

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bentley v. Anglican Synod of the Diocese  
of New Westminster,*  
2009 BCSC 1608

Date: 20091125  
Docket: S086372  
Registry: Vancouver

Between:

**Michael Bentley, Ethel Marion Campbell, Peter Chapman,  
Zenia Cheng, Simon Chin, Krista Friebe, R.S. Patrick Greenwood,  
Marie Kristine Klukas, Johnny Leung, David Ley, Ruth Lin,  
Lanny James Reedman, Linda Seale, Anne Sheck, David Kenneth Short,  
Trevor Howard Walters, and Shirley Wiebe**

Plaintiffs

And

**Anglican Synod of the Diocese of New Westminster, and Michael Ingham  
in his capacity as the Anglican Bishop of the Diocese of New Westminster**

Defendants

- and -

Docket: S087230  
Registry: Vancouver

Between:

**Eric Law, Stephen Wing Hong Leung, Annie Sheung Kan Tang,  
Stephen Chi Him Yuen, and Winsor Wing Tai Yung**

Plaintiff

And:

**Anglican Synod of the Diocese of New Westminster**

Defendants

Before: The Honourable Mr. Justice Kelleher

**Reasons for Judgment**

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Place and Date of Trial:

Vancouver, B.C.  
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and June 8-11, 2009

Place and Date of Judgment:

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**Introduction**

[1] These two actions concern disputes over church property. They have been combined for trial.

[2] The plaintiffs are 22 in number. They are Anglican clergy and lay leaders from four incorporated parishes geographically situated in the Diocese of New Westminster (the “Diocese”). The plaintiffs are also trustees of their respective parish corporations, and bring the current proceedings in that capacity.

[3] The defendants are the Anglican Synod of the Diocese of New Westminster (the “Diocesan Synod”) and Michael Ingham, the current Bishop of the Diocese.

[4] These proceedings arise from Bishop Ingham’s decision in June 2002 to accept the recommendation of the Diocesan Synod that he authorize a rite for the blessing of same-sex unions. The plaintiffs view this as an abandonment of Christian Scripture, and their respective congregations have left the Diocese as a consequence. They contend that church properties in their four parishes are held pursuant to a trust for “historical, orthodox, Anglican doctrine and practice”, and that the blessing of same-sex unions is inconsistent with such doctrine and practice. Accordingly, the plaintiffs seek to have the church properties turned over to their congregations pursuant to the exercise of this Court’s inherent jurisdiction over trusts and charities.

[5] The defendants counterclaim for a declaration that the plaintiffs are not entitled to possession or control of the properties in question, and other ancillary relief.

[6] If the plaintiffs are not successful in the main part of their action, it will be necessary to consider a discrete dispute over a bequest by the late Daphne Wai-Chan Chun to the Church of the Good Shepherd.

**Factual Background**

**The Anglican Communion**

[7] The Anglican Church has its roots in the separation of the Church of England from the Roman Catholic Church in the 16<sup>th</sup> century. The Anglican Communion is a world-wide community of between 55 and 80 million persons. The Communion consists of 38 autonomous provinces. Each province is a defined geographic region comprising one or more countries. The Anglican Church of Canada (the “ACC”) is a province. So, too, is the Episcopal Church of the United States of America (“ECUSA”). An additional province of relevance to these proceedings is the Province of the Southern Cone, which encompasses six countries in South America: Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay. Each province is headed by a Primate.

[8] The Anglican Communion is not the central administrative body of a world-wide church as is the case with the Roman Catholic Church. The provinces of the Anglican Communion are self-governing and autonomous. Each has its own canon law, institutions and the right to interpret its own constitution. A province’s decisions are not ratified by any pan-Anglican institution.

[9] The Anglican Communion has what are termed “Instruments of Communion” or “Instruments of Unity”. There are four:

1. The Archbishop of Canterbury, the notional head of the Communion and the “first among equals” of the Primates.
2. The Lambeth Conference, a conference of bishops which meets every ten years. The last meeting was held in 2008.
3. The Anglican Consultative Council which was created as an Instrument of Communion in 1968 and is the only formally constituted Instrument.
4. The Meeting of the Primates which arose as an Instrument of Communion in 1978.

[10] None of the Instruments of Communion has any legislative or juridical authority over the provinces. Their resolutions and reports have no more than persuasive value and take effect only when adopted by the chief legislative body of a province.

### **Anglican Church of Canada**

[11] The ACC began in Canada as an extension of the Church of England. It has been a self-governing church since 1861. It is estimated that between 625,000 and 800,000 Canadians currently worship in the ACC. Archbishop Fred Hiltz is the current Primate of the ACC.

[12] The legislative or rule-making body within the ACC is the General Synod. It was incorporated in 1921 by *An Act to Incorporate the General Synod of the Church of England in Canada*, S.C. 1921, c. 82. In 1956, its name was changed to the General Synod of the Anglican Church of Canada. Its members are bishops, priests and lay people from every diocese across the country. In order for a resolution to be passed by the General Synod, it must attain a majority of the votes in each of these three orders. The General Synod meets every three years.

[13] The General Synod has enacted a Constitution and passed Canons. The Canons are the laws of the ACC, and have been amended many times over the years.

[14] The General Synod's jurisdiction includes "the definition of the doctrines of the Church in harmony with the Solemn Declaration adopted by this Synod". (The Solemn Declaration is discussed below.) This jurisdiction has been exercised to bring about many changes, including adoption of a new hymn book in 1908, a Canadian Book of Common Prayer in 1918, and a second Book of Common Prayer in 1959. More recently, controversial changes have come about, including the remarriage of divorced persons, the ordination of women as priests and the consecration of women as bishops.

[15] The ACC has four internal ecclesiastical provinces, including the Ecclesiastical Province of British Columbia and the Yukon. The head of each ecclesiastical province is known as the Metropolitan. The Metropolitan of the Ecclesiastical Province of British Columbia and the Yukon is the Most Reverend Terry Buckle.

[16] The Ecclesiastical Province of British Columbia and the Yukon is, in turn, made up of five dioceses. These are the Diocese of New Westminster, the Diocese of British Columbia (Vancouver Island and the Gulf Islands), the Diocese of Caledonia, the Diocese of Kootenay and the Diocese of Yukon. In addition, there are the Anglican Parishes of the Central Interior, formerly known as the Diocese of Cariboo. There are a total of 30 dioceses across the four ecclesiastical provinces within the ACC. Dioceses in Canada generally have geographical boundaries.

[17] The ACC is a church with an episcopal polity, meaning that its fundamental unit is the diocese, presided over by a bishop. Anglican dioceses elect their bishops. Elections are then confirmed by the bishops of the ecclesiastical province. Bishops in Canada meet twice a year at the National House of Bishops.

[18] Dioceses in Canada have diocesan synods made up of the bishop, clergy and laity. Delegates come from different parishes, usually by election. The concept of diocesan synods is that they be representational, that is, that they express the will of the people within the diocese.

### **The Diocese of New Westminster**

[19] The Diocese of New Westminster covers a geographical area from Vancouver to a point east of Hope, and northwards from the Canada – United States border to a line approximately half-way up the mainland coast. The bishop of the Diocese is the defendant, the Right Reverend Michael Ingham. Bishop Ingham was elected bishop on September 25, 1993 at an electoral synod of the Diocese.

[20] The senior governing body within the Diocese is the Diocesan Synod, which is essentially an ecclesiastical parliament. The Synod was incorporated in April

1893 pursuant to *An Act to Incorporate the Anglican Synod of the Diocese of New Westminster*, S.B.C. 1893, c. 45 (the “*Act*”). Section 1 of the *Act* provides that the bishop, together with the clergy, diocesan officials and lay delegates together constitute a body politic and corporate known as the Synod of the Diocese of New Westminster. The *Act* gives the Synod authority to adopt, amend or annul its Constitution and Canons. Canons are essentially the ecclesiastical bylaws of the Diocese. They spell out rules on such matters as governance, the creation and organization of parishes, the construction of new buildings, and finances. The Diocesan Synod is required to meet every two years. In practice, it has been called to meet by the Bishop more frequently.

[21] The Executive Committee of the Diocese, which is commonly known as the Diocesan Council, functions as the agent of the Diocesan Synod when Synod is not in session. It is comprised of the Bishop, the Archdeacons, the Diocese’s three legal officers (the Chancellor, the Registrar and the Legal Assessor), clerical and lay secretaries, regionally elected members and various others.

### **The Parishes**

[22] Dioceses comprise a number of parishes, which are served by priests. Priests are appointed and licensed to the parish by the bishop. Where the appointment is of a permanent nature, the chief priest is known as the incumbent.

[23] There are approximately 78 parishes in the Diocese. Four of these parishes have voted to leave the Diocese. I will briefly describe each.

#### **1. St. John’s (Shaughnessy)**

[24] The Parish Corporation of St. John’s (Shaughnessy) is the registered owner of properties at 1490 and 1498 Nanton Avenue in Vancouver. The St. John’s church building and parish hall are located on these properties.

[25] St. John’s (Shaughnessy) is the largest parish in the Diocese and in Canada. The parish began in the 1920s, and was incorporated pursuant to the *Act* in 1932.

The first church was a small wooden structure. A new church was built in approximately 1950. The funds came primarily from parishioners but some also came from the general community.

[26] Reverend Harry Robinson became the rector of St. John's (Shaughnessy) in the late 1970s. Under his leadership the parish became more conservative and evangelical. Gail Stevenson is a long-time member of the parish. Her evidence is that St. John's had formerly attracted some influential Shaughnessy families and that the change in culture was "difficult for some families to cope with". Some parishioners left the parish because of the changes. Those changes, however, also attracted some newcomers.

[27] The plaintiffs Michael Bentley, David Ley, Krista Friebel, and Christine Klukas were elected or appointed trustees of the parish corporation on February 13, 2008. Malcolm Ross replaced former trustee, Ms. Klukas, who is no longer a plaintiff. The plaintiff David Short, as Rector of St. John's (Shaughnessy), was *ex officio* a trustee of the parish corporation as of that date.

## **2. Parish of the Good Shepherd**

[28] The Good Shepherd Parish Corporation is the registered owner of property at 808 East 19<sup>th</sup> Avenue in Vancouver. A church and ancillary building are located on this property.

[29] This parish dates from the formation of a mission church in 1889. It was the first Chinese church within the ACC. In 1936, the Diocese built a church at 636 Keefer Street as an out-reach mission to Chinese people in the area. Peter Y.C. Pang moved to Vancouver from Hong Kong with his family in 1967. He was the priest at Good Shepherd for 21 years. The plaintiff Eric Law attested that Reverend Pang was "very orthodox". Reverend Pang's evidence is that he does not understand this label. He holds strong views against the parish's decision to leave the Diocese.

[30] In 1976, Good Shepherd became a self-supporting parish and, later in 1984, a new property was acquired at 808 East 19<sup>th</sup> Avenue. Most of the purchase price came from the sale of the Keefer Street property. The Diocese was the original payor. Funds came not only from parishioners but also from local businesses and other Anglican churches, including a parish in Toronto and the Parish of St. James in the Downtown Eastside.

[31] Good Shepherd was incorporated in 1984 at the time of the acquisition of the East 19<sup>th</sup> Avenue property. It is a non-geographical parish; its limits are defined in its Declaration of Incorporation as “the Chinese community in the Greater Vancouver Regional District and of the Province of British Columbia”.

[32] The plaintiffs Eric Law, Annie Tang, Stephen Yuen, and Winsor Yeung were elected or appointed trustees of the parish corporation at the annual vestry meeting on February 24, 2008. The plaintiff Stephen Leung, as Rector of Good Shepherd, was *ex officio* a trustee of the parish corporation as of the same date.

### **3. St. Matthias and St. Luke**

[33] The St. Matthias Parish Corporation is the registered owner of property at 680 West 49<sup>th</sup> Avenue in Vancouver. The St. Matthias and St. Luke church and rectory are located on this property.

[34] The history of St. Matthias began with the purchase of land at 49th Avenue and Tisdale Street in Vancouver in 1959. According to a parish history, the cost of building the church was \$150,000. Of this amount, \$50,000 was a grant from the Diocesan Synod and \$25,000 was donated by the Canadian Pacific Railway.

[35] The parish was incorporated in 1974. By the 1990s, the size of the St. Matthias congregation had dwindled. It made sense to merge with the Parish of St. Luke.

[36] The Parish of St. Luke was established in 1894. The first church was at Southeast Marine Drive and Fraser Street in Vancouver. In the 1950s, it was

determined that the building was structurally unsound. The Diocese acquired land on East 61<sup>st</sup> Avenue where a new church was then built. Title to the land was in the name of the Diocese until 1994 when the Diocesan Council and the Bishop authorized the transfer of title to the parish. The parish was incorporated in June 1995.

[37] The evidence is that the congregation grew during the 1990s. Growth was attributable in part to the ability of the parish to attract members of immigrant communities, including Chinese Canadians. In fact, the Pastor, Reverend Randolph Bruce, enrolled in Cantonese classes at Simon Fraser University.

[38] Reverend Peter Y.C. Pang, the former incumbent at the Parish of the Good Shepherd, attended services at St. Luke after his retirement and became Reverend Bruce's honorary assistant. Good Shepherd used St. Luke's church for a congregation of its own called "Good Shepherd South".

[39] The merger process between St. Matthias and St. Luke began in 1994. An initial amalgamation agreement was reached in 1997. It was stated to be "subject to the approval of the Diocesan Council and the Bishop of the Diocese of New Westminster". The final amalgamation and merger agreement had three parties: St. Luke, St. Matthias and the Diocese. One of the terms was that the Diocese permit the two parishes to merge into one parish.

[40] The plaintiffs Peter Chapman, Zenia Cheng, Johnny Leung and Ruth Lin were elected or appointed trustees of the parish corporation on February 24, 2008. The plaintiff Simon Chin, as Rector of St. Matthias and St. Luke, was *ex officio* a trustee of the parish corporation as of that date.

#### **4. St. Matthews (Abbotsford)**

[41] The St. Matthew's Parish Corporation is the registered owner of property at 2010 Guildford Drive in Abbotsford. The St. Matthew's church building and adjoining parish hall are located on this property.

[42] This parish was established in about 1900, well before it was incorporated in 1989. The first church was built on Montvue Street in Abbotsford, and was consecrated in 1909.

[43] Reverend Charles Bryce was the incumbent priest from 1972 to 1979. During this period, a new church was built on Guildford Drive. He was succeeded by Reverend Jack Major. One witness described Reverend Major's incumbency as a period of "charismatic renewal". He welcomed a diversity of views. Reverend Dr. Trevor Walters became rector in 1991. Under his leadership the parish became more conservative.

[44] The plaintiffs Ethel Campbell, Lanny Reedman, R. Patrick Greenwood, Linda Seale, Anne Sheck and Shirley Wiebe were elected or appointed trustees of the parish corporation on February 17, 2008. The plaintiff Reverend Walters, as Rector of St. Matthew's, was *ex officio* a trustee of the parish corporation as of that date.

### **The Solemn Declaration**

[45] The plaintiffs say that although Anglican Provinces are autonomous, it is important that they be in full communion with the Anglican Church worldwide. They say this is expressed in the ACC's Solemn Declaration of 1893:

We, the Bishops, together with the Delegates from the Clergy and Laity of the Church of England in the Dominion of Canada, now assembled in the first General Synod, hereby make the following Solemn Declaration:

We declare this Church to be, and desire that it shall continue, in full communion with the Church of England throughout the world, as an integral portion of the One Body of Christ composed of Churches which, united under the one Divine Head and in the fellowship of the one Holy Catholic and Apostolic Church, hold the one Faith revealed in Holy Writ, and defined in the Creeds as maintained by the undivided primitive Church in the undisputed Ecumenical Councils; receive the same Canonical Scriptures of the Old and New Testaments, as containing all things necessary to salvation; teach the same Word of God; partake of the same Divinely ordained Sacraments, through the ministry of the same Apostolic Orders, and worship one God and Father through the same Lord Jesus Christ by the same Holy and Divine Spirit Who is given to them that believe to guide them into all truth.

And we are determined by the help of God to hold and maintain the Doctrine, Sacraments, and Discipline of Christ as the Lord hath commanded in His Holy Word and as the Church of England hath received and set forth the

same in “The Book of Common Prayer and Administration of the Sacraments and other Rights and Ceremonies of the Church, according to the Use of the Church of England; together with the Psalter or Psalms of David pointed as they are to be sung or said in churches; and the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests and Deacons”; and in the Thirty-nine Articles of Religion; and to transmit the same unimpaired to our posterity.

[Emphasis added]

[46] The plaintiffs see the Solemn Declaration as of profound significance. They describe it as a foundational document, and speak of the importance of being in full, as opposed to “impaired” or “broken”, communion with the Anglican Communion.

[47] Reverend David Short, the Rector of St. John’s (Shaughnessy), stated in his affidavit:

9. It is inherent in the character of the Anglican Church as I know it that it forms a worldwide communion. The Anglican Church is a family. A church that is true to its Anglican character cannot regard itself as independent of the worldwide communion or set its own course on matters of teaching. Indeed, a number of Lambeth Conferences have explicitly rejected the language of independence and have stressed the interdependence of the communion.

10. At a fundamental level, the communion between Anglican churches worldwide is based on acceptance of the same faith, worship, doctrine and discipline. These core characteristics of Anglicanism have been expressed through the Book of Common Prayer and such foundational documents as the Thirty-nine Articles. In Canada, the Solemn Declaration of 1893 expresses the same fundamental Anglican character as I would expect to find in an Anglican church anywhere in the world. I strongly believe that a church that departs from these fundamental characteristics is no longer truly Anglican. ...

[48] It was put this way by Dr. James Packer, a professor of theology at Regent College in Vancouver, who discussed the nature of communion and impaired communion in his evidence:

... congregations who are in unresolvable disagreement and thus in impaired communion with their diocesan bishop and who seek alternative episcopal oversight from another Anglican bishop but who remain committed and loyal to the Anglican heritage and purpose, and in continuing communion with the See of Canterbury, retain their status within the Anglican Communion unimpaired by their differences with the diocesan bishop.

[49] There are, as well, views of the significance of the Solemn Declaration that differ from those expressed by Reverend Short. Bishop Ingham, for instance, views the Solemn Declaration as a document of historical significance. He sees Anglicanism as a “big tent” in which there is room to preserve and respect differing views within the same church.

[50] Reverend Kevin Dixon is the Rector of St. Mary, Kerrisdale in Vancouver. He was ordained in 1987, and received his theology training at Huron College, an Anglican seminary associated with the University of Western Ontario. He testified that the Solemn Declaration was not mentioned in his education. He first heard of the Solemn Declaration in 2001. He attended an event at Trinity Western University when he heard Dr. Packer make reference to it.

[51] Reverend Alan Perry is the Rector of St. Barnabas Church in the Diocese of Montreal. He is the prolocutor, a senior officer in the Ecclesiastical Province of Canada. (This ecclesiastical province comprises the Dioceses of Montreal, Quebec, Fredericton, Nova Scotia, Prince Edward Island, Western Newfoundland, Central Newfoundland, Eastern Newfoundland and Labrador.) He holds a Master of Laws degree in canon law from Cardiff University. His perspective is that the Solemn Declaration was not intended to restrain future action by the Church. He put it this way in his affidavit:

17. It would be a serious misreading of the Solemn Declaration, or its predecessor Declarations of Principles, to suggest that they were intended to restrain future action. ...

21. The Solemn Declaration is best understood in its historical context, as a statement of continuity with the past and with the Church of England, upon embarking on development of the future course of the Anglican Church of Canada. It is part of a family of similar Declarations, which had their origin forty years earlier in Toronto as a defence against potential charges of illegitimate and unlawful action or even schism. It is a starting point for new action, and not a mechanism for restraining future action – a statement of continuity with the past from which the future might begin its own trajectory.

[52] The defendants make the point that the Solemn Declaration was previously invoked to frame an argument against the ordination of women.

### **History of Same-Sex Blessings**

[53] The issue that divides the plaintiffs from the Diocese is not same-sex marriage; within the Anglican Church, marriage remains exclusively the union of a man and a woman. Rather, it is Bishop Ingham's decision to accept and act on a resolution of the Diocesan Synod in 2002 that priests be permitted, in certain circumstances, to perform a liturgical rite blessing a same-sex union.

[54] Discussions about homosexuality within the ACC are not a recent development. The Parliament of Canada decriminalized homosexuality in the early 1970s, and by 1976, the National House of Bishops had formed a national task force to consider the issue of homosexuality in contemporary society and how the ACC ought to respond. Canadian bishops committed themselves to a period of study and dialogue regarding these matters. In February 1979, the National House of Bishops issued a set of guidelines based on the work of the national task force which provided as follows:

1. Our present and future considerations about homosexuality should be pursued within the larger study of human sexuality in its totality;
2. We accept all persons regardless of sexual orientation, as equal before God; our acceptance of persons with homosexual orientation is not an acceptance of homosexual activity;
3. We do not accept the blessing of homosexual unions;
4. We will not call in question the ordination of a person who has shared with the bishop his/her homosexual orientation if there has been a commitment to the bishop to abstain from sexual acts with persons of the same sex as a part of the requirement for ordination.

[55] The then Primate of the ACC, Archbishop Scott, noted at the time, "Our statement is not meant to be, in any way, legislation or a final doctrinal statement."

[56] Much discussion of the issue ensued in the years that followed. In 1987, the Diocesan Synod passed a resolution in which it encouraged congregations to "undertake the study of sexuality and the influences of societal attitudes and our faith on our understanding of sexuality". In 1992, the Diocesan Synod asked the then Bishop of the Diocese to initiate a study of human sexuality for both clergy and laity.

This led Archbishop Douglas Hambidge to appoint a Task Force on Human Sexuality. Also in 1992, the Diocesan Synod debated a motion to endorse the 1979 Guidelines of the National House of Bishops. That motion was tabled. The following year, 1993, the Task Force on Human Sexuality made its report. It recommended a two-year program of study throughout the Diocese on the issue of human sexuality. In 1994, motions endorsing the 1979 Guidelines were again debated by the Diocesan Synod. Those motions were again tabled.

[57] At the national level, the General Synod in 1992 requested that the National House of Bishops and the National Executive Council of the ACC commission a study of homosexuality and homosexual relationships. The General Synod received that report, entitled “Hearing Diverse Voices”, in 1995 and asked that the 1979 Guidelines be updated. The General Synod passed this resolution:

The Anglican Church of Canada affirms the presence and contributions of gay men and lesbians in the life of the Church and condemns bigotry, violence and hatred toward any due to their sexual orientation.

[58] In 1997, the subject of same-sex relationships was debated by the National House of Bishops. New guidelines regarding the ordination and pastoral care of homosexuals were adopted. They provided, in part:

#### Blessing of Covenanted Relationships

We continue to believe that committed same sex relationships should not be confused with Holy Matrimony. The house will not authorize any act that appears to promote this confusion. There is, and needs to be, ongoing discussion about how to respond appropriately to faithful and committed same sex relationships. In the context of the ongoing debate this would necessitate respectful listening and learning about the nature of such relationships and their meaning for the persons involved in them. We recognize that relationships of mutual support, help and comfort between homosexual persons exist and are to be preferred to relationships that are anonymous and transient. We disagree among ourselves whether such relationships can be expressions of God’s will and purpose.

While consensus may be unlikely in the near future, we believe that study and dialogue continue to be fruitful. As we continue to listen together to scripture, tradition and reasoned argument based on the experience of the Church, including and especially the experience of its gay and lesbian members, we grow in our recognition that our disagreements reflect our attempts to be faithful to the Gospel in our different personal and pastoral contexts.

As long as such dialogue continues to be fruitful we believe it should continue. We are not ready to authorize the blessing of relationships between persons of the same sex. However, in interpreting the Gospel, we must always reflect on the context to which it is addressed. We are, therefore, committed to ongoing study of human sexuality and of the nature and characteristics of human intimacy and family life as it exists in our society.

[59] In the mid- to late 1990s, tensions arose between the conservative clergy and congregations of the Diocese, and Bishop Ingham for reasons that included but were broader than the issue of homosexuality. Bishop Ingham was criticized for espousing a “pluralistic theology”, the notion that there are ways to God other than through Jesus Christ. There was concern in conservative parishes arising from a book written by Bishop Ingham, *Mansions of the Spirit: The Gospel in a Multifaith World* (Toronto: Anglican Book Centre, 1997). In that book, Bishop Ingham expressed the view that God does not limit salvation to Christians alone.

[60] Reverend Walters deposed that he considers this view to be in direct conflict with the Bible, specifically John 14, wherein it is stated that Jesus is “the way”. It is a fundamental tenet of orthodox Anglican belief, and, indeed, orthodox Christian belief, he deposed, that Jesus Christ is the only way to the Father. Publication of Bishop Ingham’s book indicated to him “the direction that Anglican liberalism was headed”. Reverend Walters said that it “galvanized” the orthodox Anglicans in the Diocese against this “liberal agenda”.

[61] Discussion and tension over same-sex blessings were not restricted to the Diocese or, for that matter, Canada. In February 1997, 20 provinces located in the Global South issued a statement on human sexuality which stated, in part:

We are deeply concerned that the setting aside of biblical teaching in such actions as the ordination of practicing homosexuals and the blessing of same-sex unions calls into question the authority of the Holy Scriptures. This is totally unacceptable to us.

[62] The Global South refers to a grouping of approximately 20 provinces outside of North America and Europe. It represents more than 70% of the active membership of the Anglican Communion.

### **1998 Diocesan Synod Vote**

[63] The Diocesan Synod met in May 1998. The Synod voted by secret ballot on “Motion 9”, which provided:

That the Synod of the Diocese of New Westminster ask the Bishop to authorize clergy in this diocese to bless covenanted same-sex unions, subject to such conditions as the Bishop deems appropriate.

[64] Motion 9 passed 179 to 170, or 52.8%.

[65] A bishop in a diocese of the ACC may approve or withhold consent from motions passed by diocesan synods. On this occasion, Bishop Ingham withheld his consent to the motion, as he wished to consult further with the wider Church. He distributed a letter to Diocesan clergy advising that he would be consulting with colleagues from around the world at the Lambeth Conference scheduled for later in 1998.

[66] Also in May 1998, the General Synod voted to affirm the direction of the National House of Bishops in their 1997 Guidelines.

[67] The Lambeth Conference took place in Canterbury in June 1998. The meeting included some 800 bishops from 160 countries. Resolution 1:10, which was passed by a large majority, affirmed that Anglican teaching rejected homosexual practice as incompatible with Scripture, and ruled out the legitimizing or blessing of same-sex unions or the ordaining of those involved in such unions. It also called for further study, pastoral concern, and understanding of homosexuality.

[68] Back in the Diocese, Bishop Ingham continued the process of seeking advice and encouraging dialogue. He established a Council of Advice consisting of various people, including Reverend Short of St. John’s (Shaughnessy), and the Chancellor of the Diocese, George Cadman, Q.C. Bishop Ingham also reported to the National House of Bishops about the events in the Diocese. The National House of Bishops supported the idea of a Council of Advice and asked that two members of the National House of Bishops be appointed to join it. Bishop Ingham complied with this

request, appointing Bishop Victoria Matthews and Archbishop Percy O’Driscoll. Bishop Matthews was seen as a conservative voice while Archbishop O’Driscoll was viewed as a progressive.

[69] The Council of Advice met twice in the fall of 1998 but did not reach a consensus on the course of action to follow.

#### **Four Initiatives**

[70] In early 1999, Bishop Ingham introduced four further initiatives:

1. He appointed the Legal and Canonical Commission.
2. He established a Commission on Gay and Lesbian Voices in the Diocese.
3. He established a Commission on Faith and Doctrine.
4. He initiated a process of “twinning” parishes to foster discussion of the issue.

#### **1. The Legal and Canonical Commission**

[71] The Legal and Canonical Commission was made up of three persons: Linda Barry-Hollowell, Dr. Stephen J. Toope and George Cadman, Q.C.

[72] Ms. Barry-Hollowell was a member of the Anglican Diocese of Calgary. She was an advisor to the National House of Bishops and had served as a judge of the Supreme Court of Appeal of the ACC.

[73] Dr. Toope was from the Anglican Diocese of Montreal. He is the former Dean of Law at McGill University and was a member of the Anglican Consultative Council. (He is currently president of the University of British Columbia.)

[74] Mr. Cadman is a British Columbia lawyer who is Chancellor of the Diocese and Chancellor of the Provincial Synod of British Columbia and the Yukon. The

Chancellor is a diocese's legal officer, and provides advice on civil and canon law to the diocese and its bishop.

[75] The Commission was mandated by Bishop Ingham to consider three questions:

1. Do the Canons of the Anglican Church (national, provincial, diocesan) permit or preclude the Bishop of New Westminster to authorize/from authorizing the blessing of same-sex unions?
2. If permitted, what approvals, if any, are required?
3. Are there impediments under civil or common law to such blessings?

[76] The Commission invited submissions and considered both the submissions received and a variety of other materials. It published its report some 18 months later in April 2001. It reached these conclusions:

1. The Bishop is not precluded by the Canons or the Constitution of any of the General Synod, the Ecclesiastical Province or the Diocese from authorizing the use of a rite for the blessing of covenanted same-sex unions.
2. While the Commission was of the opinion that the Bishop need not seek approval from any other body to proceed to authorize the blessing of covenanted same-sex unions within the Diocese, it nonetheless recommended that he consult with the Diocesan Synod, the General Synod and the National House of Bishops before implementing the use of such a rite. As well, it recommended to the Primate and the National House of Bishops that the House "exercise its corporate leadership on this issue".
3. The Commission knew of no impediment under civil or common law to the blessing of covenanted same-sex unions.

## **2. The Commission on Gay and Lesbian Voices**

[77] This Commission was created largely in response to Resolution 1:10 of the 1998 Lambeth Conference. Bishop Ingham testified that Lambeth had called upon the Church to listen to the experience of homosexual persons, and that this Commission was a mechanism to enable them to speak.

## **3. Commission on Faith and Doctrine**

[78] This Commission was made up of prominent conservative and liberal bishops, and had a mandate to prepare a series of study papers for discussion purposes.

## **4. Twinning**

[79] Approximately 80 parishes in the Diocese were “twinned” to engage in a dialogue concerning human sexuality. Parishioners were to read and discuss papers prepared by the Commission on Faith and Doctrine, listen to experiences of gay and lesbian Anglicans, and consider a proposed rite of blessing.

### **Events in 2001**

[80] In April 2001, Bishop Ingham brought the matter of same-sex blessings before the National House of Bishops meeting in Niagara Falls. The House made no statements in regard to this but asked that the matter be brought back for consultation during the General Synod in the event the Diocesan Synod again approved the motion regarding the blessing of same-sex unions and Bishop Ingham decided to grant his consent.

[81] The Diocesan Synod met in June 2001 and voted a second time on Motion 9. The wording was the same as in 1998. Again, the vote was by secret ballot. Motion 9 passed with a slightly increased majority, 226 to 174, or 56.5% in favour. Once again, Bishop Ingham withheld consent to the motion. He felt that 56.5% did not represent the clear and substantial majority he needed to act and that a stronger consensus was required.

[82] In the summer of 2001, a national conference of the Anglican Essentials, a group of conservative clergy and laity, was held in Langley, British Columbia. Bishop Ingham made a welcoming address to the conference. He described in his remarks the division between liberals and conservatives at that time:

Today I feel myself to be in a Church where theology has become a grim and humourless affair, a struggle not for truth but for power, characterized at its worst by superficial analysis, threats and personal attacks. Liberals accuse conservatives of lacking compassion, a charge that I reject. Conservatives accuse liberals of abandoning orthodoxy and scripture, a charge I equally reject. In a climate of name-calling, *ad hominem* arguments, and the demonizing of individuals, truth stands no chance.

[83] The General Synod met in Waterloo, Ontario in July 2001. It devoted a session to a “Presentation on Sexuality”, which included a full report on events within the Diocese. There were several speakers, including Bishop Ingham and Reverend Sarah Tweedale, a conservative priest in the Diocese. The General Synod took no action regarding the issue.

[84] The National House of Bishops met in Edmonton in the fall of 2001. Again, Bishop Ingham reported on events within the Diocese. There was also discussion about the possibility of alternative episcopal oversight. Under such an arrangement, another bishop would work in the Diocese to provide pastoral care to persons who were more conservative than Bishop Ingham. The evidence of Bishop Ingham is that there was a discussion of models which had been used in England, the United States and New Zealand. None of these models included the ceding of episcopal jurisdiction; that is to say, the power to appoint priests remained with the bishop. His evidence is that the majority of bishops were of the view that episcopal jurisdiction should not be ceded.

### **Events in 2002**

[85] The General Synod had earlier appointed a task force on jurisdiction to examine which levels in the ACC (diocesan, provincial and national) could exercise authority over various aspects of its life and work. The task force reported in February 2002. Its report was made in the context of the multi-year period of study

and reflection in the Diocese regarding the blessing of same-sex unions. Among its statements was the following:

It is apparent that there is no single clear process to determine whether or not a matter is one of doctrine, discipline or worship and therefore the prerogative of General Synod. It is through struggling with an issue that the 'mind of the church' about where and by whom it should be resolved emerges.

The confederal nature of our church means that undesignated powers rest with the dioceses and/or diocesan bishops. This seems to suggest that when it is unclear at what level a matter should be decided, the power to decide it should rest at the Diocesan level unless the 'mind of the Church' deems it to belong at another level. In short, when jurisdiction in a contentious matter is not specified, it will be decided at the highest level that has the will to decide it.

[86] The task force drew this conclusion:

While the Task Force concludes that formal jurisdiction over doctrine and discipline rests with the General Synod of the Anglican Church of Canada, in practice this jurisdiction has been exercised with a careful circumspection and with due regard to local expression. In a country as diverse as Canada with a wide variety of settings in which the Church is called to ministry, this flexibility of jurisdiction has served the Church well and can continue to do so. Therefore, we do not propose any efforts at definition of jurisdiction.

[87] The Diocesan Synod was scheduled to meet on June 14 – 15, 2002. The resolution concerning authorization of same-sex blessings was to be back before it again. In preparation, Bishop Ingham invited several clergy who had expressed difficulty with this issue, including the plaintiff Reverend Short, to meet to discuss the matter. That meeting took place on May 23, 2002. Bishop Ingham and Chancellor Cadman were there on behalf of the Diocese. Bishop Ingham introduced a proposal he wished to make to the Diocesan Synod. The first part of the proposal was that an episcopal visitor would be appointed. This would be a bishop who would provide pastoral care to conservative congregations. The second part was a "conscience clause". The effect of such a clause would be that no member of the Diocese would be required to act against his or her conscience in the blessing of same-sex unions. Thus, a conservative priest who was opposed to the blessing of same-sex unions would not be required to do so.

[88] The proposal was rejected by the clergy at this meeting.

[89] Bishop Ingham was aware that the plaintiffs wanted a bishop from outside the Diocese who would have jurisdiction to appoint priests. His evidence is that he felt this would undermine the nature of the historic episcopate, entrench division and balkanize the Diocese along theological lines.

[90] In early June, Bishop Ingham sent the proposal he had raised during the May 23 meeting to all members of the Diocesan Synod and Diocesan Council. Entitled “A Proposal to Address Pastoral Needs Within the Diocese of New Westminster”, it read, in part, as follows:

1. Context

After 25 years of discussion within the Canadian Church, our Synod in 1998 and 2001 voted to proceed with a blessing of covenanted same-sex unions.

On both occasions, my episcopal consent was withheld. My hope has been to allow time for the development of greater consensus and mutual understanding.

In the 12 months since Synod 2001 it appears the issue remains contentious and far from resolution. Gay and lesbian members of our church feel their pastoral needs are being denied despite majority support from Synods. Other Anglicans express sincere commitment to the church but feel they would be pastorally isolated if I were to give my consent in the future.

2. A Proposal

In order to resolve the impasse, and to enable the highest level of communion to continue within the diocese, I offer the following proposal as a way forward.

A. Appointment of Episcopal Visitor

I will appoint a Canadian bishop from outside this diocese to offer pastoral care to those parishes and clergy who desire it. It is to be understood that this is a temporary measure, renewable annually by vestry vote and with my consent, while the diocese and the affected parishes continue to work toward mutual reconciliation.

The Diocesan Bishop shall retain canonical authority over all parishes and licensed clergy, including jurisdiction in all episcopal acts, while delegating pastoral oversight to the Visitor. The Visitor shall be accountable to the Diocesan [Bishop]. Costs shall be borne by the diocese for an initial period of three years, renewable. Parishes under the care of the Episcopal Visitor shall continue to meet their financial obligations to the Diocese.

B. Conscience Clause

No member of the diocese, lay or ordained, shall be required to act against their conscience in the blessing of same-sex unions. There

shall be no discrimination against any member of the diocese in respect of employment, appointment or advancement on grounds of conscience. No “sunset clause” is intended, although I cannot bind my successors in this matter.

Clergy holding or seeking the bishop’s license must honour the conscience of others (as on other matters such as the ordination of women), maintain collegiality including attendance at clergy events, and respect the decisions of Synod. The Bishop’s Expectations of Clergy published in the Diocesan Procedures Manual, shall continue to apply to all diocesan clergy. Failure to comply may result in the termination of license.

C. Rite of Blessing

I shall approve a rite of blessing, subject to review by the Legal and Canonical Commission. Requests to use the rite must be made in writing indicating the consent of both the Incumbent and the congregation, by vestry vote. Only those parishes meeting these conditions shall be authorized to offer such pastoral services.

D. Episcopal Consent

In order to avoid further contentious and divisive debate on this matter, I shall give my episcopal consent to Motion 9 at Synod 2002 subject to the above conditions. I would like to see the withdrawal of all motions on the issue.

...

[91] On approximately June 13, 2002, the plaintiff Reverend Walters wrote an open letter to the then Archbishop of Canterbury, George Carey. He alleged that Bishop Ingham had threatened to withdraw licences of clergy unable to live with the blessing of same-sex unions. Bishop Ingham does not accept that as an accurate statement of his position. Nonetheless, it led to considerable international reaction.

[92] Among the motions considered during the Diocesan Synod in June 2002 was a version of the motion permitting same-sex blessings, as modified by Bishop Ingham’s proposal. Motion 7 provided:

That this Synod endorse the Bishop’s proposal to meet pastoral needs in the Diocese of New Westminster as set out in paragraphs A, B, C and D of the proposal dated May 23<sup>rd</sup>, 2002.

[93] The results of the secret ballot were 215 to 129 in favour, a majority of 62.5%.

[94] When the results were announced, the clergy and a majority of the lay delegates from eight parishes left the Diocesan Synod in protest. These parishes were St. John's (Shaughnessy), St. Luke/St. Matthias, St. Matthew (Abbotsford), Church of the Good Shepherd, St. Simon, St. Andrew (Pender Harbour), St. Martin and Church of Emanuel.

[95] Following this dramatic event, Bishop Ingham assented to Motion 7.

[96] The reaction to Motion 7 was emotional. Reverend Short described his reaction this way:

It felt like a tearing, for me, when the Bishop said he would go ahead and assent to it. It felt like the train had reached a fork in the track and instead of going down one track it hit the fork and went down both tracks, and as I left, there were many tears. I think there were tears on both sides of the issue, and it was – it was extraordinarily difficult, but I felt that physically, I had to do something to demonstrate the depth of the crisis for me, and so that's why I walked out.

[97] There was also response from many persons outside the Diocese, including: within the ACC, 13 of 40 Canadian bishops signed a public statement criticizing the move to approve same-sex blessings as being in conflict with the teachings of Scripture and beyond the jurisdiction of a single diocese acting alone; 23 bishops from ECUSA issued a public statement; the Primate of Kenya expressed his shock at the actions during the National Anglican Conference in Sydney, Australia; 52 clergy in the Diocese of Fredericton wrote to express their support for the dissenting parishes; and 12 clergy in Brandon, Manitoba signed a letter to Bishop Ingham.

[98] The Archbishop of Canterbury was critical, as well. He called the action in New Westminster "schismatic" and said that it "undermines marriage" and "makes us a very embarrassing partner in ecumenical circles as well".

[99] In September 2002, the Anglican Consultative Council met in Hong Kong. Archbishop Crawley (who was the Metropolitan of the Ecclesiastical Province of British Columbia and the Yukon), Chancellor Cadman and Bishop Ingham attended.

The Bishop held a private meeting with members of the Council to explain the decision to bless same-sex unions.

[100] Reaction was also strong at the parish level. Shortly after the Synod, the eight dissenting parishes formed an informal coalition under the name Anglican Coalition in New Westminster (“ACiNW”). Reverend Short described the purpose of the coalition as being for mutual support and coordination during what was anticipated to be a difficult time. It was also intended to be a vehicle for the search for alternative episcopal oversight.

[101] Between June and September 2002, each of the parishes represented by the plaintiffs called a special vestry meeting to deal with issues arising from Motion 7. On June 30, 2002, for instance, a meeting of the vestry was held at St. Matthias/St. Luke. Among the motions passed was one to withhold the parish’s normal payment to the Diocese and to work together with other parishes that opposed Motion 7 under the ACiNW. The same thing occurred at the Church of the Good Shepherd a few days later.

[102] Similar events were occurring at St. Matthew’s in Abbotsford. The plaintiff Linda Seale testified that the parish stopped remitting monthly assessments to the Diocese in June 2002. On July 14, an extraordinary general meeting of the vestry was held and a motion was passed to join other parishes under the ACiNW.

[103] St. John’s (Shaughnessy) made the same decision on September 10, 2002.

[104] The withholding of assessments by these four parishes has continued to date.

[105] In early July, it came to the attention of Chancellor Cadman that St. John’s (Shaughnessy) was hosting an “ACiNW celebration”. On July 10, 2002, he wrote to the wardens, trustees and Reverend Short. His letter included this:

As Trustees of the Parish, the canonical requirements under which you serve require you to maintain the property and assets of the Parish (the “Property”) for the good of the Parish of St. John’s (Shaughnessy) an incorporated Parish of the Diocese of New Westminster, and to ensure that the property is preserved for Ministry by all your parishioners and for use within the Diocese.

This precludes use for Ministry outside the Diocesan structure and other than under our act of Incorporation without the consent of Diocesan Council and the Bishop, Michael Ingham.

[106] Not everyone opposed to same-sex blessings reacted in the manner described above. Many are in favour of remaining within the Diocese and the ACC. For instance, Reverend John Oakes, a conservative priest in the Parish of Holy Trinity, wrote an open letter “To Members of the Essentials Clergy Group and Other Interested Parties” in June 2002. It included the following:

I personally see nothing necessarily unbiblical in staying with the Diocese of New Westminster, as is, as long as I am given the option not to participate in the blessing of same-sex unions personally or to minister in a parish which does so. What is more, in remaining where I am, I can avoid causing further division within the church, which I regard as a grave sin in and of itself. I can also continue to preach, minister and act on the biblical truth as I understand it.

[107] Reverend Sarah Tweedale is another conservative priest. She was Rector of St. Clements from 1999 until 2008. She describes herself as a life-long Anglican who was baptized, confirmed and married at St. John’s (Shaughnessy). Reverend Tweedale voted against same-sex blessings at the 1998, 2001 and 2002 Diocesan Synods. Nevertheless, her evidence is that she believes the Bishop’s pastoral statement adequately meets the needs of clergy like her who are opposed to the blessing of same-sex unions.

### **Events in 2003**

[108] In October 2002, the National House of Bishops met in Mississauga, Ontario. The House urged the Diocese and the ACiNW parishes to enter into a process of reconciliation on the basis of the motion passed by the Diocesan Synod. Bishop Ingham took this to mean that the House respected the decision of the Diocesan Synod.

[109] The parties engaged an experienced mediator, Gordon Sloane, and a series of meetings took place. By February 2003, however, the mediated talks had reached an impasse. Mr. Sloane advised the parties that the process was not productive and that no consensus could be reached.

[110] In February 2003, the Parish of St. Clement's in North Vancouver availed itself of the episcopal visitor provision in the Bishop's terms of endorsing the 2002 Motion 7. Bishop William Hockin, a conservative opponent of same-sex blessings, was appointed in this regard.

[111] In early 2003, some of the ACiNW leaders approached Bishop Terry Buckle of the Diocese of the Yukon. Bishop Buckle wrote to Bishop Ingham offering to provide alternative episcopal oversight, including episcopal jurisdiction (meaning the right to appoint and remove clergy) to the ACiNW parishes. This offer was not accepted. Bishop Ingham issued a "Notice of Inhibition" against Bishop Buckle exercising any ministry within the geographic boundaries of the Diocese. (Pursuant to the Canons of the General Synod, no bishop, priest or deacon can exercise ordained ministry within a diocese without a licence or temporary permission from the diocesan bishop.) Despite the inhibition, Bishop Buckle wrote to "the Executive Committee of the Anglican Communion in New Westminster" and offered them alternative episcopal oversight, including jurisdiction.

[112] At vestry meetings in March 2003, several parishes, including the four at issue in these proceedings, voted overwhelmingly in favour of accepting Bishop Buckle's offer of oversight. This, in turn, led to a letter from Bishop Ingham to the incumbents of those parishes describing Bishop Buckle's actions as "contrary to Canon Law and my letter of inhibition to him dated February 24, 2003" and stating that the actions of the vestry meetings were null and void.

[113] On March 25, 2003, Chancellor Cadman wrote to Archbishop Crawley, the Metropolitan of the Ecclesiastical Province of British Columbia and the Yukon, asking that he take disciplinary against Bishop Buckle.

[114] Diocesan Synod took place on May 29 - 30, 2003. The four parishes in question did not attend and have not attended any Synod since that time.

[115] In August 2003, Chancellor Cadman brought charges against the incumbents of the four parishes (Reverend Short, Reverend Walters, Reverend Chin and

Reverend Leung) under the Discipline Canon of the Diocesan Canons. The four clergy were accused of such offences as disobedience to the Bishop, contemptuous and disrespectful conduct toward the Bishop, schism and conduct causing scandal. He asked that a Commission of Inquiry be convened.

[116] In October 2003, Archbishop Crawley announced disciplinary proceedings against Bishop Buckle. His correspondence to the members of the ACC in British Columbia and the Yukon included the following:

The basic structural unit of the Anglican Church of Canada is the diocese. A diocese comprises a geographical area and in the civil Province of British Columbia, all diocesan boundaries are fixed by acts of the Provincial Legislature. Anglican parishes can exist only as units within a diocese.

The Canons of General Synod, which govern our Church, state specifically that a bishop from outside cannot function in a diocese without permission of the diocesan bishop. Further, the Canons provide the diocesan bishop with the authority to inhibit any other bishop from functioning in the diocese.

The Rt. Rev. Michael Ingham has formally inhibited the Rt. Rev. Terence Buckle, Bishop of Yukon, from functioning within the Diocese of New Westminster. I, as the Metropolitan of British Columbia and Yukon, have required Bishop Buckle to respect that inhibition and refrain from interfering in the life of the Diocese of New Westminster. ...

No bishop of the Anglican Church of Canada can claim or assert any authority within the bounds of another diocese. ...

In continuing to assert that he has full episcopal authority over the disaffected parishes in New Westminster, Bishop Buckle is acting unlawfully and any commissionings, licensings, appointments he might claim to have made, or confirmations he has performed are unlawful.

Disciplinary proceedings against Bishop Buckle as provided in the Canons have begun and will take their proper course.

Parishes cannot remove themselves from the authority of their diocesan bishop and place themselves under the authority of another bishop. Any parishes in the Diocese of New Westminster accepting Bishop Buckle's claim to authority over them are acting unlawfully and contrary to the Canons of the Anglican Church of Canada.

No Anglican Primate, Archbishop or Bishop from any part of the Anglican Communion other than Canada has any authority to appoint, license, commission, ordain or confirm anyone anywhere in the Anglican Church of Canada, and any such person claiming that authority is acting unlawfully.

[117] Also in October 2003, the National House of Bishops urged the dissenting congregations to speak to Bishop Hockin, the Episcopal Visitor, to determine

whether he could bring about some form of reconciliation. It passed a motion requesting that Bishop Buckle withdraw his offer to assume episcopal jurisdiction, that Metropolitan Crawley stay charges against Bishop Buckle, and that Bishop Ingham stay charges against the dissenting clergy.

[118] On November 7, 2003, Bishop Buckle withdrew his offer of episcopal oversight. As a result, the Metropolitan stayed the charges against him. Shortly thereafter, Chancellor Cadman wrote to Bishop Ingham asking that all proceedings currently pending before the Commission of Inquiry be stayed. On November 12, Bishop Ingham advised the clergy that he had instructed the Commission of Inquiry to stand down. The disciplinary proceedings in respect of the four incumbents were thereby stayed.

[119] The first blessing of a same-sex union occurred at the Parish of St. Margaret's, Cedar Cottage on May 27, 2003. To date, four same-sex blessings have occurred in that parish. As of May 2003, there were six parishes that by majority vote had decided to be parishes where such blessings take place.

[120] At about the same time, the Primates of the Anglican Communion were conducting their annual meeting in Brazil in May 2003. They issued a Pastoral Letter which read, in part:

The question of public rites for the blessing of same sex unions is still a cause of potentially divisive controversy. The Archbishop of Canterbury spoke for us all when he said that it is through liturgy that we express what we believe, and that there is no theological consensus about same sex unions. Therefore, we as a body cannot support the authorisation of such rites.

[121] In June 2003, Reverend Gene Robinson, a priest living in a common law same-sex relationship, was elected Bishop of New Hampshire, part of ECUSA. In October of that same year, the Archbishop of Canterbury, Rowan Williams, convened an emergency meeting of the Primates "in response to recent events in the Diocese of New Westminster, Canada, and the Episcopal Church (USA)...". The Primates issued a statement which read, in relevant part:

If [Reverend Robinson's] consecration proceeds, we recognise that we have reached a crucial and critical point in the life of the Anglican Communion and we have had to conclude that the future of the Communion itself will be put in jeopardy. In this case, the ministry of this one bishop will not be recognized by most of the Anglican world, and many provinces are likely to consider themselves to be out of communion with the Episcopal Church (USA). This will tear the fabric of our Communion at its deepest level, and may lead to further division on this and further issues as provinces have to decide in consequence whether they can remain in communion with provinces that choose not to break communion with the Episcopal Church (USA).

Similar conditions apply to the situation pertaining in the Diocese of New Westminster.

[122] Despite the Primates' statement, Reverend Robinson was consecrated as bishop.

[123] Cheryl Chang is a member of St. John's (Shaughnessy). Her evidence is that by the end of 2003, the ACiNW had grown to 11 congregations.

[124] In 2004, four parishes in the Diocese left the ACC and accepted episcopal oversight from Southeast Asia and Rwanda. These parishes were St. Simon's North Vancouver; St. Timothy's North Vancouver; Church of Emmanuel Richmond; and, St. Andrew's Pender Harbour. This group became known as the Anglican Coalition in Canada ("ACiC"). There are now six ACiC congregations in the Lower Mainland and a total of ten congregations in British Columbia, as well as four more in the rest of Canada.

#### **Events in 2004**

[125] In June 2004, the General Synod passed a resolution which affirmed "the integrity and sanctity of committed adult same-sex relationships". At the same meeting, the Synod deferred until 2007 a motion regarding same-sex blessings pending a determination by the Primate's Theological Commission as to whether same-sex blessings were a matter of doctrine.

[126] At the request of the Anglican Primates during their emergency session in October 2003, the Archbishop of Canterbury established the Lambeth Commission to consider ways of strengthening relationships of communion within the Anglican

Communion. This Commission was to report on the developments in New Westminster and ECUSA, and their impact on the Anglican Communion. In October 2004, the Commission reported its findings in *The Windsor Report 2004* (London: the Anglican Communion Office, 2004). There are statements in the report upon which both sides of the debate rely.

[127] The *Windsor Report* was critical of the Diocese of New Westminster for not further consulting the wider Province or Communion on the theological issues in question. The report reminded readers that “the clear and repeated statements of the Instruments of Unity have been to advise against the development and approval of such rites.” It also noted that 18 of the 38 Provinces, or their Primates on their behalf, had issued statements which indicated their basic belief that developments in North America were “contrary to biblical teaching” and unacceptable.

[128] The *Windsor Report* recommended a moratorium on same-sex blessings and recommended that bishops who had authorized such rights “be invited to express regret that the proper constraints of the bonds of affection were breached by such authorization”. It also said that “pending such expression of regret, we recommend that such bishops be invited to consider in all conscience whether they should withdraw themselves from representative functions in the Anglican Communion.”

[129] The defendants, on the other hand, note that the *Windsor Report* did not comment on the constitutional propriety of the steps that had been taken in New Westminster. The report urged all Provinces engaged in processes of discernment regarding the blessing of same-sex unions to engage the Communion in “continuing study of biblical and theological rationale for and against such unions.”

[130] In November 2004, the National House of Bishops adopted a model for alternate episcopal oversight called shared episcopal ministry or “SEM”. This would entail a visiting bishop exercising pastoral care for ACiNW parishes on a temporary transitional basis until they returned to the full jurisdiction of the Diocesan Bishop. However, this did not meet the needs of the plaintiffs and was unsatisfactory to the parishes concerned.

[131] On November 17, 2004, Bishop Ingham advised the Primate, members of the National House of Bishops, the Diocesan clergy and members of the Diocesan Council that he was lifting the Notice of Inhibition issued to Bishop Buckle in February 2003. Bishop Buckle and Bishop Ingham had reached a satisfactory solution under the terms of which Bishop Buckle would respect diocesan boundaries and the jurisdiction of bishops.

### **Events in 2005**

[132] The moratorium on the blessing of same-sex unions recommended by the *Windsor Report* was not implemented in the Diocese. However, the Diocesan Synod determined in 2005 that only those parishes which had already complied with the conditions of Motion 7 from the 2002 Diocesan Synod and had already received the Bishop's permission to use the rite could continue to offer such blessings. It thus imposed a partial moratorium.

[133] In February 2005, the Primates held a meeting in Ireland. They accepted the *Windsor Report's* recommendations and asked the ACC and ECUSA to voluntarily withdraw from the Anglican Consultative Council until 2008 while "they consider their place within the Anglican Communion" and "whether they are willing to be committed to the inter-dependent life of the Anglican Communion". The Anglican Consultative Council met in Nottingham in June 2005. It supported and upheld the "voluntary withdrawal" of the ACC until 2008 as the Primates had requested. The ACC accepted the recommendation to withdraw and did withdraw until 2008.

[134] On May 6, 2005, the Archbishop of Canterbury appointed a Panel of Reference to consider some of the issues which have been raised in this litigation. ANiC made submissions to this panel in October 2005, and indicated that it was not satisfied with shared episcopal ministry. The Panel issued its report in September 2006, which included the following conclusions:

21. The argument that in order to remain "in full communion with the Church of England throughout the world" it is necessary for dissenting clergy and parishes to separate themselves from the diocese of New Westminster, adopting a title for their organisation which implies they represent the

Anglican Communion in New Westminster, in addition to or instead of the diocese and Bishop Ingham, cannot be sustained. The Church of England itself remains in full communion with the Diocese of New Westminster and Bishop Ingham, pending resolution of the presenting issue, and therefore with all of its clergy, members and parishes, including those who dissent from its diocesan synod decision but remain in full fellowship with the Bishop and the Diocese, together with the dissenting parishes unless they formally withdraw themselves from the Anglican Church in Canada. Even if this were not the case there is no evidence that communion with dissenting parishes would in fact be broken since such provinces which have declared impaired communion have made it clear that they remain in communion with those whom they regard as faithful.

...

25. The [submission of ANIC] critique of SEM elaborates further on the claim, which we believe to be unsustainable in the current situation, that in order for the dissenting clergy and parishes to be in full communion with the Archbishop of Canterbury and the “Church of England throughout the world” it is necessary for special arrangements to be made for them outside not only the Diocese of New Westminster, but outside the Anglican Church in Canada. It is factually incorrect to state [as the submission of ANIC stated] that “the province has been suspended from the Anglican Communion until 2008”. In fact the Anglican Church of Canada was asked voluntarily to withdraw its representatives from the Anglican Consultative Council until the Lambeth Conference in 2008.

...

33. For jurisdiction to be transferred to another bishop implies a division of the ministry of the chief pastor of the diocese, its clergy, congregations and places of worship. Jurisdiction is not shared with suffragan or assistant bishops, who may however share the delegated pastoral oversight of the diocese with the diocesan, as may others invited to share in particular tasks or ministries. Such delegation must have the consent of the diocesan bishop concerned.

...

#### RECOMMENDATIONS

1. The Panel of Reference cannot recommend the proposals of the applicants for transfer of jurisdiction either to the ANiC or to CAPAC. The Diocese of New Westminster is part of the Anglican Communion within the Anglican Church of Canada, which is due to debate both Resolution 1.10 of the Lambeth Conference and the *St Michael Report* at its General Synod in June 2007. The most desirable outcome, as stated in TWR [The Windsor Report] (see s. 6 above) is for the theological dispute to be resolved and for reconciliation to be effected within the Anglican Church of Canada.
2. In the present temporary situation, the Panel recognises that an agreed scheme of extended episcopal ministry needs to be offered to a number of clergy and parishes within the Diocese of New Westminster, which will

both for their spiritual needs and offer assurance of continuity for their distinctive theological tradition.

3. Such a scheme should be achieved within the Anglican Church in Canada itself, at national or provincial level. The bishop of a diocese is subject to the general ecclesiastical law of the church or province concerned, and one would look to the Anglican Church of Canada for action to be taken in the first instance. The provision of a scheme of Shared Episcopal Ministry [SEM] by the Canadian House of Bishops in 2004 offers a model which we believe to be appropriate, with some additional safeguards designed to take account of the special circumstances prevailing in this case, given the protracted and deep divisions which exist.

...

[135] By this time, Terry Buckle had become the Metropolitan of the Ecclesiastical Province of British Columbia and the Yukon. He issued a statement in response to the report thanking the panel “for care, diligence and clarity in the report” and noting that he would “respond willing and fully to any request for assistance in implementing the recommendations of the Panel of Reference in concert with the Parishes concerned, the Bishop of New Westminster and the Provincial House of Bishops.” ANiC rejected the report’s recommendations as inadequate.

[136] In June 2005, the Canadian Primate’s Theological Commission, whose mandate had been to consider whether same-sex blessings were a matter of doctrine, issued its report: *Report of the Primate’s Theological Commission of the Anglican Church of Canada on the Blessing of Same-Sex Unions: The St. Michael Report*, (Toronto: The General Synod of the Anglican Church of Canada, 2005). The *St. Michael Report* concluded that the blessing of same-sex union was a matter of doctrine, but not core doctrine “in the sense of being credal” and that the issue should not be “communion breaking”.

### **Events in 2007**

[137] The General Synod met and debated the blessing of same-sex unions in June 2007. The Synod considered and voted on the following three resolutions:

- (a) Resolution A184 – “That this General Synod accept the conclusion of the Primate’s Theological Commission’s *St. Michael Report* that the blessing of same-sex unions is a matter of doctrine, but is not core doctrine in the sense of being credal.” This resolution passed.
- (b) Resolution A186 – “That this General Synod resolves that the blessing of same-sex unions is consistent with the core doctrine of the Anglican Church of Canada.” This resolution passed.
- (c) Resolution A187 – “That this General Synod affirm the authority and jurisdiction of any diocesan synod, with the concurrence of its bishop, to authorize the blessing of committed same sex unions.” This resolution was defeated.

[138] Since the General Synod in 2007, six additional dioceses in Canada have voted to authorize the blessing of same-sex unions.

[139] Bishop Donald Harvey is a former bishop from Newfoundland and Labrador. Upon his retirement, he settled in British Columbia. He is an active conservative. His evidence is that in 2006 or 2007, he had a conversation with Archbishop Gregory Venables, the Primate of the Province of the Southern Cone. Archbishop Venables offered to take Bishop Harvey under his jurisdiction. That would mean that Bishop Harvey would continue to be a bishop in the Anglican Communion although not in the ACC.

[140] After the General Synod of 2007, Bishop Harvey concluded that he wished to leave the ACC. He relinquished his license and was appointed bishop by Archbishop Venables.

### **Anglican Network in Canada**

[141] In November 2007, the Anglican Network in Canada (“ANiC”) commenced operations as an incorporated entity.

[142] A significant aspect of this dispute is the role of the Global South. As noted earlier, the Global South refers to a grouping of approximately 20 provinces outside of Europe and North America. The Global South is conservative or traditional. Its congregations represent the majority of Anglicans worldwide.

[143] Christopher Sugden is an Anglican clergyman and the executive secretary of Anglican Mainstream, a coalition of orthodox Anglican churches and organizations. The Anglican Mainstream works closely with ANiC. His evidence is that there are 55 million Anglicans worldwide and of that number, 40 million are found in Nigeria, Uganda, Kenya and Rwanda. The Global South also encompasses other parts of Africa such as Tanzania, as well as the West Indies and the Southern Cone.

[144] The views of Anglican leaders in the Global South on Scripture and homosexuality are clear. In 1997, Global South Anglican churches met in Kuala Lumpur. The statement they issued on Human Sexuality includes the following:

3. While acknowledging the complexities of our sexual nature and the strong drives it places within us, we are quite clear about God's will in this area which is expressed in the Bible.
4. The Scripture bears witness to God's will regarding human sexuality which is to be expressed only within the life long union of a man and a woman in (holy) matrimony.
- ..
9. We are deeply concerned that the setting aside of biblical teaching in such actions as the ordination of practicing homosexuals and the blessing of same-sex unions calls into question the authority of the Holy Scriptures. This is totally unacceptable to us.

...

[145] In February 2006, the Primates of the Council of Anglican Provinces in Africa ("CAPA") commissioned a report. It included these words:

We in CAPA want to say clearly and unequivocally to the rest of the Communion: the time has come for the North American churches to repent or depart. ...

The current situation is a twofold crisis for the Anglican Communion: a crisis of doctrine and a crisis of leadership, in which the failure of the "Instruments" of the Communion to exercise discipline has called into question the viability of the Anglican Communion as a united Christian body under a common foundation of faith, as is supposed by the Chicago-Lambeth Quadrilateral.

*Due to this breakdown of discipline, we are not sure that we can in good conscience continue to spend our time, our money and our prayers on behalf of a body that proclaims two Gospels, the Gospel of Christ and the Gospel of Sexuality. [Emphasis in original]*

[146] As a result of this controversy, a large number of bishops did not attend the 2008 Lambeth Conference. Several Primates had called upon the Archbishop of Canterbury to delay the Lambeth Conference until the issues surrounding Bishop Robinson had been settled. When the Archbishop of Canterbury instead invited 60 bishops of ECUSA and other ACC bishops, many other bishops decided they could not attend. Two hundred thirty bishops, or roughly one-quarter of the bishops, boycotted the 2008 Lambeth Conference.

[147] These orthodox Anglicans organized an alternative conference in 2008 which they called the Global Anglican Future Conference or “GAFCON”. It took place in Jerusalem and was attended by 291 bishops and 857 clergy and laity from 17 Anglican Provinces. Both Bishop Don Harvey and Reverend David Short were in attendance on behalf of ANiC and were actively involved. The conference expressed support for the notion of a separate North American Province for those congregations who rejected the direction of the ACC and ECUSA.

[148] As of April 2009, there were 28 ANiC parishes in Canada.

[149] In 2008, a new structure was launched called the Anglican Church in North America (“ACNA”). Cheryl Chang, the Chancellor of ANiC, deposed in her affidavit that this body has a number of groups in Canada and the United States which are dissatisfied with the ACC and ECUSA.

[150] The ACNA seeks to be recognized as a Province. The ACNA has received support from Primates and Anglicans in many conservative provinces and dioceses around the world.

[151] By early November 2007, Bishop Harvey, identified as the “Moderator” of ANiC, was scheduled to preside at a service of ordination in Abbotsford. Bishop Ingham issued a memorandum to certain clergy in the Diocese advising that such

purported ordinations did not have his permission or authority. He also wrote to Bishop Harvey explicitly denying permission to exercise ordained ministry within the Diocese. Despite the inhibition, the ordination proceeded, though apparently in premises other than parish buildings.

[152] Both the General Synod and the Primate and Metropolitans of the ACC issued statements condemning the actions of the Province of the Southern Cone in purporting to extend its jurisdiction into the ACC. In addition, the Primate of the ACC wrote a letter to the Primate of the Anglican Communion and the Moderators of the United Churches in January 2008 which included the following:

General Synod 2007 also concurred by resolution with the opinion of the *St. Michael Report* that the blessing of same-sex unions should not be a communion breaking issue. Nonetheless some people feel compelled to leave our church over this issue. Their decision is regrettable given the fact that the bishops have made adequate and appropriate provision for pastoral care and episcopal support of all members of our church including those who find themselves in conscientious disagreement with the view of their bishop and synod. ...

In light of these provisions as well of ancient canons of the Church, statements of successive Lambeth Conferences, the Lambeth Commission on Communion (the *Windsor Report*), and the 2005 and 2007 communiqués from the Primate, we believe that recent interventions by another province in the internal life of our church are unnecessary and inappropriate.

[153] Also in January 2008, the Bishop of the Diocese of Brandon in the ACC wrote to the Archbishop of Canterbury regarding Bishop Harvey and Malcolm Harding, the former Bishop of Brandon. He asked the Archbishop to “issue a clear statement about your understanding regarding [Malcolm Harding’s] and Donald Harvey’s exercise of ministry in Canada.”

[154] The Archbishop of Canterbury replied to the letter on February 4, 2008. His letter included this:

The situation you describe is distressing and I can imagine the difficulties it must be causing to you personally. I hope that the letter I wrote a few weeks ago to the Primate may have clarified things a little, but if it did not, I am quite content to repeat that I do not endorse any cross-provincial transfers of allegiance, and that this office and that of the Anglican Communion recognise one ecclesial body in Canada as a constitutive member of the Communion, the Anglican Church of Canada. [Emphasis added]

### **Precipitating Events Leading to the Current Proceedings**

[155] In February 2008, vestry votes were held in the four parishes regarding episcopal oversight from the Province of the Southern Cone, facilitated by affiliation with ANiC. The motions were largely the same in each parish. That before the Church of the Good Shepherd read as follows:

Whereas

1. The Solemn Declaration of 1893 (forming part of the constitution of the Anglican Church of Canada (“ACoC”)) requires that the ACoC be in full communion with the Church of England throughout the world;
2. The ACoC, by its actions, is “walking apart” from the Anglican Communion, specifically by:
  - Failing to commit to or uphold the doctrine and teaching of Anglican Communion, particularly Lambeth Resolution 1.10;
  - Failing to give a clear and unequivocal response to the questions addressed to it in the Windsor Report, as requested by the Primates at Dromantine in February 2005;
  - Failing to provide Adequate Episcopal Oversight to parishes and clergy who are in serious theological dispute with the ACoC, as called for in the Primates’ Communiqués (2003, 2005, and 2007) and the Windsor Report (2004);
  - Rejecting a pastoral scheme proposed by the Primates at Dar Es Salaam in February 2007; and
  - Threatening clergy and congregations who seek to remain faithful to the historic faith and order of the Anglican Communion;
3. Many Anglican Primates and Provinces have declared broken or impaired Communion with this diocese or the ACoC;
4. This parish wishes to remain in full communion with the Church of England throughout the world and to be recognized as such;
5. The parish desires to commit to and uphold Anglican Communion teaching and doctrine, including 1998 Lambeth resolution 1.10;
6. The Presiding Bishop of the Southern Cone has offered adequate Episcopal oversight (“AEO”) on an emergency and pastoral basis through Bishop Donald Harvey, a bishop of the Province of the Southern Cone;
7. The Anglican Network in Canada (“ANiC”) has established an ecclesial structure through which such AEO can be facilitated;

Therefore, MOVED by Mr. William Tse and SECONDED by Mr. William Au

In order to remain “in full Communion with the Church of England throughout the world”, this parish hereby requests on an emergency and pastoral basis, the Episcopal oversight of Bishop Donald Harvey, under

the Primatial oversight of Archbishop Gregory Venables of the Province of the Southern Cone;

If this request for Adequate Episcopal Oversight is accepted, we hereby agree to affiliate with the ANiC to facilitate the provision of such oversight.

We further authorize and direct the Wardens and Trustees to take whatever steps as are necessary to arrange such affiliation with the ANiC, and to use the parish funds to facilitate and support the provision of such Adequate Episcopal oversight and protection of the parish.

[156] The motion passed overwhelmingly in each parish: St. John's (Shaughnessy) voted 97.7% in favour; St. Matthew's in Abbotsford, 97.9% in favour; St. Matthias and St. Luke voted 133 in favour, 1 opposed and 7 abstaining; and, the Church of the Good Shepherd voted 203 in favour with none opposed.

[157] The Canons of the General Synod set out circumstances in which the exercise of ministry is relinquished or abandoned. Canon XIX provides, in part, that a priest or deacon who has not relinquished the exercise of ordained ministry and "has abandoned the Anglican Church of Canada either by public renunciation of its doctrine or discipline, or by formal admission into another religious body, or in any other manner" shall be presumed to have abandoned the exercise of ordained ministry. Canon XIX also sets out a process of inquiry.

[158] On February 22, 2008, Bishop Ingham issued Notices of Presumption of Abandonment of the Exercise of Ministry to Reverend Short of St. John's (Shaughnessy) and Reverend Walters of St. Matthew's. In essence, the notice provided that they had 60 days to declare that they had not renounced the doctrine and discipline of the ACC, and had not sought admission into a religious body outside the ACC. The notice further provided that if they failed to do so, their spiritual authority as minister would be revoked on April 21, 2008. Similar notices were subsequently issued to Reverend Chin of St. Matthias and St. Luke and to Reverend Leung of the Church of the Good Shepherd, with the 60-day period to expire on April 28.

[159] On April 21, the Diocesan office received a statement signed by, among others, the four clergy who had received the Notices of Presumption of

Abandonment of Ministry. They disputed the engagement of the canonical process and indicated their intent to remain members of the Anglican Church, though unable to continue the Anglican ministry to which they were ordained under Bishop Ingham's jurisdiction. They further advised that they were "hereby relinquish[ing] the licenses we hold from the Bishop of New Westminster".

[160] By letter dated May 1, Bishop Ingham advised the four clergy that he accepted their decisions to relinquish his license and to leave all appointments under his jurisdiction. His letter also noted that since they had not contested the Notices of Presumption of Abandonment of Ministry, he would be sending Notices of Abandonment of Ordained Ministry in the ACC to the metropolitans and bishops of the church, and to Diocesan clergy.

[161] The four clergy responded on May 11 confirming that they had voluntarily relinquished their licences to minister in the ACC and advising that they had received licences to minister from Bishop Harvey under the jurisdiction of the Province of the Southern Cone. Accordingly, they wrote, they continued in Anglican ministry at their respective churches under Bishop Harvey's ecclesiastical authority. They also reiterated their views regarding irregularity in the engagement of the canonical process.

[162] On May 13, Bishop Ingham wrote to the plaintiff Peter Chapman, a trustee at St. Matthias and St. Luke, noting that "those who are entrusted with Parish assets, including buildings, have a special obligation to preserve those assets for the work of the Diocese and the Anglican Church of Canada", and seeking the "timely and orderly handing over of control of the building and assets of the Parishes to the Diocese". He further noted that the Diocese "would be happy to grant a reasonable amount of time for this orderly transition, so that those who wish to leave Parish buildings within the Diocese may make suitable alternative arrangements for worship etc."

[163] Also on May 13, the Diocesan Council unanimously passed the following motion with respect to each of the four parishes:

WHEREAS the Incumbent of the Parish of [name] has declared himself no longer subject to the jurisdiction, license or discipline of the Bishop of New Westminster, Anglican Church of Canada;

AND WHEREAS the former incumbent and others continue to occupy and worship in the Parish buildings, notwithstanding such unilateral action on their part;

BE IT RESOLVED THAT this Council ask the Bishop, in consultation with the Regional Archdeacon, the Regional Dean and one or more of the legal officers, together with such others as he may deem appropriate, to consider the implementation of an alternative form of Organization structure, pursuant to Canon 1503(a) together with such corollary actions as may be necessary, and to report back to the September 2008 meeting of this Council as to such actions provided that notice of this Resolution shall be given to the former Incumbent and Wardens of the Parish by the Bishop (or the Chancellor on his behalf) before such alternative form of Organization structure is implemented.

[164] On May 29, Chancellor Cadman wrote to Reverend Walters, Reverend Short and Reverend Chin advising that they did not have “the privilege or licence to preside at worship in the buildings which you continue to occupy. You are free to preside at worship of your choosing at any other location, but you are not free to do so in any Parish of this Diocese, nor, by reasons of your actions of Relinquishment and Abandonment, in any other Parish of any other Diocese in the Anglican Church of Canada”. Reverend Walters was told to depart the building no later than July 15, 2008; Reverend Chin, July 31, 2008. Chancellor Cadman also sent correspondence to the wardens and trustees of these two parishes informing them of his letters to their clergy.

[165] Around July 15, the trustees of the Parish of St. Matthew responded to Chancellor Cadman’s letter. They expressed their view that their obligation as trustees of the parish corporation was to see that parish property was used for the purpose of Anglican ministry that was consistent with historic, orthodox Anglican doctrine and practice. They advised that pending resolution of the dispute between the Diocese and those who had chosen the episcopal authority of Archbishop Venables, they would continue to administer their offices pursuant to the terms of the trust as they understood them.

[166] In July, Bishop Ingham signed notices pursuant to Canon 15 in respect of three of the parishes referenced in the May 13 motion of the Diocesan Council: St. John's (Shaughnessy), St. Matthias and St. Luke, and St. Matthew's. Canon 15 was ultimately invoked effective August 25, 2008 in respect of St. Matthias and St. Luke, and St. Matthew's after the deadlines for the departure of Reverend Walters and Reverend Chin had passed. Neither the clergy nor the trustees had left the properties. The notices were communicated to the clergy and wardens by a letter from Chancellor Cadman dated August 25, 2008.

[167] The notices were entitled "Notice of Creation of an Alternative Parish Structure and Notice of Appointment". They explained that Bishop Ingham was of the opinion that the parishes were experiencing difficulties and were in crises that affected their orderly management and operation. This was due to the fact that their former incumbent clergy had abandoned ministry in the ACC but continued to use and occupy the parish buildings and other assets with the apparent concurrence of the wardens and trustees of the parish corporations. The notice went on to explain that the Bishop, having first consulted with the Regional Archdeacon, Regional Dean, Chancellor and Registrar, deemed it both appropriate and necessary to take action, including establishing a new or alternative form of organizational structure for the parish. In each case, the notice directed the establishment of an alternative form of organization structure as set out in a schedule. That schedule provided as follows:

- 1 This Schedule is effective and operative from and including August 25, 2008.
- 2 An alternate form of Organization structure for the Parish is hereby established in accordance with Canon 15.
- 3 Except as expressly stated herein, Canon 14 shall not apply to the Parish.
- 4 All persons holding office as Wardens, Trustees, Treasurer, Parish Secretary, all Delegates to Synod and alternates and other officers and all persons who are members of Church Committee are hereby removed from office.
- 5 A Parish Executive Committee is hereby established to assume all of the duties, powers and responsibilities of the Parish that would

- otherwise vest in the Church Committee, Wardens and other officers of the Parish pursuant to Canon 14.
6. The Parish Executive Committee shall consist of the Minister in charge and the persons appointed to the Parish Executive Committee.
  7. The members of the said Parish Executive Committee shall be the Trustees of the Parish.
  8. The Trustees, Officers of the Parish and the members of the Parish Executive Committee shall be appointed from time to time by the Bishop in consultation with the Minister or Priest in charge of the Parish from persons nominated by one or more of the Bishop, Minister in charge, Regional Archdeacon or Regional Dean.
  9. Lay delegates and alternates shall be appointed by the Parish Executive Committee, unless Vestry shall, with permission of the Bishop, elect lay Delegates and alternate Delegates at a Vestry meeting called for that purpose.
  10. Signing authorities for the banking purposes of the Parish (including but not limited to all bank accounts and investment accounts) shall be any two of the members of the Parish Executive Committee.

[168] Priests-in-charge were also appointed in the two parishes.

[169] On September 9, the Diocesan Council ratified Bishop Ingham's actions.

[170] Although he considered that the preconditions for invoking Canon 15 also existed in the Church of the Good Shepherd and St. John's (Shaughnessy), Bishop Ingham did not take similar action with respect to those two parishes.

[171] On August 27, the trustees of St. Matthias and St. Luke advised Chancellor Cadman by letter that they had determined that it would be inconsistent with their duties to the parish to surrender control of access to church property to the Diocesan designates, absent a court determination or some other resolution. They also informed him of their view that it would be in the best interests of the parish corporation and of maintaining Anglican ministry consistent with historic Anglican doctrine and practice for Reverend Chin to continue to lead the parish.

### **Position of the Plaintiffs**

[172] The plaintiffs' argument with respect to the parish properties has four pillars: first, the parish properties are held on trust; second, the terms of the trust require

that parish ministry and liturgy be consistent with historic, orthodox Anglican doctrine and practice in full communion with the worldwide Church; third, Bishop Ingham's actions have made performance of the trust impracticable; and fourth, the Court should therefore order a *cy-près* scheme directing modification of the terms of the trust.

**1. Is the property held on trust?**

[173] The plaintiffs submit that the existence of a trust is essentially conceded in these proceedings. A trust, they say, is consistent with: (a) legal authorities that have consistently held that religious institutions hold their property on trust; (b) the understanding of Anglicans that church property is held on trust for the original purposes of the institution; and (c), the structure of parish corporations under the *Act*.

[174] The plaintiffs refer to M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2003) at 293-294, for its summary of the principle that the property of religious institutions is held in trust for the original purposes of such institutions:

It is a well-settled principle of law that the property of a religious institution must be held and applied to the original purposes for which that institution was founded, that is, for the original "trust". Such property cannot be redirected to other purposes by a mere majority of members, and where a majority decides upon a diversion, the property remains in trust for the dissenting minority (even one person) who adheres to the original trust for which the property was given.

[175] The plaintiffs further submit that Anglicans generally understand that church property is held for Anglican ministry on the basis of a shared belief system and a shared commitment to the constitution of the Church. In cross-examination in these proceedings, for example, Bishop Ingham was asked whether a trust relationship exists in relation to parish property and whether he has always understood that to be the case. He replied affirmatively.

[176] Similarly, in a video posted on YouTube entitled “Leaving the Diocese”, Bishop Ingham stated:

So, in this joint venture, parish and diocese work together to further the mission of Christ according to our tradition. And so the diocese holds all property in trust for congregations who worship in that place to carry on that ministry. ...

The diocese owns title to land and buildings which we hold in trust for congregations that wish to be members of the Anglican Church of Canada. ... So we hold land and buildings in trust for congregations that worship in the Anglican tradition in the Canadian context.

[177] Further, the Dean and Commissary of the Diocese, the very Reverend Peter Elliott, wrote to parishioners of St. Matthias/St. Luke in August 2008:

... we cannot allow clergy not associated with the Anglican Church of Canada to use buildings that are held in trust for the ministry of the Anglican Church of Canada. The Bishop, Synod and Diocesan Council have a legal and fiduciary responsibility to be faithful to this trust. This is not simply an administrative matter. It is a matter of law. It is a matter of both civil and canonical law in compliance with the *Anglican Synod of the Diocese of New Westminster Incorporation Act, 1893 (amended)* and the Constitution and Canons of the Diocese which govern and regulate our life together as members of the Anglican Church of Canada. [Emphasis added]

[178] Each of the four parishes is incorporated under the *Act*. The plaintiffs submit that as such, each is a body corporate and legal entity separate from the Diocese. A parish corporation can deal with property subject to the limitation that the Bishop’s consent is required for the alienation of any interest in property, such as a sale, mortgage or transfer. The plaintiffs argue that the four parish corporations, through trustees, hold their property in trust for the purpose of Anglican ministry, and that the role of the trustees is to ensure that the property is preserved and applied for that purpose.

[179] The plaintiffs further submit that the parish corporations are charitable corporations and are treated as charities in the eyes of the law. They argue that for practical purposes, there is little difference between property held by a parish corporation for its objects (none of which are stated in the *Act*) and that held on trust. The functional result is the same: the court takes jurisdiction and applies trust law or principles analogous to trust law to the charitable property.

**2. What are the terms of the trust?**

[180] The plaintiffs submit that the parish properties are held pursuant to a trust for the purpose of ministry that is consistent with historic, orthodox Anglican doctrine and practice, as identified in the Solemn Declaration. They adopt the definition of orthodoxy given by Professor John Stackhouse in his affidavit:

It is also legitimate, however, to use the term simply to recognize a state of affairs, namely, that the “orthodox” in any given situation is the group or view that is understood to be normative for that tradition – and usually that indicates the numerically most significant and therefore culturally dominant group.

[181] The plaintiffs define traditional, orthodox Anglican ministry in Canada as encompassing belief in the supremacy of the truth and authority of Holy Scripture, the Book of Common Prayer as a standard of doctrine and worship, the Ordinals, the Thirty-Nine Articles (as affirmed by Lambeth 1968) and the Solemn Declaration. The traditional doctrines of the Church, they contend, are inconsistent with a liturgy that allows a rite for same-sex blessings, and such an innovation constitutes an abandonment of the authority of Scripture. To reject or overturn the clear teaching of Scripture on a matter as fundamental as marriage and sexuality is to radically alter the very nature of Anglican faith. The plaintiffs submit that the ACC does not have the authority to “mutate its DNA at will” and to alter the purposes of ministry underlying the trust on which the property is held.

[182] The plaintiffs submit that the Solemn Declaration remains a limitation on the authority of the Church to define doctrine and liturgy. They point to the evidence of Bishop Ronald Farris who commented on the relationship between the constitution of the General Synod and the Solemn Declaration:

General Synod’s foundational constitutional obligation is not to the See of Canterbury, nor to the subsequent structures of the Anglican Communion, but is directly linked to the other Church of England entities “throughout the world”. Thus the General Synod has the constitutional obligation to use its legal autonomy only by being in the fullest possible harmony with other Anglican entities throughout the world. To break or damage that harmony is an abrogation of its own constitutional and trust responsibilities. When people gave land, property and resources, often to the Bishop “in trust”, to advance the work of the Church of England in Canada, or to advance the

work of their own parish, this was the understood foundation stone of that trust.

[183] The plaintiffs contend that the role of the Solemn Declaration is confirmed in the Declaration of Principles of the General Synod, which includes within the jurisdiction of the General Synod “the definition of the doctrines of the Church in harmony with the Solemn Declaration adopted by this synod” (s. 6(i)).

[184] The plaintiffs further argue that the purpose of the trust also requires that the Anglican ministry of the parishes take place within the context of a diocese and national church whose members are in full communion with each other and with the other members of the Anglican Communion. The Solemn Declaration represents a formal commitment on the part of the Church to remain in full communion with the “Church of England throughout the world”, which, in turn, is a requirement for the fulfillment of the trust underlying the parish properties.

[185] Thus, the plaintiffs say, the terms of the trust can be found in the Solemn Declaration, and require three things: (1) that the parishes remain in an Anglican jurisdiction that is in full and unified communion with the worldwide Church; (2) that parish ministry be in accordance with Anglican doctrine that is true to the Solemn Declaration; and (3) that parish liturgy be consistent with doctrine and acceptable to the Anglican Communion.

**3. Is the performance of the trust practicable in the present circumstances?**

[186] It is the position of the plaintiffs that the fulfillment of this trust has become impracticable and that there is no reasonable possibility of future fulfillment. As such, the prerequisite to engaging the *cy-près* jurisdiction of the Court has been satisfied, and the Court should rescue the trust by directing the application of the trust property to a new purpose that falls within or as near as possible to the original charitable intention: *Varsani v. Jesani*, [1999] Ch. 219 (C.A.). The test, say the plaintiffs, is whether performance of the trust as contemplated is no longer practicable. “Impracticability” for this purpose does not mean absolute

impracticability: *Re Stillman Estate* (2003), 68 O.R. (3d) 777, 5 E.T.R. (3d) 260 (Ont. S.C.J.).

[187] The plaintiffs say that the events of 2002 and 2003 have made performance of the trust impracticable. They cite the following as evidence of impracticability:

1. The current division in the Diocese and the ACC was entirely unanticipated when the ACC was established.
2. Although the plaintiffs are in the minority locally, they adhere to the “official teaching of the Church” in the Solemn Declaration which has not been altered by the General Synod or the international communion. They share those views with the vast majority of Anglicans throughout the world.
3. Bishop Ingham exercised his episcopal authority with support of the local Diocese but otherwise unilaterally and in advance of any consensus being formed within the Canadian or international communion.
4. Bishop Ingham’s actions have caused members of the Anglican Communion to consider themselves in a state of impaired communion with the Diocese.
5. The deadlock between the parties is made clear by events that have occurred between Bishop Ingham and the conservative dissenters since 2003, including his use of Canon 15 in an effort to gain control over the trust properties.
6. Bishop Ingham has disregarded the on-going character of the Solemn Declaration. The Diocesan Synod’s concurrence with these views implicitly collides with the Constitution and the views of the conservative dissenters.

7. The fact that the division continues seven years after the vote of the Diocesan Synod in 2002 is evidence of its enduring nature.
8. Bishop Ingham's decision concerns a liturgical rite. As such, it is a publicly shared statement of belief and places the division in a setting which cannot be confined in its significance to only those who practice it.

[188] The plaintiffs argue that Bishop Ingham and the Diocese have departed from the traditional teaching of the Anglican Church on issues of human sexuality. That traditional belief, representing the teaching of the Christian Church for 2000 years, is that sexual relations belong only in a faithful marriage between a man and a woman. Orthodox Anglicans believe that to go beyond treating homosexual persons with understanding and concern and to bless homosexual unions is to countenance same-sex unions as a gift from God. This, the plaintiffs argue, is contrary to the Scripture, the Marriage Canon and liturgy, the ACC's constitution, Article 20 of the Articles of Religion, and international teachings.

[189] Although Canadian Anglicans have studied human sexuality since the 1970s, no consensus has been reached on the blessing of same-sex unions. In 1998, the National House of Bishops approved a pastoral statement which read, in part:

As long as ... dialogue continues to be fruitful we believe it should continue. We are not ready to authorize the blessing of relationships between persons of the same sex.

[190] The recent April 2009 *Galilee Report* from the Primate's Theological Commission stated this at pp. 5-6, demonstrating that there remains no consensus in Canada on this theological issue:

The experience of the Primate's Theological Commission has reflected, in many ways, that of the whole Church. We are not of one mind among ourselves. Deeply faithful and prayerful members, though following similar paths of inquiry, found themselves at very different conclusions. ...

To date, we are not in a position to be able to present a single or consensus answer to the questions the church has placed before us....

[191] The plaintiffs argue that Lambeth Resolution 1.10 has been consistently reinforced by the four Instruments of Unity as the standard of teaching of the Anglican Communion in the area of human sexuality. For example, at an October 2003 meeting in advance of the pending consecration of Gene Robinson as Bishop of New Hampshire, the Primates reaffirmed Lambeth Resolution 1.10, stating in part:

We also re-affirm the resolutions made by the bishops of the Anglican Communion gathered at the Lambeth Conference in 1998 on issues of human sexuality as having moral force and commanding the respect of the Communion as its present position on these issues....

Therefore, as a body we deeply regret the actions of the Diocese of New Westminster and the Episcopal Church (USA) which appear to a number of provinces to have short-circuited that process, and could be perceived to alter unilaterally the teaching of the Anglican Communion on this issue. They do not. Whilst we recognize the juridical autonomy of each province in our Communion, the mutual interdependence of the provinces means that none has authority unilaterally to substitute an alternative teaching as if it were the teaching of the entire Anglican Communion.

To this extent, therefore, we must make clear that recent actions in New Westminster and in the Episcopal Church (USA) do not express the mind of our Communion as a whole, and these decisions jeopardise our sacramental fellowship with each other. ...

[192] In February 2005, the Primates issued a communiqué reaffirming Lambeth Resolution 1.10. Then in June 2005, the Anglican Consultative Council, one of the four Instruments of Unity, also reaffirmed Lambeth Resolution 1.10. In 2007, the Archbishop of Canterbury referred to Lambeth Resolution 1.10 as “the only point of reference clearly agreed by the overwhelming majority of the Communion.”

[193] The plaintiffs argue that by authorizing a rite for the blessing of same-sex unions, Bishop Ingham and the Diocese have departed from the common mind of the Anglican Communion regarding human sexuality as set out in Lambeth Resolution 1.10 and the subsequent statements reaffirming it. Orthodox Anglicans committed to the truth and authority of Scripture consider the blessing of such unions to be a gospel issue that engages the deepest realities of their faith. To reject or overturn the teaching of Scripture on a matter as fundamental as marriage and sexuality is to radically alter the very nature of that faith. The plaintiffs accept that other controversial issues have arisen in the Church’s history, such as the

ordination of women. However, they say that that issue engaged church order or structure, as opposed to the gospel and moral teaching of the Church, and did not fracture the basic unity of the Communion.

[194] The plaintiffs say that in these circumstances of broken communion, there is a supervening impracticability wherein the Court should exercise its inherent jurisdiction to rescue the trust.

[195] The plaintiffs submit that the actions of Bishop Ingham and the Diocese have led to an unprecedented division in the Diocese, the ACC and the Anglican Communion. They cite opinion evidence about the unprecedented nature of the current dispute. They refer, as well, to the immediate reaction within the ACC and the Anglican Church worldwide to the 2002 Diocesan Synod where Bishop Ingham upheld Motion 7 and approved a rite for the blessing of same-sex unions. A large number of delegates walked out of Synod. Several congregations accepted oversight from other provinces in the Anglican Communion. The Bishop found it necessary to invoke Canon 15 to remove and insert trustees. There was also much strong reaction from Canadian and international Anglicans. A group of Canadian bishops, for instance, issued a public statement challenging the action as being in conflict with the moral teaching of Scripture. Internationally, a number of global Anglican leaders declared a state of broken or impaired communion with Bishop Ingham and the Diocese. The Archbishop of Canterbury said in a sermon the following month that the action in the Diocese “undermines marriage”, “is schismatic” and “makes us a very embarrassing partner in ecumenical circles as well”.

[196] The plaintiffs point to another indication of the unprecedented nature of the current dispute: some 25% of bishops refused to attend the 2008 Lambeth Conference because Bishop Ingham and other ACC and ECUSA bishops who were in broken communion with the worldwide Church were invited. Many instead attended the alternative GAFCON conference.

[197] All of this has led to a new structure, the ACiNA, which seeks recognition as a Province in the Anglican Communion. This, say the plaintiffs, is yet another reflection of the unprecedented nature of the current division.

[198] The plaintiffs also point to the deep and fundamental theological nature of the issue at the heart of the division. For many orthodox Anglicans, coexistence with the ACC is simply impossible. According to Reverend Short, the decision of the Diocese exposes two contradictory views of Scripture. One is the “objectivist” view consistent with the historic orthodox view that gospel is revealed to Christians and this revealed truth is grasped by letting the Bible interpret itself. The “subjectivist” position concludes that the present is wiser than the past and that the teaching of the Church must develop relative to a developing and changing society and culture. Reverend Short states that since its inception, the Anglican Church has maintained the objectivist position.

[199] The Thirty-Nine Articles of Religion were adopted by the Church as a summary of Anglican convictions. They were developed by the 16<sup>th</sup> Century Archbishop of Canterbury, Thomas Cranmer. Article 20 of the Thirty-Nine Articles of Religion states, in effect, that the Church cannot ordain anything contrary to Scripture or interpret one passage of Scripture in a way that conflicts with another. As further explained by Reverend Short, the effect of authorizing the blessing of same-sex unions is to affirm that such relationships are holy and righteous and appropriately to be blessed by the Church, though contrary to scriptural requirement and orthodox Church teaching.

[200] The plaintiffs say that neither the conscience clause, the episcopal visitor position, nor shared episcopal ministry makes performance of the trust practicable. All of these provisions are temporary, can be revoked at any time and do not address the breakdown of trust and the impossibility of two irreconcilable doctrinal teachings co-existing.

**4. If there is impracticability, how should the court respond?**

[201] The plaintiffs argue that the Court should be guided by the English Court of Appeal's decision in *Varsani v. Jesani*, supra. That case concerned a charity known as Shree Swaminarayan Sidhant Sajivan Mandal London. The assets of the charity were held pursuant to a declaration of trust. The parties were at the time followers of a Hindu sect known as Shree Swaminarayan Gaddi based in India. An essential element of the faith was that the founder, Shree Swaminarayan Bhagwan, was believed to be the manifestation or incarnation of the Supreme Being.

[202] When the founder died, a division arose among the adherents as to the recognition of the divine status of his successor. The majority recognized him; the minority did not. Both groups felt unable to worship together in the same temple, and sought a scheme under the *Charities Act, 1993*.

[203] Carnwath J. acknowledged that there was a schism and held that under s. 13 of the *Charities Act*, a regulatory scheme could be made without the necessity of resolving the religious difference in favour of either party.

[204] The case differs from that at bar in that the *Charities Act* obviated the necessity of finding impracticability. Here, the plaintiffs argue, impracticability has been made out on the facts, and they say that the decision provides guidance as to how a *cy-près* order should be framed, specifically:

- (a) the order should permit the effective carrying out of the two new purposes;
- (b) the order should address the needs of the bodies rather than their respective contributions;
- (c) the court should not draw qualitative distinctions between the two doctrinal camps; and
- (d) the scheme should minimize hurt and the risk of further conflict.

[205] It is clear, the plaintiffs say, that two new Anglican bodies are rapidly emerging from the present dispute. They have coherent and irreconcilable views of core aspects of the Anglican identity relating to doctrine, liturgy and interpretation of Scripture. They argue that the evidence refutes the defendants' position that their purpose is the only Anglican purpose.

[206] The plaintiffs say that the evidence demonstrates that some liberals made contributions to conservative parishes and that some conservatives made contributions to liberal parishes. Many made contributions before the current division was even contemplated. Thus, the plaintiffs submit, the division created by the dispute requires some means of reconciliation with congregational reality. A scheme based on identifying contributions would have to be Diocese-wide and would encourage rather than resolve the hard feelings among its members. Instead, a restructuring of the Diocese is required, as attendance is declining and the closure of ministries in the future will increase the existing surplus of lands and buildings available to the Diocese. The only prospect of reconciliation lies in the congregations represented by the plaintiffs being able to continue in Anglican worship and ministry in the available buildings.

[207] The plaintiffs urge the Court not to decide between the two positions on qualitative grounds. Well-meaning people have formed irreconcilable views of the matter. Alternatively, if it is necessary, the plaintiffs argue that their position should be preferred. Theirs is the long-established position held by virtually all Christian communities until recently. It is also supported by the majority of Anglicans worldwide. Upholding the defendants' position and granting the counterclaim will add the authority of the Court to the majority's rejection and expulsion of the minority conservative view. It is the role of the Court in equity to protect the minority when their continued use of property is faithful to the purpose for which it was dedicated. If the counterclaim is granted, the Court will essentially be taking sides in the dispute. The only neutral ground is that which would permit the parties to both use the properties set aside for Anglican worship.

[208] The plaintiffs argue that granting the counterclaim will cast the largest congregation within the ACC out of its building because it stands against innovations in doctrine and practice which are, at the least, controversial. The same outcome will similarly befall the largest congregation in the Fraser Valley and almost the entirety of the Chinese Anglican community. This outcome should be avoided in order to minimize the existing conflict within the Christian community.

[209] With respect to the form of order, the plaintiffs say that the *cy-près* order need go no further than this:

1. The plaintiffs be continued as trustees of the trusts for Anglican ministry and worship relevant to each parish property, the parish corporations conveying the properties and transferring the assets to the trustees or new parish corporations on the same trusts;
2. The plaintiffs' successors be elected or appointed in accordance with the votes of the respective vestry and appointment of clergy pursuant to Bishop Harvey or his successor's license.

### **Position of the Defendants**

[210] The defendants cast the issues in this case as follows:

- (a) What is the legal framework within which property is held in the ACC?
- (b) Is there a trust over the properties and, if so, what are its terms?
- (c) Is the conduct of any party in breach of that trust?
- (d) If so, what is the appropriate remedy?

#### **1. Legal framework regarding church property disputes**

[211] The defendants submit that the plaintiffs' case fails even on the legal framework upon which they rely. They say that the jurisprudence on religious purpose trusts contains three principles that are determinative of the present dispute.

[212] First, not every belief or practice becomes the basis of an implied religious purpose trust; rather, it is only the “fundamental principles” or “defined doctrines” of a religious organization that do. There is no such fundamental principle at stake here, say the defendants. The non-sanctity of same-sex relationships is plainly not fundamental to the ACC. Further, two authoritative bodies of the ACC have answered the question of whether the blessing of same sex-unions engages fundamental doctrine. The *St. Michael Report*, authored by the Primate’s Theological Commission, determined that while such blessings are a matter of doctrine, they are not a matter of core doctrine. In addition, the General Synod accepted this conclusion.

[213] Second, the principle that the property of a religious organization is held on trust for the original purposes of the organization is subject to any mechanisms within the organization that allow for change. If a religious organization’s structure allows for doctrinal changes, then any such changes cannot be a breach of an implied trust. The defendants say that it is clear that the structure of the ACC allows for doctrinal changes. The General Synod has authority and jurisdiction over “the development of the doctrines of the Church in harmony with the Solemn Declaration adopted by this synod”. Further, bishops have authority to introduce new liturgy. The defendants submit that the powers of the General Synod and bishops have been used – sometimes separately, sometimes in combination – to effect doctrinal changes of significance, including the Church’s stance on slavery and racial segregation, and the ordination of women as priests.

[214] Third, the defendants submit that a substantial body of authority confirms that where a religious organization is hierarchical and has officers or tribunals to determine correct doctrine, civil courts ought to defer on religious matters to the determination of those officers or tribunals. The defendants say that in the present case, the determination of the Primate’s Theological Commission in the *St. Michael Report* and of the General Synod in 2007 must be respected. Those determinations completely resolve the issue in this case.

[215] Thus, the defendants say, even on the religious purpose trust law upon which the plaintiffs rely, their case must fail. That law, however, is not appropriate in the context of a hierarchical, corporately-structured church, such as the Anglican Church. The better approach to resolving property disputes in that context is to allow the church to govern itself with respect to religious matters, and to treat the church as if were a corporation. In this regard, the Court should first look to the internal rules of the Church to see whether they determine the issue in dispute. If they do, then the Court should apply them. Only if the rules do not resolve the matter should the Court go on to consider whether to imply a trust. Any implied trust should not be framed in terms of religious doctrine but, rather, according to the Church's neutral principles of law. These encompass any relevant statutes, constitutions, canons, rules and regulations.

[216] The defendants posit a number of reasons for this analytical framework.

**(a) It respects the arrangement by which members of the Church have agreed to organize themselves**

[217] The defendants argue that a church is not only a faith but also an organization with rules for the management of affairs between members. Those rules ought to be respected rather than superseded by implying a trust that is inconsistent with them. This point is made in *Religious Institutions and the Law in Canada* at 293:

In determining church property disputes, courts rely on two basic legal categories, contract and trust. Religious organizations are treated in law as voluntary associations whose legal basis is the multipartite contractual consent of all members to the doctrine, practices, and discipline of the organization. Thus, as long as members of a religious organization remain as members of it, they are subject to its doctrine, practices, and discipline as a matter of consent or contract. When property disputes arise they are equally subject to the doctrine, practices, and discipline in relation to such disputes, unless they simply leave.

[218] The defendants rely, as well, on *Craigdallie v. Aikman* (1813), 1 Dow 1, 3 E.R. 601 at 606, where the House of Lords observed, "if it were distinctly intended

that the synod should direct the use of the property, that ought to have been a matter of contract.”

[219] The defendants submit that where a church is hierarchical, governed by formal institutions and organized corporately, most disputes will be capable of being resolved simply by reference to its statutes, canons and rules and regulations.

**(b) The defendants’ approach is consistent with the law of charitable corporations.**

[220] The defendants submit that use of trust arrangements was developed to surmount difficulties encountered by unincorporated charitable associations and religious institutions. The necessity for some form of legal mechanism to enable religious institutions to hold property was described by A.H. Oosterhoff in “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 442:

It is apparent from the Act that a church congregation or other religious body was not a juristic entity. It was merely a voluntary association of persons and, as such, incapable of holding land or of bringing or defending actions in its collective name. In this respect a religious organization was no different from any other unincorporated association. All such bodies had the same disabilities, unless a special capacity was conferred upon them by statute.

In order for a religious organization to be able to hold land, therefore, it either had to be incorporated, hold the land by means of trustees, or have a special status conferred upon it by the state.

[221] Here, however, the General Synod, the Diocesan Synod and the parishes are all incorporated. The properties in question are thus held by corporations subject to incorporating statutes, the Canons of the Diocese and their bylaws.

[222] Citing *Bowman v. Secular Society*, [1917] A.C. 406, [1916-17] All E.R. 1 (H.L.), the defendants argue that a gift of property to a corporate entity is absolute and not subject to any trust in the absence of an express trust. The House of Lords explained in that case that the safeguard rests on the fact that the money can only be used for the purposes of the company. Similarly, charitable corporations do not generally hold property subject to trust either; as with any corporate entity, they are

presumed to hold their assets beneficially. Until recently, it was believed that there was an exception to the principle expressed in *Bowman* for charitable corporations and that the existence of a trust could be inferred based on such a corporation's charitable objects. This view, however, has been abandoned in Anglo-Canadian law. Cullity J. of the Ontario Superior Court of Justice described the progression of the law in "The Charitable Corporation: A 'Bastard' Legal Form Revisited" (2002) 17 *Philanthropist* 17 at 21:

The 19<sup>th</sup> century approach lingered on in Ontario with the strong support of the office of the Public Trustee. In 1987 ... the Court of Appeal ... appears to have accepted that property was beneficially owned by a corporation established for charitable religious purposes. Two years later, the question was discussed, at some length, by Osler J. in *Re Centenary Hospital Association* where, without expressing a firm view one way or the other, the learned judge noted the recognition given by the Court of Appeal to beneficial ownership by a charitable corporation. Finally, in *Re Christian Brothers of Ireland in Canada*, Blair J. accepted that charitable religious corporations could hold property beneficially and this view was endorsed by the Court of Appeal.

[223] Similarly, Levine J. (as she then was) wrote in *Rowland v. Vancouver College Ltd.*, 2000 BCSC 1221 at para. 100, 78 B.C.L.R. (3d) 87, (aff'd. 2001 BCCA 527, 94 B.C.L.R. (3d) 249):

It is trite to state that any corporation can legally own property absolutely. Corporations incorporated to carry out charitable objects (so-called "charitable corporations") generally do not hold property on trust for any of their objects or purposes, but are presumed to hold their assets beneficially as do all corporations: *Re Christian Brothers of Ireland in Canada*, Blair J. at pp. 390-2; Feldman J.A. at pp. 701-702.

[224] Thus, the defendants say, there is no presumption of a trust. Any trust must be well grounded in the evidence. Moreover, the safeguards provided by the sophisticated governance structures within the Anglican Church merit a deferential approach by this Court: *Re Public Trustee and Toronto Humane Society* (1987), 60 O.R. (2d) 236, 40 D.L.R. (4th) 111 (Ont. H.C.); and *Seong v. Korean Canadian Cultural Association of Metropolitan Toronto* (2007), 29 B.L.R. (4th) 134 (Ont. S.C.).

**(c) It preserves the Church by enforcing the rules rather than reallocating property inconsistent with the rules.**

[225] The defendants argue that where decisions are taken outside the purposes of a religious corporation, the plaintiff's remedy is to seek to quash the offending decision rather than to distribute property to one group or another. That is to say, judicial intervention is warranted where decisions are *ultra vires* or procedurally invalid. The defendants submit that the decisions at the centre of the present dispute are precisely the types of decisions amenable to review on grounds of jurisdiction or procedural validity. Indeed, they say, the plaintiffs have made those charges. For instance, the plaintiffs delivered a legal opinion to Bishop Ingham opining that he lacked jurisdiction to consent to the synodical vote requesting authorization of the blessings. However, when the Bishop gave his approval in 2003, the plaintiffs did not take any steps to challenge it even though they could have done so in either ecclesiastical or civil courts.

[226] The defendants submit that similarly, despite the plaintiffs' claim that the Solemn Declaration is a constitutional limit on what the ACC can do, the plaintiffs have never sought to quash the resolutions of the General Synod as being *ultra vires* or procedurally invalid.

**(d) The defendants' approach respects freedom of religion**

[227] The defendants argue that the ACC has organized itself so that doctrinal differences can be resolved democratically. The Court should respect that practice. The approach to church property disputes that is most respectful of freedom of religion is that which allows the churches to organize themselves and to determine religious issues internally and for courts to determine legal issues only by reference to neutral principles of law.

**The American "neutral principles of law" approach**

[228] The defendants submit that the approach they propose is consistent with that which has developed in the United States where courts have been careful not to

violate the First Amendment through state interference with religion. The “neutral principles of law” approach looks to the governance structure of the church at issue and seeks to apply any relevant rules. It is an approach that has also been applied in this country in *Montreal 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.*, [2001] O.J. No. 438 (Ont. Sup. Ct.); varied (2002), 30 B.L.R. (3d) 315 (Ont. C.A.).

**Application of this approach to this case**

[229] The defendants submit that the property in question is held by parish corporations which are inherently part of the Diocese. Section 7 of the *Act* which permits parish incorporation also provides that such incorporation requires the approval of the Executive Committee of the Synod and the Bishop. The *Act* provides no power to parish corporations to be anything but parishes in the Diocese. Consequently, the defendants say, it is *ultra vires* the parish corporations to purport to leave the Diocese. Further, pursuant to s. 7 of the *Act*, parish corporations have no authority to sell their property to another entity without the consent of the Diocesan Council and the Bishop. Accordingly, Church property must always remain within the Diocese unless the Bishop and Diocesan Council agree to its disposal.

[230] The defendants submit that the parishes are also subject to Diocesan Canons. Certain of the Canons regulate property directly, such as Canon 21 regarding the Architectural and Plans Committee. Others regulate the parishes more broadly, such as Canon 13 regarding the creation and closing of parishes, and Canon 14 regarding parochial and congregational organization. Additionally, various General Synod Canons regarding licensing and discipline are relevant, as they illustrate the episcopal governance that is central to the Anglican Church.

[231] The defendants argue, then, that the Church property must always remain part of the Diocese so long as the Bishop and Diocesan Council wish to retain it. That property is held by parish corporations, the very identities of which are that they

are within the Diocese. The parishes are in turn subject to Diocesan Canons, and the ministry that is conducted within the Parishes is subject to oversight by the Bishop. The defendants argue that it would be contrary to the intention of the members of the Church for the Court to supersede these rules by implying a religious purpose trust.

## **2. The terms of any trust**

[232] The defendants argue, in the alternative, that if the Church properties are held on trust, that trust is for the promulgation of the Christian faith as defined by the ACC and according to the Constitutions and Canons of the ACC and the Diocese. Contrary to the trust as pleaded by the plaintiffs, a trust on these terms is both workable and certain. It is also consistent with the fact that Church properties are held by parish corporations whose corporate identities are defined by the fact they are members of the Diocese.

[233] The defendants submit that there is substantial evidence for the trust as they set forth. First, the sentences of dedication and consecration for Church buildings are essentially in the terms of trust the defendants assert. Second, the trust is consistent with how church property is held throughout the Anglican Communion. Third, s. 2 of the *Act* refers in similarly general terms to the trust on which property owned by the Diocese is held. Finally, a trust so defined is consistent with the history of how property is held in the Diocese. Historically, property was held by the Diocese, and it was only later when parishes became incorporated that it came to be held at that level.

[234] The defendants dispute the plaintiffs' characterization of the trust and argue that the trust as pled by the plaintiffs must be rejected.

## **3. Reply to the plaintiffs' *cy-près* scheme**

[235] The defendants submit that even if I conclude that the parish properties are held on the trust terms pleaded by the plaintiffs, *cy-près* is not an available remedy, as it is not impossible or impracticable to perform that trust. It is only necessary that

I determine on the evidence which party's control of the property would fulfil the trust; the defendants say that it would be fulfilled under their control.

[236] Should I conclude that the trust is impossible or impracticable to perform such that *cy-près* is appropriate, the defendants say that the next step is to arrange a scheme that is as close as possible to the original purposes of the trust. They contend that the plaintiffs' scheme is further from those original purposes than would be the continued use of the property within the Diocese and the ACC. Within the Diocese and the ACC, the property would be put to uses consistent with the core doctrines of the Church; the General Synod has affirmed that the blessing of same-sex unions is not in conflict with those doctrines. Moreover, the property would be used in a manner consistent with the governance structure of the Church and of Anglicanism worldwide. The property would be part of a parish within a Diocese and a national church that is a full member of the Anglican Communion.

[237] On the other hand, giving the property to the plaintiffs would be distant from the original trust for two reasons. First, it would contradict basic principles of Anglicanism and, second, it would relegate the property to a tenuous and uncertain place.

**(a) Contrary to Anglican Polity**

[238] The defendants submit that core elements of Anglican governance are territorial definition, episcopal jurisdiction and self-government of provinces. It would be unprecedented to have two Anglican provinces or dioceses covering the same territory.

[239] *The Principles of Canon Law Common to the Churches of the Anglican Communion* (London: The Anglican Communion Office, 2008) is a compilation published by the Anglican Consultative Council. Paragraph 1 of Principle 15 states that "a church is an autonomous territorial unit of ecclesiastical jurisdiction". Paragraph 10 provides that "episcopal leadership is fundamental to the polity of a church". The defendants argue that the *cy-près* scheme put forward by the plaintiffs

would undermine the authority of bishops by making their jurisdiction subject to the theological agreement of the congregations of the parishes.

[240] Moreover, it is a core principle of Anglicanism that each province is autonomous and self-governing. The plaintiffs' scheme would undermine this order by rewarding disrespect for the autonomy of provinces.

[241] The defendants point out that the Church has sophisticated forms for the determination of doctrinal disputes including bishops, synods, commissions and courts. The *cy-près* order put forward by the plaintiffs would undermine the Church's ability to maintain its own doctrine and discipline.

[242] The defendants argue that membership in the Anglican Communion is determined by the four Instruments of Unity. The ACC is a member of, and in full communion with, the Anglican Communion. The plaintiffs, however, seek instead to place weight on the views of Primates of the Global South who share their conservative approach. Acceding to the request of the plaintiffs would undermine the authority of the Instruments and cast the nature of membership within the Anglican community into doubt.

[243] Moreover, the defendants say, the plaintiffs' scheme is contrary to the fact that these properties are held by entities that are statutorily defined. To accede to their scheme would be to essentially amend the *Act*: see *Attorney-General v. Governors of Christ's Hospital*, [1896] 1 Ch. 879 at 889, where Chitty J. wrote:

In a word, I cannot, under guise of executing the trusts *cy-près*, upset the constitution of the present governing body, or, by transferring their powers and duties of administering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney General, nothing less than an Act of Parliament will suffice.

**(b) Uncertain status of the plaintiffs**

[244] The defendants say that the second reason the plaintiffs' scheme is not "as near as possible" is that it would put the property into a tenuous position. The

plaintiffs and ANiC are not part of the Anglican Communion, as membership is by way of a province and they have left the ACC. They are also not members of the Province of the Southern Cone, as that province's constitution restricts its membership to countries within South America. The defendants recognize that the plaintiffs hope to establish a new province, the Anglican Church in North America. However, they say that this is merely an aspiration and may never be accepted by the Anglican Communion.

[245] Finally, the defendants say that the plaintiffs' argument contains a contradiction. The plaintiffs urge the Court to imply a trust defined by religious doctrine but at the same time insist that the Court may not enforce that trust because of concerns about freedom of religion. The defendants say that freedom of religion is not violated by enforcing the natural consequences of a dissenting group leaving its church. Freedom of religion does not include the right to take the property. As Dickson J. (as he then was) said in *Hofer v. Hofer* (1966), 59 D.L.R. (2d) 723 at 735:

Plaintiffs are not being denied full liberty of conscience. Nor are they being denied the free exercise of the mode of religious worship which they desire. They have been free at all times to leave the [Hutterite] Colony. Others before them have left Hutterian colonies on finding themselves at odds with the Hutterian religious beliefs or Hutterian way of life.

[246] The defendants say that if the plaintiffs' argument is accepted, churches would be forced into rigorous conservatism by a trust that is defined by "historic, orthodox doctrine and practice". Adapting doctrines and practices to changing times would bring the risk of schism and dissolution. That is why this approach was rejected in *Dorland v. Jones* (1886), 12 O.A.R. 543 (C.A.), and why it should be rejected here as well.

### **Analysis**

[247] The parties advance two very different analytical approaches to resolving this property dispute. The plaintiffs' submissions start from the premise that church property is presumed to be held on a religious purpose trust. In contrast, the

defendants contend that the issues in dispute can be resolved by reference to statutes and canon law, and that it is unnecessary to turn to trust principles.

[248] What the defendants advance is akin to the “neutral principles of law” approach that American courts routinely apply in resolving church property disputes. The two seminal decision from the United States Supreme Court are *Watson v. Jones*, (1871) 80 U.S. 679, 1871 U.S. LEXIS 1383 and *Jones v. Wolf*, (1979), 443 U.S. 595, 1979 U.S. LEXIS 16. In the former, the Court held that secular courts must accept as binding any church adjudication regarding “questions of discipline, or of faith, or of ecclesiastical rule, custom or law”. In *Jones*, the Court upheld that principle but added that it did not prevent courts from applying neutral principles of law to resolve a church property dispute that did not turn on questions of church doctrine. These principles were recently summarized in *Episcopal Church Cases* (2009), 198 P.3d 66, 2009 Cal. LEXIS 1, a decision of the Supreme Court of California. The decision related to a dispute over church property within the Episcopal Church. At 6 - 7 (cited to LEXIS), the Court wrote:

In this case, a local church has disaffiliated itself from a larger, general church with which it had been affiliated. Both the local church and the general church claim ownership of the local church building and the property on which the building stands. The parties have asked the courts of this state to resolve this dispute. When secular courts are asked to resolve an internal church dispute over property ownership, obvious dangers exist that the courts will become impermissibly entangled with religion. Nevertheless, when called on to do so, secular courts must resolve such disputes. We granted review primarily to decide how the secular courts of this state should resolve disputes over church property.

State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of the property dispute involves a doctrinal dispute, the court must defer to the position of the highest ecclesiastical authority that has decided the doctrinal point. But to the extent that the court can resolve the property dispute without reference to church doctrine, it should use what the United States Supreme Court has called the “neutral principles of law” approach. (*Jones v. Wolf* (1979) 443 U.S. 595, 597, [61 L. Ed. 2d 775, 99 S Ct. 3020].) The court should consider sources such as the deeds to the property in dispute, the local church’s articles of incorporation, the general church’s constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property, such as *Corporations Code* section 9142.

[Emphasis added]

[249] I acknowledge that the neutral principles of law approach is a consequence of the First Amendment's separation of church and state. Nevertheless, it has the benefit of approaching church property disputes in a manner that respects the corporate organization of the church and endeavours to resolve them according to the statutes and rules that govern the church and by which its congregants are bound. The approach has also been fairly recently applied in this country. In *Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc.*, the plaintiff diocese sought, *inter alia*, to invalidate amendments to the defendant parish corporation's by-laws purporting to remove the parish from the diocese to join another church. The plaintiff had framed the action on the basis of jurisdiction, as opposed to trust. It was ultimately successful at trial and on appeal in invalidating the by-law amendments on the grounds that the parish had not obtained the required approval of the diocese.

[250] At trial, the plaintiff had sought a further declaration that in order to be a member of the defendant parish, an individual must observe the findings, teachings and tenets of the larger church. Panet J. concluded on the basis of the neutral principles of law approach that he should not decide that issue. At p. 12, he wrote:

In the case of *Balkou v. Gouleff* (1989) 68 O.R. (2d) 574, the Ontario Court of Appeal held that questions of church doctrine were inappropriate subjects for judicial determination. In arriving at this conclusion, the court referred to the decision of the U.S. Supreme Court in *Jones v. Wolf*, 443 U.S. 595, (1979). In that case, the Supreme Court referred with approval to the "neutral principles of law" method of resolving church property disputes. This requires a civil court to scrutinize church documents, such as a church constitution, in purely secular terms and not to rely on religious precepts in determining the rights and obligations of the parties. If the interpretation of the documents would require the courts to resolve a religious controversy, then the courts are to defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.

[251] This ruling was undisturbed on appeal. Further, in addition to upholding Panet J.'s conclusion regarding the invalidity of the by-laws, the Court of Appeal made these comments at paras. 6 - 7:

The second way to approach the issue is to treat the Church Parish Council and the Board of Directors as separate entities. Under this approach, the Church Parish Council is responsible for questions of Church doctrine and

other ecclesiastical questions. Any proposed amendments that deal with these questions will be governed by the approval requirements in article 54 of the Normal Parish By-laws. Corporate law questions, not involving Church doctrine, would be dealt with by the Board of Directors under the Supplementary By-laws.

Taking this approach, the by-law amendments proposed by the appellants deal directly with questions of Church doctrine. These amendments would be subject to article 54. But because the parties' dispute over the validity of the proposed amendments and, indeed, over the approval requirements in article 54, 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.

Presumably, the reference to the Supreme Court of Canada is in error and ought to be to the United States Supreme Court.

[252] The notion of civil courts deferring to ecclesiastical authority on questions of doctrine has deep provenance in Canada. In *Itter v. Howe* (1896), 23 O.A.R. 256, [1896] O.J. No. 31 (QL) (C.A.), for instance, Burton J.A. held, at para. 97 (cited to QL):

As I understand the law in this respect, it is that when the right of property is dependent on the question of doctrine and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it.

[253] In the present case, parishes in the Diocese are subject to the *Act*, as well as the Constitution, Canons, Rules of Order and Regulations of the Diocese. Incorporated parishes are additionally subject to any by-laws, rules and regulations applicable to the parish corporation. Before considering whether a religious purpose trust ought to be implied in the circumstances of this case, it is logical, in my view, to first ascertain whether any of these sources determine entitlement to the parish property in question.

[254] Both the Diocese and the parish corporations are incorporated pursuant to the *Act*. Section 7 governs parish corporations. That provision reads, in part:

Any Parish in the Diocese of New Westminster, the limits whereof have been defined by the Executive Committee of the Synod, may become incorporated in the following manner:

- (1) The Parish Officers, consisting of the Rector or Incumbent, the two churchwardens, and the two sidesmen for the time being, and two vestrymen elected for that purpose by the electors, shall make and sign a declaration in writing, setting forth
  - a. The intended corporate name of the Parish;
  - b. The names of those who are to be the first trustees, who shall in every case comprise the two churchwardens and two sidesmen;
  - c. The mode in which their successors are to be elected or appointed;
  - d. That the Rector or other Priest in charge of such Parish shall be ex-officio a trustee and presiding officer of such Parish Corporation; and
  - e. Such other particulars as the said officers may think fit, providing the same are not contrary or repugnant to law;
- (2) The declaration shall be made and signed in three parts, and each part thereof shall be certified under the hand and seal of the Lord Bishop of New Westminster, as being approved of by the Executive Committee of the Synod and the Bishop, and shall be signed and acknowledged by the parties making the same before a Notary Public, who shall certify to the same having been so signed and acknowledged under his hand and seal of office.
- (3)
  - a. The declaration shall be forwarded to the Registrar of Companies in duplicate together with the fees for filing and publication as provided in Schedule A hereto, and the said Registrar shall
    - i. retain and register the same and return the duplicate copy certified to that effect;
    - ii. on registration as aforesaid issue a certificate under his seal of office showing that the Parish is incorporated under this Act; and
    - iii. at the cost of the Parish publish a notice of the issuance of such certificate of incorporation in the Gazette.
  - b. One copy of such declaration shall be delivered to the Registrar of the Synod to be deposited among the records of the Synod.
- (4) The persons who signed such declaration, and their successors, shall thenceforth be a body corporate and politic in fact and in name, by the name set forth in such declaration, and shall have all the powers, rights, and immunities vested by law in such bodies, with power –
  - a. To take, receive, purchase, and otherwise acquire and hold real and personal property, and the same to manage, lease,

- and, with the consent of the Executive Committee and the Bishop, mortgage, sell, or otherwise dispose of:
- b. To sue and be sued in any Court;
  - c. To make and use a corporate seal, and alter the same at pleasure;
  - d. To elect and appoint such officers, agents, and servants as may be necessary for conducting the business and management of such Corporation, or any property belonging to the same;
  - e. To make by-laws, rules, and regulations for the management of the affairs of the said Corporation, and to alter, amend, and rescind the same; providing always that all such by-laws, rules, and regulations, and all amendments thereof, shall be assented to by the Executive Committee of the Synod and the Bishop before they shall become operative, and such assent shall be certified under the hand and seal of the Lord Bishop of New Westminster. ...

[255] While a parish corporation is a body corporate and politic with all attendant rights and powers, certain important steps require the consent of the Executive Committee and the Bishop. They include the act of incorporation itself, the making and amendment of by-laws, rules and regulations, and the sale or other disposal of property. These limitations on the autonomy of parish corporations, together with the fact that they are incorporated under legislation entitled *An Act to Incorporate the Anglican Synod of the Diocese of New Westminster*, indicate they are intrinsically part of the Diocese and must be approached in that context.

[256] A parish does not have authority to unilaterally leave the Diocese, and it is consequently *ultra vires* for it to pass a resolution purporting to do so. Additionally, while parish corporations may hold title to real property, the effect of s. 7(4)(a) is that that property effectively remains within the Diocese unless the Executive Committee and Bishop agree to mortgage, sell or otherwise dispose of it. In using the church properties for purposes related to ANiC, the parish corporations are using them outside the jurisdiction of the Diocese, and, indeed, the ACC. In my view, this is sufficient to bring the properties within the ambit of s. 7(4)(a) such that the consent of the Executive Committee and Bishop is necessary. As that consent is obviously not forthcoming, the properties remain with the Diocese.

[257] This is sufficient to resolve the issue. However, were I to have approached it from a trust perspective as advocated by the plaintiffs, I would not have implied a trust in the terms they propose.

[258] To repeat, the plaintiffs submit that the parish properties are held on trust for purposes of ministry consistent with historic, orthodox Anglican doctrine and practice. “Historic” and “orthodox” are uncertain and subjective terms that cannot, in my view, form the basis of an enforceable trust. The history of Anglicanism spans over 400 years, and thus it is simply not apparent what period “historic” is in reference to. “Orthodox” is similarly subjective and, therefore, equally problematic in defining a trust. Moreover, a trust which freezes doctrine at a point in history is inconsistent with the history of change and evolution in Anglicanism. For example, the ACC now permits the remarriage of divorced persons. The Church ordains women as priests, and there are also female diocesan bishops in the ACC. These developments are inconsistent with what many would consider historic and orthodox Anglicanism.

[259] In their written submissions, the plaintiffs qualify this description of the trust and say that its terms can be found in the Solemn Declaration and require three things: (1) that the parishes remain in an Anglican jurisdiction that is in full and unified communion with the world-wide Church; (2) that parish ministry be in accordance with Anglican doctrine that is true to the Solemn Declaration; and (3) that parish liturgy be consistent with doctrine and acceptable to the Anglican Communion. I am not persuaded that these are necessarily viable terms of trust. Nevertheless, even if I were to accept that they are, I would not conclude that the impugned actions of the Diocesan Synod and Bishop Ingham are inconsistent with a trust on those terms.

[260] The evidence is clear that the ACC remains in communion with the Anglican Communion: the ACC remains in Communion with the See of Canterbury; it was invited to send its bishops to the Lambeth Conference in 2008 and those who were able to attend, did; it continues to participate as a full member in the Anglican

Consultative Council; and, it continues to participate in Primates' meetings. I observe, as well, that the Archbishop of Canterbury affirmed in February 2008 that his "office and that of the Anglican Communion recognize one ecclesial body in Canada as a constitutive member of the Communion, the Anglican Church of Canada".

[261] The status of the Solemn Declaration was a matter of considerable evidence and argument in these proceedings. Without deciding whether it sets out enduring foundational principles for the ACC or is a document of historical relevance only, it is sufficient to note that even ascribing to the Solemn Declaration the significance the plaintiffs contend, its interpretation ultimately falls to the General Synod. The General Synod is a representative body whose determinations are binding on the whole of the ACC. Section 6(1) of its Declaration of Principles provides that the Synod has authority and jurisdiction respecting "the definition of doctrines of the Church in harmony with the Solemn Declaration adopted by this synod". For their part, bishops have jurisdiction over liturgy. Consequently, it would be contrary to these jurisdictions for congregations to determine what constitutes ministry consistent with historic, orthodox Anglican doctrine and practice. Moreover, and significantly, the ACC has concluded that the blessing of same-sex unions does not engage core Anglican doctrine. This clearly implies that such blessings are not contrary to the Solemn Declaration, and, accordingly, not contrary to any term that parish ministry be in accordance with Anglican doctrine that is true to the Solemn Declaration.

[262] In seeking to have me imply a religious purpose trust, the plaintiffs rely upon the principle commonly drawn from *General Assembly of the Free Church of Scotland v. Overtoun*, [1904] AC 515 (H.L.), which, as summarized by Professor Ogilvie, holds that "the property of a religious institution must be held and applied to the original purposes for which that institution was founded, that is, for the original 'trust'". A number of qualifications to this principle emerge from *Free Church* itself, as well as from subsequent authorities. One is that only the fundamental principles or defined doctrines of a religious organization can form the objects of a trust. This

proposition was summarized more recently in *Chong v. Lee* (1981), 29 B.C.L.R. 13 at 17-18 (S.C.):

Where a number of people group together to establish a Christian church and it is formed for the purpose of promoting certain *defined doctrines* of religious faith then expressed, property which the Church acquires is impressed with a trust to carry out that purpose, and a majority of the congregation cannot divert the property to uses inconsistent with such defined religious doctrines against the opposition of a minority of the congregation, however small such minority may be. I acknowledge that the foregoing statement of general principle is based in part upon a statement made by Dennistoun J.A. in *Anderson v. Gislason*, supra, at p. 312, but with some deletions and modifications.

The authorities indicate that the “defined doctrines” may be ascertained from a number of sources, including the following:

1. The corporate articles or constitution of the Church adopted at the time of its establishment: see *Anderson v. Gislason*, supra.
2. An Act of Parliament incorporating a church, where its articles of association spell out the purpose for which the church was established: see *Hofer v. Hofer*, 59 D.L.R. (2d) 723, affirmed 65 D.L.R. (2d) 607, which was affirmed [1970] S.C.R. 958, 73 W.W.R. 644, 13 D.L.R. (3d) 1.
3. The claim, declaration and protest issued at the time of the establishment of a new church: see *Free Church of Scotland (Gen. Assembly) v. Lord Overtoun*, [1904] A.C. 515 (H.L.).
4. The wording of the conveyance which established the trust upon which trustees were to hold property in trust for a church: see *Dorland v. Jones* (1885), 12 O.A.R. 543, affirmed 14 S.C.R. 39.

[Emphasis in original]

[263] It is only a departure from the core tenets or fundamental doctrine of a church that can breach a religious purpose trust. The facts of *Free Church* demonstrate this point, and were conveniently summarized in *Anderson v. Gislason*, [1920] 53 D.L.R. 491 (Man. C.A.) at 493:

The history of the Free Church of Scotland which was founded in 1843 by secession from the Established Church of Scotland as a protest against interference by the State in matters spiritual is set forth in the report. Its two main doctrines were the Establishment principle and the unqualified acceptance of the Westminster Confession of Faith. For several years an attempt was made to bring about a union between the Free Church and the United Presbyterian Church, which was in its essence opposed to the Establishment principle and did not uphold the Westminster Confession in its entirety. In 1900 Acts of Assembly were passed by the majority of the Free Church and the Free Church property was conveyed to new trustees for the

benefit of the new Church. The minority of the Free Church objected that it (the Church) had no power to change its doctrines, or unite with a body that did not confess those doctrines and complained of a breach of trust and asked for a declaration that they were entitled to the property.

It was held that the Establishment principles and the Westminster Confession were distinctive tenets of the Free Church, which had no power, where property was concerned, to alter or vary the doctrines of the Church; that there was no true union and the representatives of the minority were entitled to the property held by the Free Church for its benefit and on its behalf.

[264] Thus, since the Free Church had been founded on fundamental theological principles, which included the Establishment principle and the unqualified acceptance of the Westminster Confession of Faith, the trustees could not use funds for a church that did not similarly accept these tenets as fundamental. At p. 664 of *Free Church*, Lord James wrote:

... regarding “essential” as meaning fundamental, I do not think that a Church can change such fundamental principle and yet at the same time preserve its identity. As I understood, it was admitted at the bar this power of change is restricted so as to keep the Church within the limits of identity.

[265] The proposition that an implied religious purpose trust encompasses only fundamental doctrines was accepted by the Ontario Court of Appeal in *Dorland v. Jones*. This case involved a Quaker “Monthly Meeting”. The original trust conveyed the property in question to trustees of the West Lake Monthly Meeting of Friends. A dispute arose when the Canada Yearly Meeting, of which West Lake was a subordinate branch, resolved to adopt the revised, more liberalized discipline of the New York Yearly Meeting. This was a change from its historical association with the more orthodox English Yearly Meeting. This led a dissident group within the Monthly Meeting to purport to set up separate Monthly and Yearly meetings in accordance with the English discipline, at which point the remaining Monthly Meeting brought an action to determine entitlement to the property. The plaintiffs insisted that they were entitled to possession of the property. The defendants countered that the plaintiffs had departed from the true faith and discipline of the society and therefore ceased to be beneficiaries under the trust.

[266] Hagarty C.J.O. framed the issue as follows, at para. 10:

In this case the whole burden rests on the respondents to show beyond reasonable doubt, that the plaintiffs have so far departed from the fundamental principles of the society, or have so far departed from its discipline and form of worship, which is here claimed to be the essence of the position, as in effect to cause them to be no longer members of the society. Such a departure (as in the vigorous language of Chief Justice Shaw) is "so deep and radical as to destroy its identity with the Society of Friends who had been invested by law with the enjoyment of property and civil rights. But, (he adds) if such a case be possible it would seem to be a suicidal destruction of the body itself, leaving its property derelict." Our task here is to examine whether the plaintiffs' title to this property is successfully attacked.

[267] He ultimately concluded that no case had been made out to warrant the Court's interference.

[268] Hagarty C.J.O. expressed the same concept in *Itter v. Howe*, at para. 71, citing *Kuns v. Robertson*, 154 Ill. 394, a decision of the Illinois Supreme Court:

The law is well settled that Courts will interfere only to prevent the perversion or abuse of a trust, especially if it be of a charitable or religious nature. ... The trust and abuse of it must be clearly established. ... It must clearly appear that such change or departure has taken place in fundamental doctrine that it cannot be said to be the same, or that the denomination, as it existed before the change, is not, in all essential particulars and purposes, identical with that existing afterward."

[269] In that case, a vote to change certain aspects of the church's doctrine was passed by the requisite two-thirds majority at a general conference of the United Brethren in Christ. As a result of the vote, 15 delegates left the conference and proclaimed themselves the true United Brethren in Christ. They then claimed entitlement to the church's property which they said was on trust for the doctrines of the congregation. The Court unanimously found against the dissident group, concluding that they had failed to establish any substantial or important variation in doctrine. Osler J.A. made the point in these words, at para. 104:

Changes which are to bring about such a result [destruction or change in the historical continuity or identity of church] must be vital in their character, affecting the organic life and beliefs of the body, the distinctive theological character of the church. We are not dealing with a case in which by the terms of the deed certain specified articles of faith are to be adhered to or a certain prescribed ritual to be observed. What the defendants must prove is, that, to the use the language of Chief Justice Shaw in *Earle v. Wood*, 8 Cush. 430, there has been a departure from the fundamental principles of the body

so deep and radical as to destroy its identity with the body which has been invested by law with the enjoyment of the property.

See also *Bliss v. Christ Church, Fredericton* (1887), Tru. 314, 1887 CarswellNB 2 (N.B.Q.B.).

[270] With these authorities in mind, I return to the case at hand. The plaintiffs' core submission is that the blessing of same-sex unions is inconsistent with Scripture and the Solemn Declaration, and thus in breach of the trust on which they say the parish properties are held.

[271] The General Synod passed a resolution in 2004 affirming the integrity and sanctity of committed adult same-sex relationships. This was followed by the release in June 2005 of the *St. Michael Report* by the Canadian Primate's Theological Commission. The report concluded that while the blessing of same-sex unions was a matter of doctrine, it was not one of core doctrine. As the Commission explained, at para. 10:

We are agreed that blessing of same-sex unions is not a matter of core doctrine in the sense of being credal. The determination of this question will not hinder or impair our common affirmation of the historic creeds. The Commission acknowledges that for some on all sides of the issue it has taken on an urgency that approaches the 'confessional' status, in that they believe that the Church is being called absolutely by the Spirit to take a stand. On the contrary, the Commission does not believe that this should be a Communion-breaking issue. We do believe that this issue has become a matter of such theological significance in the Church that it must be addressed as a matter of doctrine.

[272] In 2007, the General Synod accepted the conclusion of the Primate's Theological Commission, passing Resolution A184, "[t]hat this General Synod accept the conclusion of the Primate's Theological Commission's *St. Michael Report* that the blessing of same-sex unions is a matter of doctrine, but it is not core doctrine in the sense of being credal." It also passed resolution A186 "[t]hat this General Synod resolves that the blessing of same-sex unions is consistent with the core doctrine of the Anglican Church of Canada". By these two resolutions, the General Synod has defined the ACC's doctrinal position on the blessing of same-sex unions. It can also be implied from these resolutions that the General Synod does

not view the blessing of same-sex unions as being contrary to the Solemn Declaration. It is clear that the blessing of such unions does not engage core or fundamental doctrine, and, accordingly, there is no breach of trust on even the terms that the plaintiffs put forth.

[273] Although not necessary for me to decide, it is my view that the parish properties are held on trust for Anglican ministry as defined by the ACC. There are several reasons for this conclusion.

[274] The Anglican Church has organized itself in a highly-structured manner with decision-making institutions and express spheres of authority. It is therefore preferable that this Court defer to the appropriate bodies within that structure with respect to what constitutes Anglican ministry. The ACC is an autonomous organization. Its highest body is the General Synod. Section 6 of its Declaration of Principles sets out its authority and jurisdiction. They include the following:

- a. The national character, constitution, integrity and autonomy of the ACC;
- b. The relations of the Church to other Churches in the Anglican Communion; and
- c. The definition of the doctrines of the Church in harmony with the Solemn Declaration adopted by the Synod.

[275] Secondly, s. 2 of the *Act* refers to property held on trust by the Diocesan Synod in general terms:

It shall be lawful for the Corporation of the Bishop of New Westminster, or any other corporation, or any person or persons, to transfer any property, real or personal, held in trust by him or them for the uses of the Church of England, or the Church of England in British Columbia or the Anglican Church of Canada, to the Synod, to be held in trust for the same purposes.

[276] While not in respect of property held by parish corporations, this section nevertheless casts the particular trust in general terms: for the use of the ACC. The

terms on which parish corporations hold property under the *Act* should, in my view, be consistent.

[277] After a church is built, the bishop of the diocese dedicates it and, in appropriate circumstances, consecrates it in the name of the ACC. The 1962 Book of Common Prayer prescribes the petition for and sentence of consecration in terms that are consistent with a trust as I have defined. When a parish church is to be consecrated, “the Incumbent, Churchwardens, and the inhabitants of [the parish]” petition the diocesan bishop to consecrate the church and “set it apart for ever for the worship of God, according to the rights and discipline of the Anglican Church of Canada”. The Sentence of Consecration provides for a bishop to “dedicate the [church] to Almighty God for the ministration of his holy Word and Sacraments, and for public worship, according to the rites and ceremonies of the Anglican Church of Canada”.

[278] Also consistent with a broadly worded trust is Part VII of *The Principles of Canon Law Common to the Churches of the Anglican Communion*. The introduction to that Part, entitled “Church Property”, provides:

While day-to-day management of church property should be left to appropriate local church entities, their responsibilities may be prescribed by law adopted at other levels of authority, so that persons entrusted with the care of church property are held accountable for preserving it “for the mission of a church and the use of its members from generation to generation in accordance with the law of that church”. [Emphasis added]

[279] “Church” in this context refers to “an autonomous member church, national, regional, provincial, or extra-provincial, of the Anglican Communion”. It is therefore a reference to the ACC.

[280] Within Part VII of *The Principles of Canon Law*, Principle 80 regarding ownership and administration of church property includes the following:

4. Ecclesiastical authorities must hold and administer church property to advance the mission of a church, and for the benefit and use of its members, from generation to generation, in accordance with the law of that church.

5. Church property is held in trust for a church and should not be alienated or encumbered without such consents as may be prescribed by law.

[281] For the foregoing reasons, were it necessary for me to decide to the issue, I would conclude that the parish properties are held on trust for Anglican ministry as defined by the ACC.

### **The Bishop's Replacement of Parish Trustees**

[282] I reviewed the facts relevant to this issue earlier in these Reasons. In summary, the clergy, wardens and trustees of the four parishes to which this litigation relates held vestry votes in February 2008 regarding episcopal oversight from the Province of the Southern Cone, facilitated by affiliation with ANiC. The motion passed overwhelmingly in each parish. Bishop Ingham served the plaintiff clergy with Notices of Presumption of Abandonment of the Exercise of Ministry as a consequence of their decisions to leave the ACC and join another ecclesiastical province. On April 21, the plaintiff clergy relinquished their licences under Bishop Ingham. In May, the Diocesan Council passed motions asking Bishop Ingham to consider implementing an alternative parish structure under Canon 15 in each of the four parishes. As the dissident clergy and trustees did not leave and continued to use the parish properties, Canon 15 was invoked effective August 25 in respect to two parishes, St. Matthew's and St. Matthias and St. Luke.

[283] The plaintiffs take the position that nothing in the *Act* confers authority on the Diocese or the Bishop to play a role in the appointment or removal of trustees once a parish corporation has been incorporated. Moreover, the declarations of incorporation and by-laws of the two parish corporations include no such mechanism either. The plaintiffs submit that Canon 15, a rarely used ecclesiastical canon, simply does not override statutory and common law regimes governing statutory corporations and charitable trusts. Accordingly, the Bishop's dismissal of the trustees of St. Matthew's and St. Matthias and St. Luke was illegal and of no force and effect.

[284] The defendants respond that Canon 15 does, in fact, permit the impugned actions and that its application to the two parishes was consistent with past Diocesan practice. They say that the Diocese was confronted by dissident clergy who had renounced their oaths and relinquished their licenses. Along with other trustees in the parishes, they had violated their obligations by purporting to remove the parish and parish property from the Diocese. The parishes clearly met the threshold in Canon 15 of “experiencing difficulties or a crisis, which in the opinion of the Bishop, affects the orderly management and operation of the Parish...”. That Canon, the defendants say, empowers a bishop to intervene in a parish and make structural changes in such circumstances. Canon 15 also recognizes the inherent jurisdiction of the bishop to “amend the organizational structure of a parish, mission or missionary district where the bishop is of the opinion that the same is desirable or necessary”. The defendants submit that Bishop Ingham’s institution, at the request of the Diocesan Council, of alternative parish structures in St. Matthew’s and St. Matthias and St. Luke was necessary and appropriate so that those parishes could continue to participate in the life of the Diocese within the ACC.

[285] The defendants point out that Canon 15 has been previously invoked in relation to the present matter. It was applied to the Parish of Holy Cross in Vancouver after the vestry purported to accept the offer of alternative episcopal oversight from Bishop Buckle. A conflict at St. Martin’s in North Vancouver led Bishop Ingham to reorganize the governance structure of the parish by appointing three Bishop’s Wardens and a Parish Executive Committee to replace the persons holding office as Wardens and other officers. The use of Canon 15 in that parish was challenged by certain parishioners but the legal proceedings were ultimately dismissed by consent.

[286] For the reasons that follow, I conclude that Canon 15 does not confer the Bishop or the Diocese with authority to terminate the appointment of trustees and wardens elected by the vestry.

[287] Canon 15 provides as follows:

CANON 15 – ALTERNATIVE PARISH STRUCTURES

1501. In this Canon a geographical area may be one or more Parishes or Missionary Districts or Missions or all or any part of a Regional Deanery or Archdeaconry.

1502. When it shall be deemed advisable to consider a new or alternative form of Parish or Congregational Organization structure in one or more geographical areas of the Diocese, and when either representations of such geographical area shall have been received by the Diocesan Council or Diocesan Council has requested such representations but none have been received, the Bishop may, after consultation with, and the concurrence of the Diocesan Council, implement such forms in accordance with such regulations as shall be determined by the Bishop and the Diocesan Council.

1503. If a Parish, Mission or Missionary District is experiencing difficulties or a crisis which in the opinion of the Bishop, affects the orderly management and operation of the Parish, Mission or Missionary District:

- (a) The Bishop, after having first consulted with the Regional Archdeacon, Regional Dean and one or more of the Legal Officers of the Diocese, may take such action as the Bishop deems appropriate or necessary including but not limited to establishing a new or alternative form of Organization structure and shall advise Diocesan Council of such action;
- (b) If any action is taken by the Bishop under this paragraph 1503, which action amends the Organization structure on a temporary or permanent basis, the same shall be implemented in accordance with such written instrument as shall be determined by the Bishop for such period as the Bishop may establish, not exceeding 120 days.
- (c) Within the aforesaid 120 days, Diocesan Council and the Bishop shall either:
  - (i) pursuant to paragraph 1502 pass a resolution formalizing the new or alternative Parish Structure implemented under this paragraph 1503; or
  - (ii) pursuant to paragraph 1502 pass a regulation to establish some other new or alternative structure under paragraph 1502; or
  - (iii) reinstate the structure existing immediately prior to implementation of the new or alternative structure under this paragraph 1503, and call a Vestry Meeting to effect the election of a new Church Committee and Wardens and such reinstatement shall take effect after completion of the said elections;

and failing such action under this clause, a Vestry meeting shall be called to elect a new Church Committee and Wardens in accordance with Canon 14, which Vestry meeting shall be held within 30 days of the expiration of the said 120 days and the Organizational structure implemented under this paragraph

1503 shall be replaced by the structure prescribed under Canon 14 after completion of the said elections; and,

- (d) The time limits set out in the prior clauses may be extended, prior to or after the expiration thereof, by resolution of Diocesan Council with the assent of the Bishop.

1504. Nothing in this Canon shall be taken to derogate from the Bishop's inherent jurisdiction to amend the organizational structure of a Parish, Mission or Missionary District where the Bishop is of the opinion that the same is desirable or necessary.

1505. The provisions of Canon 14 are expressly waived and are deemed to have no application to Parish Organization and structure implemented under provision of this Canon, save and except:

- (a) where Canon 14 refers to the election of Synod Delegates and Alternates of each Congregation; and
- (b) to the extent that the regulation or instrument implementing the new or alternative structure provides otherwise.

1506. Alternative organization structures established pursuant to paragraphs 1502, 1503 or 1504 may be amended or rescinded at any time and from time to time.

1507. Notwithstanding Canon 14 or paragraph 1505 of this Canon 15:

- (a) The number of Lay Delegates to which a Mission or Missionary District is entitled, if any, shall be determined in the sole discretion of the Bishop, provided that the number shall not exceed the number that it would be entitled to send if it was a Parish.
- (b) If the Bishop does not grant a Mission or Missionary District the right to send any Delegates to Synod, it may send a lay observer to Synod and that observer shall have all the rights of a Delegate to Synod other than the right to vote.

1508. All regulations passed under the predecessor of this Canon shall be deemed to have been passed under this Canon and shall remain in full force and effect until repealed or amended.

[Emphasis added]

[288] Canon 15, from its title, context and content as a whole is concerned with the restructuring of a parish, either because such restructuring has been requested by the parish or because it has been deemed necessary by the Diocese. An example of its application was the merger of the parishes of St. Matthias and St. Luke into one Anglican community. In my view, there is a vast difference between restructuring a parish on the one hand and removing elected trustees and wardens on the other. I accept that what was occurring in St. Matthew's and St. Matthias and

St. Luke, from the viewpoint of the Diocese, was certainly a “crisis”. The parishes’ leadership was purporting to remove the parishes from the Diocese. It may well be that the wardens and trustees were acting in a manner inconsistent with their fiduciary responsibility. Nevertheless, there is no specific authority in Canon 15 for the extraordinary action of removing elected trustees and appointing replacements. That goes beyond restructuring, and is not contemplated by my reading of Canon 15.

[289] I acknowledge that s. 1503(a) of Canon 15 confers authority on the Bishop to “take such action as the Bishop deems appropriate or necessary *including but not limited to* establishing a new or alterative form of Organization structure”. This broad authority could be interpreted as providing the Bishop with sufficient scope to replace trustees. However, such an interpretation would be contrary to the declarations of incorporation or by-laws of the two parishes, which set out the methods by which trustees are to be elected and appointed. For example, the by-laws of St. Matthews read, in part, as follows:

At the Annual Vestry meeting after the election of Lay Delegates, Alternate Lay Delegates and members at-large is completed, the Vestry shall elect from among the Church Committee at least two (2) persons who shall upon their said election become Trustees and from the Vestry at least a further two (2) persons who shall upon their election become Trustees. The number of elected Trustees shall be no less than four (4) and no more than six (6) and shall be determined by resolution at the Annual Vestry Meeting. If no resolution determining the number of elected Trustees shall be passed at the Annual Vestry Meeting, the number shall be four (4).

[290] The by-law does not contemplate the Bishop’s involvement in electing Trustees.

[291] Similarly, the Declaration of Incorporation of St. Matthias and St. Luke provides, in part:

That the successors of the said Trustees shall be elected each year at the annual vestry meeting of the electors of the Church, shall continue in office until their successors are elected and shall comprise in every case the Wardens and two Sidesmen elected at the annual vestry meeting. The retiring trustees shall be eligible for re-election. The trustees shall have the power at any time and from time to time to appoint a person who is a member

of the Church Committee of the Parish to fill any casual vacancy occurring in the Board of Trustees.

[292] Again, there is no suggestion of any involvement on the part of the Bishop.

[293] Accordingly, I conclude that Bishop Ingham did not have authority to terminate the appointment of trustees validly elected by the vestry.

[294] It follows that the individuals elected or appointed at the annual vestry meetings of St. Matthias and St. Luke and the Church of the Good Shepherd on February 24, 2008 continue to hold their positions as trustees of their respective parish corporations. They are, however, required to exercise their authority in relation to the parish properties in accordance with the *Act*, as well as the Constitution, Canons, Rules and Regulations of the Diocese. As I have already concluded, they do not have authority to use those properties outside of the Diocese; this includes using them for purposes related to ANiC.

[295] It may be that in light of the other conclusions I have reached, the trustees will no longer wish to remain as such. I do not know. For now, I will leave it to the parties to arrive at a workable resolution. In the event it becomes necessary, they may return to court for further orders in this regard.

### **Chun Bequest**

[296] Because of the conclusion I have reached above regarding the parish properties, it is necessary that I consider the plaintiffs' separate claim regarding a bequest of property in Hong Kong to the "Church of the Good Shepherd" by a former member. Proceeds from the sale of that property, including interest, now amount to some \$2.2 million. At issue is the disposition of those funds.

[297] The Church of the Good Shepherd ministers to the Chinese community in Greater Vancouver. From approximately 1936 until the early 1980s, the parish church was located at 636 Keefer Street in Vancouver. In 1984, the parish bought a building at 808 East 19th Avenue.

[298] In approximately 1990, Good Shepherd began a congregation at St. Luke's at 390 East 61<sup>st</sup> Avenue. In 1996, Good Shepherd, in the words of the plaintiff Eric Law, "planted" another church, Church of Emmanuel, in Richmond. Its purpose was to reach out to the growing Chinese population in Richmond.

[299] Mr. Law's evidence is that by 1996, the congregation of Good Shepherd had outgrown the facility at 808 East 19th Avenue, which sat approximately 250 persons. Various options were considered and, for a variety of reasons, rejected. Discussions then took place with Metropolitan Tabernacle. That organization had a building at 189 West 11th Avenue which seated approximately 500 people, more capacity than Metropolitan Tabernacle needed. In 2004, the churches entered into reciprocal leases.

[300] In January 2009, a charitable entity called the Anglican Network in Canada Good Shepherd ("ANiC Good Shepherd") purchased the property at 189 West 11th Avenue. It now leases the property to the Church of the Good Shepherd.

[301] I turn now to the bequest.

[302] Dr. Daphne Wai-Chan Chun was a professor and medical doctor at the University of Hong Kong. She married for the first time after she retired from teaching in 1972. With her husband, Wang Chun Kwong, she moved from Hong Kong to Vancouver in 1983 or 1984. Some time thereafter, the couple began attending the Church of the Good Shepherd.

[303] Dr. Chun had been baptized at St. Paul's Anglican Church ("St. Paul's") in Glenealy, Hong Kong. She married at the church and attended it until she emigrated to Canada. Reverend Robert Yeung was the vicar of St. Paul's from 1983 to 1987. His evidence is that the parish is conservative in both theology and worship style.

[304] Reverend Yeung first met Dr. Chun in 1985 when he was on holiday in Vancouver; they had many mutual friends at St. Paul's who suggested they be in touch. Reverend Yeung subsequently moved to Vancouver. In 1989, he was appointed the interim rector at Good Shepherd, a temporary replacement for

Reverend Peter Y.C. Pang. Reverend Yeung's evidence is that he found the Good Shepherd parish to be conservative in theology and "typically Anglican in character".

[305] Although Dr. Chun was already a parishioner at Good Shepherd by the time Reverend Yeung arrived, her declining health permitted her to only attend church occasionally. As a consequence, Reverend Yeung regularly visited Dr. Chun's home to care for her pastorally and take her Holy Communion.

[306] Reverend Yeung says that during one of those visits, Dr. Chun told him that she had decided to make a will and was thinking of leaving an apartment she owned in Hong Kong to St. Paul's. She solicited his views. Reverend Yeung suggested to her that she consider leaving the Hong Kong property to Good Shepherd, reasoning that her home was now in Canada and that Good Shepherd was her home congregation. He told her that Good Shepherd was thriving but lacked an adequate building in which to house its current ministries and allow for future expansion. He also suggested that she could specifically designate the property for the Good Shepherd building fund. Reverend Yeung's evidence is that Dr. Chun later confirmed to him that she was leaving the property to Good Shepherd because it needed the money more than St. Paul's and that Good Shepherd was more relevant to her current life.

[307] Dr. Chun had executed a will earlier in February 1990. In that will, she had designated the apartment in Hong Kong to Cao-Yan Church, an independent Christian church in Hong Kong. There was also an unsigned codicil dated May 1990 which amended the will to leave the property to St. Paul's.

[308] Dr. Chun executed her final will on January 13, 1992. It contained the following bequest:

My property known as Apartment 10A and Car Park 16, 92 Pokrulam Road, Hong Kong, to the building fund of the CHURCH OF THE GOOD SHEPHERD of 808 East 19th Avenue, Vancouver, British Columbia, V5V 1K5.

[309] Dr. Chun died on June 29, 1992. Her will was probated in this Court on May 12, 1994. A committee of Good Shepherd parishioners was eventually able to

arrange the sale of the apartment property. By virtue of s. 7 of the *Act*, the Bishop's assent was necessary for the sale of the property. On February 11, 1998, Bishop Ingham provided a letter to the Church of the Good Shepherd certifying his assent to the sale of the property. As of December 31, 2008, the funds, including interest, totalled \$2,274,850. The intention of parish trustees is to use the Chun bequest toward a long-term solution to the ongoing need for a building for Good Shepherd. What they do will ultimately depend on the outcome of these proceedings.

[310] The plaintiffs argue that the Chun bequest is held by Good Shepherd on trust for a specific charitable purpose separate from the other parish property. They say that it is clear from both the will and surrounding circumstances that Dr. Chun intended the funds to be applied to the building fund of the Good Shepherd, in the character as she knew it, in order to purchase or construct a new church to continue the parish's ministry to the ethnic Chinese community in Vancouver. That ministry is to be consistent with historic, orthodox Anglican doctrine and practice.

[311] The plaintiffs submit that the bequest itself refers to the "building fund", which suggests that it is to be held on trust for the building needs of the organization, as opposed to being an absolute gift to the church. It is also apparent from surrounding circumstances, they say, that Dr. Chun was a person who had shown an interest in benefiting particular purposes rather than institutions. For example, her prior 1990 will left a percentage of her estate to the Cao-Yan Church to be used for the benefit of needy and elderly members. The unexecuted codicil provided that any unvested gifts should go to the Relief Fund of the Hong Kong Faculty of Medicine to assist needy medical students. The plaintiffs further submit that Good Shepherd had building needs that Dr. Chun was aware of at the time she made her will, as they had been described to her by Reverend Yeung.

[312] The plaintiffs also argue that Dr. Chun's will should be construed as evidencing an intention to benefit the congregation of which she was a member, not the Diocese or the ACC. She was a member of St. Paul's and Good Shepherd, both of which have conservative theology and worship styles. The character of the Good

Shepherd congregation has remained consistent since the time that Dr. Chun attended. It views the Diocesan practice of permitting blessings of same-sex unions to be a departure from Christian doctrine and teaching, and this has prompted it to leave the Diocese and realign under the jurisdiction of the Southern Cone. The congregation is now part of ANiC. Accordingly, the plaintiffs seek a declaration to the effect that the funds are to be held on trust for the building needs of the ANiC congregation.

[313] The plaintiffs' alternative position is that if the Court finds that the parish corporation holds the funds on trust, then fulfillment of the trust will be impracticable in the event that the Bishop replaces the current trustees, as he did in the parishes of St. Matthews and St. Matthias/St. Luke. They say that should that happen, the current congregation will leave the parish as a matter of conscience, and the parish will then cease to have the character of the congregation that Dr. Chun intended to benefit by her bequest. The Diocese would have title to the parish church on 19th Avenue with no likelihood the funds would be used for a new church for the Chinese community in the region.

[314] Accordingly, the plaintiffs submit that the appointment of new trustees by the Diocese would be a supervening impracticability in the performance of the trust on which the Chun Bequest is held, thus raising a *cy-près* situation. The Court therefore has jurisdiction to rescue the trust by ordering that the funds be held on trust for the building needs of the ANiC congregation; such a scheme, the plaintiffs say, would be as near as possible to what Dr. Chun contemplated. They also seek, if necessary, an order pursuant to s. 31 of the *Trustee Act*, R.S.B.C. 1996, c. 464, appointing them trustees to hold the proceeds of the Chun Bequest on those terms.

[315] The defendants counter that the terms of Dr. Chun's will are clear, and that the Court should not import unwritten conditions into her bequest. The gift is to the building fund of the parish corporation, which is part of the Diocese of New Westminster. Consistent with this is the fact that the parish sought and obtained permission for the sale of the property from the Diocesan Council and the Bishop.

The defendants further say that it is apparent from the factual matrix that the funds are for the parish, not the congregation. The Anglican Church has an episcopal polity; it is not congregational. As well, a parish is inherently part of a diocese. This diocesan structure exists equally in Hong Kong where Dr. Chun was from. Further, the defendants say that, as reflected in other provisions in her will, Dr. Chun was quite clearly plain-spoken. There is, accordingly, no reason to believe that she would have been anything other than express in setting out her intentions regarding her bequest to Good Shepherd.

[316] The defendants additionally argue that it cannot be assumed that Dr. Chun would have been on the side of the ANiC. Beyond the fact that she was Anglican, her theological position is unknown.

[317] As to the plaintiffs' second position, the defendants say there is no basis for a finding of impracticability. First, it is clear that the persons appointed as trustees by Bishop Ingham will serve the Chinese community; the incorporating declaration describes the limits of the parish as "the Chinese community in the Greater Vancouver Regional District of the Province of British Columbia". Second, the plaintiffs' submission that persons of Chinese origin will not be attracted to a parish in the Diocese is based in part on cultural stereotyping. There are, in fact, Chinese Anglicans presiding over and attending Diocesan churches. St. Chad's, for example, is a small parish where Chinese continue to attend.

[318] The defendants further argue that even if there is no present need for a building, a finding of impossibility or impracticability does not automatically follow. A fund can be held until such time as circumstances change and it is put to use: *Parish of Christ Church v. Canada Permanent Trust Co.* (1984), 66 N.S.R. (2d) 132, 18 E.T.R. 150 (S.C.).

[319] Whether a bequest or gift in trust for a charitable purpose is for the general purposes of the charity or for a specific or restricted purpose is a matter of construction: *Rowland v. Christian Brothers*. I do not understand there to be any serious dispute between the parties that the Chun Bequest is held on trust for the

building fund specifically, as opposed to the more general trust on which parish property is held. Where they diverge is with respect to whether Dr. Chun bequeathed that property to the congregation or to the parish corporation as part of the Diocese.

[320] The approach to determining a testator's intention was recently set out in *Re Johnston Estate*, 2008 BCSC 1185 at para. 18, 42 E.T.R. (3d) 286:

When attempting to glean a testator's intentions in the context of a possible charitable bequest, the law has taken a broad approach with a view to finding such an intention where the evidence supports it. It is not a matter of asking what a reasonable person in the place of the testator would have meant, but rather attempting to discern what the specific testator meant when he or she made the bequest. The Will itself is the primary source of that intention, but it is not the only source. Regard may be had to the surrounding circumstances, and that is so whether on its face the Will is ambiguous or not.

[321] Dr. Chun bequeathed her property to "the building fund of the Church of the Good Shepherd". In my view, this is quite clearly a gift to the parish and not to the congregation. Certainly that is how both the parish corporation and the executor of her will understood the gift. The parish corporation sought and obtained permission from the Diocesan Council to sell the Hong Kong property, which would only have been necessary if the gift were in relation to the corporation. The executor similarly assigned and assented to the vesting of the property in the "Church of the Good Shepherd and also known as The Parish of Church of the Good Shepherd". While I acknowledge that these events subsequent to her death do not necessarily cast light on Dr. Chun's subjective intention, they are consistent with what I see as the clear meaning of her will. I therefore conclude that the testamentary gift was to the parish, not the congregation.

[322] That being the case, is this an appropriate circumstance in which to apply the *cy-près* doctrine? *Cy-près* is a remedy used to save an existing trust that is otherwise impossible or impracticable to perform. Donovan W.M. Waters, ed., *Waters' Law of Trusts in Canada*, 3<sup>rd</sup> ed. (Toronto: Thomson Carswell, 2005) at 773 describes the *cy-près* doctrine in these terms:

It sometimes happens that when the donor's instrument of gift takes effect, the charitable object or the required mode of achieving the object cannot be carried out. The court will then by order approve a scheme, or require a scheme to be drawn up, for the trust property to be applied to an object or mode of achieving the object which is as close as possible to that set out by the donor. For the court to have this jurisdiction two things must be established; first, that it is impossible to carry out the object or mode of attainment, or, if it is indeed possible, that to carry out the object or mode would in the circumstances be impracticable. Second, it must be shown that the donor in making the gift had a general or overriding charitable intent. If both tests are satisfied, then the court as part of its inherent jurisdiction will, in its discretion, make the appropriate order for a *cy-près* scheme.

[323] A number of prerequisites to *cy-près* jurisdiction can be drawn from the foregoing: (1) the donor must have transferred property in trust for a particular charitable purpose or object; (2) it must be impossible or impracticable to administer the trust according to that purpose or object; and (3) the donor must have demonstrated a general or overriding charitable intent. Where these conditions are met, the court then has jurisdiction to order a scheme for the trust property that is as close as possible to that intended by the donor.

[324] An example of a case involving religious property in which the *cy-près* doctrine was invoked is *Parish of Christ Church v. Canada Permanent Trust Co.* A testator left part of his estate in trust for a parish corporation. The trust income was permitted to be used for church repairs but the capital was only to be used for the purpose of constructing a new church, whenever that might occur. Parish members applied to vary the terms of the trust on the basis of the *cy-près* doctrine. They argued that the existing historical building required extensive repairs and renovations, and they sought to be permitted to direct the funds to that purpose. They additionally submitted that even if the church were accidentally destroyed some time in the future, insurance proceeds would cover the cost of rebuilding.

[325] Rogers J. held that the arguments advanced by the plaintiffs did not justify application of the *cy-près* doctrine. He observed that though laudable, the plaintiffs' present desire to preserve the old church did not bind future church officials who might hold a different view of the matter. He also considered irrelevant the fact that the church was adequately insured, as it could not be assumed that the policy would

always be in force or cover every contingency. Ultimately, Rogers J. wrote, the Court had to concern itself with the wishes of the testator as to the disposition of the property, not the wishes of others; the testator's intention in that case was clear.

[326] *In Re Lysaght*, [1966] 1 Ch. 191 (Chancery Div.), is another example of the doctrine being invoked. The testatrix had bequeathed funds to the Royal College of Surgeons for scholarship purposes. A recipient had to be "of the male sex and the son of a duly qualified British born medical man ... and any such student must be a British born subject and not of the Jewish or Roman Catholic faith". The Royal College declined to accept the bequest on those terms, stating that the exclusion of students of the Jewish and Roman Catholic faiths was "so invidious and so alien to the spirit of the college's work as to make the gift inoperable in that form." (It did not appear to object to the other restrictions.) The College was willing to accept the gift with that provision deleted.

[327] The Court held that the paramount intention of the testatrix was that the College be the trustee of an endowment fund. If the provision requiring religious discrimination was insisted upon, the College would disclaim the trust and thus defeat the testatrix's paramount intention entirely. Performance of the trust was therefore impracticable. The Court ultimately ordered that the trust as set out in the will be amended by omitting the words "and not of the Jewish or Roman Catholic faith". As the Court wrote at 207, "[t]he impracticability of giving effect to some ineffectual part of the testatrix's intention cannot, in my judgment, be allowed to defeat her paramount charitable intention."

[328] Turning to the present case, the incorporating declaration of the Parish Corporation of the Church of the Good Shepherd defines the limits of the parish as "the Chinese community in the Greater Vancouver Regional District of the Province of British Columbia". The evidence establishes that the three parishes in the district with substantial Chinese congregations have left the Diocese: Good Shepherd, Church of Emmanuel (the parish planted in Richmond by Good Shepherd) and St. Matthias & St. Luke. St. Chad's is a small congregation, approximately half the

members of which are Chinese, that remains in Diocese. Nevertheless, the overwhelming majority of Chinese Anglicans have left. Given the unlikelihood that there will be need for a new building for the Chinese community in the Diocese, the proceeds of Dr. Chun's bequest will simply remain in trust. This would render the bequest useless and defeat Dr. Chun's main intention: *In Re Robinson*, [1923] 2 Ch. 332 (Chancery Div.). I therefore find that the fulfilment of the purpose of Dr. Chun's bequest has become impracticable and that this is an apt occasion in which to apply the *cy-près* doctrine.

[329] In bequeathing the Hong Kong property to the building fund of the Church of the Good Shepherd, Dr. Chun intended the proceeds to be applied to the building needs of the parish that served the Chinese community. That parish voted unanimously to receive episcopal oversight from the Province of the Southern Cone and to affiliate with ANiC. In the circumstances, I conclude that a scheme whereby the funds are held on trust for the building needs of the ANiC congregation will best fulfil Dr. Chun's charitable intent.

[330] The precise terms of the trust must now be developed and trustees must be appointed. I leave these matters to the parties. If they are unable to agree, any party may return to court for further orders.

### **Summary**

[331] The plaintiffs in Action No. S086372 are entitled to the following declarations and orders:

It is declared that:

1. The defendant Bishop Ingham has no jurisdiction or authority to dismiss or appoint trustees to parish corporations incorporated pursuant to s. 7 of the *Act* in the circumstances of this case.
2. The purported dismissal of the trustees of the St. Matthew's Parish Corporation, by way of the St. Matthew's Notice dated

July 10, 2008, but stated to be effective August 25, 2008, is of no force and effect.

3. The purported appointment of new trustees of the St. Matthew's Parish Corporation, by way of the St. Matthews Notice dated July 10, 2008, but stated to be effective August 25, 2008, is of no force and effect.
4. The purported dismissal of the trustees of St. Matthias Parish Corporation and trustees of the St. Luke Parish Corporation, by way of the St. Matthias and St. Luke Notice dated July 10, 2008, but stated to be effective August 25, 2008, is of no force and effect.
5. The purported appointment of new trustees of the St. Matthias Parish Corporation and of new trustees of the St. Luke Parish Corporation, by way of the St. Matthias and St. Luke Notice dated July 10, 2008, but stated to be effective August 25, 2008, is of no force and effect.
6. The persons elected or appointed at the annual vestry meeting of St. Matthew's Abbotsford on February 17, 2008, as trustees, namely R. Patrick Greenwood, Linda Seale, Anne Sheck, Shirley Wiebe, Lanny Reedman and Ethel Campbell, still hold their position as trustees of the parish corporation; and
7. The persons elected or appointed at the annual vestry meeting of the Parish of St. Matthias and the Parish of St. Luke on February 24, 2008, as trustees, namely Ruth Lin, Peter Chapman, Zenia Cheng and Johnny Leung, still hold their positions as trustees of the Parish Corporation.

[332] The action is in other respects dismissed.

[333] The plaintiffs in Action No. S087230 are entitled to the following declarations sought in the amended statement of claim:

It is declared that:

1. The defendant Bishop Ingham had no jurisdiction or authority to dismiss or appoint trustees to the Good Shepherd Parish Corporation.
2. The persons elected or appointed at the annual vestry meeting of the Good Shepherd on February 24, 2008, as trustees, namely Eric Law, Annie Tang, Stephen Yuen and Winsor Yung, hold their position as trustees of the parish corporation.

[334] A *cy-près* scheme to fulfill the charitable intent of Daphne Wai-Chan Chun is ordered whereby the funds are to be held on trust for the building needs of the ANiC congregation. The parties are to develop the terms of this trust and appoint trustees, with leave to return to court for further orders if necessary.

### **Counterclaim**

[335] The defendants in Action No. S086372 are entitled to a declaration that the plaintiffs' entitlement to possession and control of the properties held by the parish corporations must be exercised in accordance with the *Act* and the Constitution, Canons, Rules and Regulations of the Diocese.

[336] The other declarations and orders sought in the amended counterclaim are dismissed.

“The Honourable Mr. Justice Kelleher”