "*lawfully appointed*" and possession and control of the parishes should be turned over to those administrators. At the time of the original Notice of Motion, Good Shepherd was not involved; however, in the amended Notice of Motion, the Plaintiffs included Good Shepherd, seeking similar relief. Moreover, the Motion seeks alternate relief, that is, an Interim Order that there be joint possession and administration of the three parish properties on specified terms. The proposed Order was appended to the Plaintiffs' Factum, marked as Schedule C.

[3] In his argument, Mr. Jervis for the Defendants indicated that the parties have agreed that there will be joint administration; the real issue for me to decide deals with the interim use of the property between the date of the Motion and the ultimate hearing to determine the issues in dispute between the parties. (A Notice of Action was delivered by the Plaintiffs on February 20, 2008; I understand that it is to be amended and thus no Statement of Defence or Counterclaim has yet been filed. I was however told of some of the anticipated defence pleadings).

[4] It is the position of the Plaintiffs that as a compromised position the three properties should be shared between the parties until the ultimate resolution of the larger issues. The proposed Order follows such lines and suggests an approach for me to follow.

[5] The Defendants argue that this suggested approach, while on its face perhaps appealing as a compromise position, is entirely unworkable given the mistrust and the level of division between the parties. Defence counsel analogizes it to a family situation – sharing a home post-marital breakdown would be unworkable, too difficult, and disruptive for all concerned. Moreover, they point to the fact that virtually all of St. Hilda's and Good Shepherd's parishioners voted to leave the Diocese, as well as the vast majority of those at St. George's. As such, few to no parishioners would benefit from the Diocesan presence.

[6] The Defendants thus seek an extension of the Interim Order of Justice Ramsay dated February 29, 2008, allowing them exclusive possession of the church properties.

The Parties

[7] It is important to note that the Plaintiffs in this action are the Synod of the Diocese of Niagara and the individually named administrators of the three churches in question – that is, Reverend Susan Wells at St. George's, Reverend Canon Dr. Brian Ruttan at St. Hilda's, and Archdeacon McPetrie at Good Shepherd. The Defendants are the wardens of those three parishes – Ron Bales and Neil Denison from St. George's; Martin Jones and Jeff Kendall from St. Hilda's; and John MacDonald and Patricia Decker from Good Shepherd.

[8] It was a sad irony that this pitched legal battle was waged before me for an entire day on Holy Thursday – the day before the most important weekend on the church calendar. Given the length of the argument, the almost twelve inches of materials filed, and the complexity of the issues, I had no choice but to reserve my decision to allow me the time to read and consider everything placed before me. I have now taken substantial time to absorb the materials filed and thus tender this decision on the Motion.

The Dispute

[9] I was provided with affidavit material from Anglicans across the country as well as theologians and church historians. I have been presented newspaper articles, copies of reports from commissions, and task forces of the Anglican Church both in Canada and around the world. It is strenuously argued that there is a substantial difference in approach amongst the Anglican Church in Canada, the United States and elsewhere in the world. While most interesting to read, I am somewhat perplexed

as to the rationale for the provision of the voluminous historical material. If, it is included merely to convince me that there is a serious issue to be tried, I stand convinced. That being said, I am not the ultimate trier, my task is a much narrower one. I am mindful of the direction of the Supreme Court in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para 50 (S.C.C.), which states that a "*prolonged examination of the merits is generally neither necessary nor desirable.*"

[10] I am asked to exercise my discretion to grant an interlocutory injunction, to provide a temporary resolution as to the possession of the three church properties until the issue is fully canvassed in the court process.

[11] I do not accept that this will be a short process. Most litigation takes longer than the litigants would hope. The complexity and far-reaching implications of this action, in my view, make it unlikely to be resolved in the short term. Whether it will take the 10 years predicted by the Plaintiffs, I cannot say. I would seriously question the more optimistic time frame of months provided by the Defendants regardless of any potential imposition of case management. As well, I do not expect that my decision, either way, will mean the practical end of this litigation; this is not that sort of case.

[12] While I do not intend to evaluate the theological dispute in tremendous detail, it is important to provide some explanation of the rift.

[13] In this case, Special Vestry (parish) meetings were held in all three parishes, in mid-February 2008. These meetings resulted in majority votes to leave the Diocese of Niagara and the authority of the Bishop of that Diocese, and come under the jurisdiction and authority of the more conservative Bishop Harvey and Archbishop Venables of the Anglican Province in the Southern Cone of America.

[14] I do note that the Vestry meetings and the results of the votes are a contentious issue between the parties. While the Plaintiffs argue that there is no authority in the Canons for the resolutions approved at the "irregular" Vestry

meetings, the Defendants argue that the Canons make no reference with respect to a parish voting to leave the Diocese and asserting a right to exclusive possession of their church parish buildings. The validity of the Vestry meetings, the results from the votes, and the interpretation of the Canons with respect to the meetings may need to be determined in a different forum.

[15] However, it is apparent that these votes followed years of discussion and soul searching on the part of the parishes and parishioners in issue. While not the only issue, clearly one of the more significant issues that substantially divides the church deals with the treatment of same-sex unions by the Anglican Church of Canada, and the Diocese of Niagara more specifically. It is apparent from all of the material before me that similar issues are fuelling a substantial debate between Anglicans across this country and elsewhere. As such, I cannot accept the position of the Defendants that all we are dealing with here are three individual parishes. It is clear that this litigation is being monitored by many; the ongoing interest of the national news agencies, and the affidavits from individuals in other provinces are just two examples of how far-reaching the implications of this case will be.

[16] The rift deals with a proposed recommendation of the Synod to the Bishop of Niagara in November of 2007, that he "*grant clergy permission*" to exercise their discretion in blessing the relationships of gay or lesbian couples who have been married civilly, once their congregations have defined themselves as "*blessing communities*" by Vestry decision. I understand that the Bishop has reserved the right to determine when he will, in fact, give authorization for such blessings. Although, I am unaware if in fact he must give such authorization, it is clear that the Bishop has not presently done so.

[17] While I am told that the same-sex blessing issue was not the only issue dividing these groups, it clearly has played a significant role in the rift. The Defendants argue that they remain faithful to the worldwide Church of England, a communion characterized by orthodox doctrine, theology, and traditional practices. It is their position that the Anglican Church of Canada has liberalized traditional

doctrine, reinterpreted foundational texts, and ignored resolutions passed by conferences of the leadership of the 38 Anglican Provinces. As such, the Defendant parishes have voted to come under the Episcopal jurisdiction and authority of the Province of the Southern Cone of America.

[18] The Plaintiffs maintain that the parishes and all members of the church are bound by the rules of conduct under which the Anglican Church of Canada operates.

[19] Under the *Acts of the Province of Ontario incorporating the Synod of the Diocese of Niagara, and Amendments Thereto*, 1876, as amended, ("Incorporating Act"), the Synod has the power to enact canons, rules, regulations, and by-laws. Any actions of the Synod must be assented to by the Bishop to have any force and affect. The Plaintiffs state that all activities of the Synod are governed by the Canons of the Diocese of Niagara, and certain Canons of the General Synod. These Canons are the agreed upon rules and regulations by which the practice of the Anglican faith within the Diocese is undertaken.

[20] It is the position of the Plaintiffs that these Canons constitute a contract by which individuals and organizations operate within the Diocese. The Canons set out, for instance, that a Bishop has sole authority to issue licenses to Bishops, Priests, or Deacons of his or her Diocese.

[21] It is clear to me that the role of Bishop in the Anglican Church is a critical one. This is seen in the Canons and the public affirmation required of every Priest and Deacon which states that they will be loyal to and obey their Bishop, and conform to the doctrine, discipline, and worship of the Anglican Church of Canada.

[22] As well, while the ArchBishop of Canterbury is the head of the Church, he is described as the first among equals amongst fellow bishops; a role quite different from that of the Pope of the Roman Catholic Church for instance.

[23] The Plaintiffs maintain that the actions of each of these three parishes is contrary to the Canons; the contract under which they are members of the Anglican

Church. While individuals may choose to leave a parish or the Diocese, entire parishes have no ability to secede.

[24] The Defendants argue that the Plaintiffs by their "*aggressive*" approach have themselves ignored the Canons. The suspension of the three priests, for instance, was in the Defendants' view, contrary to the Canons of the Diocese.

[25] As well, the Defendants state that the Diocese was unnecessarily "*aggressive*" with the parishes, that they did not take any conciliatory steps, or make attempts to resolve the issues consensually as have been done in other Dioceses across this country.

Property Issues

[26] It is the position of the Plaintiffs that while this may, on the surface, appear to be a liturgical dispute, at the heart of the matter is a dispute over property. Property issues may indeed be resolved by this court.

[27] I start this analysis with the following in mind, as stated by M.H. Ogilvie in *Religious Institutions and the Law in Canada, Second Edition* (Toronto: Irwin Law Inc., 2003) at page 79:

> Essentially, each diocese [of the Anglican Church of Canada] is incorporated pursuant to provincial legislation, usually by private act, and all the property in the diocese is vested in the bishops as trustee who holds and manages it as provided by the legislation, bylaws, and the constitution and canons and their bylaws, if any, of the diocese.

[28] All three churches are owned and/or held in trust for the Synod of the Diocese of Niagara. I note that title to St. Hilda's and Good Shepherd are in the name of the Synod of the Diocese. The title of St. George's however, is in the name of the Incumbent and Church Wardens of the Church of St. George's. Regardless of title,

the Diocese maintains that the Canons and the Incorporating Act are clear – all property, regardless of how it is held, belongs to the Diocese, and consequently all lands and premises are held in trust for the Synod of the Diocese.

[29] Based on the reasoning of the Supreme Court of Canada in *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586 (cited in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at para 6):

> ... it is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order.

[30] The Defendants claim that the real property and buildings of each of the parishes is owned either by:

> 1) the Incumbent Priest and Wardens in trust for the parishioners in furtherance of traditional and orthodox Anglican doctrine and practice; or
>
> 2) by the title holders in trust whose beneficiary is the local parish for the furtherance of traditional and orthodox Anglican doctrine and practice.

Alternatively, they claim a constructive trust over the parish assets.

[31] The Defendants also argue that the churches of all three parishes have substantially or entirely been paid for, supported financially by, and maintained on an on-going basis by their parishioners. Additionally, these same parishes have contributed to the Diocese on a regular basis for generations.

[32] The Defendants maintain that the property is held in trust for the parishioners as they are the members who hold true to the original doctrines and practices referred to in the *Solemn Declaration of 1893 of the Anglican Church of Canada*. According to the Defendants, the current Anglican Church has gone too far afield of these principles to be beneficiaries of the trust when established.

[33] This is an interesting issue most particularly as it relates to St. George's as one would need to determine which parishioners have paid for and supported these churches over the generations. That clearly is a moving target. Certainly, although the minority voices, there are parishioners referenced by the Plaintiffs who claim to have been contributing members over generations.

[34] I accept that although there are fundamental religious disputes between these parties (disputes not before me or within the realm of the civil law), there is clearly a dispute over property rights.

[35] The property issue is made more interesting by the differences in title. It is clear that title to St. Hilda's and Good Shepherd are in the name of the Diocese. Those parishes however, are the two that voted unanimously to secede from the Diocese of Niagara. St. George's did not vote unanimously to secede, although clearly a vast majority of the current Vestry members did so. St. George's title is held not by the Diocese but by the "Incumbent and Wardens."

[36] I note from the Parcel Register included as Exhibit "E" to Michael Patterson's affidavit, that title to St. Hilda's is in the name of the Synod of the Diocese of Niagara as a result of a transfer on 1957/08/14. This abstract shows one transfer only.

[37] A review of the title documents contained in the Notice of Motion at Exhibit "D" to the affidavit of Mr. Patterson is most curious. That document shows a Transfer to the "Incumbents and the Church Wardens" of the Church of St. George's, Lowville in 1901/08/06, 1909/10/21, 1955/12/22. I note that some of the transfers speak of an Incumbent or Incumbents. I am unclear why the same property was transferred to the same bodies on so many occasions. (I speculate it may have been as a result of changes of name or number of individuals referenced, but do not have the underlying documentation for review).

[38] With respect to the "Incumbents and the Church Wardens" being named on St. George's title, I note s. 5, of the Incorporating Act, assented to on May 4, 1891, which provides as follows:

> Any real estate which may be granted or devised to the incumbent and churchwardens appointed under the rules and regulations of Synod, under section 7 of the said Act, may be conveyed to the incumbent and churchwardens as a **corporation** with perpetual succession in the name of "the incumbent and churchwardens of the Church of.....in the parish of.....in the Diocese of Niagara...(emphasis added).

This suggests to me that while the property may have been conveyed to the "Incumbents and Churchwardens", it was done so under the institution of the Church, and not meant to be conveyed to the individual incumbents or churchwardens at any specific point in time.

[39] Furthermore, common sense suggests that title in a name as vague as the "Incumbents and Church Wardens" implicitly acknowledges that the individuals holding any of those positions are subject to change periodically. The individuals holding the positions are not named. This makes sense as it would involve a new transfer being registered whenever someone in any of those positions stepped down, died, moved, or was replaced.

[40] When I look at this set up and read it in conjunction with the Incorporating Act, as amended, commencing with the *Acts of the Province of Ontario incorporating the Synod of the Diocese of Niagara, and Amendments Thereto*, 1876, I conclude that the property is owned by the Synod of the Diocese of Niagara. Although the legislation is quite convoluted, I note particular references to property issues in a document entitled *An Act to Simplify the Sales of Property Held in Trust for the Church of England in Canada in the Diocese of Niagara* ("Act"), which received assent on May 8, 1923. Section 2 of the Act states that regardless of how title is held,

(as per section 1), no sale of such lands or personalty shall be made unless the vestry or vestries **having the right to** appropriate or dispose of the rents, issues, profits or income thereof do, by a resolution passed for that purpose, nor without the approval of the Synod of the Diocese of Niagara. Further, s. 3 of the Act states that all proceeds of such sale shall be paid to the said Synod. Since I find that the issue with respect to the validity of the Vestries and their votes in mid-February 2008, will not be resolved on this Motion, pursuant to s. 2 the approval of the Synod of the Diocese of Niagara is needed in any sale of land of personality referred to in s. 1.

[41] All of the foregoing suggests to me that St. George's as well, is owned, or at very least controlled by the Diocese pursuant to the private statutes.

[42] While considerable reference was made to the Canons with respect to who owns the property, I would prefer to leave consideration and interpretation of those documents to another audience and/or another forum. However, I will note in passing, that Canon 4.7 of the Diocese of Niagara, titled "As to Purchasing, Selling or Mortgaging Church Property", requires that any sale of property, purchase of property by a parish, purchase of property by the Synod, mortgage of property by a parish, leases and other encumbrances be approved by the Synod.

[43] I find that the Synod of the Diocese of Niagara owns all three properties. The trust argument waged by the Defendants is for another forum. I also note that the Defendants did not provide any submissions in their factum with respect to the Incorporating Act or the Act, and in fact they did not even mention any of enabling statutes in their factum.

Injunctive Relief

(1) Serious Issue To Be Tried

[44] It is now virtually trite to cite the test from *RJR – MacDonald, supra,* for injunctive relief on an interlocutory basis. I must first assess whether the Plaintiffs have presented a case which is neither frivolous nor vexatious, but which does present

a serious case to be tried. The threshold is low. There is no doubt in my mind that this test has been satisfied on the facts before me.

[45] At minimum, the title documents to St. Hilda's and Good Shepherd vest these properties in the Diocese. St. George's is held differently, but the Plaintiffs argue that regardless of the title documents, the rules of the church, the Canons, mandate that all church property is held in trust for the Diocese.

[46] While I acknowledge a serious dispute is waged by the Defendants based on arguments of trust, these arguments confirm my position that indeed there are serious issues to be tried.

[47] The more interesting issues, in my view, involve the evaluation of the second and third aspects of the *RJR – MacDonald* test: irreparable harm and balance of convenience.

[48] It is the position of the Plaintiffs that I need not assess these latter two components as the efforts of the dissident members of these parishes to dissociate themselves from the Anglican Church of Canada is a clear breach of the Canons that govern them, and thus should be enjoined. In this regard, they reference *Canpark Services Ltd. v. Imperial Parking Canada Corp.* (2001), 56 O.R. (3d) 102 (S.C.J.), and *Rothmans, Benson- Hedges v. Hard Rock Café*, [2002] O.J. No. 3117 (S.C.J.), to support their view that when presented with actions such as those before me, I need not consider irreparable harm or balance of convenience. The Plaintiffs argue that this is particularly so given that the right in question is proprietary and not only contractual.

[49] I am not convinced that this argument is applicable in the case before me. The cases to which I was referred to, deal with clear breaches of negative covenants. The defendants in *Rothmans, supra,* were not to sell competitors tobacco products at their Hard Rock Café; the defendants *Imperial Parking Canada Corp., supra,* had used information obtained from a letter of intent process (from Canpark) after specifically undertaking not to do so. I do not see a negative covenant before me;

rather, I see an alleged breach of the private acts, the Canons, and the presence of the titles, which vest control of property in the Diocese. As such, I will go on to assess the remaining branches of the *RJR – MacDonald* test.

(2) Irreparable Harm

[50] In terms of irreparable harm, I must ask whether damages will provide the Plaintiffs with an adequate remedy. I am mindful that I should avoid taking too narrow a view of irreparable harm.

[51] *RJR – MacDonald, supra,* indicates that "*irreparable*" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. I find this is a real consideration in the case before me as I am dealing with three groups of individual parishioners.

[52] The Defendants state that they will suffer irreparable harm if they are forced out of the church facilities that they have effectively created, supported, and maintained for many years. They are clearly attached to the bricks and mortar of these buildings. In this regard, I am mindful of their own family law analogy, and my usual advice to family litigants that the bricks and mortar of a home do not make a family.

[53] I have not been persuaded that the dissident parishioners will suffer irreparable harm if they are forced to leave these church buildings; let alone, share the premises as is proposed by the Diocese. The Diocese on the other hand, would in my view, suffer irreparable harm.

[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.

[55] On the face of the materials before me however, I cannot say that such a position has been definitively established by the Defendants asserting the trust; a trust that seems inconsistent with the wording of the statute and the Canons. This reminds me of a franchise situation, such as those in *Chem Dry Canada Ltd. v. Groulx*, [1999] O.J. No. 779 (Ont. Ct. J. (Gen. Div.)), and *Cash Money Express Inc. v. 1035216 Ontario Inc.* (Ontario decision, unreported). The words of Justice Wright in *Cash Money*, in particular, resonate with me. On a common sense basis, if an injunction is not granted pending the courts determination of the trial issue, it would mean that by a mere majority of votes any of the 98 parishes in the Diocese, and in fact the hundreds of parishes across the country may effectively takeover the apparent proprietary rights of the governing body and keep the property from them for a considerable period of time.

[56] An interesting argument waged by the Defendants is based on the majority nature of the votes to secede. The materials disclosed that all of the parishioners at St. Hilda's and Good Shepherd, and the vast majority of the parishioners at St. George's, voted to accept the Episcopal oversight of another Bishop in the Anglican Province of the Southern Cone of America. I learned that to vote at a Vestry meeting, parishioners must have attended the parish regularly for the last six months and be of a certain age.

[57] The Plaintiffs' materials reveal that a minority of the parishioners of St. George's did not agree with the decision. Some voted accordingly, and some did not attend for the vote. Others stated that they had previously left the parish as they did not agree with the direction being taken by their Rector Charlie Masters for some time. All of these issues will be relevant to the property and trust determinations. Clearly, St. George's at least, is quite an old church. Parishioners change from time to time for whatever reason, due to philosophies, doctrines, approaches, and practical life realities such as a job change or a personal move; they change as does society.

[58] Is the Anglican Church of Canada bound by a trust set up in 1863? The decisions of *Dorland v. Jones*, [1886] O.J. No. 13 (C.A.), affirmed (1887), 14 S.C.R. 39, at both the appellate and the Supreme Court of Canada levels were most instructive and interesting in this regard. In *Dorland, supra,* the defendants made somewhat of a similar argument as the Defendants made in the case before me. The defendants in *Dorland, supra,* argued that the identity of the existing "Monthly Meeting" had been lost due to the departure from the principles which governed the Society of Friends at the time the trusts were created, with respect to discipline, and practice as in points of faith and doctrine. Therefore, the defendants argued that consequently the plaintiffs were no longer entitled to the use and possession of the lands. However, the Ontario Court of Appeal, [1886] O.J. No. 13 at para 33 (C.A.), which was affirmed by the Supreme Court, held that the society had the authority to alter its discipline and forms, and that dissentients from such a change could not insist that the right to the enjoyment of property was thereby forfeited.

[59] The Plaintiffs argue that if barred entirely on an interim basis from any use of these three church facilities, they would be unable to rebuild these congregations, and carry on the work and mandate of the Diocese.

[60] The Defendants state there is no harm as there are a number of diocesan parishes within close proximity of these three churches where parishioners who seek diocesan leadership and practice may worship. They specifically mentioned the availability of St. John's Nassagaweya (which is a "comfortable church facility"; apparently under-utilized) for the Lowville parishioners, but I am unclear of the status of that parish as the materials indicate that Charlie Masters (the rector of St. George's) was the rector of that facility as well.

[61] I do see irreparable harm given the great divide between these two factions. The Diocese has been the guiding presence in all of these churches for a significant time. The parishes pay fees to the Diocese, and in turn the Diocese has responsibility to its congregants. The viability of the larger organization, in my view, is very much

being challenged. If the dissidents were allowed to retain property which on its face, at least, appears to be:

a) held in the name of the Diocese (St. Hilda's, Good Shepherd); and/or

b) held in trust for the Diocese (St. George's)

it would be most difficult to undo.

[62] 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 held 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.

[63] The Defendants argue that in the case of Lowville, the Plaintiffs can utilize the St. John's property and be suitably accommodated. Perhaps this building can indeed be utilized by the parties to better implement a shared arrangement. I am not persuaded that the Diocese should be forced to use that facility instead, but the building may be of use in facilitating a more workable "*sharing*" of the Lowville facilities, if indeed, as the Defendants state, it is so very difficult to share the same building. With some ingenuity this situation could replicate the situation agreed to in St. Mary's in British Columbia, where buildings situated side by side were shared on an interim basis.

(3) Balance of Convenience

[64] With respect to the third part of the test, the balance of convenience, the Defendants maintain that the Plaintiffs cannot satisfy this aspect of the test as virtually all of the parishioners at each of these parishes would be displaced if I were to allow the interim injunction sought by the Diocese.

[65] Moreover, they argue strenuously, that their community outreach work (from school children to Alcoholics Anonymous meetings) would be substantially and adversely affected.

[66] There is no doubt that the numbers alone would suggest that the parties least inconvenienced by a move for worship would be the Diocese, and the parishioners wishing to remain affiliated with it and its bishop.

[67] This common sense argument would have more resonance, if not for the proposal of the Diocese that the facilities each be shared. Their proposal suggests setting aside a block of time for each group for Sunday worship with additional sharing of the facilities through the week. The Defendants state that if this were to be ordered, they would leave. It is their view that the level of discomfort and mistrust between the two sides is so great that a sharing arrangement would be untenable. They, in their evidence, cite numerous problems experienced on the one occasion when the church was shared, on February 24, 2008. (I note the sharing was the result of an attempted interim resolution arrived at by the parties themselves).

[68] The affidavits filed by the Defendants, spoke of an overtly political approach being taken by the Diocese and numerous non-parishioners attending to effectively bolster the numbers. However, there is affidavit evidence of the Plaintiffs which disputes these assertions.

[69] I have no doubt that this may have been a less than ideal atmosphere – it was at a time when all of the actions of both the parish and the Diocese were quite fresh. I suspect there may be another period of additional strife when my decision is released. It is my hope and expectation that this will level off over time with each side being polite, and respectful to the views and convictions of the other. This after all is a worship community; one created to celebrate Christian beliefs and do community outreach of varying kinds. I am saddened by the response of the Defendants to this proposal. This is particularly so given the position of the

Defendants that this need not be a long protracted litigation. If they are correct in this assertion, the "*discomfort*" felt by both sides will be short lived.

Conclusion

[68] It is my view that the Plaintiffs have satisfied the *RJR-MacDonald* test for an injunction. The title to two of the three properties rests with the Diocese; the third appears to rest with them as well. As the Plaintiffs have proposed a temporary solution that is logical to me, an Order should go that:

A) There will be joint possession and administration of the three church properties on the following terms:

1) The three parish properties will be jointly managed and administered by a committee consisting of one representative of the withdrawing members of St. George's, St. Hilda's, and Good Shepherd, and the Diocesan Administrator for each parish (the "management");

2) Any dispute relating to the management and administration of the three parishes will be referred to an arbitrator, to be agreed by the parties, who will render a decision in respect of such dispute within five (5) days of the managers meeting with the arbitrator;

3) The joint administration and management will provide that the management will determine, on a quarterly basis, the expenses for the operation, maintenance, and insurance of the property (the "expenses");

4) Upon determining the expenses, the management will apportion the expenses based on the use of each parish property by each party;

5) If the apportionment of the expenses cannot be agreed, then this issue will be determined by arbitration in accordance with paragraph two (2);

6) The Defendants shall not transfer or encumber the Parish properties or other personal or real property, except in the ordinary course of administering and operating the parish property, as approved by the management;

7) The Diocese will have full access to and use of each of the three parish properties every Sunday between 7:00 a.m. and 10:00 a.m. for the purpose of Sunday service and for a three (3) hour block of time on other feast days including, but not limited to Christmas Eve, Christmas Day, Holy Thursday, Good Friday, and Easter Sunday.

8) The Diocese will have full access to the three parish properties for the sacrament of marriage, including rehearsal, and funeral services of members of the continuing congregation of the Diocese at St. George's, St. Hilda's, and Good Shepherd;

9) The Diocese will have full access to and use of the three (3) properties for one four (4) hour afternoon period and one three (3) hour evening period, to be agreed by the managers; and

10) Either party may move to vary the order upon seven (7) days notice to the other party.

[69] Costs to the Applicant. If parties are unable to agree as to quantum of costs, they shall contact the Hamilton trial co-ordinator to schedule an attendance before me for resolution.

Madam Justice L.A. Milanetti

Released: May 5, 2008

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE SYNOD OF THE DIOCESE OF NIAGARA

-and-

REVERAND SUSAN WELLS, ADMINISTRATOR OF THE PARISH OF ST. GEORGE'S LOWVILLE IN THE DIOCESE OF NIAGARA

-and-

RON BALES, NEIL DENISON, MARTIN JONES and JEFF KENDALL

BEFORE: **The Honourable Madam Justice J.A.Milanetti**

COUNSEL: Mr. John Page, Mr. Gerald Aggus and Ms. Eunice Machado, counsel for the Plaintiffs (Moving Party)

Mr. Peter Jervis and Mr. Stanley Martin, counsel for the Defendants (Responding Party)

REASONS FOR JUDGMENT

Madam Justice J.A.Milanetti

Release Date: May 05, 2008