IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF BATHURST

Citation: 2010 NBQB 400
Date: November 29, 2010 **Docket: MM/0103/10**

Between:

L'Évêque Catholique Romain de Bathurst

Applicant

- and -

Her Majesty the Queen in Right of the Province of New Brunswick as Represented by the Attorney-General of New Brunswick

Respondent

Before: **Justice Fred Ferguson**

Date of hearing: **November 15, 2010**

Date of decision: **November 29, 2010**

Appearances:

Mark R. Frederick **Robert B. Hayhoe**	**for the Applicant**
Nancy Forbes	**for the Respondent**
Bruce Eddy Q.C.	**court appointed counsel representing the objects of the Trusts**

FERGUSON J.

INTRODUCTION

[1] This Application, filed on October 1, 2010, is brought by L'Èvêque Catholique Romain de Bathurst (the Bishop) in relation to twenty one trusts (the Trusts or the Funds) that are the property of the Diocese. These trusts came into existence at one time or another over the last one hundred years largely through bequests to the Diocese as well as, to some extent, specific purpose contributions of the congregations of the Diocese made at its behest from time to time. The objects of all of these trusts are the education and training of candidates for the priesthood. The proceeding was conducted in English because that was the language of choice of the Applicant.

[2] The Diocese asks that those original objects of the trusts be broadened by the court to allow the Diocese to access a major portion of the accumulated funds in the Trusts. The Applicant contends that the specific objects have become largely "impracticable" to accomplish, in the broad sense of the word, owing to a long standing deficiency within the Diocese in the number of candidates prepared to undertake the necessary education and training for the priesthood. That deficiency of

candidates has resulted in a steady increase in the financial value of the trusts to the point that they are now collectively valued at approximately $4,300,000. The average draw down from the funds for the education and training of candidates for the priesthood over the last twenty years has been approximately $57,200 per year.

[3] It is likely that the steady growth of the Funds would have continued unabated and thus untouched had the Diocese not voluntarily accepted civil responsibility for the sexual abuse of a number of persons within the Diocese, at present numbering approximately forty five, committed between the late 1950's and the 1980's by one or more of its priests. The offences were principally perpetrated by a formerly practising priest named Levi Noel. None of the perpetrators are still practising clergy within the Diocese or the Roman Catholic Church.

[4] The Diocese asks that the trust doctrine of *cy-près* be applied to broaden the specific objects of the Trusts in a way that allows the Diocese to access the excess funds in the Trusts' income portion that have accumulated over the years. The doctrine of *cy-près* allows a court in certain circumstances to vary the specific objects that were originally intended by the settlor/donor to alleviate or eliminate a problem encountered in

the carrying out of the trusts' specific objects. In this instance it is contended that the ever growing Funds have resulted in "supervening impracticability" to achieve the goal intended. If the Bishop is granted access to the surplus that has accumulated this money would then be used to assist the Diocese in paying the compensation claims identified as well as those that are pending and may become judgments against the Diocese. As shall be seen, it is not yet clear because of the legally unresolved portion of this sexual abuse scandal whether, even if this request is granted, the financial and thus ultimate corporate demise of the Diocese can be avoided.

THE EVIDENTIARY AND PROCEDURAL FRAMEWORK

The Bishop's Response to the Sexual Abuse Revelations

[5] The current Bishop of the Diocese, Father Valery Vienneau, upon discovering the sexual abuse scandal, reached out to the general membership of the Diocese in open letter in April 2010 asking that those who suffered sexual abuse at the hands of any of its priests come forward and become part of an independent and confidential Alternative Dispute Resolution (ADR) process he had devised. This process is headed by former Supreme Court justice, The Honourable Michel Bastarache. That approach,

initiated by the Bishop prior to any litigation being launched against the perpetrator(s) and the Diocese, has been described by counsel as virtually unprecedented in Canada in the Catholic and Protestant faith.

[6] Mr. Bastarache has guaranteed the victims of sexual abuse who come forward anonymity to the point that when compensation is paid the Diocese will do so to individually numbered victims through Mr. Bastarache who will be the only person able to personally identify each victim. His task has been, and continues to be as he works through the process, the verification and quantification of claims made by the victims who have and may come forward.

[7] The rationale for such a peremptory decision by the Diocese was to afford victims timely justice and fair financial compensation for the wrongs done to them. Making the process confidential and independent addressed the potential concern that some victims might not otherwise come forward owing to the unwarranted but nonetheless real shame they might subjectively feel for what had been done to them. They, of course, share none of the blame for what was done to them. Plainly and simply, they were the victims of a heinous breach of trust committed by one or more rogue priest(s).

[8] In a previous decision, *L'Èvêque Catholique Romain de Bathurst v. Her Majesty the Queen in Right of the Province of New Brunswick* 2010 NBQB 372 (N.B.Q.B.), that focussed on preliminary issues that required resolution before this Application could be heard, I described this initiative by the Bishop as both courageous and empathetic. The hearing of this Application reinforced, from the Diocese's financial liability standpoint to the victims, the courageous aspect of those conclusions.

[9] The Bishop's decision to extend the hand of the Diocese to each person and initiate a process to compensate the victims of this sexual abuse was courageous. Moreover, the full extent of the pool of victims was not at the time of that decision, and may still not be, completely identified. Thus, the Diocese had not, and may still not have, as shall be seen, an accurate assessment of the financial implications of the ADR process begun by the Bishop, the concurrent litigation begun by some of those who have chosen not to participate in the mediation and the possible litigation by others who have not decided what they will do about their claims. To date, two law suits have been filed against the Diocese and the rogue priest(s). Mr. Noel is currently serving a federal sentence of eight years imprisonment

for the sexual abuse of his victims having been sentenced on eighteen sexual abuse related charges on January 22, 2010.

[10] His decision was also empathetic in that it attempted to deal with the suffering of the victims as quickly and effectively as was possible in the circumstances once the criminal prosecution against Levi Noel was concluded.

[11] That having been said, no Bishop, no person and no group of persons can restore to those victims, who suffered long term or irreparable damage, their sense of well being. That entitlement to a healthy sense of well being is an implicit individual right. It is presumptively due every person in this country and arises from our individual right to autonomy of the person and the consequent peace of mind that flows from it. Financial compensation, the formal apologies of the Diocese and the request that those who were victimized return to the Church for religious and spiritual comfort may help provide a basis for the healing process to begin for each of them.

[12] Additional policy and education changes within the Diocese have been instituted that may help to prevent a recurrence of this type of activity. All of these actions by the Diocese will assist in helping right the wrongs that have been perpetrated on

the victims and ensuring, as well as is possible, the elimination of a repetition of the abuse in the future.

[13] The functional “near term” goal of the Diocese, Bishop Vienneau and the Honourable Michel Bastarache in carrying out the present plans to attempt to redress the wrongs committed is to provide compensation to all of the victims who have chosen the ADR process by late November or early December of 2010. It is unlikely that a more ambitious time schedule could be set. At the time of the hearing of the Application it appeared that the identification and verification of the valid claims of those who agreed to be part of the ADR had been completed. The quantification of the claims although underway had not been finished.

[14] Finally, as noted, although the vast majority of identified victims have chosen to become part of the ADR process two Plaintiffs have begun litigation against the Diocese and the defendant(s) while ten other potential victims have not made a visible decision on which course of action to take. Counsel for the Bishop advised at the hearing that The Honourable Mr. Bastarache would try one more time to determine whether those undecided persons wished to become part of his attempt to

mediate their individual cases in trying to find a satisfactory financial compensation solution for them.

The Origin of the Trust Funds

[15] As noted, on October 1, 2010 the Bishop made application to this court for a variation of the objects of the twenty one different Funds which are the property of the Diocese and have been treated as charitable trusts since their creation. Some of these were bequests or “letters of donation” to the Diocese by parishioners; thirteen of them arose from bequests by former priests of the Diocese; one fund is the result of “specific purpose” requests of the Diocese. This last Fund has been referred to as “The Seminaristes” Fund. As stated, all of the Funds were specifically aimed at providing financial support for the education and training of candidates for the priesthood.

[16] Most of the bequests and “letters of donation” appear to have originated in the Bathurst region. However, some were the result of bequests to the Diocese of Chatham before that Diocese was eliminated in a church restructuring that saw the current Diocese of Bathurst created in 1939 by private Act of the New Brunswick Legislature. See: *3 George VI, 1939 Ch. LXI*. The Miramichi region, in a later restructuring, became part of the

Diocese of Saint John. When the original restructuring took place in 1939 all of the resulting charitable trusts arising from the bequests from the Miramichi area became the property of the Diocese of Bathurst.

The Efforts of the Diocese to Recruit Candidates for the Priesthood

[17] The historical context in which these Funds have continued to grow is critical to the outcome of the Application. If the Diocese, while in possession of such Funds did nothing to attempt to fulfill the charitable objects of these trusts, namely, priestly education and training, it could not expect to have a court grant any application to redirect the Funds to other sources of financial need encountered by it.

[18] The Supplementary Affidavit filed by the Diocese's Vicar, Wesley Wade, sets out the considerable efforts that have been taken over the years by the Diocese to attempt to fulfill the objects of the Trusts. As shall be seen, as contemporary Canadian society has grown increasingly secular, recruitment of candidates for the priesthood has become a greater challenge for this and many other Dioceses across the country.

[19] Father Wade deposed that to that end the Diocese established a committee of lay persons and priests:

> "with aims to develop a culture of religious vocations, priests and missionaries."

It regularly considers the needs for vocations in the Diocese and its constituent churches through regular meetings of the committee. The committee proposes projects to increase:

> "…awareness of the faithful of the vocations of marriage, celibacy, and religious life, and the priesthood in particular. The committee efforts ensure that parish communities remain alert to any young men who show a religious vocation, so that the Diocese can encourage and support this calling. This approach to the recruitment of new priests is standard for Roman Catholic dioceses. The Bishop and priests of the diocese also regularly call upon parishioners to pray that the Diocese will obtain new priests to support its ongoing religious mission."

[20] Notwithstanding these efforts the Diocese has had very limited success in recruiting new candidates for the priesthood. Between the years 1990 and 1999 only four men from the Diocese were ordained as priests. Between the year 2000 and 2010 that number declined to two. As present only three are: "still in seminary." In total the Diocese has supported nineteen

seminarians over the past twenty years of which the six previously noted are the only ones to have been ordained.

[21] Of that total number of nineteen candidates who became part of the program between 1989 and 2010 the average annual expenditure of funds for their education and training drawn from the Trusts has been $57,222.41 per year. This includes funding for education and to some extent, in more recent years, for stipends for personal expenses accorded the candidates during part of their education and training period. It is indisputable that the Funds currently held by the Diocese in the twenty one Trusts far exceed the demand generated by the ambitious recruitment efforts and the resulting demands on the Diocese's program to educate priests.

[22] Subsequent to the appointment of Mr. Eddy to represent the specific objects of the Trusts discussions were held among all counsel on this Application. After much consultation it was unanimously proposed by counsel at the hearing that if the Application was to be granted, that is, that the specific objects of these trusts be broadened by application of the doctrine of *cy-près* to allow access to the surplus funds available in the Trusts that it be done on the following basis:

1) that there be no encroachment on the original capital bequest or contribution to the Diocese in each of the individual trusts that stipulated that only the income from the original bequest was to be used for the specific purpose specified;

2) that “drawing down” the surplus funds from each of the twenty one trusts be done on a *pro rata*, or proportional basis, from each of the trusts with “the draw down” to be determined based upon the current market value of each Trust;

3) that a minimum capital amount of $1,500,000.00 be retained in the Trusts on the same *pro rata* basis to perpetually meet the needs of the training and education of candidates for the priesthood on a “going forward” basis.

The Diocese’s Efforts to Prevent Recurrence of the Sexual Abuse

[23] As previously briefly alluded to, and although not central to the outcome of this Application, it is worth explaining that the Diocese has undertaken steps to attempt to prevent recurrence of the sexual abuse that has inflicted so much harm on the victims

of the rogue priest(s) and that has placed the financial survival of the Diocese in jeopardy.

[24] As a result of the sexual abuse of these victims, the Diocese began an education program that will involve all of its 2,800 volunteers and priests in order to help prevent this sort of activity from ever happening again. To date approximately 1,000 people have completed the education program.

The Procedural Processes Preliminary to the Hearing of the Application

[25] The Application was originally filed in Moncton on October 1, 2010 and was subsequently assigned by the Chief Justice of this court in late October. On November 2, 2010 counsel for the Bishop and the Attorney General appeared before me in court in Miramichi to deal with certain preliminary matters, the principal of which was a request by counsel for the Bishop to hold the hearing of the matter *in camera*, that is without public access, and to seal the entire file from public access. The reason given for that request was that disclosure of the general financial information relevant to the health of the Diocese, as well as financial information specific to the process of compensating victims of sexual abuse in the Diocese would

compromise the ability of the Diocese to obtain a fair trial on the law suits that are pending or possibly contemplated. Counsel for the Bishop also submitted that disclosure of the financial information might well also compromise the ongoing ADR process.

[26] The decision on the request for the *in camera* hearing was reserved after submissions were made and the final decision on whether the entire file should be sealed was adjourned for further submissions to be made on the date set for the hearing of the Application, November 15, 2010. The entire file was sealed by interim order until those final submissions could be made. Although the Attorney General had initially adopted a neutral position on all of the issues the Application engaged, in written submissions filed by her counsel, Ms. Forbes, subsequent to the November 2nd appearance, the Attorney General voiced her opposition to the closing of the courtroom to the public for the hearing.

[27] By decision dated November 9, 2010 the hearing of the Application was ordered not to be closed to the public. That decision was the product of an application of the “open courts” principle as enunciated on a number of occasions over the past twenty years by the Supreme Court. For a summary of those Supreme Court decisions see: *L’Èvêque Catholique Romain de*

Bathurst v. Her Majesty the Queen in Right of the Province of New Brunswick (*supra*) beginning at paragraph 15.

[28] The November 9th judgment also provided the reasoning for a decision made by me on November 5th, 2010 to appoint Mr. Bruce Eddy Q.C., an acknowledged expert in the field of trust law. His appointment was effected pursuant to Rule 15.03 and, alternatively, Rule 11.01 of the *Rules of Court*. His task was to represent the objects and inferred objects of the various trusts that were the subject of the Application. That was a necessary step because of the neutral position adopted by the Attorney General on the substantive issues raised by the Application.

[29] It should be made clear that the role of the Attorney General in this proceeding is not one of an adversary to the Bishop. Rather, her role is based on the important responsibilities her office holds with respect to her *parens patriae* jurisdiction: “the state in its capacity as provider of protection for those unable to care for themselves.” *Black’s Law Dictionary* 9th ed., Thomsen Reuters, St. Paul MN. In that capacity she is an invigilator ready to make submissions to the court on the legal principles applicable to all trusts that might be raised by this Application.

[30] In *Re Kunze Estate* [2005] S.J. No. 306 (S.Q.B.) Smith J. described the role briefly at paragraph 32:

> Nonetheless, even in the case of trusts, the Crown also had a role to play as *parens patriae*. As Waters explains:
>
> ... Under its prerogative power, [the Crown] was a protector of the interests of charities and therefore concerned with the maladministration of charitable trusts. Primarily the Crown was thus concerned to see that funds were properly handled, and that expenditures were only made upon trust objects. It would also sue to recover charitable funds which had been fraudulently made available to third parties. This responsibility of the Crown devolved upon the senior law officer, the Attorney-General, as one of his many tasks, and for three centuries at least the Attorney has discharged it, first in England and then later in all other common law jurisdictions where his counterpart, or a nominee like the Public Trustee, has assumed the role.
>
> The extent of the prerogative power has never been entirely clarified but it has assumed the nature of legal representation on behalf of charitable trusts. Legal action may be necessary against fraudulent or negligent trustees or third parties on behalf of the objects of the trust, whether they be persons or purposes, or representation may be needed when the charity is sued or its interests are otherwise affected by pending or current litigation. *The Crown has also assumed a duty to the court whenever called upon to advise and assist it with regard to charities, and, upon an application being made for approval or the ordering of a scheme, the Crown will either represent the*

> *charity or, being informed of the application, be available for the court's assistance*. ... [Waters, supra, at 535] [emphasis added]

[31] The Attorney General thus plays a more protective role than one as a supervisor or adviser of trusts to the court. See: *Waters' Law of Trusts in Canada,* 3rd ed. Thomsen-Reuters, Toronto ON at pp. 788-9. Her role has also been described as: "the representative of all absent charities." *Re Beaverbrook Trust and the City of Saint John* (1980), 30 N.B.R. (2d) 427 (N.B.Q.B.) per Higgins J. at paragraph 5 quoting: *Re King* [1917] 2 Ch. 420 (Chancery Division). For a full explanation of that role, see: *Re Beaverbrook Trust and the City of Saint John* (supra) at paragraph 10.

[32] In her oral submissions Ms. Forbes indicated that if the Attorney General was of the view that the goal of the Applicant was inconsistent with the objects of the Trusts in a general sense she would intervene if necessary. After all of the submissions had been made by all participants at the hearing on November 15, 2010 there was no intervention by counsel for the Attorney General.

[33] Initially, counsel for the Bishop also requested that consideration be given to holding the hearing at a location

other than the Judicial District of Bathurst. Upon release of the decision on preliminary matters the Attorney General filed a motion to have the hearing held in Bathurst. Counsel for the Bishop resiled from his earlier position and consented to having the hearing relocated to Bathurst. Mr. Eddy supported the move and a Consent Order was executed by me moving the trial to that jurisdiction.

[34] In the interim, between the first appearance before me on November 2, 2010 and the hearing of the matter on November 15th, counsel for the Bishop on a number of occasions revised their position on whether all, some or only a small portion of the file should be sealed by way of a confidentiality order. By the time the hearing of the Application commenced on November 15 they had adopted the final position that only five discrete financial figures should be considered by the court as possibly being subject to a confidentiality order sealing that information. Those figures included:

1) the estimated cost of the total amount of compensation due the victims identified and verified through the ADR process;

2) the estimated legal costs due The Honourable Michel Bastarache and his staff for their work;

3) the total of 1) and 2);

4) the estimated cost of compensation for those who have been identified as possible victims who have not become part of the ADR process if they were all to choose to become part of it in the future; and

5) the estimated cost of litigation and compensation if those same persons identified in 4) all were to take their claims through the litigation process to judgment.

[35] Counsel for the Bishop acknowledged that *dicta* in the earlier decision on the preliminary matters to this Application had been the cause of the Applicant's change of position from a blanket sealing order of the entire file to one that sought sealing of only a minimal portion of the relevant financial information.

[36] On November 15, 2010 at the opening of the hearing only counsel for the Bishop spoke to the request for a sealing order. Members of several media organizations attended the hearing. However, only Gail Savoy, the editor of the Miramichi Leader and a spokesperson for Brunswick News, a group of four New Brunswick English daily newspapers and a much larger number of community newspapers in the Province, submitted that no final decision

should made on the request for a confidentiality order until legal counsel for the newspapers could appear to make submissions on the issue.

[37] After being provided a copy of the supplementary affidavit of Father Wesley Wade proposed to be filed by the Applicant that day with the five numbers previously described redacted, and after consulting with legal counsel for the news organization, she withdrew the Brunswick News application for a supplementary hearing at a later date as well as her opposition to the limited confidentiality order being requested.

[38] Upon the conclusion of the submission by counsel for the Bishop an oral judgment was rendered sealing the five financial figures previously set out. The basis of that sealing order involved an application of the principles relating to confidentiality orders outlined in the Supreme Court decision in *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (S.C.C.). In that decision Iacobucci J. fashioned a rule that allows the sealing of confidential information when it can be established that: “an important interest, including an important commercial interest” of a general nature requires it and the salutary effects of the order outweigh the deleterious effects of such an order on the right to freedom of expression

in the context of the principle of open and accessible court proceedings. (*Sierra Club* at paragraph 53).

[39] At paragraph 50 of *Sierra Club* the Court recognized that one of the important interests that may warrant the imposition of a confidentiality order is the right to a fair trial, a principle of fundamental justice. In this instance the Diocese's right to a fair trial on the unlitigated matters might well be compromised if the specific financial liabilities to the verified victims who are part of the current ADR, as well as any financial liability projections of future voluntary compensation settlements or judgments of the court were to become public prior to the resolution of the outstanding claims.

[40] In summary, the very limited confidentiality order sealing the five figures is consistent with long settled principles of civil law. Those principles allow a Defendant, such as the Diocese will be in any litigation arising from the sexual abuse claims, the right to keep confidential the amount or amounts it has paid during litigation to opponents that has not been made public, what funds it holds in reserve for possible compensation awards it feels it may be liable to pay in the future as a result of ongoing litigation and the costs of legal fees necessary to complete a legal proceeding to final resolution.

All are in one way or another linked to solicitor-client privilege or litigation privilege against disclosure. See, in this regard: *Smith v. Jones* [1999] 1 S.C.R. 455 (S.C.C.) per Cory J. for the majority at paragraphs 44 and 50.

[41] Allowing even that very limited but important financial information to be publicly disseminated would, on the basis of the current evidentiary record, place the Diocese at an unacceptable litigation and negotiation disadvantage going forward. It should also be noted that this limited confidentiality order is consistent with the statutory right of privacy of certain records found in *The Right to Information and Protection of Privacy Act*, S.N.B. 2009 Ch. R-10.6, s. 22.

[42] In keeping with the application of the principles approved and set out in *Sierra Club*, counsel for the Attorney General, Mr. Eddy and myself have been provided unredacted copies of the Supplementary affidavit of Father Wesley Wade by the Applicant. That information as shall be seen is vital to ensure an informed, fair and just resolution of the Application. See: *Sierra Club of Canada v. Canada (Minister of Finance)* (*supra*) at paragraph 79.

ANALYSIS

The Basis of the Admitted Liability of the Diocese

[43] To begin, it is clear by its actions in instituting the ADR process that the Diocese has accepted its legal responsibility for the sexual abuse perpetrated by the rogue priest(s) of the Diocese. This decision accords with the Supreme Court's view of the nature of the legal relationship between the Diocese and the priest/offender(s) in question in the circumstances of this case. *John Doe v. Bennett* [2004] 1 S.C.R. 436 (S.C.C.) In that decision the Chief Justice explained the rationale for holding a diocese vicariously liable for the acts of a rogue priest. See, particularly paragraphs: 7, 11 and 17-33. At paragraph 17 she described it thus:

> The plaintiff-respondents also seek a finding that the Roman Catholic Episcopal Corporation of St. George's is vicariously liable for Father Bennett's assaults, as his employer. The doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise.

[44] She then went on to describe in some detail its legal basis at paragraphs 20-21:

In *Bazley*, the Court suggested that the imposition of vicarious liability may usefully be approached in two steps. First, a court should determine whether there are precedents which unambiguously determine whether the case should attract vicarious liability. "If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability": *Bazley*, at para. 15; *Jacobi*, at para. 31. Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorized by the employer. This is necessary to ensure that the goals of fair and effective [page446] compensation and deterrence of future harm are met: *K.L.B., supra*, at para. 20.

In determining whether there is a sufficient connection in the case of intentional torts, factors to be considered include, but are not limited to the following (*Bazley, supra*, at para. 41):

(a) the opportunity that the enterprise afforded the employee to abuse his or her power;

(b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

(c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d) the extent of power conferred on the employee in relation to the victim;

(e) the vulnerability of potential victims to wrongful exercise of the employee's power.

The employer's control over the employee's activities is one indication of whether the employee is acting on his or her employer's behalf: *K.L.B., supra*, at para. 22. At the heart of the inquiry lies the question of power and control by the employer: both that exercised over and that granted to the employee. Where this power and control can be identified, the imposition of vicarious liability will compensate fairly and effectively.

Trusts Generally

[45] A trust involves essentially three elements;

1) a trustee (in this instance the Diocese) who holds trust property subject to dealing with it for the benefit of one

or more others (in this instance those who wish to become candidates for the priesthood);

2) one or more beneficiaries to whom and for whose benefit the trustee owes duties with respect to the trust property (in this instance those who might be called to become candidates for the priesthood);

3) trust property which is held by the trustee for the beneficiaries (in this instance, the Funds).

[46] With that context in mind, it is reasonable to expect that a judge would not lightly interfere with the original intention of the settlors, those persons who created these trusts, as, at the time each was created, it was their intention that the money bequeathed or transferred by donation be used for the specific purpose set out in the trust document in perpetuity.

[47] It must be firmly born in mind when considering the application of "a *cy-près* scheme" that the public must continue to have confidence that when a charitable bequest or grant is made it will only be in limited and justifiable circumstances that a court will step in and alter what was intended by the person who created the trust. To do otherwise would threaten and

likely damage the confidence the public have in the enduring nature of any charitable trust that might be contemplated for creation in the future.

[48] For that reason, the law does not allow a judge to alter the specific objects of a trust except in such narrow circumstances. Those circumstances are limited to situations in which the specific objects of the trust are impossible to achieve, are illegal or are or have become impracticable. It is in those circumstances that the doctrine of *cy-près* can be applied to remedy the difficulties arising from the implementation of or continued accomplishment of the specific objects of the trust.

The Legal Character of the 21 Funds

[49] It has been the unanimous submission of all counsel that the Funds in character are charitable trusts. They are correct in arriving at that conclusion. See: *Porter v. Porter* (1983), 52 N.B.R. (2d) 130 (N.B.Q.B.) at paragraphs 2 and 10. The gifts, whether they arose from bequests of particular individuals, named or anonymous donors or the contributions of parishioners in response to a call from the clergy of the Diocese for financial assistance to be dedicated to the education of candidates for the priesthood were all aimed at that goal.

[50] More importantly, however, when viewed through a broader lens it is abundantly clear that in each instance the superordinate goal of the settlor or the donor was the perpetuation of the Diocese in its religious mission. It must not be forgotten that over half the twenty one trusts were bequests from priests. It is thus reasonable to conclude that those last mentioned funds were intended to be applied to carry on the work of the Diocese and of those priests after their death.

[51] In sum, the gifts were clearly intended to be used for a charitable purpose, in this case a specific religious purpose, and were intended to be an exclusive dedication to the perpetuation of a religious charity, namely, the Diocese or its predecessor.

The Applicant's Submission Generally

[52] In its initial written submission filed on October 1, 2010 counsel for the Diocese based its Application on two possible avenues the court might utilize to allow the Diocese access to the surplus funds in the Trusts.

[53] First, it contended that the doctrine of *cy-près* could be employed to amplify the specific objects of the Trusts in such a

way that the surplus funds in the Trusts could be used for general charitable purposes of the Diocese, in this case more particularly, the payment of compensation to victims of sexual abuse by a member or members of the diocese's clergy.

[54] The term *cy-près*, translated literally, means: "as close as." While this trust doctrine has often been employed when the specific objects of a trust are impracticable or impossible to accomplish to simply expand the specific objects in order that they accomplish the goal the settlor had in mind, it has also been used, as shall be seen, to open the way for such a trust to be used for more general purposes. When impracticability is pleaded as the basis for applying *cy-près* the court must find that the settlor intended an exclusive dedication to charity for a broader or different charitable goal to be included or substituted for the original specific object(s).

[55] Second, and in the alternative, the Diocese contended that the principles arising from the judgment of the Court of Appeal for Ontario in *Re: Christian Brothers of Ireland in Canada* [2000] O.J. No. 1117 (O.C.A.) could be employed to access the surplus Funds despite the fact that the Diocese was not in a winding up process brought on by a bankruptcy proceeding relative to it as a religious corporation.

[56] At the hearing of the Application the *Christian Brothers* issue was stood aside by counsel for the Bishop. Counsel then chose to advance its legal position principally on the basis that it was open to the court to apply *cy-près* and determine that the surplus Funds could be used for general charitable purposes falling within the religious mission of the Diocese, in this particular case the compensation of victims of sexual abuse by one of its former priests. This could be done, counsel contended, if the court found that the surplus in the Trusts had become functionally impracticable because the total value of the Funds was on an unswerving track of increasing value year over year despite the educational demands for funding. That ever increasing value, the submission posits, is now far beyond any reasonable and even unreasonable financial demands they may face in the future for priestly education.

The *Christian Brothers* Issue

[57] However, the principles set out in *Christian Brothers*, as shall be seen, are not irrelevant to a proper resolution of this Application and thus some explanation of the factual circumstances surrounding that case is warranted.

[58] The *Christian Brothers* litigation involved a winding up proceeding in relation to the notorious Christian Brothers of Ireland in Canada Corporation, a federally incorporated body that was a world-wide teaching order of the Catholic Church. Several of the Brothers of the organization were implicated in a sexual abuse scandal that arose at the infamous Mount Cashel Orphanage in Newfoundland. At the time of the scandal the orphanage was run by the Christian Brothers.

[59] During the period the Corporation was being wound up verified claims against the organization for sexual abuse amounted to $36,000,000. The organization had two valuable assets in form of two Catholic high schools located in the Province of British Columbia valued at $38,500,000. These schools were not the locus of any of the sexual abuse offences that was the basis of the sexual abuse claims. The schools were deemed to be trust property held by the Christian Brothers.

[60] In its decision on the availability of the school assets to satisfy the abuse claims the Court of Appeal for Ontario held that the schools were not held as trusts for the specific charitable purposes of those particular schools but were trust assets broadly held by the Christian Brothers. Thus, they were exigible or accessible in the circumstances as assets belonging

to the Corporation such that tortious creditors, in this case the victims of sexual abuse, could access the school assets in order to satisfy the claims even though the claims did not arise from sexual abuse committed at the schools in question. The Corporation was thus deemed to be one corporate entity. In the event of a winding up, all of the assets, including assets held in trust, were exigible by creditors.

[61] In simple terms, none of the assets held in trust benefited from any protection of charitable trust immunity that might protect two schools from seizure and sale to satisfy claims against the Corporation made on the basis of vicarious liability of the Corporation for the acts of its agents, in this case the Brothers who perpetrated the sexual abuse.

[62] Leave to Appeal to the Supreme Court of that decision was denied on November 16, 2000. See: [2000] SCCA No. 277 (S.C.C.). An Application for Reconsideration was dismissed May 23, 2002 without reasons: Bulletin, 2002 p. 811. Mr. Eddy, counsel for the specific objects of the trusts, postulates that such a resounding rejection of the efforts to appeal makes it unlikely that any Canadian court of appeal faced with similar circumstances in the future would reject the reasoning of the Court of Appeal for Ontario in *Christian Brothers*. While that is

a compelling argument, the Supreme Court has made it clear in the past that the mere failure to obtain Leave to Appeal from the Court does not amount to an affirmation of the judgment of the court below.

[63] The decision in *Christian Brothers* is significant to this Application from a contextual standpoint. It illustrates that if the Diocese at some date in the future is unable to meet its financial obligations including, most importantly to this Application, any obligations to victims of sexual abuse perpetrated by a priest or priests serving within the Diocese at the relevant time, and is forced into bankruptcy, thus becoming the subject of a winding up, all of the Funds held within the Trusts in question together with the rest of the assets of the Diocese would be subject to seizure and sale if necessary to satisfy its creditors, including the claims of any verified victims of sexual abuse for which it is legally responsible by vicarious liability.

[64] Shortly put, in the event of a bankruptcy proceeding initiated by or against the Diocese brought on by the payment of validated claims of the sexual abuse victims, not only would a portion of the Trust Funds be exigible to pay validated claims of sexual abuse but every dollar held within those funds, if

necessary, would be liable to seizure and sale or liquidation to satisfy any such valid claims against the Diocese.

[65] At least as important is the stark financial and legal reality for the victims of the sexual abuse and the Diocese that, if a winding up proceeding was to be initiated, bankruptcy trustees, lawyers, accountants and monitors would have to be appointed to oversee the winding up. Their fees would become the primary financial charge on all of the assets of the Diocese, that is, they would be paid first; the victims would be forced to retain legal counsel at considerable cost and pursue their individual claims with the monitor of the trustee in bankruptcy. The victims would become unsecured creditors in such a proceeding and stand behind any secured creditors the Diocese might have at the time. It is clear that in such an eventuality the victims would realize only a portion of the financial settlements they would, by the current ADR process, receive.

[66] Although the possible financial demise of the Diocese of Bathurst may seem to some too remote to be real, it must be noted that religious corporation bankruptcy has recently become part of the legal landscape in Canada. In almost every instance it has been brought on by the revelation of sexual abuse scandals in circumstances that are very similar to this case.

See, for example: *Re Christian Brothers of Ireland in Canada* (*supra*); *Re Oblats de Marie du Manitoba* [2004] M.J. No. 112 (M.Q.B.); *Re Roman Catholic Episcopal Corp. of St. George's* [2005] M.J. No. 281 (N.& L.S.C.).

[67] As well, recently, in Nova Scotia the Roman Catholic Diocese in the Antigonish area has been faced with raising approximately $15,000,000 to pay claims arising from a similar sexual abuse scandal settlement achieved by out of court negotiations. The congregations of the churches in the various parishes of that diocese have been asked to shoulder a potentially crushing financial burden as a result of the agreement reached. It is clear that "donor fatigue" may be a distinct possibility if such a oppressive financial obligation of the diocese becomes that of the individual members of that diocese.

[68] In this instance, counsel for the Bishop indicated that one of the unknown financial liabilities is what the cost of legal fees will be for the Diocese if a number of possible victims make the decision to litigate their claims. At present, the Diocese has $4,000,000.00 in its general account that it can access to pay the verified claims. Without undercutting the confidentiality order that I previously issued, it is clear by this Application for access to some of the funds in the Trusts

that the $4,000,000.00 currently available in the general account will not be enough to complete the whole of the compensation process of payouts through the ADR process and any litigation awards.

[69] Mr. Frederick candidly admitted that insofar as litigated portion of the process is concerned, for every dollar awarded in compensation by a court the Diocese would spend two dollars in legal fees and disbursements for any possible trials.

[70] It is clear from the redacted financial realities and projections that the financial imperilment of the Diocese has been established. At this point insolvency of the Diocese is not an imminent probability if a portion of the Funds in the Trusts are accessed to continue the compensation process. Whether that situation changes will only be known in the fullness of time as the process of compensation and litigation continues.

[71] By definition the Diocese would become insolvent according to *The Bankruptcy and Insolvency Act* R.S.C. 1985, Ch. B-3 if it fell within the following definition:

> “insolvent person” means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims

> under this Act amount to one thousand dollars, and
>
> (*a*) who is for any reason unable to meet his obligations as they generally become due,
>
> (*b*) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (*c*) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

The Doctrine of *Cy-près*

[72] The doctrine of *cy-près* was explained concisely in *Re Christian Brothers of Ireland in Canada* (*supra*). Feldman J.A. described it in the following terms at paragraph 71 saying:

> Because of the trust-like obligations of the charitable corporation, it is accepted that the court maintains its supervisory scheme-making power whether a charity's legal form is as a charitable trust or a charitable corporation: Liverpool Hospital v. Attorney General, supra, at 213. This is to continue to ensure that gifts made with charitable intent will not fail even if the object of the gift is unclear or uncertain, or if the gift is directed to a charitable corporation which is misnamed or the corporation no longer exists: Re Vernon's Will Trusts (1962), [1971] 3 All E.R. 1061 (Ch. D.); Re Myers, [1951] 1 All E.R. 538 (Ch. D.); Re Morgan's Will Trusts, [1950] 1 All E.R. 1097

> (Ch. D.); Re Finger's Will Trusts, [1972] 1 Ch. 286; Re Buchanan Estate (1995), 11 E.T.R. (2d) 8 (B.C.S.C.). This power of the court is referred to as the cy-pres doctrine. It is described in the Restatement of the Law of Trusts (2d) s. 399 as follows:
>
> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settler.

[73] To repeat, in this instance the Applicant's position is that the financial growth of the Funds over the years, together with the declining interest by young men in the Diocese to choose the vocation of becoming a priest, combined to result in a legally impractical financial circumstance. The Funds have plainly and simply grown to such an extent that only a very small amount of money, an average of $57,200 per year, is needed to fund the training and education of candidates for the priesthood from a total fund that now exceeds $4,300,000.

[74] It is true, as counsel for the Bishop suggests, that even without the current impending settlement with the victims of sexual abuse, the Trusts could be subject to an application to devise a "*cy-près* scheme" to utilize the surplus money for other

charitable goals of the Diocese. That has been done in many instances in the past in other cases.

[75] A review of a number of *cy-près* cases illustrates when and how the doctrine can be applied:

1) *Re Beaverbrook Trust and the City of Saint John* (supra) This was an attempt made to alter a specific condition of a charitable trust originally created to finance the construction of a skating rink in the City of Saint John for the children of the City. One of the conditions of the trust was that there was to be no professional hockey played in the arena. The City of Saint John brought an application to vary the terms of the trust by *cy-près* to allow a professional hockey team to use the rink as its home. The application was denied on the basis that it was not in the best interests of the named beneficiaries, the school children of Saint John, and in direct conflict with a specific term of the trust.

2) *City of Saint John v. Attorney General of New Brunswick, Lord Beaverbrook Rink Committee of Citizens, Inc. and McKenzie* [1983] N.B.J. No. 361 (N.B.Q.B.). This Application involved the same trust that was previously referred to

relating to the rink built for the school children of Saint John. The court was asked to approve a change to the specific terms of the trust that stipulated how the Board of directors was to be constituted. The application focused on replacing a cumbersome management scheme that had evolved from the original trust agreement with a corporate board of trustees specifically incorporated to manage the affairs of the rink. Hoyt J., as he then was, approved the *cy-près* scheme.

3) *Porter v. Porter* (1983), 52 N.B.R. (2d) 130 (N.B.Q.B.) The trust involved in this application was one created by a bequest of money to a trust fund on terms that the interest from the account was to be used to provide scholarships for students attending the University of New Brunswick who had been graduates of a particular school district in the Province. At the time of the application the two high schools in the school district were graduating approximately one hundred seventy students per year. The available funds for distribution amounted to $1,300,000.00. Dickson J. found that the doctrine of *cy-près* was available to alter and enlarge the candidate pool of students eligible to apply to the scholarship scheme if

"insurmountable difficulties in administration be encountered."

4) *Re Lynds* (1978), 20 N.B.R. (2d) 564 (N.B.Q.B.) This educational trust arose from a bequest that narrowly defined the potential recipient pool to graduates of The New Brunswick Teacher's College who also had been a graduate of Acadia University and who wished to pursue post graduate work in speech arts. Having been so tightly defined, the objects produced only one applicant between 1959 when the trust took effect and 1978. Moreover, the teacher's college in question had been closed and replaced by university programs for the education of teaching candidates. The fund had, by the time of the application, doubled its size due to a deficiency of applicants seeking funding. Dickson J. approved a *cy-près* scheme that broadened the potential recipient pool to Acadia University, University of New Brunswick and University of Moncton students at the rate of one student per year who had successfully completed two years of study in the Faculty of Education and who wished, after graduation from an education program, to continue to study in speech, drama and creative writing.

5) *University of New Brunswick v. Attorney General of New Brunswick* (1977), 19 N.B.R. (2d) 140 (N.B.Q.B.) This case involved another educational trust by way of bequest. The testator created a trust that would allow university students to receive a loan of $300.00 from the capital bequest of $900,000.00 that vested in 1953 upon his death. The Applicant asked that due to rising costs of university education, and an increase in the value of the fund to over $1,000,000.00, the amount of the loan should be increased to $800.00. Dickson J. agreed and varied the terms of the trust by an application of *cy-près.*

6) *Re Killam Estate* (1999), 185 N.S.R. (2d) 201 (N.S.S.C.) The circumstances in this case were that an educational-research trust was created from a very large bequest. In total, the trusts value totaled $360,000,000.00 These trusts provided for distribution of income only from them. The institutions the funds were aimed at supporting applied for a *cy-près* scheme to be approved that would, because of problems with an increased value of capital in the funds but diminished income accumulation, allow for a better functioning scheme to be put in place that allowed a “total return” model of investing to be implemented and a 5% spending level to be fixed as a “draw down.” Thus, a fixed

percentage of the total value of the portfolios of the trusts would be distributed each year without regard to whether it came from income or capital. This new scheme would stabilize funding for the recipient institutional pool. Kennedy C.J. approved the *cy-près* scheme.

7) *Re McSweeney* (1982), 41 N.B.R. (2d) 419 (N.B.Q.B.) In this instance the trust again arose from a bequest, this time for the construction and maintenance of a home for aged men and women. The amount of the bequest, $176,000.00, was insufficient to build and maintain a free standing home as stipulated. The court approved a very general *cy-près* scheme that proposed the executor identify a number of groups that would then be invited to submit proposals for an extension to be built on an existing nondenominational senior citizen's home and then select one from those submitted.

8) *Re Miller* (1975), 12 N.B.R. (2d) 4 (N.B.Q.B.) This, was a bequest in which the testator created a trust that was to pay the church $60 per year from the bequest that was valued at $18,388.50 The money was to be divided so that annually $50 went to the salary of the church's minister and $10 went to the United Church Mission and Service Fund.

The church applied for a *cy-près* scheme to be created that would allow the church to access the entire fund. Stevenson J. allowed the application and varied the terms as requested granting the church authority to utilize all of the funds for the needs of the church as the church Board of Trustees saw fit.

SUMMARY AND CONCLUSIONS

[76] Certain factual findings, admissions and legal conclusions are inescapable from what appears relevant from the filings in this Application. The ultimate conclusion reached as well as the associated factual findings and admissions are unique to the constellation of factors that have come together to cause this Application to be made. They include that:

1) the Diocese implemented specific and reasonable measures and undertook reasonable steps in practice to attempt to identify possible candidates for the priesthood through a committee specifically designed for that purpose that operated within all of the churches in the Diocese to accomplish the specific charitable goals of the Trusts, namely priestly education and training that, had they been

more successful, may have assisted in curtailing the financial growth of the Trusts;

2) the ever building surplus in the twenty one Trusts over the years between 1911 and 1995, together with the relative paucity of candidates seeking educational support for possible entry into the priesthood combined over the years to make the Trusts currently “impracticable” from a fund utilization standpoint thus opening the way for an application of the *cy-près* doctrine to be employed to remedy that legal “impracticability”;

3) judgments rendered in New Brunswick provide sound legal support for the conclusion that where the circumstances establish that an educational trust, by virtue of underuse or non-use, grows in monetary terms beyond what is reasonably necessary to fulfill the specific or inferable objects of a Trust, “supervening impracticability” is established and a “*cy-près* scheme” may be devised to reduce or eliminate that impracticality while preserving sufficient capital to meet the specific or inferred objects of the trust;

4) the parties, as well as legal counsel appointed to represent the specific and inferred objects of the Trusts, are unanimous that the sum of $1,500,000.00 provides sufficient capital to accomplish the objects of the Trusts, namely priestly education and training in perpetuity based upon the historic financial demands on the trusts of approximately $57,000.00 per year;

5) the parties proposal to not permit the "*cy-près* scheme" devised to encroach on the capital portion of those trusts that stipulate that any education and training funding for candidates for the priesthood be provided from the interest accruing from the initial capital bequest or donation, as the case may be, and the proposal that funds be drawn from each trust on a *pro rata*, or proportional basis, is both reasonable and correct in the current financial circumstances of the Diocese as disclosed to the court and all counsel but under sealing order of the court from public dissemination;

6) in ordinary circumstances the application of the doctrine of *cy-près* to a trust that has become legally "impracticable" is intended to result in the creation of a "*cy-près* scheme" that is as close as possible to the

specific objects intended by the donor or settlor, as the case may be;

7) that the clear intention of those who created the Trusts was not simply to provide educational and training funding for candidates for the priesthood but, more importantly, the superordinate goal of ensuring the financial and thus the spiritual health of the Diocese in its religious mission in perpetuity and that those intentions were exclusive of any other intent of the settlors and donors;

8) that by operation of the principles set out in *Christian Brothers*, in the event of a winding up of the Diocese if, at some future date a bankruptcy proceeding were to take place, the entirety of the Funds in the Trusts, currently valued at $4,300,000.00 would be exigible, or accessible, by verified victims to pay just compensation awards due each of them and not be protected from seizure and sale or liquidation;

9) the financial and legal variables that have yet to be determined, as the process of compensating proven victims of sexual abuse moves forward, make it unreasonable to predict whether, because of the multiplicity of proceedings

that may occur in the future, the Diocese can survive financially; included in these variables are: a) how many possible victims may choose to sue the Diocese, b) how long any such law suits might take to conclude, c) how complex the litigation might become, and d) the specific amounts of the compensation awards that might be ordered as a result of such litigation;

10) even if a "*cy-près* scheme" is devised to allow the Diocese to access the surplus of $2,800,000.00 in the Trusts for general charitable purposes it may be entirely reasonable in the future that a further Application may have to be made for access to a portion or the rest of the Trusts funds in the events that costs of litigation and awards or settlements with verified victims result in the threat of imminent financial demise of the Diocese;

11) Mr. Eddy, counsel for the specific and inferred charitable objects of the Trusts, having reviewed all of the unredacted financial information, especially the financial projections of current and future costs to conclude all of the associated proceedings accepts: a)that the financial imperilment of the Diocese has been established; b) that the current costs of the ADR and

projected costs of future ADR work and possible litigation support an application of the doctrine of *cy-près* to allow the Diocese to access a portion of the Funds; and c) that the application of the surplus of the Funds to the compensation of victims of a rogue priest or priests is philosophically consistent with priestly education and training inasmuch as the "*cy-près* scheme" being advanced: a) preserves the core funding necessary to carry out the will of those who either bequeathed or were donors of money or its equivalent to the Diocese, or b) contributed funds to the Seminaristes Fund, while c) at the same time granting the Application helps to perpetuate the continued existence of the Diocese.

[77] The unique combination of circumstances that this Application presents warrant the granting of the Application that the proposed "*cy-près* scheme" be implemented. Central to that determination are:

1) the intentions of the Diocese to use the Funds to pay just compensation in timely fashion to the victims of the malevolent priest(s) who perpetrated these crimes of heinous sexual abuse;

2) that the granting of the Application will substantially improve the prospects that the Diocese will be able to avoid a financial demise because of the sexual abuse scandal;

3) the primordial intention of those who created these trusts by gift of one sort or another to the Diocese was the perpetuation of the Diocese in its religious mission; and

4) that the granting of the Application will substantially improve the prospects that the Diocese will not have to download the financial responsibility of raising the funds necessary to pay all of the claims onto the backs of the members of the various parishes within the Diocese.

[78] This Application involves the potential of a serious financial crisis for the Diocese whose religious mission is one shared by many other religions and religious institutions of various sorts found in a variety of cultures throughout Canada.

[79] The Supreme Court has made it clear that the constitutional rights set out in the *Canadian Charter of Rights and Freedoms* are not directly applicable in civil proceedings. See, for example, *Hill v. Church of Scientology* [1995] 2 S.C.R. 130

(S.C.C.) per Cory J at paragraphs 93-6. However, in *A.M. v. Ryan* [1997] 1 S.C.R. 157 (S.C.C.) McLachlin J., as she then was, noted at paragraphs 22, 30 and 38 that the common law applicable to private litigation must develop in a way that reflects *Charter* values.

[80] No special niche can be created in trust law that would allow special consideration to be given to Applications brought by religious institutions faced with onerous financial liabilities in circumstances that resemble those of this Diocese. For the doctrine of *cy-près* to be applied by reason of "supervening impracticality" and thus allow a scheme to be devised that continues to accomplish the goals of the specific objects of a trust fund, the factual circumstances must fit within the curtilage of the legal principles governing such Applications for *cy-près* as they have evolved over time.

[81] However, in granting the Application in the circumstances that presently exist for L'Èvêque Catholique Romain de Bathurst, and thus allowing him to continue to sedulously foster of the religious mission of the Diocese, it is worth repeating the seldom utilized words that constitute the whole of the Preamble of the *Canadian Charter of Rights and Freedoms*:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

[82] In conclusion, the Application to access to the Funds contained in the Trusts is allowed on the basis proposed as set out herein and codified in the attached order.

ORDERS

[83] The Orders are as set out in the attached schedule. There shall be no costs of this Application.

POSTSCRIPT

[84] This Application has proceeded through this court in exceptionally speedy fashion. From the date of its assignment and first appearance only a few days later on November 2, 2010, to the conclusion of the matter today, only twenty seven days have elapsed. There were four hearings conducted in total, two of which were held by telephone conference call. Two lengthy written judgments and one oral decision have resulted from the proceedings.

[85] It would have been impossible to have concluded the matter in such a brief period of time had counsel for all of the interests

represented not been so accommodating to the court and committed to quickly do the work necessary for that to take place. Mr. Eddy, who was appointed without timely prior notice, agreed to lend his expertise in this area of law to the court and put his busy practice aside at least for a time. Ms. Forbes and her staff, I am told, on at least one occasion worked through the night preparing the Attorney General's written submissions to the court. Finally, Mr. Frederick and Mr. Hayhoe represented their client, the Diocese, with great commitment. All have exhibited the finest traditions of the Bar and I thank them for those efforts.

Fred Ferguson J.C.Q.B.

CAUSE NO.: MM0103/10
IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF BATHURST
B E T W E E N:

L'ÉVÊQUE CATHOLIQUE ROMAIN

DE BATHURST

APPLICANT,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW BRUNSWICK AS REPRESENTED BY THE ATTORNEY GENERAL OF NEW BRUNSWICK,

RESPONDENT,

O R D E R

THIS APPLICATION was heard on the 15th day of November, 2010, at Bathurst, New Brunswick.;
WHEREAS, the Applicant holds certain funds on the trusts attached as Schedule "A" (collectively, the "**Funds**" and each a "**Fund**");
AND WHEREAS, the Funds have grown in excess of the needs to fulfill their original trust purposes;
AND WHEREAS, the Applicant requires funds for the purpose of paying settlements arising from an alternative dispute resolution process initiated by the applicant to address allegations of vicarious liability of the Diocese (the "**ADR Process**"), as well as for settlements, judgments and/or costs arising from litigation related to these allegations (collectively the "**Litigation Costs**");
THIS COURT ORDERS that:

a) the Applicant shall retain such portions of the Funds as are indicated in the column entitled "Retained Amount" in Schedule "A" (the "**Retained Amounts**"), and each such Retained Amount shall be used exclusively for the original trust purpose(s) to which it is subject;
b) the Applicant shall, as soon as reasonably possible, transfer all funds held by it in the Funds in excess of the Retained Amounts to the Applicant's general operating fund, and may disburse such funds to pay settlements arising from the ADR process, compensation awards and/or Legal Fees and Litigation Costs;
c) there shall be no costs of this Application.

DATED at Miramichi this 29th day of November, 2010.

_____

JUSTICE FRED FERGUSON

SCHEDULE "A"
Restricted Funds of L'Évêque Catholique Romain de Bathurst

FUND	TRUST INSTRUMENT	FUND BALANCE (as of)	RETAINED AMOUNT
1. Austin	Will of Miss Austin	$41,409.05 (July 31, 2010)	$16,030.83
2. Bannon	Last Will and Testament of Reverend Edward J. Bannon, dated October 16, 1920	$423,957.35 (July 31, 2010)	$164,128.05
3. Barry	Originally donated to Seminaire de Quebec by Mgr. Thomas F. Barry by donation letter dated March 16, 1915; transferred from the Collège to the Diocese on November 14, 1975.	$68,557.02 (July 31, 2010)	$27,889.02
4. Belliveau	Originally donated to Collège du Sacré-Coeur de Bathurst by Mgr. Philippe Belliveau by donation letter dated February 10, 1924; transferred from the College to the Diocese on November 14, 1975.	$82,325.11 (July 31, 2010)	$33,433.61
5. Blanchard	Last Will and Testament of Alexandrine Blanchard,	$29,357.27 (July 31, 2010)	$11,365.18

		dated November 6, 1975.		
6.	Comeau	Letter of donation of Father Lionel Comeau, dated 1985.	$17,898.12 (July 31, 2010)	$15,509.09
7.	Commune	Letter of Donation dated September 28, 1995.	$173,044.46 (July 31, 2010)	$66,991.29
8.	Dumont	Originally donated to Collège du Sacré-Coeur de Bathurst by Reverend Israel-Norbert Dumont by donation letter dated June 12, 1938; transferred from the College to the Diocese on November 14, 1975.	$129,403.32 (July 31, 2010)	$50,096.35
9.	Elkin	Last Will and Testament of Miss Elizabeth M. Elkin, dated July 18, 1911.	$15,443.55 (July 31, 2010)	$5,978.71
10.	Gauvin	Originally donated to Collège du Sacré-Coeur de Bathurst by Georges Gauvin by donation letter dated August 1, 1938; transferred from the College to the Diocese on November 14, 1975.	$23,745.38 (July 31, 2010)	$10,173.22

11.	Godin	Records suggest that the fund was intended “pour les vocations sacerdotales”, but the trust documents cannot be located	$33,969.02 (July 31, 2010)	$13,150.54
12.	Hennessy	Letter of Donation of Patrick and Catherine Hennessy, dated March 26th, 1915.	$1,348,751.26 (July 31, 2010)	$528,275.31
13.	Levasseur	Originally donated to Collège du Sacré-Coeur de Bathurst by Joseph Levasseur by donation letter dated 1932; transferred from the Collège to the Diocese on November 14, 1975.	$7,854.58 (July 31, 2010)	$6,105.10
14.	Levesque	Donation letter from estate of Reverend Leon Levesque, dated July 30, 1959.	$10,308.13 (July 31, 2010)	$5,216.35

15. Martin	Donation from estate of Reverend Eloi Martin on April 19, 1927.	$131,671.78 (July 31, 2010)	$50,974.54
16. McGaffigan	Last Will and Testament of James McGaffigan, dated September 5, 1924.	$60,199.47 (July 31, 2010)	$43,843.30
17. Richard	Donation letter from Mgr. Marcel F. Richard, dated March 3, 1915.	$147,048.93 (July 31, 2010)	$58,766.15
18. Seminariste	Anonymous donations by parishioners in response to oral appeals by priests of Diocese.	$735,361.00 (July 31, 2010)	$284,682.80
19. Van de Moortel	Last Will and Testament of Reverend Theophilus Van de Moortel, dated April 14, 1924.	$81,146.43 (July 31, 2010)	$43,671.82
20. Varrily	Donation letter from Mgr. William Varrily, dated July 30, 1924.	$78,501.51 (July 31, 2010)	$32,842.02
21. Violette	Last Will and Testament of Reverend Abel Violette, dated February 28, 1970.	$79,757.33 (July 31, 2010)	$30,876.73
22. TOTAL	23.	**24. $3,719,710.07**	**25. $1,500,000.00**