June 28, 2017

Interim Measures in a Classic Church Property Dispute

By: Jonnette Watson Hamilton

Case Commented On: *Bruderheim Community Church v Moravian Church in America (Canadian District)*, 2017 ABQB 355 (CanLII)

In this brief judgment, Justice Brian Burrows granted an interim injunction restraining the Board of Elders of the Moravian Church in America from interfering with the use of church land and buildings located in Bruderheim, Alberta by the local congregation, formerly known as the Bruderheim Moravian Church and now known as the Bruderheim Community Church. The application of the standard three-part test for an interim injunction is of interest for the "serious issue to be tried" that it discloses, as well as for the understanding of "irreparable harm" applied in the situation of a local congregation being evicted from its place of worship. In addition, this particular dispute appears to have all the elements of a classic church property dispute brought to the civil courts as a last resort as a result of an irreparable rift within a church over a matter of doctrine. The reason for the Bruderheim congregation's disassociation was a decision by the Moravian Church, Northern Province that individuals were eligible to be clergy regardless of their sexual orientation or marital status.

Facts

Local congregation members were originally affiliated as an unincorporated association called the Bruderheim Moravian Church. The local congregation has enjoyed possession and use of the church buildings located on 40 acres of land in the town of Bruderheim (the church property) for about 120 years. Until May 2016, they were a congregation associated with the Moravian Church, Northern Province.

The Board of Elders of the Canadian District of the Moravian Church in America is part of the Moravian Church, Northern Province (the Church); see "A Brief History of the Moravian Church". Legal title to the church property is held by the Board of Elders, which was incorporated by a federal statute in Canada in 1909.

The facts concerning the title to the church property are crucial (at para 12), although they were not that well developed in this interim application. The original land grant in April 1897 was conveyed by the Government of Canada to three individual Moravian colonists "to have and to hold the said lands unto the said Wilhelm Lilge, Frank Heffner and Gustav Werner, their successors and assigns for ever, in trust, for the purposes of the Congregation of the Moravian Church at Bruderheim aforesaid and to be devoted to public purposes within the meaning of

Clause 31 of the [*Dominion Lands Act*].” Their 1907 title certified that the three individuals, described as “Trustees of the Moravian Congregation of Bruderheim”, were the owners of an estate in fee simple of the church property.
Subsequent to the 1909 incorporation of the Board of Elders, title was transferred in 1912 to “the Board of Elders of the Canadian District of the Moravian Church in America, a body corporate” and the title noted that their fee simple interest in the land was “subject to the condition that the same shall be held in trust for the Congregation of the Moravian Church in Bruderheim and to be devoted to public purposes only.” A certificate of that 1912 title issued after July 1975 was subject on its face to the same express trust conditions.

However, a certificate of that title that was issued in January 2017 omitted the trust conditions and only showed that the Board of Elders is the owner of a fee simple estate in the church property. Neither the reason for nor the date of the deletion of the trust condition was revealed by the evidence (at para 13), although Justice Burrows made it clear it will have to be at trial.
In June 2014, the Church adopted a resolution by which “individuals regardless of sexual orientation and whether single, married or in a covenanted relationship” could be ordained and considered clergy (at para 5). In May 2016, the Bruderheim Moravian Church members decided they could not accept that resolution. As a result, a “very large majority” of the local congregation resolved to disassociate from the Church and to incorporate as the Bruderheim Community Church (at para 24).

In March 2017, the Church body with the authority to do so dissolved the Bruderheim Moravian Church. The next day, the Board of Elders gave notice to the Bruderheim Moravian Church to vacate the church property.

In April 2017, the local congregation incorporated under the *Religious Societies' Land Act*, RSA 2000, c R-15, as the Bruderheim Community Church “for the purpose of holding and dealing with real and personal property” (section 12).

In May 2017, the Bruderheim Moravian Church and the Bruderheim Community Church sued the Board of Elders and applied for an interim injunction.

Law

The three-part test for an interim injunction is:

1) that there is a serious issue to be tried;
2) that the applicants will suffer irreparable harm if the injunction is not granted; and
3) that the balance of convenience favours granting the injunction. (at para 11)

Application of Law to Facts

1) Serious issue

In the course of analyzing whether there was a serious issue to be tried, Justice Burrows described the documents of title to the church property (at para 12). He speculated that the trust condition was omitted in order to make the title consistent with "general Torrens system principles" that do not allow equitable interest to appear on title except by way of caveat (at para 13). Nevertheless, he decided that there was little in the evidence before him to suggest that the trust did not still exist (at para 13).

The applicants argued that the Board of Elders holds only a bare legal title to the church property and that the beneficial title is held by "the congregation of the Moravian Church at Bruderheim". The Board of Elders conceded that the issue of whether or not the Board of Elders holds title as a trustee is a serious issue to be tried, fulfilling the first part of the test for an interim injunction (at para 14).

Justice Burrows noted that the issue about whether or not the Board of Elders holds title to the church property as a trustee is more than a question about the nature of the estate. There is also a question about whether one of the three essential characteristics required for a trust to come into existence is present in this case, namely, whether there is certainty about the object or beneficiary of the trust. In other words, is the Bruderheim Moravian Church or the Bruderheim Community Church or some other entity "the congregation of the Moravian Church at Bruderheim"?

Other aspects of the serious issues to be tried include whether the internal laws of the Church governing incorporating congregations, owning property and vesting the property when a local congregation disassociates itself were followed (at para 15).

2) Irreparable harm

There was little proof of irreparable harm to meet the second part of the test. A member of the local congregation simply gave evidence that the "Congregation consists of 55 families residing in Bruderheim and north-central Alberta area and has as a group a history of worship in the church on the land for in excess of 120 years" (at para 17). However, Justice Burrows understood that the point was that if the congregation was required to vacate the church property it would interrupt the long-standing tradition of worship of the 55 families (at para 18).

Justice Burrows noted that the test is not whether the anticipated harm is devastating or of a great magnitude. The test is whether it is irreparable, i.e. "of such a nature that it cannot be readily addressed and remedied by an award of monetary damages" (at para 19). Justice Burrows concluded that it was a vital and fundamental element of the faith tradition of the members of the Bruderheim Moravian Church that their worship be carried out on the church property as it has been for more than a century. He specifically noted that the church property contained the graves of former members of the local congregation and ancestors of the current members. He

determined that money could not compensate for the harm that would be caused if the local congregation could no longer worship on the church property.

3) Balance of convenience

On the last element of the test for an interim injunction, the Board of Elders argued that the occupation of the church property by the Bruderheim Moravian Church members prevented the Board of Elders from caring "for the souls who wish to remain adherents to the Moravian Church, Northern Province" (at para 22). The Board of Elders had sent out a notice to members of the Bruderheim Moravian Church advising that weekly Moravian worship services would be conducted on the church property beginning June 4. Nonetheless, Justice Burrows decided that the balance of convenience slightly favoured the local congregation, in part because there was no proof that there were any worshipers who wanted to worship at the Board of Elders' services. Justice Burrows found that the desire of both parties to use the church property for worship while the case was pending could be accommodated (at para 25). As a result, while granting the local congregation the interim injunction for an initial term of eight months, Justice Burrows also ordered that they permit the Board of Elders to conduct a worship service on the church property each Sunday afternoon (at para 29).

Comments and Questions

Because this decision concerned only an interim measure with the facts not yet fully developed and the matter remains to be tried (or settled, but how likely is that?), I will focus on contextualizing this dispute and justifying my suggestion that it appears to have all the elements of a classic church property dispute brought to the civil courts as a last resort as a result of an irreparable rift within a church over a matter of fundamental doctrine.

The issues identified by Justice Burrows in determining that there are serious issues to be tried in this case are ones that have arisen in many previous church property disputes. How the issues are resolved depends upon many variables, including the structure of the relevant church and the wording of the original grant of the church property.

As Professor Alvin J. Esau has noted, property entitlements are often linked to church membership issues because the property of a religious association is usually held in trust for the beneficial use of that religious association (Alvin J. Esau, "The Judicial Resolution of Church Property Disputes: Canadian and American Models" (2003) 40 Alta L Rev 767 at 768). A trust, such as a religious purposes trust, is "a mechanism whereby one person manages property for the benefit of another": *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thomson Canada, 2005 at 163). In order to come into existence a trust must have three essential characteristics: (1) the language creating it must be imperative; (2) the subject-matter or trust property must be certain; and (3) the objects of the trust must be certain (*Waters* at 132). As Justice Burrows noted, it is the third characteristic that will be an issue if and when this matter is tried.

The main reason the third characteristic is arguable is that local congregation members were originally affiliated as an unincorporated association, i.e., the Bruderheim Moravian Church. As *Waters* notes (at 628), gifts to unincorporated associations are an intractable problem. An unincorporated association is simply a group of people who associate with each other for a particular purpose—an informal organization which has no separate legal identity from that of its members. Because it has no separate legal identity, its property must be held by trustees on its behalf. Such gifts to trustees were usually made for the advancement of certain purposes or for the benefit of the current members of the association. The 1897 Crown grant was made to Wilhelm Lilge, Frank Heffner and Gustav Werner in trust for the purposes of the Congregation of the Moravian Church at Bruderheim because the local congregation was and is an unincorporated association.

The use of trustees who hold a bare legal title, with the beneficial interest belonging to others such as an unincorporated association or its members, is a problem under a Torrens land title system such as Alberta's. Justice Burrows speculated that the trust condition was omitted on a later title to the church property in order to make the title consistent with "general Torrens system principles" that do not allow equitable interest to appear on title except by way of caveat (at para 13). However, more than just "general Torrens system principles" prohibit the appearance of equitable interests on title. Section 47 of the *Land Titles Act*, RSA 2000, c L-4, explicitly states:

> 47 No memorandum or entry shall be made, on a certificate of title, of any notice of trusts, whether expressed, implied or constructive, but the Registrar shall treat any instrument containing any such notice as if there were no trust, and the trustee or trustees named in the instrument are deemed to be the absolute and beneficial owners of the land for the purposes of this Act. (emphasis added)

It is as a result of section 47 of the *Land Titles Act* that the existence of a trust is not readily apparent when examining any certificate of title. That adds to the serious issue to be tried in this case, namely, whether or not the Board of Elders holds title to the church property as a trustee.

There have been a number of recent Canadian cases dealing with disputes within religious organizations and many of them have concerned church property. For example, *Pankerichan v Djokic*, 2014 ONCA 709 (CanLII), was a dispute between the local congregation and a bishop and diocese of the Serbian Orthodox Church. The bishop had forced the long-time parish priest to retire against his will and introduced a new priest. Ensuing local dissatisfaction led the bishop and diocese to replace the congregation's elected Executive Board in order to eliminate the Board's ability to control and manage the property and affairs of the congregation. As the Court of Appeal noted (at para 65), the dispute was unusual because there was no dissident group wanting to leave the church and take the church property with them (as there is in this case).

However, the issue of the forced retirement of the parish priest became a church property issue because whoever held the church property in trust had control of the affairs of the congregation.

The local congregation was an unincorporated association and therefore its properties were held in trust under the *Religious Organizations' Lands Act*, RSO 1990, c R23, the Ontario equivalent of Alberta's *Religious Societies' Land Act.* The deeds to the property conveyed it to named individuals "as trustees" or "in trust". The Court of Appeal noted the structure of the Serbian Orthodox Church and, most importantly, that it is hierarchical (as, it appears, is the Church in this case). That meant that each congregation was subordinate to its diocese, of which it was a part. The bishop and diocese won because they complied with the *Religious Organizations' Lands Act* when they replaced the elected Executive Board.

In upholding the lower court's decision, the Ontario Court of Appeal noted that, while "the principles underpinning the connection between civil law … and religious organizations and their internal laws" are something Canadian courts are still working on, "a relatively consistent method or pattern has emerged in property disputes" (at para 57). That relatively consistent approach involved "construing the terms of the trust by considering the deeds, the applicable legislation, the canons or church law promulgated by each diocese and, to some extent, the doctrinal context …" (at para 63). We only see the construing of the deeds in Justice Burrows' decision about whether there is a serious issue to be tried because he was deciding only an interim application.

In determining what the relatively consistent approach was, the Ontario Court of Appeal relied on two decisions involving the Anglican Church of Canada: *Bentley v Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506 (CanLII), leave to appeal refused [2011] SCCA No 26, and *Incorporated Synod of the Diocese of Huron v Delicata*, 2013 ONCA 540 (CanLII), leave to appeal refused [2013] SCCA No 439. In both cases, the aggrieved majority of local parishes were opposed to the decision of the Anglican Church of Canada to allow the blessing of same-sex partnerships. Both congregations joined a breakaway group which they contended is the true, orthodox Anglican Church and asked the courts for a declaration that they were the beneficial owners of the church property. Both appeal courts saw their job as one of interpreting the terms of the trust on which the properties were held.

Most church property disputes are like those two Anglican cases, i.e., the result of the local congregation's belief that their denomination is moving away from its fundamental beliefs. That appears to be the problem in this case as well. Courts are, of course, reluctant to get involved in disputes within religious organizations that involve issues of church governance and doctrines of faith. Freedom of religion is a protected liberty under the *Charter* and courts are leery of misunderstanding the relevant doctrine and context. See the analysis of numerous cases by the two leading Canadian scholars in the area of church property disputes: Professor Margaret Ogilvie, "Church Property Disputes: Some Organizing Principles" (1992) 42 UTLJ 377 and *Religious Institutions and the Law in Canada*, 3rd ed (Toronto: Irwin Law, 2010) and Esau, "The Judicial Resolution of Church Property Disputes" (above).

Despite the courts' reluctance, as the Ontario Court of Appeal confirmed in *Pankerichan v Djokic* (at paras 54 and 86), they will intervene when property, contract or other civil rights are

engaged. However, the line between religious and civic matters is open to debate; see Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014) at 61-65. The on-going controversy surrounding Trinity Western University's proposed law school, a matter now scheduled to be heard by the Supreme Court (see *Law Society of British Columbia v Trinity Western University*, Case No 37318 and *Trinity Western University v Law Society of Upper Canada*, Case No 37209), is an example of a case presented as a civic/religious dichotomy; see Howard Kislowicz, "The Court and Freedom of Religion" (2017) 78 SCLR (23d) 221 at 230-31, online at SSRN.

Can a court enforce a trust for purposes which are contrary to law, such as discrimination on the basis of sexual orientation? As far as I know, we have yet to see a *Charter* argument in these church property disputes over doctrinal changes. The *Charter* has been irrelevant to most church disputes because section 32 limits the *Charter*'s application to the federal Parliament and Canadian government and provincial legislatures and governments and to non-government actors who are implementing government policies or programs. The Supreme Court's upcoming decision in the Trinity Western University cases may provide some direction on this issue.

As the law currently stands, it is more likely that the dispute over ordaining clergy regardless of their sexual orientation or marital status will be characterized as an internal dispute, as such disputes have been to date. See Margaret Ogilvie, "Judicial Restraint and Neutral Principles in Anglican Church Property Disputes: *Bentley v Diocese of New Westminster*" (2011) Ecclesiastical Law Journal 198, discussing how the British Columbia Court of Appeal stayed away from the doctrinal issues so that it was not drawn into the same-sex blessing issue. Based on past cases, if there is an express trust, it is more likely a Canadian court will enforce that trust.

Church property disputes and the enforcement of express trusts tend to result in "winner take all." But the breakdown of a long-standing relationship, especially in the context of a small town with many networks of relationships, and Justice Burrows' order requiring the sharing of the church property in the interim, suggests "all or nothing" might not be the best resolution.

The town of Bruderheim is northeast of Edmonton, a 30-minute drive from the city's outskirts. The Moravian community appears to play a large role in the town. The congregation consists of 55 families residing in Bruderheim and north-central Alberta (at para 17), and so they appear to make up a substantial number of the area's population, which was pegged in the 2016 Census of Population at only 1,308 individuals. The Town of Bruderheim, on their "About Us" page, includes "A Supportive Church Presence" as one of the fourteen items on their "What Makes Us Proud" list. It specifically mentions that "[b]oth our Bethlehem Lutheran and Moravian churches are an integral part of the community, helping to support her residents through faith and community events and programs." The town's "Heritage" page includes a photograph of "The First Place of Worship in Bruderheim" and a brief account of how the first group of Moravian colonists arrived in Bruderheim in the spring of 1894.

The very fact this litigation is occurring suggests that the local congregation has not only made significant financial and temporal contributions to the religious association and the church property, but also has what Professor Esau calls "significant psychic investments in the use of the property." ("The Judicial Resolution of Church Property Disputes" at 771) But disputes about church doctrine, and consequently about control of local places of worship, may be significant in different ways in a small town such as Bruderheim as compared to such disputes in Vancouver. A schism that involved a large enough portion of the local congregation would probably be extremely difficult for many of the residents of a town as small as Bruderheim. Fortunately, there does not seem to have been a schism within the Bruderheim congregation; Justice Burrows noted that the majority in favour of disassociating was a very large one and there was no evidence of any demand for Moravian services. But even if every single member of the Bruderheim Moravian Church disassociated themselves from the Church and became part of the Bruderheim Community Church, it is likely that the members' ties to the church property are deeply rooted. In considering the presence of irreparable harm, Justice Burrows suggested that local congregation members wanted to control property that was maintained not only with their contributions but also with those of many earlier generations of their families.

Justice Burrows refused to grant an all-or-nothing remedy, an appropriate move at this early stage. Professor Esau has suggested that, if there is no clearly worded trust, a division of the church property on the breakdown of a religious relationship between a congregation and the entity it is or was subordinate to might be appropriate ("The Judicial Resolution of Church Property Disputes" at 816). It's not a suggestion that has been taken up outside the interim order context, but it might be more appealing than a winner-take-all decision as a way to resolve some church property disputes over doctrinal points or other affiliation issues.

This post may be cited as: Jonnette Watson Hamilton "Interim Measures in a Classic Church Property Dispute" (28 June, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/06/ Blog_JWH_Bruderheim_v_Moravian_Church.pdf

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**

Follow us on Twitter **@ABlawg**