

**VANCOUVER**  
**FEB 23 2011**  
**COURT OF APPEAL**  
**REGISTRY**

Court of Appeal File No.: CA037770  
Supreme Court File No.: S086372  
Supreme Court Registry: Vancouver

**COURT OF APPEAL**

**ON APPEAL FROM: THE ORDER OF THE HONOURABLE MR. JUSTICE KELLEHER  
OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED THE 25<sup>TH</sup> DAY  
OF NOVEMBER, 2009**

**BETWEEN:**

**MICHAEL BENTLEY, ETHEL MARION CAMPBELL, PETER CHAPMAN, ZENIA  
CHENG, SIMON CHIN, KRISTA FRIEBEL, R. PATRICK GREENWOOD,  
MARIE KRISTINE KLUKAS, JOHNNY LEUNG, DAVID LEY, RUTH LIN, LANNY  
JAMES REEDMAN, LINDA SEALE, ANNE SHECK, DAVID KENNETH SHORT,  
TREVOR HOWARD WALTERS, and SHIRLEY WIEBE**

**APPELLANTS  
(PLAINTIFFS)**

**AND:**

**ANGLICAN SYNOD OF THE DIOCESE OF NEW WESTMINSTER,  
and MICHAEL INGHAM in his capacity as the Anglican Bishop  
of the Diocese of New Westminster**

**RESPONDENTS  
(DEFENDANTS)**

**- AND -**

Court of Appeal File No.: CA037771  
Supreme Court File No.: S087230

**BETWEEN:**

**ERIC LAW, STEPHEN WING HONG LEUNG, ANNIE SHEUNG KAN  
TANG, STEPHEN CHI HIM YUEN, and WINSOR WING TAI YUNG**

**APPELLANTS/CROSS RESPONDENTS  
(PLAINTIFFS/DEFENDANTS BY COUNTERCLAIM)**

**AND:**

**ANGLICAN SYNOD OF THE DIOCESE OF NEW WESTMINSTER,  
and MICHAEL INGHAM in his capacity as the Anglican Bishop  
of the Diocese of New Westminster**

**RESPONDENTS/CROSS APPELLANTS  
(DEFENDANTS/PLAINTIFFS BY COUNTERCLAIM)**

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**RESPONDENTS' FURTHER SUBMISSIONS ON COSTS**

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**A. Overview**

1. These are the Respondents' submissions addressing costs in response to this Court's email memorandum of January 11, 2011.

2. These submissions are supplementary to the Respondents' factum on costs. That factum addressed two issues: 1) whether the Appellants' should have their legal costs indemnified from the properties of the parish corporations, and 2) whether the trial judge's order granting costs to the Respondents should be vacated and each party bear its own costs at trial and on appeal. The first issue was raised in the Appellants' Amended Notices of Appeal dated July 29, 2010, which sought an order "[d]eclaring that the Appellants are entitled to be indemnified for their reasonable costs and disbursements in this court and in the court below from the properties of the Parish Corporations" (see Supp. A.R. at pp. 10 and 14). It was unclear to the Respondents from the Appellants' factum whether the Appellants continued to seek indemnification or only that the parties bear their own costs, and so the Respondents responded to both issues in their costs factum.

3. It subsequently became evident that the Appellants only ask that the parties bear their own costs in both courts. In the Respondents' respectful submission, that request ought to be denied. As set out in their factum on costs and as further supplemented in these submissions, the Respondents were substantially successful both at trial and on appeal and there is no valid basis to depart from the usual rule that they are entitled to their costs.

**B. The Appellants' Burden and the Standard of Review**

4. The trial judge found, and the Appellants now appear to accept, that the Respondents were substantially successful at trial: Supp. A.R., pp. 6-7, para 23. Pursuant to the Rule then in force, Rule 57(9) (now Rule 14-1(9)), costs go to the party that was substantially successful, unless the court otherwise orders (see also paras 22 and 23 of the Respondents' factum on costs).

5. In the Respondents' respectful submission, they were also substantially successful on appeal. While they did not succeed on their cross-appeal in respect of the Chun Bequest, that issue was always very much secondary to the main appeal. The trial judge found that the issue on which the Respondents did succeed was the "principal issue" (Supp. A.R., pp. 6-7, para 23) and that, notwithstanding that the Respondents lost at trial on the Chun Bequest and the issue concerning the use of Canon 15 to replace the parish corporations' trustees, the Respondents had achieved substantial success. The Respondents did not cross-appeal the Canon 15 issue, and so *a fortiori* their win on the main appeal constitutes substantial success in this Court. While it is only a rough calculation of the relative importance of the two issues, it is useful to observe that this Court's reasons dwell on the main appeal for approximately 76 paragraphs over 32 pages, and on the Chun appeal for 7 paragraphs over 3 pages. Pursuant to section 23 of the *Court of Appeal Act*, the Respondents are entitled to the costs of the appeal, unless this Court otherwise orders.

6. The Appellants say that the trial judge erred in awarding the Respondents costs of the trial essentially because, first, they brought the litigation as trustees and sought to clarify the trust on which the properties are held, and second, it is not in the interests of "harmony" for costs to be awarded against them. The Appellants argue on these same grounds that they should not bear the Respondents' costs of the appeal.

7. The Respondents address these issues in their factum on costs and under the headings below, but first it should be remembered that the trial judge's costs award is a "quintessentially discretionary" decision that is "subject to limited appellate review" (see the Respondents' costs factum at paras 17-20). For the reasons set out in the Respondents' costs factum, and summarized again below, the trial judge clearly acted within the proper bounds of his discretion. Similarly, there is no valid reason to depart from the usual rule that the costs of the appeals should go to the substantially successful party – in this case, the Respondents.

### C. The Appellants Were Not Acting As Trustees In Any Relevant Sense

8. The Appellants base their submissions on costs primarily on their assertion that “the plaintiff trustees had brought to the court a serious and legitimate issue as to the administration of the trusts” (Appellants’ Supplementary Submissions, para 14).

9. The Respondents respectfully submit that the Appellants were not properly acting as trustees and should not be shielded from liability for costs. In their costs factum at paragraphs 27 to 37, the Respondents set out how the Appellants acted outside of their authority as trustees of the parish corporations and acted in order to retain the use of the church properties for the Anglican Network in Canada (“ANiC”), with which they had aligned themselves. Those paragraphs set out how the Appellants’ argument that they commenced the litigation in a genuine effort to resolve a trust claim is belied by:

- (a) The timing of the litigation: the Appellants brought the litigation *after* the congregations voted to leave the Diocese and *after* the clergy relinquished their licenses in the ACC – and indeed only after the Diocese sought to replace the trustees of St. Matthews and St. Matthias/St. Luke; and
- (b) The relief the Appellants sought: the Appellants did not merely seek directions as to their duties as trustees; primarily they sought a *cy-près* scheme that would remove the church properties from the Diocese and the ACC and secure them for the use of ANiC.

10. As the Respondents set out at paragraph 34 of the costs factum, the reality is that this litigation is ANiC’s litigation: ANiC rightly calls opposing counsel “[o]ur legal team” and the trustees of St. John’s (Shaughnessy) used the church building to collect donations made out to “The Anglican Network in Canada – St. John’s Project” (see also paras 3 – 9 of the Respondents’ costs factum). The trial judge correctly characterized the Appellants as acting “for the collective benefit of a large number of like-minded people who have elected to leave the Anglican Church of Canada and the Diocese and align themselves with the Anglican Network in Canada” (June RFJ at para 16, Supp. AR p. 6).

11. Contrary to the Appellants' contention that they were simply acting to clarify the nature of the trust over the properties, these two points demonstrate that the Appellants were acting entirely in the interests of their new church organization, ANiC, and against the interests of the ACC and the Diocese. Indeed, the Appellants have declared that they "do not wish to remain as trustees on the terms found in the reasons [of the trial judge]" (June RFJ, para 17, Supp. A.R. p. 6), which presumably remains the case after this Court's decision. The Appellants were not seeking the courts' advice as to how to carry out their trust duties; to the contrary, they sought a *cy-près* order altering those trust duties to allow them to use the properties as they would prefer. Having not received the advice they sought, they now simply wish to leave. That is not how true trustees behave.

12. A further point leads to the same conclusion. The Appellants, as they say at paragraph 15 of their supplemental submissions, "brought these proceedings in their status as trustees of Anglican parish corporations" (emphasis added). It is those parish corporations that hold the church properties, and it is to those parish corporations that the Appellants owe their duties as trustees. Far from acting with good faith in the parish corporations' interests, however, the Appellants have vigorously worked *against* the parish corporations. They have:

- (a) Voted to leave the ACC and the Diocese, of which the parish corporations are inherently a part;
- (b) Formed entirely different church organizations, namely ANiC and now the Anglican Church in North America; and
- (c) Brought this litigation, seeking, in this Court, that "the parish corporations [be] replaced with suitable trustees holding the assets on trust for Anglican ministry" (see this Court's reasons at para 53).

13. The Appellants have, as trustees of the parish corporations, sought to strip the assets from those corporations and put them in the hands of new trustees. While in this Court the Appellants were coy about the identities of the new trustees, it is obvious they

intend that they or their allies would be the new trustees, unfettered by any duties to the parish corporations, the Diocese or the ACC. Indeed, their proposed order at trial reveals their intention plainly: “The plaintiffs be continued as trustees of the trusts for Anglican ministry and worship relevant to each parish property, the parish corporations conveying the properties and transferring the assets to the trustees or new parish corporations on the same trusts” (see this Court’s reasons at para 53; underlining added by this Court; see also the trial judge’s reasons at A.R. p. 130, para 209).

14. The Appellants’ trust duties are to the parish corporations. Far from bringing this litigation in order to clarify those duties, they sued the Respondents in the hopes of negating their trust duties and converting the parish corporations’ properties to their own use. While they say they brought this litigation in order to advance a legitimate trust claim, in reality they have abdicated their trust responsibilities and sought to alienate the parish properties from their original trust. The trial judge was entirely correct when he stated (June RFJ para 14, Supp. A.R. p. 5):

I am not persuaded that what the plaintiffs were engaged in was the administration of the trust. The property in question belongs to the parish corporations. The plaintiffs were trustees of those corporations. However, they were attempting to remove the properties from the parish corporations because of doctrinal differences between themselves and the defendant Diocese of New Westminster.

[Emphasis added]

15. All four judges who have heard the Appellants’ case have dismissed it. There is simply no basis on which the Appellants should be able to avoid the usual costs rule.

#### **D. The Interests of “Harmony”**

16. The Appellants also say that this Court ought to relieve them of liability for costs both in this Court and in the court below in the interests of “harmony” between the parties. With respect, it does not lie in the Appellants’ to now plead for harmony.

17. In 2002, the Appellants stopped paying their parishes’ annual assessments to the Diocese. For St. John’s (Shaugnessy) alone, the withheld assessments were estimated by its former priest, David Short, to amount to approximately \$700,000 up to the time of

trial; with the other parishes and the subsequent years included, the total of withheld assessments is in the millions of dollars (Cross of David Short, 2 Trans. p. 239 I. 35 – p. 240 II. 10, which is reproduced as Appendix A). Despite not paying their assessments, the Appellants and their allies remained in the parish buildings. Then, in 2008, the congregations voted to leave the ACC and receive episcopal oversight from the Province of the Southern Cone. Those of the Appellants who were clergy relinquished their licenses to minister in the ACC and commenced ministering in the name of ANiC. When the Bishop sought to remove them, they brought this litigation, in which they charged that the Bishop was “off the road of Anglicanism” and “draconian and autocratic”, that he could not be “trust[ed]” and that he “did not care about the people of the parish” (see the Respondents’ costs factum at para 40). ANiC used the church buildings to raise money for this litigation, in which ANiC sought to wrest the church properties from the Diocese, the ACC and the Bishop’s episcopal jurisdiction.

18. Nonetheless, the Respondents entered into a standstill agreement with the Appellants that allowed them to remain in the church buildings until the trial judge rendered his judgment. That judgment having gone against them, the Appellants did not vacate the buildings and, indeed, they remain there still today. The Appellants are now seeking leave to appeal this Court’s decision to the Supreme Court of Canada.

19. For almost nine years the Appellants have not been paying their assessments. For three years they have been using the church buildings to minister in the name of ANiC, instead of preaching the doctrine of the ACC. They have not accepted the judgments of either the trial court or this Court, but seek to put the Respondents to further expense in the Supreme Court of Canada. That is their right, but it is also the right of the Respondents to have the partial and normal compensation for their legal costs under the *Supreme Court Rules* and the *Court of Appeal Act*.

20. The Appellants have not acted in any way to preserve “harmony” between them and the Respondents, and apparently have no intention of doing so in the future: they have indicated that, if the judgments of this Court and the trial court stand, then they will simply quit the parish corporations (June RFJ paras 17 and 19, Supp. A.R. p. 6). Neither harmony nor justice would be served by denying the Respondents their costs.

**E. Scale of Costs**

21. The trial judge held that “[t]here is no doubt that this was a matter of more than ordinary difficulty” (June RFJ para 24, Supp. A.R. p. 7) and so ordered costs to the Respondents at Scale C. That assessment was wholly within the discretion of the trial judge and should not be disturbed.

22. Similarly, the appeal was plainly of unusual difficulty and importance, having regard to the factors set out in section 2(3) of Appendix B to the *Court of Appeal Rules*. This Court described the appeal as a “difficult case” at paragraph 1 of its judgment, and indeed it did raise difficult and complicated issues of law and fact. The case was also of tremendous importance to Anglicans within the Diocese. Barring an appeal to the Supreme Court of Canada, this Court’s decision will determine the dispute between the immediate parties, and will also provide persuasive guidance for other disputes involving the ACC. The Respondents therefore submit that they ought to be granted their costs of the appeal at Scale 3.

**F. Conclusion**

23. For the reasons set out above, there is no basis on which to set aside the trial judge’s decision to grant the Respondents’ their costs of the trial at Scale C. In the Respondents’ respectful submission, they ought also to be granted their costs of the appeal at Scale 3.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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Counsel for the Respondents/Cross-Appellants

Dated: February 23, 2011

Appendix A

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David Kenneth Short (for Plf)  
Cross-ex by Mr. MacIntosh

- 1 Q All right. Leaving aside those for now, because  
2 neither you nor I have them, but you would accept  
3 that from your own experience and observation,  
4 Bishop Ingham has endeavoured to appoint  
5 conservative priests where conservative clergy so  
6 request.  
7 A I would -- I would want to qualify my "yes" on  
8 that. We had an instance at St. John's where, in  
9 an application process, one of the priests, who  
10 was a conservative from the outside of the  
11 country --  
12 Q And what's his name?  
13 A Peter Rollinson.  
14 Q Yes.  
15 A He was required to distance himself and to not  
16 have anything to do with the essentials movement,  
17 which is the movement of conservatives from the  
18 three different streams in Anglicanism in Canada.  
19 Q All right.  
20 A If he came into the Diocese.  
21 Q All right, apart from this one instance -- and  
22 there are different contexts that people present  
23 with respect to that instance -- apart from that  
24 instance you've named, you would accept that  
25 Bishop Ingham's appointments in conservative  
26 congregations have been of conservative priests.  
27 A I think we can say the 40,003, yes.  
28 Q All right. Now, you said to His Lordship that --  
29 I think it was in 2002, that St. John's decided to  
30 stop paying assessments.  
31 A Yes.  
32 Q And obviously, though, it, at the same time, chose  
33 to stay in the Anglican Church of Canada.  
34 A Correct.  
35 Q And the other day I asked you if you knew what the  
36 assessments totalled, and you didn't know, and --  
37 correct?  
38 A Correct.  
39 Q And you discussed it with Mr. Cowper today, that  
40 there were assessments unpaid.  
41 A Yes.  
42 Q And so perhaps it's the case you've actually found  
43 out what the assessments are. Do you know what  
44 they are?  
45 A I have not.  
46 Q And if I suggest to you a number of 2.3 million  
47 dollars, have you never heard anything like that

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David Kenneth Short (for Plf)  
Cross-ex by Mr. MacIntosh

1 said at St. John's?  
2 A I think that would be extraordinarily high. Our  
3 assessment in 2002 was somewhere in the vicinity  
4 of \$110,000, multiplied by six years, comes to  
5 \$700,000.  
6 Q All right, so you -- although you don't know, I  
7 understand that -- you believe that 2.3 is high,  
8 is very high.  
9 A I do.  
10 Q And you think it's more like 700,000.  
11 A Yes.  
12 Q And what about the residential school's payment?  
13 Do you know where that stands?  
14 A Yes, the financial Synod at the beginning of 2003  
15 voted to pay the money to the residential school  
16 fund out of the fund in the Diocese called "new  
17 development fund". The new development fund had  
18 been paid into by our congregation and other  
19 congregations over a period of time. We believe  
20 something like 10 percent of that fund had been  
21 supplied already by the Diocese of New  
22 Westminster.  
23 The Diocese requested us, as parishes in the  
24 fund-raising campaign, to replenish that fund, and  
25 we felt that because communion was breached, we  
26 could not replenish that fund because money and  
27 communion move together. The giving of money is  
28 an expression of communion, and because our  
29 communion was breached, we couldn't give to the  
30 Diocese. However, we did write a letter to the  
31 congregation indicating that we thought this was  
32 an important thing and we encouraged individuals  
33 in the congregation to give to it, which some  
34 people did.  
35 Q How much had St. John's committed to give on the  
36 residential school settlement prior to 2003?  
37 A We'd made no commitments.  
38 Q And so when you took the position you've just  
39 described in 2003, you made no change? There was  
40 no change?  
41 A No.  
42 Q I see.  
43 A Except that we encouraged individuals to give.  
44 Q And you hadn't encouraged that before.  
45 A It became part of the -- part of the fund-raising  
46 program the Diocese was doing.  
47 Q And so it's your evidence, sir, that St. John's