# COURT OF APPEAL FOR ONTARIO

CITATION: Pankerichan v. Djokic, 2014 ONCA 709
DATE: 20141017
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Doherty, Lauwers and Strathy JJ.A.

BETWEEN

Zoran Pankerichan, Milan Vukosavljevic, (Elected Trustees For St. Nicholas Serbian Orthodox Church-School Congregation of Hamilton) and Sveto Dojcinovic, Miroslav Cucuz, Branko Bibic, Sava Bibic, Milan Brkovic, Milan Dabic, Mirko Dronjak, Dusan Ivancevic, Marko Krekic, Todor Maric, Dragan Pankerichan, Veljko Stanojcic, Sretko Tadic, Branko Vincic, Dragomir Vrabac, Slavko Vrzina, Radovan Vukaljevic

Applicants
(Appellants)

and

Rt. Rev. Bishop Georgije Djokic, Rev. Radmilo Gardovic, V. Rev. Ljubomir Rajic, V. Rev. Milutin Veljko, V. Rev. Lazar Vukojev, Zoran Curcic, Milosav Ivkovic, Milan Lazic, Ilija Rakanovic, Milenko Savovic, Dobro Stanisic, Radoslav Veljovic and Rev. Djuro Samac, Goran Propovic, Nikola Manojlovic, Vladimir Savic, Srobljub Mitic, Ostoja Maglov, Gliso Popov, Todor Manojlovic, Vesna Zdero, Slavko Zdero, Damjan Gligic

Respondents
(Respondents)

Elena Mamay, for the appellant

Milena Protich, for the respondent

Heard: February 6, 2014

On appeal from the decision of Justice Robert B. Reid of the Superior Court of Justice, dated April 23, 2012, with reasons reported at 2012 ONSC 2438, [2012] O.J. No. 6633, in which he dismissed the application.

**Lauwers J.A.:**

[1] The appellants and the respondents are in a dispute about control over church property. The resolution of the dispute requires careful consideration of statutory authorities and church documents. After hearing this appeal, the panel dismissed it with reasons to follow. These are the reasons.

## A. OVERVIEW

### (1) The Parties

[2] The appellants are members of a Hamilton, Ontario congregation of the Serbian Orthodox Church (the "Church"), known as the Serbian Orthodox Church-School Congregation of St. Nicholas in Unity (the "Congregation"). A number of the appellants were elected to the Executive Board of the Congregation on February 13, 2005. The appellant, Zoran Pankerichan, is described in the minutes as an "elected trustee" for the Congregation.

[3] The respondent Bishop Georgije Djokic is the head of the Serbian Orthodox Diocese of Canada (the "Diocese"). The other named respondents are members of the Diocesan Council, the two parish priests of the Congregation and members of the Temporary Trusteeship appointed by the Diocesan Administrative Board on September 1, 2005.

**(2) The Protest**

[4] In 2005, Bishop Djokic obliged the Congregation's long-time parish priest to retire against his will. When the Bishop introduced the new priest during a liturgical celebration on August 28, 2005, some Congregation members protested, including some of the appellants. The ensuing events eventually led to the application and to this appeal.

**(3) The Congregational Properties and the Application**

[5] The Congregation occupies a number of properties that it uses for religious and ancillary purposes. The Congregation is not incorporated. Its properties are held in trust under the provisions of the *Religious Organizations' Lands Act*, R.S.O. 1990, c. R.23 ("ROLA").

[6] The deeds to the Congregational properties convey them to, variously, certain named individuals as "Trustees of the Congregation of the Serbian Eastern Orthodox Church of St. Nicholas in Unity", or "In trust for the Congregation of the Serbian Eastern Orthodox Church of St. Nicholas in Unity", and in one instance, without naming the individuals, to "Trustees of St. Nicholas Serbian Orthodox Church". The deeds had the standard habendum clause, namely: "To have and hold unto the said grantees, their successors, and assigns, to and for their sole and only use forever." There are, however, no express trust

terms in any of the deeds. None of the trustees named in the deeds appear to have been a party to the application.

[7] After the August protest, on September 1, 2005, the Diocesan Administrative Board, with the support of the Bishop, removed the Congregation's elected Executive Board and replaced it with a Temporary Trusteeship. This eliminated the Executive Board's ability to control and manage the property and financial affairs of the Congregation.

[8] The appellants applied for a declaration that the Congregation's elected trustees hold the Congregational properties in trust and that the elected trustees, not the Temporary Trusteeship appointed by the Diocesan Administrative Board, have authority to manage and deal with the properties. They also sought a declaration that the replacement of the Congregation's Executive Board by the Temporary Trusteeship "wrongfully invaded" a property trust.

[9] The application judge refused to make the declarations or to order the requested consequential relief of reinstating the Executive Board, requiring new elections, and requiring an accounting by the Temporary Trusteeship.

[10] The parties filed a large record. The major affidavits were sworn by Mr. Pankerichan, on behalf of the appellants, and Davor Milicevic, the secretary to the Bishop, on behalf of the respondents. The affidavits exhibited many documents associated with the Congregation the Diocese, and the Church.

[11] The parties broadly agree on some basic facts but significant differences remain regarding how and why events unfolded. It is fair to say that the application judge generally accepted the evidence of Davor Milicevic where it conflicted with that of Mr. Pankerichan.

## B. THE STRUCTURE OF THE SERBIAN ORTHODOX CHURCH

[12] The Church is described as an autocephalous religious body (meaning its head bishop does not report to any higher-ranking bishop) with its centre, or See, in Belgrade, Serbia. The Church has a constitution.

[13] The Church is subdivided into dioceses, each headed by a diocesan bishop. As Davor Milicevic says, "each Diocese is ecclesiastically, hierarchically and juridically an integral part of the Serbian Orthodox Church." Each diocese is subdivided into geographical parishes as designated by the diocesan bishop. A parish can be elevated into a "church-school congregation" by the diocesan bishop.

[14] The Congregation was established in Hamilton in 1964. At that time the parishes and congregations in Canada were part of the Eastern American and Canadian Diocese under the authority of a diocesan bishop located in Edgeworth, Pennsylvania. That diocese had a constitution that was adopted in 1927 and was consistent with the Church's constitution. The Congregation

adopted bylaws in 1979 (the "Bylaws") that were consistent with the 1927 diocesan constitution.

[15] The Eastern American and Canadian Diocese adopted a new constitution in 1982 (the "1982 Constitution"). The new Serbian Orthodox Diocese of Canada was created in 1983, and Bishop Djokic was appointed as its first bishop the following year. In 1995 the Diocesan Assembly adopted a constitution, also known as the "Statute", for the Canadian Diocese. The Statute was subsequently ratified by the Church's Holy Assembly of Bishops and is consistent with the Church's constitution.

[16] As a result of a Diocesan Assembly held in February 1996, parishes and congregations were directed to comply with the Statute and to bring their bylaws into conformity with it by September 1, 1996. In February 2007 the Diocesan Assembly decided that for parishes that had not adapted their bylaws, such as the Congregation, the Statute would be the only governing bylaw.

**The Governance Model**

[17] As the application judge noted, the Church is hierarchical. Each parish or congregation is subordinate to its diocese, which is subordinate to the Church's patriarch.

[18] Although the 1927 diocesan constitution is not in the evidence, there appears to be a consistent governance pattern that is repeated in the 1982

Constitution and the 1996 Statute, and is also reflected in the Congregation's Bylaws. Regarding organizational hierarchy and the Diocese's control over the activities of the Congregation, there have not been any fundamental changes in principle between 1979, when the Bylaws were enacted, and the present governing rules under the Statute.

[19] Each parish and congregation annually elects an executive board. The membership of the board must be approved by the Diocese. The executive board has always been subject to the authority of the Diocese.

[20] The nature of this hierarchical relationship is reflected in the oath of office that the Congregation's Bylaws require members of the Executive Board to swear. This oath is also found in the rules to the 1982 Constitution and is substantially similar to the oath required by the Statute:

> I (name and surname) swear by Almighty God and with my honor that I will as an Orthodox Christian, obey, respect, fulfill, protect and defend the Holy Canons, laws, traditions, regulations, order of the Holy Orthodox Church and my Diocesan Bishop, and that I will, as a member of the Serbian Orthodox Church Congregation of St Nicholas in Hamilton, my parish church, I will regularly and devotedly fulfill all duties and obligations, prescribed by the Constitution, Rules and Regulations of the Serbian Orthodox Church in the United States of America and Canada and the By-Laws prescribed by this Church-School Congregation, so help me God. (Bylaws, art. 81)

[21] The rules under the 1982 Constitution provided that the Diocesan authorities could substitute a temporary trusteeship if they determined that the Executive Board was not serving in accordance with the precepts of the Church (arts. 41 and 44). The Statute provides similarly in art. 31.15:

> If in the opinion of the Diocesan authorities, the Executive Board of a Church-School Congregation is not serving according to the precepts of the Church, the Diocesan Administrative Board may appoint a temporary trusteeship which performs all the duties of the Executive Board and which has all the rights, powers and obligations of an Executive Board under this Statute, until the Diocesan Administrative Board determines that conditions in the Church-School Congregation have normalized so that a new Board may be elected.

[22] The Congregation's Bylaws acknowledge this authority in art. 31: "If an Annual Assembly deliberately oversteps the boundaries of its authority and disregards the directives of the Diocese, the Diocesan authorities are within their rights to annul such a decision."

[23] Article 31.15 of the Statute is the provision under which the Diocesan Administrative Board replaced the Congregation's Executive Board with the Temporary Trusteeship in 2005. It substantially repeats art. 44 of the 1982 Constitution.

[24] As required by the Statute, the Diocese attempted to hold new elections for the Executive Board in early 2006, but protests continued. Things had not improved by the end of 2006.

**The Executive Board and Congregational Property**

[25] The Executive Board has always been responsible for administering the Congregational property. The 1982 Constitution stated, in art. 26:

> 1. The Church and other buildings constituting parish property shall be used in the service of the [...] needs of the parish. Parish property shall at all times be held subject to and administered in accordance with this Constitution, the Rules and Regulations and the laws of the state or province in which the parish may be registered.
>
> 2. [...] Property of the Church-School congregation shall be used to serve the Church, school, religious-educational and charitable purposes of the congregation. Properties of the Church-School congregation shall be administered directly by the board thereof, under the direct control of the Diocesan council, and in accordance with this Constitution, the rules and Regulations, and the laws of the state or province in which it is incorporated.

The Statute states:

> The Diocesan Bishop supervises the administration of real and personal property by the clergy and laity of the respective administrative bodies of the Church in the Diocese of Canada. (Art. 14.3)
>
> The properties of the Congregation are administered directly by the Executive Board thereof under the direct

> control of the Diocesan Council and Diocesan Bishop according to this Statute. (Art. 29.9)

[26] The Bylaws provide:

> The officers of the Church-School Board represent and are responsible for the movable and real estate property. The rights and duties are as follows: to buy, sell, rent property of the Church-School Congregation if and when such transaction is approved at an extraordinary meeting by the two thirds of members in good standing. (Art. 41(a))

Among the duties of the Executive Board listed in art. 42 of the Bylaws is managing Church property (subsection (c)).

[27] Despite this responsibility, art. 42(h) of the Bylaws states that if conflicts arise in the performance of any Executive Board duties and the membership cannot find a solution, the Diocesan Council can make a final binding decision.

[28] The position of "Trustee" is created by art. 56 of the Bylaws, presumably to reflect the deeds to the Congregational properties. It provides:

> The TRUSTEES are elected at the Annual Assembly from the members. [...] Without their consent and signatures no loan can be taken on behalf of the Church-School Congregation, nor can any piece of property be sold even if the Executive Board of the Church-School Congregation has decided so.
>
> If there arises a question of buying some property for the Church-School Congregation and which is found to be profitable and it can be purchased if the money is borrowed against already owned Church-School

> Congregation property and two thirds of the members in good standing vote for it, be it on a regular or Extraordinary assembly meeting convened for that purpose, then trustees are obliged to consent to it and grant their signatures.
>
> In accordance with the Constitution of the Serbian Orthodox Church and Diocesan Constitution all decisions relating to purchasing, incurring debts or giving away in any form of the property of the Church-School Congregation foreseen by articles 41 and 56 of these bylaws, must be submitted to the Diocesan Authorities, namely to the Bishop for final approval.

[29] Trustees are responsible for taking out loans and selling property, but this requires approval by two-thirds of the Congregation and by the Diocese (arts. 41, 56).

[30] The nature of the property interests is addressed in both the 1982 Constitution and the Statute. Article 26 of the 1982 Constitution states that parish property is to be used in serving the needs of the parish, but in the event of dissolution of a church-school congregation it devolves to the Diocese.

[31] The Statute provides:

> The property of the Church-School Congregation consists of all its property in general as well as property of individual funds, institutions and establishments acquired by the Congregation with its material means or by gift. Such property shall be used to serve the church, school, religious, educational and charitable purposes of the Congregation and shall be maintained by the congregation. (Art 29.8)

> All property of the Church or its bodies in Canada is held on trusts for the Serbian Orthodox Diocese of Canada. If the Serbian Orthodox Diocese of Canada ceases operations, its property is to be held in trust by the Serbian Orthodox Church for the renewal of church life in the Canadian Diocese. (Art 9.4)
>
> Properties of the dissolved or disbanded parish devolve to the Diocese to be used for missionary purposes. (Art 28.19)

[32] Similarly, art. 82 of the Bylaws provides: "In case that the Church-school congregation in Hamilton ceases to exist, all Church property will be held for safe keeping by the Canadian Diocese, which will try to revive this Church-School Congregation."

## C. THE DECISION BELOW

[33] The application judge reviewed the governance documents of the Diocese and the roles and responsibilities of parishes. He also reviewed the Congregation's Bylaws, how the Bylaws came into force and the process by which the Diocese replaced the Executive Board with the Temporary Trusteeship. He identified the "threshold question" at para. 41 as whether the respondents had violated trust law in "constructively removing and replacing the elected trustees". Such a violation, he noted, "would be a breach of property rights which could justify judicial intervention."

[34] The application judge referred to the relevant provisions of the ROLA. Two of the properties were purchased when its predecessor, *The Religious Institutions Act,* S.O. 1912, c. 81, was in force. The others were bought after the ROLA came into force. The parties accept the application judge's statement, at para. 6, that all of the properties are held pursuant to the ROLA.

[35] The application judge found, at paras. 26-27, that, indisputably, "the Congregation falls within the definition of a 'religious organization' in section 1(1) of ROLA." He also found that "the Congregation's trustees fall within the definition of trustees in the [ROLA] as regards of the holding of *real* property." He noted, consistent with s. 3 of the ROLA, that "the religious organization may 'by resolution adopted at a meeting of the organization' provide for the appointment and removal of trustees," and that a trustee is to hold office until he or she dies, resigns or ceases to be a member of the organization, "unless the constitution or a resolution of the religious organization otherwise provides."

[36] The core of the application judge's decision is found at para. 42:

> There is no doubt that the Congregation's property is held in a charitable trust for the benefit of its members. Since the Congregation is an unincorporated organization, its property must be held in trust, and *ROLA* applies to the real property. In non-hierarchical organizations, the trustees may be said to hold property in trust for themselves and all members of the congregation. Here the structure of the Church as set out in its Statute makes it clear that individual members do not have a beneficial, equitable interest in the

> property. The property would devolve to the Diocese in the event of dissolution of the Congregation, therefore individual members of the Congregation have no right to an ownership interest in either the real or personal property held for the Congregation but rather they have the right to share in the benefits derived indirectly from the use of that property for religious purposes by virtue of their membership. As a result, their *individual* property rights are not engaged as for example in a case where membership in the religious organization was accompanied by certain rights to occupy and use communally owned property.

[37] Regarding the relationship between the Executive Board, the trustees, and the Diocese, the application judge found, at paras. 43 and 44:

> ... [I]t is reasonable to say that under both the Congregation's bylaws and the Statute, the actions of the trustees are directed by the administrative decisions of the Executive Board (or temporary trusteeship) and subject to diocesan approval.
>
> Since the Congregation's bylaws were superseded by the Statute as a result of the diocesan resolution in February 2007, the provisions of the Statute apply to this matter. In it, the Executive Board is given the duty to represent and protect the interests of the Congregation and administer Congregation property as directed by the Assembly and Diocesan Administrative Board. In effect, by the Statute, the Executive Board is given the role previously shared (at least nominally) in the bylaws between the Executive Board and the trustees.

[38] The application judge concluded, at para. 46, that the Diocese acted in compliance with s. 3 of the ROLA when it replaced the Executive Board of the Congregation with the Temporary Trusteeship. He noted that:

> The trustees have continued to exist but the entity directing them has been changed by the Bishop and diocesan authorities. As a result, I find no breach of provincial law and therefore no engagement of property, contract or other civil rights.

[39] As I interpret these findings, according to the application judge, the members of the Temporary Trusteeship are now the trustees for the purposes of the ROLA. When a new Executive Board is elected by the Congregation, those new members will then assume the role of trustees under the ROLA, unless new congregational bylaws, as approved by the Diocese, revive the position of trustee.

## D. THE ISSUE

[40] The factual context raises the following issue: Are the Congregational properties held in trust to be managed by the previously elected trustees, as the appellants contend, or by the Temporary Trusteeship, as the respondents contend?

## E. THE POSITIONS OF THE PARTIES

[41] While conceding that the Diocese has "overriding authority over spiritual and ecclesiastical matters", the appellants take the position that the Congregation, through the trustees and the Executive Board elected in 2005, has "overriding authority over matters relating to the Real Property which was granted to them [by] the Deeds." The appellants argue, as noted by the application judge at para. 22, that under the ROLA, it was "not legal to constructively remove the trustees of the real property." They assert that the Diocese's "purported authority" to do so, "must be subservient to provincial legislation and was therefore invalid in these circumstances."

[42] The appellants argue that the application judge erred by looking beyond the deeds to base his analysis on "the Statute, the resolutions made by the Diocese based upon the Statute, and the Diocese's Trusteeship that was imposed pursuant to the Statute." These documents, according to the appellants, are "irrelevant and extraneous factors." They argue that the application judge should have taken a rigorously secular, American approach to resolving church property disputes known as the "neutral principles of law" doctrine ("NPL doctrine").

[43] The respondents support the application judge's reasoning.

## F. ANALYSIS

[44] At bottom, the appellants' argument is based, as I will explain, on a misapprehension of the nature and purpose of the ROLA. In aid of their argument the appellants enlist the American NPL doctrine. On close examination, however, this doctrine is not helpful in resolving this case. The application judge did not err in his application of the principles of law as they have developed in Ontario and in Canada.

[45] In this section of the reasons I consider first the purpose and genesis of the ROLA, and second, how courts have approached disputes within religious organizations. I next turn to the application judge's analysis, and then conclude by addressing the American NPL doctrine.

### (1) The Purpose and Genesis of the *ROLA*

[46] The ROLA was enacted in 1979 after the Ontario Law Reform Commission's report on "Mortmain, Charitable Uses and Religious Institutions" (Toronto: Ministry of the Attorney General, 1969). It is the successor statute to *The Religious Institutions Act*, which had been in force, with few changes, since 1873.

[47] The Commission's report noted, at p. 49, that *The Religious Institutions Act* was "originally designed to permit religious societies to acquire and hold land for places of public worship and related uses in a convenient way." The Commission

supported its revision because "it continues to be of great utility, particularly, for smaller denominations". The main advantage of the legislation, according to the Commission, was the benefit of perpetual succession for trustees. Without legislation these organizations would be treated in law like any other unincorporated association, and could "hold land only through individual trustees whose appointment, tenure and power would be governed by the more onerous provisions of *The Trustee Act*."

[48] Professor Albert H. Oosterhoff served as director of research for the Commission. In his view, the ROLA effected two important changes. The first was to "extend the privileges of holding land by means of trustees with perpetual succession to virtually all religious persuasions" (Albert H. Oosterhoff, "Religious Institutions and the Law in Ontario: An Historical Study of the Laws Enabling Religious Organizations to Hold Land" (1981) 13 Ottawa L. Rev. 441 at p. 465). Second, the purposes for which land might be held under legislation were broadened to ancillary uses other than worship.

[49] Professor Oosterhoff noted, at p. 465, however, that:

> The Act always was and remains biased in favour of religious organizations with a congregational form of church government. In other words, the trustees are appointed by and derive their authority for specific acts such as sale, lease and mortgage from the congregation or other organization, assembled in a meeting called for that purpose. It may be questioned

> whether this model is appropriate for many religious organizations.

[50] However, there is no hint in the Commission's report or in the ROLA of any intention to force governance changes on religious organizations, for example, by making congregational democratic practices mandatory for hierarchical organizations.

[51] Professor Oosterhoff observed, at pp. 465-466, that s. 4 of the ROLA would respect an episcopal form of organization by permitting the property to be held by one person, where, under the organization's constitution, customs or practices, its "property is vested in one person." He did not refer specifically to s. 3(2) of the ROLA, which provides that "[u]nless the constitution or a resolution of the religious organization otherwise provides, a trustee holds office until he or she dies, resigns or ceases to be a member of the organization." This was the provision on which the application judge based his decision.

### (2) The Court's Approach to Disputes within a Religious Organization

[52] While the law relating to property disputes within a religious organization might seem arcane, in my view most issues can be resolved using a mix of ordinary trust and contract law principles the court applies to voluntary associations and analogous relationships. See, generally, Professor Margaret

Ogilvie, *Religious Institutions and the Law in Canada*, 3rd ed. (Toronto: Irwin Law, 2010), at 217, and at 291 and following.

**(a) Judicial Diffidence**

[53] The invitation to a court to intervene in the internal affairs of a religious organization comes invariably, as it did in this case, at the request of members who feel aggrieved by the actions of the organization.

[54] The application judge accurately observed, at para. 40, that: "Courts are reluctant to exercise jurisdiction over disputes within religious organizations that involve issues of church governance." He added that while disputes about religious doctrine are not appropriate for judicial determination, "courts *have* intervened to review the actions of religious bodies when the controversies (typically regarding membership) involve property, contracts or other civil rights." This was a fair characterization of how Canadian courts generally approach disputes within religious organizations.

[55] There are good reasons for judicial diffidence. Freedom of religion, a fundamental right protected by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, can be implicated in such disputes and must be respected. Courts also recognize the real risk of misunderstanding the relevant religious tradition and culture, and that a mistaken decision could saddle the organization

with difficult if not unworkable consequences: *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at paras. 63-64.

[56] Judicial angst about the area shows in the numerous cases cited and explained by Professor Alvin Esau in "The Judicial Resolution of Church Property Disputes" (2003) 40 Alta. L. Rev. 767, and by Professor Margaret Ogilvie in "Church Property Disputes: Some Organizing Principles" (1992) 42 U.T.L.J. 377, and in *Religious Institutions and the Law in Canada*.

**(b) A Consistent Method has Emerged**

[57] While it is fair to say that Canadian courts are still feeling their way through the principles underpinning the connection between civil law, on the one hand, and religious organizations and their internal laws, on the other, a relatively consistent method or pattern has emerged in property disputes. This can be seen in two recent decisions involving the Anglican Church of Canada, one by the British Columbia Court of Appeal and the other by this court: *Bentley v. Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506, 11 B.C.L.R. (5th) 209, leave to appeal refused, [2011] S.C.C.A. No. 26, and *Incorporated Synod of the Diocese of Huron v. Delicata*, 2013 ONCA 540, 117 O.R. (3d) 1, leave to appeal refused, [2013] S.C.C.A. No. 439.

[58] In both cases, the dissident majority of a parish congregation was opposed to the decision of the Anglican Church of Canada (ACC) to permit the blessing of

same-sex partnerships. Both congregations sought a declaration that they were the beneficial owners of the property held in trust for the parish. Each appeal court saw its task as construing the terms of the trust on which the properties were held. In doing so, each court considered the deeds, the applicable legislation, the canons or church law promulgated by each diocese, and, to some extent, the doctrinal context.

[59] In *Bentley*, the B.C. Court of Appeal considered the historical and statutory context of the incorporation of the parish corporations and found that the property was held on implied trusts for "the purpose of Anglican Ministry" (paras 63-65). The court found, at paras. 74-75, that in Canada, "Anglican ministry" and "Anglicanism" cannot be separated from the notion of the ACC's episcopal authority. The ACC is a "quintessentially hierarchical body" and "Anglican ministry in Canada is "as defined by the ACC.'" Thus, although the parish corporations hold the property in trust for the purposes of Anglican ministry, this court found that the trial judge did not err in declining to grant a *cy-près* order as it was "antithetical to the nature of Anglicanism to contemplate 'Anglican ministry' in a parish that has withdrawn from the authority of its diocese and bishop."

[60] The authority of the Anglican Diocese of Huron was at issue in *Delicata.* The Diocese was incorporated by S.O. 1875, c. 74, which provides that property held for church purposes may be conveyed to the Synod (the governing council of the diocese), which "shall hold the property in trust". The Act also empowers

the Synod to enact canons, which function as bylaws. Canon 14 provides that legal title to all real property held by any parish or congregation within the diocese must be registered in the name of the Incorporated Synod of the Diocese of Huron, which holds such property "in trust for the benefit of the Parish or congregation" (paras. 17-19).

[61] This court confirmed the trial judge's conclusion that the "Parish" for which the property was held in trust is a static entity: members may come and go, but the parish itself remains constant and cannot sever itself from the diocese (para. 69). This conclusion was based on the language and purpose of Canon 14, which states that church property cannot be disposed of without the Bishop's consent (para. 70). This provision implies that the Bishop, and by extension the Diocese, retains control over church property in perpetuity for the benefit of members of the Diocese. The court's interpretation of the *Anglican Church of Canada Act,* S.O. 1979, c. 46 also supported this conclusion. Section 2(1) of this Act requires the consent of diocesan bishop and of the Synod's executive committee to any sale, lease or encumbrance of church land (para. 71). I observe that the trial judge and this court relied on expert evidence about the institutional structure and doctrines of the Anglican Church.

[62] The analytical method applied by both appeal courts of 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, was not novel. The same approach was applied to a similar dispute in *United Church of Canada v. Anderson* (1991), 2 O.R. (3d) 304, [1991] O.J. No. 234 (Gen. Div.), and in numerous earlier and later cases cited by Professor Esau involving Hutterites, Lutherans, Greek Orthodox, Presbyterians, Christian Reformed and other faith groups. Professor Esau summarizes how courts have approached these cases at paras. 117-118 of his article, where he states that "Canadian courts will not simply defer to the ecclesiastical judgments of church authorities about membership issues without judicially reviewing those decisions to ensure that they conform with the internal law of the religious group." He adds that: "Canadian courts can interpret and apply both express and implied doctrinal trusts to resolve property disputes when membership alone does not determine the matter", and are willing "to muddle through religious documents and entertain the conflicting testimony of religious experts." As I noted earlier, this happened in *Delicata.*

[63] That said, it is highly unlikely that a Canadian court today would engage in the thoroughgoing doctrinal analysis this court undertook in *Wodell v. Potter* (1929), O.J. No. 74 at para. 45, 64 O.L.R. 484. The court was obliged to determine which of two factions in a Baptist church was entitled to the property under the *Property of Religious Institutions Act* (the previous title of *The Religious Institutions Act*). The trust requirements in the deed imposed a very detailed theological litmus test. While the court did interpret these requirements and

ultimately held that both factions met the trust terms, Riddell J.A. noted the court's discomfort at para. 45:

> The Court has no jurisdiction in this case to enter upon the belief of any man, except as the inquiry may be necessary to determine property-rights of some kind. We have declared the rights of the plaintiffs in respect of the class of persons for whom they hold the property in question; and that is as far as the should attempt to go.

[64] In summary, while courts are cognizant of the unique implications of property disputes within religious organizations, they have nonetheless been willing to imply trust terms and to construe institutional documents that involve some aspect of religious doctrine. I now turn to whether the application judge correctly applied this approach in the case at hand.

**(3) Application to this Dispute**

[65] What makes this intra-congregational dispute unusual is that there is no schism. There is no dissident group that wishes to leave the Congregation and take the Congregation's property with it. Although the Temporary Trusteeship has been imposed by the Diocese, it is composed of members of the Congregation. Further, the Congregational properties have continued to be used throughout this time by the Congregation in the same way that it did before this litigation started. No one has been displaced. While there is some suggestion of disputes regarding expenditures on the roof and the floor, these are relatively

minor. For reasons that are not clear, the appellants simply seek to wrest control of the properties from the Temporary Trusteeship.

[66] It is common ground that the trustees who took title did so in accordance with *The Religious Institutions Act* or the ROLA and were properly empowered to do so by the Congregation under the terms of each statute, and that the Congregation's properties are held in trust under the ROLA.

[67] The appellants argue that:

> ... the deeds clearly and unequivocally designate the Congregation as the sole beneficiary under each deed executed in 1963 and 1964 respectively. Since then, the Congregation has continuously exercised its authority and absolute control over the real estate property, through the original trustees and their successors, who were elected and accountable to the Congregation, in compliance with *ROLA* and the deeds.

[68] The application judge had the deeds before him, and in the absence of express trust terms, correctly expanded his analysis to the ROLA, the 1982 Constitution, the Statute, and the Bylaws of the Congregation. He considered particularly, art. 56 of the Bylaws, excerpted above, on which the appellants rely.

[69] The appellants take issue with the application judge's finding that the actions of the Diocese in replacing the Executive Board of the Congregation with Temporary Trustees complied with s. 3 of the ROLA.

[70] But the appellants do not quarrel with Church law per se. In fact, they also look beyond the deeds and rely on Church law to found their claim that they are the trustees of the Congregational properties under the ROLA by virtue of their election pursuant to art. 56 of the Bylaws. They say that the ROLA attaches to that election and gives them specific and exclusive authority over the property. However, the appellants' invocation of the Congregation's Bylaws admits what is undeniable: that s. 3 of the ROLA applies. Of particular importance is s. 3(2), which provides:

> Unless the constitution or a resolution of the religious organization otherwise provides, a trustee holds office until he or she dies, resigns or ceases to be a member of the organization.

This section specifically acknowledges that the religious organization's constitution or resolutions can supersede elements of the ROLA, as the application judge held.

[71] Further, art. 56 of the Bylaws cannot be separated from the context of the Bylaws as a whole, and the Congregation's relationship to the Church and the Diocese. The Bylaws make this relationship clear: the powers of trustees under the ROLA with respect to the acquisition, disposition and mortgaging of land are clearly subject to the approval of the Diocese. The application judge correctly concluded that the Temporary Trusteeship holds the Congregational properties in trust. The duty of the trustees to hold the properties under the direction of the

Temporary Trusteeship follows from s. 3 of the ROLA, art. 29.9 of the Statute and arts. 41 and 56 of the Bylaws.

[72] Regarding the replacement of the Executive Board with the Temporary Trusteeship, the application judge concluded, that:

> Those actions were not in conflict with section 3 of *ROLA*. The trustees have continued to exist but the entity directing them has been changed by the Bishop and diocesan authorities. As a result, I find no breach of provincial law and therefore no engagement of property, contract or other civil rights. (Para. 46)

[73] The application judge's conclusion was based on the evidence, and on his application of the applicable law to it; the appellants have identified no error in his consideration of the evidence or in his application of the law.

**(4) The American "Neutral Principles of Law" Doctrine**

[74] The appellants argue that the application judge erred by failing to apply a strict interpretation of the American NPL doctrine. Under this approach, they argue, he should have excluded from consideration virtually all of the Church, Diocesan and Congregational documents. They submit that this court adopted the NPL doctrine in *Balkou v. Gouleff*, 68 O.R. (2d) 574, [1989] O.J. No. 655, (C.A.), and in *Montréal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc. v. Protection of the Holy Virgin Russian Orthodox Church*

*(Outside of Russia) in Ottawa, Inc.*, 167 O.A.C. 138, [2002] O.J. No. 4698 (C.A.), leave to appeal refused [2003] SCCA No. 285.

[75] Although I do not agree that this court has adopted the NPL doctrine as the mandatory approach to all church property disputes, the trial judge effectively took the approach required by it. The appellants' argument thus loses much of its force.

### (a) Description of the American "Neutral Principles of Law" Doctrine

[76] The NPL doctrine reflects ongoing tension in American courts about how to reconcile the obligation to adjudicate church property disputes with the constitutional limits imposed by the First Amendment anti-establishment clause.

[77] The doctrine was adopted by a slim majority of the U.S. Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979). Under the NPL approach, a court must analyze deeds and other documents detailing entitled to church property in a "completely secular" manner, relying "exclusively on objective, well-established concepts of trust and property law". (pp. 611-612. Internal citations omitted.)

[78] The appellants' submissions misunderstand the role of the NPL doctrine in American jurisprudence.[1] Significantly, the majority in *Jones v. Wolf* did not hold that the application of the NPL doctrine is mandatory in all cases: it remains open to states to apply the traditional approaches of polity deference or abstention (p.

602).[2] Further, the majority contemplated consideration of "the provisions in the constitution of the general church" to determine who controlled the property (p. 603). It is thus clear that the NPL doctrine does not preclude courts from examining a variety of internal church documents at both the congregational and hierarchical levels.[3]

**(b) Application of the NPL Doctrine to the Decision Below**

[79] Contrary to the appellants' argument, when the NPL doctrine is viewed in its full scope, it is clear that the application judge's decision is consistent with both this court's usual approach and the neutral principles approach. The application judge examined the ROLA, and the range of documents relevant to the terms of the trust affecting the congregational properties, and to the issue of how trustees should be appointed, including the deeds, the Statute, the resolutions of the Diocese made pursuant to this Statute, and the terms of the Temporary Trusteeship. He concluded that the Diocese had the administrative authority to replace the Executive Board with the Temporary Trusteeship. In so finding, he did not determine any doctrinal issues but rather followed the process outlined in *Jones v. Wolf*.

### (c) The "Neutral Principles of Law" Doctrine in the Ontario Court of Appeal

[80] The appellants assert that this court adopted the NPL doctrine as a binding approach to property disputes within religious organizations in *Balkou* and *Holy Virgin*. I disagree.

[81] *Balkou* involved a schism in the Russian Orthodox Church outside of Russia. Although the court cited *Jones v. Wolf*, it did so not in reference to the property dispute, but with respect to the trial judge's declaration that the parish fell under the jurisdiction of one church and not another, and that consequently the parish priest had no right to officiate as a priest. As for the property dispute in *Balkou*, the court relied on *Wodell v. Potter* rather than on the NPL doctrine. Since the endorsement in *Balkou* did not apply *Jones v. Wolf* to the property issues in that case, it should not be interpreted as adopting the NPL approach for application in all church property disputes.

[82] *Holy Virgin* also involved a church property dispute that was rooted in a doctrinal schism over whether the congregation could withdraw from the Russian Orthodox Church Outside of Russia. The trial judge specifically adverted to *Balkou* and to *Jones v. Wolf*. See [2001] O.J. No. 438 (S.C.), at para. 42.

[83] On appeal, this court concluded, at para. 7, that "because the parties' dispute over the validity of the proposed amendments ... is at heart a religious dispute, under the 'neutral principles approach' affirmed by the Supreme Court of

Canada, the court has no role to play." I have been unable to find a case in which the Supreme Court of Canada has affirmed the NPL doctrine, and infer that this court was referring to and relying on the 1940 Supreme Court case of *Ukrainian Greek Orthodox Church v. Trustees of Ukrainian Greek Orthodox Cathedral*, which had been cited in argument. The NPL doctrine was not adopted in the United States until about thirty years later.

[84] On close examination, it is evident that NPL doctrine did not determine the outcome of the property issues in either *Balkou* or *Holy Virgin*. Both were short endorsements, not full decisions, and must be interpreted in light of this court's statement in *R. v. Singh* 2014 ONCA 293, that "care must be taken to avoid reading unwarranted jurisprudential principles into a decision of the court rendered in an endorsement." (para. 12)

[85] Finally, it is important to keep in mind that the NPL doctrine is rooted in the First Amendment of the American Constitution. In light of Chief Justice Dickson's observations in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at paras. 105 and 109, that American constitutional law is "not particularly helpful" since the Canadian Constitution does not contain an "anti-establishment principle" analogous to the American First Amendment, it would be a significant jurisprudential step for a Canadian court to adopt the NPL doctrine holus-bolus. I conclude that this did not occur in *Balkou* or *Holy Virgin*. I note that in Bentley,

the B.C. Court of Appeal declined to adopt the neutral principles approach (para. 55).

### (d) Concluding Observations on NPL Doctrine

[86] In the absence of the anti-establishment concerns that exist under the American constitution, Canadian courts have not hesitated to interpret religious documents that involve doctrinal matters when adjudicating church property cases. This court's reference to the NPL doctrine in *Balkou* and *Holy Virgin* did not overrule this established approach. The issues and evidence before the application judge necessitated consideration of internal church documents. It was not an error for him to take these documents into account in reaching his decision.

## G. DISPOSITION

[87] The appeal is dismissed with costs fixed at $15,000 all-inclusive.

P Lauwers JA

I agree Doherty JA

I agree G.R. Strathy J.A.

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Released: JAL

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[1] The current state of American law permits courts to take one of three approaches in disputes about church property. The first is known as "polity deference", the second is the NPL doctrine, and the third is simple abstention from deciding. See generally Esau, and Professor Kent Greenawalt, "Hands Off! Civil Court Involvement in Conflicts over Religious Property" (1998) 98 Colum. L. Rev. 1843.

[2] Blackmun J. noted "a State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of

worship or the tenets of faith" (p. 602). Further, "any rule of majority representation can always be overcome, under the neutral-principles approach, either by providing, in the corporate charter or the constitution of the general church, that the identity of the local church is to be established in some other way, or by providing that the church property is held in trust for the general church and those who remain loyal to it. Indeed, the State may adopt any method of overcoming the majoritarian presumption, so long as the use of that method does not impair free-exercise rights or entangle the civil courts in matters of religious controversy." (pp. 607-608)

[3] Professor Greenawalt notes, at p. 1887, that not only is such inquiry permitted, in determining questions of who forms the "true congregation" of a church, examination of these documents may be required.