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Day 9 – ANiC Parishes Closing Argument – June 9, 2009

Stanley Martin began the day with a discussion on the Anglican Context of this case to

help Mr. Justice Kelleher understand that the members of the ANiC parishes are Anglicans and that we are not asking the court to find that the diocese and bishop are

not Anglicans. He summarized the parishes' submissions.

1. The essential characteristics of Anglicanism throughout the world are enshrined in the Solemn Declaration of 1893, and also reflected in the fundamental principles of the diocese of New Westminster.

2. Anglican structures, whether international, national or diocesan, are intended to serve mission and ministry. They are adaptable as circumstances change.

3. It is clear in this case that there is a polarization of views as to what it means to be Anglican. Is it based upon a received faith, common faith and standard of teaching (as the parishes believe), or is it a structural relationship with constant evolution of doctrine (as the diocese believes)?

4. Behind the presenting issue, there are deeper “stress fractures” and theological divisions within Canadian Anglicanism.

5. Being Anglican is enormously important to the members of the congregations. The clergy and parishioners are deeply committed and the steps they've taken are to preserve their distinctive characteristics as Anglicans they have always valued.

He discussed “Anglican DNA”, (a term used in the recent Galilee Report of the Canadian Primate's Theological Commission), referencing the evidence set out in the

affidavits of Dr. John Stackhouse and Dr. J.I. Packer. Principally, Anglicanism is:

- catholic Christianity, embracing the fullness of the historic and apostolic faith.
- canonical Christianity, with its faith and practice based wholly on the Bible.
- creedal Christianity - including maintaining them and using them liturgically.
- comprehensive Christianity – not anything goes, but what is primary and essential?

He covered Bishop Ferris' testimony as to the “hallmarks” of Anglicanism, including our understanding of scripture, doctrines, sacraments, creeds, the historic ministry of

bishops, priests and deacons, the role of liturgy and common prayer, the sacraments,

a received tradition, collegiality and, of course, the Solemn Declaration.

He said the Solemn Declaration is a comprehensive statement of Anglican identity.

While the Declaration of Principles of the General Synod can be amended, the Solemn

Declaration cannot be altered or amended. Definitions of doctrine must be “in harmony with the Solemn Declaration”. Simply as a matter of reading words, the Solemn Declaration was intended to be “an enduring statement of the character of the

Canadian Church.” In 2001, the [then] Archbishop of Canterbury, at an Essentials

conference, praised the Solemn Declaration, saying “. . . your bishops, clergy and laity in your first General Synod articulated so clearly the heritage which you have received

. . . [it] serves as the bedrock of your national Anglican Church. . .”

The Supreme Court of Appeal of the ACoC in 1989, acknowledged the continuing role

of the Solemn Declaration in the “stated case” regarding the Book of Alternative services, saying, “. . . [the BAS] is consistent with the Solemn Declaration in that its

2 authorization and use does not impair “the Doctrine, Sacraments and Discipline of Christ”.”

Mr. Martin pointed out that the only dispute with respect to the Solemn Declaration are

the words “full communion with the Church of England throughout the world”, saying it

is “unreasonable to read those words as anything less than an intention to maintain communion with all Anglicans throughout the world.” This is not simply a commitment

to maintain communion only with the Archbishop of Canterbury, as it would’ve been very easy to draft such a phrase, but “throughout the world” was intended to be meaningful. It requires an interdependent and mutual relationship with other Anglican Churches.

Mr. Martin said there are two fundamental themes in respect of Anglican structures:

1. They are not fixed in form but are adaptable to serve the needs of ministry and the faith; and

2. The real structures are organized, not in terms of juridical obligations, but around moral authority, collegiality, communion and interdependence.

He discussed the role of bishops, the episcopacy, bishops as defenders of the faith, and unity in the faith.

He talked about the important distinction between “Communion” – belonging to a club

– and maintaining “communion”. He said you can still be in the Communion but cease

to be “in communion”.

Archbishop Jensen, in his affidavit, said that the old patterns of the Anglican Communion have been broken and cannot be recovered. It’s possible a different structure will emerge, but the future shape of the Anglican Communion is unclear.

Mr. Justice Kelleher asked why the evidence stressed that the parishes were recognized by the majority of Anglicans and why did that matter? Mr. Martin pointed

out that it showed the parishes stand in the mainstream of Anglicanism and are not merely a small sect which has “hived off”.

The Archbishop of Canterbury, at the South to South Encounter in 2005, said he recognized the members of the Networks in Canada and the U.S. as full members of

the Anglican Communion but it was not within his power or authority to recognize an ecclesial structure as a province. That process is currently ongoing with the formation of the Anglican Church in North America. He reviewed more of the evidence regarding the declining numbers in the ACoC, and the underlying stress fractures due to issues other than same-sex blessings, primarily the authority of scripture and issues raised by Bishop Ingham's book, *Mansions of the Spirit*. Even Bishop Ingham said the opposing views of scripture were irreconcilable. He discussed the evidence around Anglican Identity and pointed out this is a case of division. The parishes have not ceased to be Anglicans, but have sought to remain Anglican by accepting episcopal oversight. He pointed to the affidavits and statements that confirmed the members of ANiC, their clergy and bishops are "in full communion"

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with Anglicans in Canada and around the world.

Error! Reference source not found. then covered the "Legal Context for the Argument", quoting from trust law textbooks and extensive case law and pointing out

its application to the current dispute. One of the cases he discussed and quoted from related to a dispute in the Roman Catholic Church, and the role the courts have to play, even where there are internal dispute mechanisms.

Other cases, dating as far back as 1887, covered the clear jurisdiction of the court with

respect to religious and charitable purpose trusts and the different kind of orders a court can make to ensure the original intent or charitable purpose would not be defeated in the event of some impracticability arising.

One principle that stood out in the cases was the inability of a majority to change their

theological principles and then force out a minority that was upholding the original principles. Courts have held that where a majority seeks to change the original purposes, they lose the right to the trust over property.

There was some discussion of American cases but Mr. Cowper pointed out the constitutional separation of Church and State in the U.S., prevents the U.S. courts from doing what the British and Canadian courts have done and can do – that is, exercise a *Cy Pres* jurisdiction over religious purpose trusts. However, he pointed out

the relevance of the recent Virginia case involving similar facts to this case, and a specific statute dealing with a case of church division. In that case, the court granted the property to the congregations – but that is an exception in the U.S. What is relevant, however, is that the court found this was a case of church "division" which then invoked the relief of the statute for the parishes. Mr. Cowper said that a similar finding of division is warranted in this case.

Based upon the case law, Mr. Cowper described “a toolbox” that Mr. Justice Kelleher has at his disposal with respect to problems arising in a case of trust.

- He has an inherent jurisdiction to substitute or replace Trustees. Such a remedy doesn’t require a change to the trust or to the purpose of the Trust.
- He can appoint either those Trustees appointed by the bishop or the parish, or appoint his own.
- He can change the administration of the trust, having regard to the purpose.
- He can invoke the doctrine of Cy Pres to change the purpose of the trust if he finds the original purpose cannot be fulfilled because it has become impossible or impracticable.

It is important for the court to rescue the general overall purpose of the Trust when the

carrying out becomes impracticable. Mr. Cowper reviewed a number of cases which described various manifestations of impracticability where the courts have said this cannot defeat the original general intention.

In this case, Mr. Cowper said, “To exclude the plaintiffs from the benefit and use of their churches, would exclude from the property the very class of people who were intended to benefit from that gift”.

It was submitted that Mr. Justice Kelleher will have to determine what the terms of the

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Trust are. The purpose of a charitable trust is central and the Court will supply a purpose where the charitable purpose has failed.

In response to the diocese’s submission that the purpose of the trust is for the exclusive ministry of the ACoC, Mr. Cowper submitted that you can’t define a purpose

trust by reference to who is to administer the purpose. That confuses the charitable purpose with the Trustee.

Second, he said, the ACoC, in its self-definition, does not define itself as independent and autonomous. Therefore, he submitted, if Mr. Justice Kelleher finds that ministry of

the ACoC is the purpose, then that leads to impracticability.

Third, intrinsic in religious purpose cases, the court will assess the original purpose for

the church. In the Free Church of Scotland case, the court found the majority tried to take the church somewhere else and determined that could not be done. When you give property to a church, it is for the purposes of the church as originally intended.

Finally, he said, it is abundantly clear from the evidence in this case, that the fundamental identity of all those involved is “Anglican”, not “ACoC”. There are global facets to the experience of the witnesses. It is only the diocese’s witnesses, in affidavits, that have added to their definition that it is part of the ACoC.

In some of the cases cited by Mr. Cowper, the decisions were dependant upon the doctrine of the body involved. If the definition of the doctrine in the founding documents showed it was changeable, that was one thing. Where it is intended there should be a common belief and practice, a doctrine with limits, then the courts will not

allow the majority to change it. “A purpose trust is not for any beneficiary, but exists to

serve its original purposes, being the advancement of religion”, he submitted. It is a question of definition on the facts. The trust is a trust for Anglican ministry, not Anglican worship and ministry defined exclusively by the ACoC. That is inconsistent with the facts and with the notion of a purpose trust.

The cases come from a time when the backdrop of charitable donations were specifically for religious purposes. Mr. Cowper quoted Chief Justice Wilmot in *Attorney General v Lady Downing* from 1769, saying “The donation was considered as

proceeding from a general principle of piety of the testator”. Mr. Justice Kelleher noted

the next sentence in the written submission stated, in fact, “Charity was an expiation of

sin, to be rewarded in another state”. He was very engaged throughout the day, clearly following the submission and asking many questions.

Mr. Cowper addressed the *Varsani* case and said, while it is not binding, it is persuasive as it addresses what to do among members of the same faith where there was a genuine and sincere difference in their beliefs and it is the only case which has dealt with the same issue in this case. While the case involved a Charities Act statute, it also examined the wider common law jurisdiction of Cy Pres which Mr. Cowper discussed at length. He went on to say that if a remedy is available that doesn’t require the court to make a decision on the rightness or wrongness of the doctrinal question, that approach should be preferred. In *Varsani*, the court said in striking a balance, you need to consider what each group needs to continue exercising its faith, not what each has contributed. The property belongs to no one but the charity.

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Mr. Cowper then explored the impracticability in this case, citing some of the following

factors:

- The current division was unanticipated.
- Although the parishes are dissenters locally, they adhere to the official teaching of the Anglican Church. The minority in the diocese of New Westminster was not the innovator – they have not tried to change the definition of the faith.
- The Bishop’s episcopal authority is a factor, including that his actions were unilateral and without any consensus outside of the diocese.
- The Bishop’s disregard of the Solemn Declaration.
- The division continues after seven years and is not transitory or minor.

It was also noted that there is a direct admission from the Bishop in this case that this

issue is different from women’s ordination and the re-marriage of divorced persons. The evidence shows there is a clear difference.

Mr. Cowper pointed to the written submission on the impracticability of the ACoC’s Shared Episcopal Ministry (SEM) scheme and pointed out a number of problems, with

the “nub” being jurisdiction.

Mr. Justice Kelleher asked “If jurisdiction had been ceded, would there have been a breach of communion?” Mr. Cowper replied that acceptance of (then) Bishop Buckle’s

offer would have given the parishes a bishop who was clearly “in communion” with Anglicans around the world, and it would have allowed the Anglican Communion time

to work out a solution over the longer term. He said the issue for the parishes was “how do we stay in while the Anglican Communion is working this out? We are disconnected today and we need a bishop who is connected.” He said it was not a permanent solution but it would’ve preserved communion in the structure pending the

global realignment or restructuring of the Communion. He noted that we still don’t know how it’s going to work out in the ACoC or Anglican Communion.

Mr. Cowper said that once you get to a Cy Pres argument, it is a question of making an appropriate order that will allow both sides to get on with their ministry, without the

ongoing conflict they have experienced. He said this requires an order with a clear break so as not to subject the parties to ongoing hostility.

Finally, he discussed the fact the parishes had independent corporations with their own bylaws and constitutions. While the Canons talk about alternative parish structures, that does not contain any legal force over the parish corporations. If the Bishop seeks relief in the event of a deadlock, he should have sought relief in civil law

from the court rather than using self-help measures.

The parishes’ submissions will conclude in the morning with Mr. Martin discussing the

Chun Bequest, after which the diocese will present their argument.

Cheryl Chang