COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bentley v. Anglican Synod of the Diocese of New Westminster,* 2010 BCCA 506

Date: 20101115

Dockets: CA037770, CA037771

Docket: CA037770

Between:

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

Appellants
(Plaintiffs)

And

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

Respondents
(Defendants)

- and -

Docket: CA037771

Between:

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

Appellants
(Plaintiffs)

And

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

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Garson

On appeal from the Supreme Court of British Columbia, November 25, 2009
(*Bentley v. Anglican Synod of the Diocese of New Westminster*, 2009 BCSC 1608,
Vancouver Registry, Dockets S086372 & S087230)

Counsel for the Appellants:	D.G. Cowper, Q.C. W.S. Martin K. Gammon
Counsel for the Respondents:	G.K. Macintosh, Q.C. T.A. Dickson
Place and Date of Hearing:	Vancouver, British Columbia September 13, 14, 15, & 16, 2010
Place and Date of Judgment:	Vancouver, British Columbia November 15, 2010

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable The Honourable Mr. Justice Lowry
The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Madam Justice Newbury:

OVERVIEW

[1] This difficult case tests the ability of the members of four Anglican parishes to remove themselves from a diocese of the Anglican Church of Canada ("ACC") and from the oversight of their Bishop, while at the same time continuing to use the church buildings and related assets of their parishes for Anglican worship. The parishioners' departure from the Diocese of New Westminster is the unhappy result of a doctrinal change first approved by the Diocesan Synod in 1998 and finally put into effect by the Bishop in 2002. This change authorizes, but does not require, the liturgical blessing of same-sex unions by clergy in the Diocese. (The sacrament of marriage is not performed for same-sex couples anywhere in the Anglican Church.)

[2] The General Synod of the ACC has pronounced that same-sex blessings are "not in conflict with the core doctrine (in the sense of being creedal)" of the ACC, but such blessings have not been adopted by the majority of dioceses in the ACC or in the wider Anglican community, aside from certain dioceses in the Episcopal Church of the United States. The result is a division described as "schismatic" in 2002 by the then Archbishop of Canterbury. Numerous meetings, conferences and studies regarding homosexual unions have been carried out at various levels of the Church worldwide, but have failed to reach a clear consensus in favour of the position taken by the Diocese of New Westminster. Many bishops have expressed opposition to or reluctance regarding same-sex blessings, and about one-quarter of the bishops invited to the Lambeth Conference in 2008 boycotted it. An alternative conference in Jerusalem was attended by 291 bishops and others from 17 Anglican "provinces" (autonomous churches such as the ACC). That conference expressed support for the idea of a separate North American province for those parishes that reject the direction of the ACC and the Episcopalean Church of the United States on same-sex blessings.

[3] In the Diocese of New Westminster, proposals by the Bishop to reach a temporary compromise in the form of a 'conscience clause' and oversight of the parishes by a 'visitor' were not accepted in the four parishes. The disagreement finally led to their withholding of assessments normally payable to the Diocese; the relinquishment, under pressure, of the licences of the clergy in the four parishes; and the Bishop's purported removal of the trustees of two of the four parish corporations. All four have entered into arrangements with a South American bishop (who is opposed to same-sex blessings) for the provision of primatial oversight, and that bishop has appointed a retired Canadian bishop to provide episcopal oversight. Given these arrangements, the dissenting parishioners and their clergy consider themselves still to be 'in communion with' the wider Anglican Church. They have 'realigned' themselves into a new "Anglican Network in Canada" ("ANiC") to facilitate the oversight arrangements. As at April 2009, 24 other Canadian parishes had aligned themselves with the Network.

[4] Although the Anglican Church has weathered many doctrinal challenges in its long history, counsel before us described the present situation as "unprecedented". Nonetheless, counsel for both groups were careful to assure the court that it need not wade into the doctrinal or ecclesiastical questions that divide them. Counsel for the plaintiffs contended that the court had only to satisfy itself as to the existence and purpose of the trusts (or trust-like conditions) on which the parish assets are held and as to the impracticability of such purposes now being carried out. If these criteria were met, a *cy-près* order could be made that would allow the plaintiffs to continue using the parish properties, on terms yet to be worked out. For their part, the defendants submitted that the ACC has clear rules, to which the court should defer, for the determination of doctrinal disputes; that the parishioners voluntarily adhered to those rules when they became members of the ACC; and that doctrinal changes authorized by the Bishop and Diocesan Synod in accordance with those rules must be accepted by the parishioners and their clergy. Failing that, the defendants submit that the dissenters are free to depart the Anglican Church, but without any rights in respect of the parish properties to which they have contributed funds, time and devotion over the years, and indeed over generations.

[5] The plaintiffs in the main action (Docket S086372) are trustees and clergy of the four parish corporations that have withdrawn from the Diocese. They say that they, or the parish corporations they represent, hold the church buildings and related assets on implied trusts created or confirmed by the statute under which both the Diocesan Synod and the parish corporations were incorporated. In their Statement of Claim filed in the court below, they sought, among other things:

- a declaration that the parish corporations, or the trustees, own the assets in trust "for the congregations for the purpose of ministry consistent with historic, orthodox Anglican doctrine and practice";
- a declaration that the actions of the Bishop and Synod are inconsistent with the trusts on which the assets are held;
- a declaration that the division has rendered it impracticable to carry on the purpose of the trusts as set out above;
- an order establishing a *cy-près* scheme to fulfill the charitable intent of the trusts;
- a declaration that the terms of the trusts are inconsistent with the requirement that the parishes accept and receive episcopal jurisdiction and oversight from the Bishop;
- a declaration that the actions of the four parishes in 'realigning' to receive oversight elsewhere are consistent with the terms of the trusts;
- a declaration that the Bishop had and has no jurisdiction to dismiss or appoint trustees of the parish corporations and that his purported removal of the trustees of two of the corporations is of no force and effect; and
- a declaration that the trustees elected or appointed at the annual vestry meetings of the two parish corporations still hold their positions as such.

[6] In a second action (Docket S087230) tried at the same time (the "*Chun*" action), a *cy-près* order was also sought in respect of a testamentary bequest made by Dr. Daphne Wai-Chan Chun to the building fund of the Church of the Good Shepherd, one of the four parishes. The trustees of that parish pleaded that if the Bishop were permitted to replace them, the purpose of the bequest could not be fulfilled, the parish church would "cease to have the character" the testator intended to benefit, and there was "no likelihood that the Diocese would use the funds for

such a purpose in the absence of the present congregation." Thus they sought, *inter alia*, a *cy-près* order to permit the fulfilment of the charitable intent of the bequest.

[7] The court below dismissed the main action, with the exception that it declared invalid the Bishop's purported removal of the parish trustees. The Court granted a *cy-près* order in respect of the *Chun* bequest. Appeals are brought against both orders.

THE MAIN ACTION

Factual Background

[8] The reasons of the trial judge are indexed as 2009 BCSC 1608. Not surprisingly, they are lengthy, running to almost 100 pages. I do not intend to recite or even to summarize the background facts which he ably described under the headings "Factual Background" and "History of the Issue of Same-Sex Blessings" at paras. 7-171 of his reasons. These facts are largely uncontroversial and I suspect anyone reading these reasons will be familiar with the background and with the trial judge's reasons.

[9] For convenience, however, I have attached as Schedule I hereto the relevant provisions of the *Act to Incorporate the Anglican Synod of the Diocese of New Westminster*, S.B.C. 1893, c. 45, as amended (the "Act"). The Act specified the geographical boundaries of the Diocese, which includes much of the Lower Mainland of British Columbia. It contemplated the transfer of property previously held in trust by the Corporation of the Bishop of New Westminster "for the uses of the Church of England, or the Church of England in British Columbia, or for the [ACC], to the Synod, to be held in trust for the same purposes" (s. 2), and specified various powers of the Synod, including powers to invest and borrow funds. Section 6 (amended in 1961) now states:

> The term "Church of England", "Church of England in Canada", or "Anglican Church of Canada" when used in this Act and in all deeds, documents, or writings that have heretofore or may hereafter be executed, shall for the purposes of this Act be taken to mean and include that body of Christians

> which is acknowledged by the Archbishop of Canterbury as a body in full communion with the Church of England, as by law in England established.

[10] Section 7 of the Act allowed parishes in the Diocese also to become incorporated in the manner provided, and s. 7(4) set forth the powers of such corporations, including the power to acquire and hold real and personal property and (with the consent of the Executive Committee and Bishop) to mortgage, sell or otherwise dispose of same; and to make, alter and rescind by-laws and rules for their management of the corporation's affairs, again with the approval of the Executive Committee and Bishop. Section 7(6) provided that the assets of a parish corporation "only shall be liable" for its debts, presumably insulating the Diocese itself from such liability.

[11] Under the present Canon 13 of the Synod of New Westminster, the Bishop and Diocesan Council have the power to permit parishes to merge, split, disband, or wind up. When a parish closes, its assets are, "subject to any trusts" and to any reserve agreed on by the parish and the Council, required to be transferred to the Diocese for other "worship centres" or programs in the Diocese.

[12] Schedule II to these reasons is the Solemn Declaration adopted by the predecessor or the ACC in 1893, together with provisions for the establishment of the General Synod of the ACC, the Order of Bishops, the Order of Clergy and Order of Laity, the office of the Primate of the ACC and the organization and jurisdiction of the General Synod. These provisions make up the ACC's "Declaration of Principles" and contemplate a church organization that is highly structured and obviously episcopal. (The *Oxford English Reference Dictionary* (2nd ed., 1996) defines "episcopal" to mean "constituted on the principle of government by bishops.") It will be noted that under s. 6(i) of the Declaration of Principles, the General Synod is given authority over "the definition of the doctrines of the Church in harmony with the Solemn Declaration".

Trial Judge's Analysis

[13] The trial judge set forth the parties' respective positions at paras. 172-246 of his reasons and then turned to his analysis of the legal issues in the primary action at para. 247. He noted that the plaintiffs' submissions began from the premise that church property is presumed to be held on a religious purpose trust (a type of charitable trust), while the defendants contended that the issues in dispute could be resolved by reference to statutes and canon law, making it unnecessary to address trust principles. The latter approach, he said, was akin to the "neutral principles of law" approach routinely taken by American courts in resolving disputes about church property. He referred to two seminal American decisions, *Watson v. Jones* 80 U.S. 679 (1871), and *Jones v. Wolf* 443 U.S. 595 (1979), both of which were considered by the Supreme Court of California in the *Episcopal Church Cases* (2009) 198 P. 3d 66. At para. 248, he quoted the following passage from the latter case:

> 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.

[14] Although acknowledging that the "neutral principles of law approach" stemmed from the separation of church and state provided for in the First Amendment to the U.S. Constitution, the trial judge noted that it had 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." As well, he said, this approach had been applied in Canada 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, ***aff'd***. [2002] O.J. No. 4698, 30 B.L.R. (3d) 315 (Ont. C.A.), which I will refer to as "*Russian Orthodox*". It was not a *cy-près* case, but concerned the validity of an amendment to the bylaws of the Holy Virgin Church approving its change to another church. The amendment was not submitted to the diocese for approval as required by its "Normal Parish Bylaws". The diocese sought a declaration that the resolution was invalid and that members of the church must observe the tenets of the diocese, and sought to have the directors removed from office.

[15] The Court held that the resolution was invalid due to non-compliance with the Church's bylaws, but refused to rule on issues of qualification for membership in the Holy Virgin Church or the directors' ability to hold office in the parish in the face of their purported secession and refusal to defer to the authority of the Synod of Bishops. In declining to determine these "doctrinal" issues, the trial judge in *Russian Orthodox* adopted the "neutral principles of law" approach described in *Jones v. Wolf* and approved in *Balkou v. Gouleff* (1989) 68 O.R. (2d) 574 (Ont. C.A.). He stated:

> ... 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.
>
> In my view, the declaration sought by the Plaintiff involves a question of church doctrine. The determination as to whether a person meets the qualifications as described would require the court to inquire into the teachings and tenets of [the Russian Orthodox Church Outside of Russia] and then to determine whether a person observed such teachings and tenets. This is a matter of church doctrine and it would be inappropriate for the court to make such a determination. [At 42; emphasis added.]

[16] By the time *Russian Orthodox* reached the Court of Appeal, the dispute had narrowed to one concerning the assets of the Holy Virgin Church. The Court of Appeal observed that the trial judge had construed the bylaws reasonably, but also noted that under the "'neutral principles of law approach' affirmed by the Supreme Court of Canada [*sic*; the Supreme Court of the United States in *Wolf v. Jones*], the court has no role to play." (My emphasis.) The Court did not choose between the two alternatives, being content to dismiss the appeal on either basis. (Para. 8.)

[17] The trial judge in the case at bar noted that the "notion of civil courts deferring to ecclesiastical authority on questions of doctrine" had deep provenance in Canada, citing as an example *Itter v. Howe* (1896) 23 O.A.R. 256, a case on which the defendants rely heavily. It concerned a doctrinal difference between the majority of the Church of the United Brethren in Christ, and a minority who withdrew from that church and adopted a new constitution and confession of faith. Years earlier, certain property in Port Elgin had been conveyed to trustees on trust "to erect and build or cause to be built a house of worship for the members of the said Church". The defendant trustees sympathized with the minority and refused to allow the presiding elder and minister of the original church to conduct religious services in the Port Elgin building. The trial judge examined the doctrinal changes approved by the majority and formulated the question before him thus:

> The question, I think, is, which of these two bodies is the body that under the original confession of faith embodied in the book of 1885 is to be treated as the body called the United Brethren in Christ. It appears to me that the only thing by which that body can be identified is the confession of faith; and, there being two confessions of faith here, one of them being that of the United Brethren in Christ at the time that this conveyance was taken, the other not being of the United Brethren in Christ, and it being shown that there has been no alteration authorized by the constitution of the society, I think I must assume that the body that holds to the unaltered creed is the body which is truly to be considered as the United Brethren in Christ. It simply comes down before me as a question of that kind: Which of these two bodies is the original society under the original bond which tied these two societies together? ... I think I must decide in favour of the defendants, and that the action must be dismissed with costs. [At 263-64; emphasis added.]

[18] The Court of Appeal allowed the appeal, issuing four separate sets of reasons. Chief Justice Hagarty referred to various American authorities that

supported the principle that the confession of faith adopted by a church should be interpreted "not ... as an impassable barrier thrown in the way of improvement of all sorts, but as a protection against the introduction of heretical doctrine, destructive of the distinctive theological character of the church." (At 276, citing *Schlichter v. Keiter* 156 Pa. St. 119 (1893).) He continued:

> It will be a singular and not very satisfactory result if we, on the points discussed by these gentlemen as to the nonexistence of substantial difference between the old and the new confessions, decide to differ from their conclusions on matters generally outside the limits of our jurisdiction as judges.
>
> The only ground on which the courts take cognizance of such matters of opinion is to decide rights affecting property. [At 276.]

[19] Hagarty, C.J.O. also referred to *Dorland v. Jones* (1886) 12 O.A.R. 543 (C.A.), *aff'd*. (1887) 14 S.C.R. 39 and *Attorney General v. Pearson* (1817) 3 Mer. 353, 36 E.R. 135 (Ch. D.), to which reference will be made below, and other English cases involving church divisions. These supported the view, he said, that "the whole burden rests on those asserting that their opponents have so far departed from the fundamental principles of the society, as in effect to cause them to be no longer members thereof". Applying this test, he was "unable to see any such departure from the accepted constitutional views of the United Brethren in Christ as would warrant the action of the 15 brethren who dissented from the large body of the quadrennial conference of 1889 in attempting to usurp the name, functions, and property, of the vast majority." (At 280.)

[20] In separate reasons, Maclennan J.A. agreed it was "impossible to say" that the amendments were void or constituted "such a departure from or abandonment of the essential character of this body that its identity was lost, or that it ceased to be in law and in fact the religious body or denomination that had theretofore existed ...". He also emphasized that no question of property was involved in the proceedings before the Court. (At 296.) Rather there was only the question of whether the interpretation put upon the rules of the church by <u>its</u> supreme court was correct and binding upon its people. In his view, "[a]ccording to law such bodies are themselves

the sole judges of these matters; and that being so, their action, right or wrong, did not and could not destroy their identity."

[21] Burton J.A. agreed with Maclennan J.A. but added that in his view, the decision of the Church's General Conference:

> ... is and ought to be conclusive. As I understand the law in this respect, it is that when a 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. [At 281.]

This passage was cited several times by counsel for the defendants in this court, although on my reading, it does not represent the *ratio* of the case.

[22] Finally, Osler J.A. also was of the view that the fundamental doctrines of the church had not been infringed, nor its identity lost, as a result of the changes approved by the majority. (At 282-83.)

Trial Judge's First Conclusion

[23] Against this background, the trial judge in the case at bar noted that parishes in the Diocese of New Westminster are subject to the Act, Constitution, Canons, Rules of Order and Regulations of the Diocese, and the bylaws and regulations applicable to parish corporations. In his view, it was logical first to "ascertain whether any of these sources determine entitlement to the parish property in question" before considering whether a religious purpose trust ought to be implied in this case. (Para. 253.) He noted s. 7 of the Act, which requires the consent of the Bishop and the Executive Committee for the incorporation of a parish corporation, the making and amendment of the bylaws, rules and regulations of a parish corporation, and the sale or other disposition of property by the corporation. From these limitations on the autonomy of parish corporations and the fact they are incorporated under the Act, he inferred that they are "intrinsically part of the Diocese and must be approached in that context." (Para. 255.) He then stated in one paragraph his first substantive conclusion:

> 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. [At para. 256; emphasis added.]

Since the trial judge stated this was "sufficient to decide the issue," counsel proceeded on the basis that it represents one of the *ratios* of this judgment, if not the *ratio*.

Second Conclusion

[24] The Court addressed the question of trust beginning at para. 257 and did so clearly in the alternative. If he had approached it from a trust perspective as advocated by the plaintiffs, the trial judge said, he would not have implied a trust on the terms they proposed – i.e., "for purposes of ministry consistent with historic, orthodox Anglican doctrine and practice." In his analysis, "historic" and "orthodox" were so uncertain and subjective they could not form the basis of an enforceable trust. In addition, he regarded a trust that "freezes" doctrine at one point in time as inconsistent with the history of change and evolution in Anglicanism. In earlier times, for example, the Church had prohibited the remarriage of divorced persons and had ordained only men as priests. Its doctrinal positions on both issues had changed, although the newer views might be regarded as inconsistent with orthodox Anglicanism. (Para. 258.)

[25] Nor was the trial judge persuaded that viable terms of trust could be found in the Solemn Declaration as argued by the plaintiffs. In their submission, the Declaration required three things – that the parishes remain in an Anglican jurisdiction that is in full communion with the world-wide Church; that parish ministry be in accordance with Anglican doctrine that is true to the Solemn Declaration; and

that parish liturgy be "consistent with doctrine and acceptable to the Anglican Communion." Even if one assumed these were "viable" terms, the trial judge disagreed with the notion that the impugned conduct of the Bishop and Synod were inconsistent with a trust on such terms. (Para. 259.) He found it clear on the evidence that the ACC remained in communion with the Anglican Communion. The ACC had been invited, for example, to send its bishops to the 2008 Lambeth Conference, and the Archbishop of Canterbury affirmed in February of that year 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". (Para. 260.)

[26] The trial judge did not address whether the plaintiffs remained in full communion with the world-wide Church. Nor did he determine whether the Solemn Declaration sets out "enduring foundational principles" for the ACC as the plaintiffs contended, or whether it is a document of only "historical" interest, as suggested by the Bishop in his testimony. The interpretation of this document, the trial judge wrote, falls to the General Synod in accordance with s. 6(i) of the Declaration of Principles (see Schedule II), and that body had decided that same-sex blessings were permissible. As I read his words, he deferred to the General Synod on the issue:

> ... The General Synod is a representative body whose determinations are binding on the whole of the ACC. Section 6(i) 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. [At para. 261; emphasis added.]

Third Conclusion

[27] The trial judge next turned to the case authorities relied on by the plaintiffs to support an implied religious purpose trust. The leading case in this line of authorities is the decision of the House of Lords of Scotland in *General Assembly of the Free Church of Scotland v. Overtoun* [1904] A.C. 515, in which long and learned judgments were given by each of the Earl of Halsbury, L.C.; Lords Davey, James, Robertson, and Alverstone, C.J.; and in dissent, Lords Macnaghten and Lindley. *Free Church* concerned resolutions passed by the majority of the Free Church of Scotland and by all members of the United Presbyterian Church for unification under the name "United Free Church". The original Free Church had espoused two fundamental doctrines, namely the Establishment principle and the acceptance of the Westminster Confession of Faith. The United Presbyterian Church on the other hand was opposed to the Establishment principle and did not maintain the Westminster Confession of Faith in its entirety. As the headnote indicates, the Act of Union between the two churches "left ministers and laymen free to hold opinions as regards the Establishment principle and the predestination doctrine (in the Westminster Confession) as they pleased."

[28] The small minority of the Free Church (the "Wee Frees") who objected to union asserted that the Church had no power to change its original doctrines or to unite with a body that did not confess those doctrines. In their submission, since the property of the original Free Church was no longer being used to further the original doctrine of the Church, the unification was invalid and the trust on which the church property was held was in breach. They sued for a declaration that they, on behalf of the (original) Free Church, were entitled to the property. They succeeded in the House of Lords.

[29] The judgment of the Earl of Halsbury is the most accessible to a modern reader and the concurring judgments were largely in agreement with his reasoning. His Lordship began his analysis by observing that the original purpose of the trust in

question was for the maintenance and support of the Free Church of Scotland. He continued:

> What was the Free Church of Scotland in 1843 can hardly admit of doubt. The reasons which those who separated themselves from the Established Church of Scotland then gave for their separation are recorded with distinctness and precision, and I do not think there can be any doubt of the principles and faith of those who came out from the Church of Scotland and described themselves as the Free Church of Scotland. Their name was significant: they claimed to be still the Church of Scotland, but freed from interference by the State in matters spiritual.
>
> It was to the persons thus describing themselves that the funds in dispute were given, and until the union of 1900 with the other body we do not hear of any difficulty having arisen in the administration of the trust.
>
> Now, however, the new body has established a new organization, it is alleged to profess new doctrines, and its identity with the Free Church, for whose behoof the property was settled, is disputed; and it accordingly becomes necessary to consider in what consists the identity of the body designated by the donors of the fund as the Free Church of Scotland.
>
> Speaking generally, one would say that the identity of a religious community described as a Church must consist in the unity of its doctrines. Its creeds, confessions, formularies, tests, and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community. [At 612-13; emphasis added.]

[30] His Lordship observed that a court of law has "nothing to do" with the soundness or unsoundness of a particular church doctrine and that in cases such as this, the court's task is "simply to ascertain what was the original purpose of the trust." (At 613.) He found ample authority for the proposition that, as later stated by Professor Margaret Ogilvie in *Religious Institutions and the Law in Canada* (2nd ed., 2003), "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'". (At 293.) In particular, he noted the comments of Lord Eldon in *Craigdallie v. Aikman* (1813) 1 Dow 2, 3 E.R. 601:

> With respect to the doctrine of the English law on this subject, if property was given in trust for A., B., C., etc., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the

> congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestuis que* trust, for adhering to the opinions and principles in which the congregation had originally united. [At 16; emphasis added.]

In response to the argument that every church should have the power to make changes to its doctrine from time to time, the Earl of Halsbury stated:

> My Lords, apart from some mysterious and subtle meaning to be attached to the word "Church," and understanding it to mean an associated body of Christian believers, I do not suppose that anybody will dispute the right of any man, or any collection of men, to change their religious beliefs according to their own consciences; but when men subscribe money for a particular object and leave it behind them for promotion of that object, their successors have no right to change the object endowed. [At 626; emphasis added.]

[31] The majority of their Lordships could find no doctrinal basis on which the two churches could be said to have formed a unified church, and described the union as "colourable", resulting in "a Church without a religion." (At 628.) In the result, the small minority who had opposed the union and remained faithful to the principles of the original Free Church were held to be entitled to the benefit of the entire church property. (See also *Doe ex dem. The Trustees of the Methodist Episcopal Property v. Bell* (1836) 5 U.C.Q.B. (O.S.) 344 at para. 234; *Bliss v. Christ Church Fredericton* (1887) Tru. 314 (N.B.Q.B.); *Hofer v. Hofer* [1966] M.J. No. 63, 59 D.L.R. (2d) 723 (Q.B.), ***aff'd*** [1970] S.C.R. 958; and *Wesleyan Methodist Trustees of the Pembroke Parish No. 2 et al. v. Lightbourne et al.* (S.C. Bermuda, 1996/280; ***aff'd***. June 21, 2001 (Bermuda C.A.).)

[32] The trial judge in the case at bar observed that a number of qualifications to the *Free Church* principle emerged from *Free Church* itself and subsequent authorities. One of these qualifications was that only the fundamental principles or "defined doctrines" of a religious organization can form the objects of a trust. On this point, he cited *Chong v. Lee* (1981) 29 B.C.L.R. 13 (S.C.) at 17-8, a decision of Hinds J., as he then was, and *Anderson v. Gislason* (1920) 53 D.L.R. 491 (Man. C.A.) – neither of which was a *cy-près* case. Like *Free Church*, *Anderson* was about a proposal to unite two churches, the First Icelandic Unitarian Congregation and The

Winnipeg Tabernacle. Certain members of the Tabernacle who opposed the union denounced its proponents as seceders from the faith and purported to elect new trustees of the church. They sought among other things a declaration that the new trustees had been duly appointed trustees of the congregation and were entitled to possession of its property, and an injunction restraining the defendants from carrying out the proposed union or interfering with the plaintiffs in their use of the property.

[33] The Manitoba Court of Appeal applied *Free Church*, upholding the lower court's decision that if the union proceeded it would "constitute a fundamental departure from the doctrinal position of the Tabernacle as set forth in its constitution". (At 495; my emphasis.) In his reasons, Cameron J.A. for the majority cited various older American cases (apparently decided prior to the pre-eminence of the "neutral principles of law" approach) for the proposition that the proposed unification was a "perversion of the trust and an unlawful diversion of the property". (At 495.) These cases included *Schnorr's Appeal* 67 Pa. St. R. 138 (1870), where it was said that:

> In church organizations those who adhere and submit to the regular order of the church, local and general, though a minority, are the true congregation and corporation, if incorporated... the title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs and principles which were accepted among them before the dispute began, are the standards for determining which party is right. ... [At 146, quoted in *Anderson* at 497; emphasis added.]

Dennistoun J.A. wrote separate reasons in *Anderson* applying *Free Church*, and concluding that the respective beliefs of the two congregations were fundamentally different.

[34] In further support of the proposition that an implied religious purpose trust encompasses only fundamental doctrine, the trial judge here also noted *Dorland v. Jones, supra,* the Quaker "Monthly Meeting" case. There it was held that the defendants had failed to show that the plaintiffs had "so far departed from the fundamental principles of the society, or ... so far departed from its discipline and form of worship ... as in effect to cause them to be no longer members of the

society." (*Per* Hagarty C.J.O. at 545.) The Chief Justice had expressed similar reasoning in *Itter v. Howe*, *supra*:

> As said in the Illinois Supreme Court, *Kuns v. Robertson,* 154 Ill. 394: "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." [At 276-77; emphasis added.]

[35] With the foregoing authorities in mind, the trial judge described the plaintiffs' "core submission" as being 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." (Para. 270.) He noted that in 2004, the General Synod of the ACC had passed a resolution "affirming the integrity and sanctity of committed adult same-sex relationships" and that in 2005, the *St. Michael Report* to the Canadian Primate's Theological Commission had concluded that the blessing of same-sex unions "is not a matter of doctrine in the sense of being credal."[i] (Emphasis added.) The Commission continued:

> ... 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. [At para. 10; emphasis added.]

The words underlined above were slightly altered in a resolution passed by the General Synod in 2007 as follows:

> That this General Synod resolves that the blessing of same-sex unions is not in conflict with the core doctrine (in the sense of being creedal) of the Anglican Church of Canada. [Emphasis added.]

[36] The 2007 resolution was paraphrased (the plaintiffs say it was misapprehended) by the trial judge at paras. 137 and 272 of his reasons, but based on the foregoing, he concluded no breach of trust had been proven. In his words:

> ... 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. [At para. 272; emphasis added.]

Fourth Conclusion

[37] The fourth and final substantive conclusion reached by the trial judge in the main action was that if the parish properties were held on trust, such trusts were "for Anglican ministry as defined by the ACC". (Para. 273.) Several factors led him to this conclusion. The Anglican Church was, he said, a highly-structured organization with decision-making institutions (including a canonical court) and express spheres of authority. It was therefore "preferable" that the Court defer to the appropriate bodies within that structure with respect to what constitutes Anglican ministry. Further, although the Anglican Church had begun in Canada as an extension of the Church of England, it had been autonomous or self-governing since 1893 when the General Synod of the Anglican Church in Canada first met. (See Ogilvie, *Religious Institutions,* at 74-5.) As we have seen, the General Synod has authority and jurisdiction over "the definition of the doctrines of the Church in harmony with the Solemn Declaration adopted by [the Synod]", the relations of the Church with other churches in the Anglican communion, and the "national character, constitution, integrity and autonomy" of the ACC.

[38] The trial judge also noted that under s. 2 of the Act, property held on trust by the Diocesan Synod is held "for the uses of the Church of England, or the Church of England in British Columbia, or the Anglican Church of Canada". It would be "consistent" if the property held by parish corporations were also held "for the use of the ACC". (Para. 276.) Further, when an Anglican church is built and consecrated

by the bishop of a diocese in Canada, it is consecrated 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". (My emphasis.) The trial judge also cited a document entitled *The Principles of Canon Law Common to the Churches of the Anglican Communion*, Part VII of which states that church property is held "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". The document defines "church" to mean "an autonomous member church, national, regional, provincial, or extra-provincial, of the Anglican Communion"– in this instance, the ACC. (Para. 279.) For all these reasons, the trial judge said, if it were necessary for him to decide the issue, he would conclude that the parish properties were held on trust "for Anglican ministry as defined by the ACC." (My emphasis.)

[39] The trial judge did not go on to consider expressly the appropriateness of a *cy-près* order on this basis, but I assume that having referred elsewhere to breach of trust, his reasoning was that since the parish properties have been retained by the ACC for worship consistent with its doctrine, no breach of the trusts or departure from their purpose had been proven, and that thus no judicial intervention was justified.

The Replacement of Parish Trustees

[40] The trial judge moved immediately to a much more specific issue – whether the Bishop had had the authority to remove or dismiss the trustees of the parish corporations of St. Matthew and of St. Matthias and St. Luke from their (elected) offices. In so doing, the Bishop and Diocesan Council had invoked Canon 15 (a copy of which is attached as Schedule III to these reasons), which permits a bishop, in circumstances of a "crisis" that in his opinion affects the orderly management and operation of a parish, to take such action as he deems appropriate or necessary, "including but not limited to establishing a new or alternative form of Organization structure".

[41] Canon 15 had been invoked previously in connection with same-sex blessings, and in connection with the unification of the parishes of St. Matthias and St. Luke in 1998. However, the trial judge found a "vast difference" between restructuring a parish on the one hand and removing elected trustees on the other. Although the circumstances at St. Matthew's and at St. Matthias and St. Luke certainly constituted a "crisis" from the Bishop's point of view, and although the parish trustees may have been acting in a manner "inconsistent with their fiduciary responsibility", the trial judge could find no specific authority in Canon 15 for the Bishop's removal and replacement of the trustees. He continued:

> 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.
>
> 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. [At paras. 294-95.]

Disposition

[42] In the result, the Court declared in the main action that, *inter alia*, the Bishop had not had the authority to remove the trustees of the parish corporations in the circumstances of this case or to appoint others in their places; and that the trustees' entitlement to possession and control of the parish properties must be exercised in accordance with the Act and Constitution, Canons, Rules and Regulations of the Diocese. The remainder of the action – the plaintiffs' application for various declarations and an order establishing a *cy-près* scheme – was dismissed, with costs to the defendants.

ON APPEAL

[43] The plaintiffs' stated grounds of appeal in the primary action are that:

1. The Trial Judge erred in law in adopting principles akin to the U.S. "neutral principles of law" approach in:

    (a) holding that s. 7 of the private Act incorporating the Synod made it unnecessary to consider the relief claimed under the law of charitable trusts.

    (b) in failing to hold that the terms of the Act both expressly and implicitly contemplated that the corporate officers of the parish corporations would serve as trustees exercising their powers under a purpose trust for Anglican ministry or as officers of a charitable corporation serving the same purposes.

2. The Trial Judge erred in his alternative finding that if a charitable purpose trust existed it was for Anglican ministry as defined by the ACC:

    (a) in misapprehending the character of a purpose trust and the role of the Court in determining whether a religious purpose trust had been proven.

    (b) in failing to have regard to the evidence that a purpose trust was intended to require church property to remain dedicated to Anglican ministry.

3. The Trial Judge erred in failing to consider and exercise the Court's supervisory jurisdiction over charities and religious purpose trusts, and in particular in failing to hold that it was no longer practicable for all Anglicans in Canada to carry out Anglican ministry together within the ACC and that a *cy-près* scheme was just and necessary. [Emphasis added.]

None of the parties challenged the declarations that were granted below – i.e., those concerning the duties and purported removal of the trustees of the parish corporations.

Overview of Arguments

[44] In broad terms, the plaintiffs submit that the trial judge's analysis was for the most part unresponsive to their arguments based on implied trust and the *cy-près* doctrine. They characterize the trial judge's reluctance to reach a conclusion regarding the existence of a trust or trusts as an abdication of the Court's supervisory responsibility over charitable trusts. They seek a declaration that the parish properties are held on trust either for "Anglican worship" without more, or (as argued in the court below) for orthodox Anglican ministry, as they regard themselves

as remaining true to the fundamental doctrines of the Anglican Church – just as the minority in *Free Church* were found to have been true to the doctrines of their church and thus remained entitled to the benefit of its trust property. The plaintiffs urge us to recognize the impracticability of the fulfillment of the trust purposes in the four parishes from which the congregations and their priests have been effectively excluded. If it is necessary to refer to the constating documents of the ACC on the question of whether the Bishop's policy in favour of same-sex blessings effected a fundamental change in doctrine, they prefer to rely on the Solemn Declaration, which expressed the desire of the "Church of England in the Dominion of Canada" (now the ACC) to be and to continue "in full communion with the Church of England throughout the world"; and on the fact that in that larger context, the Bishop's policy is an anomaly.

[45] The plaintiffs also rely on a fairly recent decision of the English Court of Appeal in *Varsani v. Jesani* [1998] 3 All. E.R. 273, which did concern an application for a *cy-près* order. A split had developed in a particular Hindu sect which had a temple in London. By a declaration of trust executed in 1967, a charity had been established to promote the faith of the sect as practiced in accordance with the teachings of its leader, who was believed to have divine status. He died in 1974 after appointing a successor in accordance with the sect's constitution. The successor's conduct, however, became the subject of allegations of impropriety. A minority of the sect believed he had lost his right to the succession and therefore his divine status. The majority of members of the sect, on the other hand, continued to recognize his authority.

[46] The headnote describes how the matter came to court:

> In 1988, the majority group issued proceedings, seeking the removal of the two trustees of the charity who were members of the minority group, and a scheme for the administration of the charity. In 1990 the minority group issued proceedings, seeking declarations that the successor had ceased to be the spiritual leader of the sect and that those who accepted him as such were not entitled to worship in the London temple nor to have the use or benefit of the assets of the charity, and a scheme for the administration of the charity. In June 1990 the majority group sought a stay of both sets of proceedings pending the resolution of parallel proceedings in India. By 1996

> discussions with a view to an overall settlement broke down and in March 1997 the majority group issued a summons in the 1988 proceedings seeking a scheme for the administration of the property of the charity *cy-près* under s. 13(1)(e)(iii) of the *Charities Act 1993*.

[47] At trial, Carnwath J. made a *cy-près* order dividing the sect's assets between the two groups, relying on the court's equitable jurisdiction. He noted that the sect had divided "in a way which was not, and could not have been contemplated by those concerned at the time the trust was set up", and that both groups continued to adhere to the essential tenets of the faith. Since the trust was designed for a unified sect, and the rift seemed unlikely to be bridged in future, he found that the founders' gift had become impracticable, necessitating the *cy-près* scheme.

[48] The Court of Appeal upheld the imposition of a scheme, but did not agree that the criteria for an equitable order of *cy-près* had been met. Citing *Craigdallie* and *Attorney General v. Pearson* (1817) 36 E.R. 135, the Court doubted the trial judge's conclusion that the schism in the sect had made the trust sufficiently impracticable to justify a *cy-près* order. In the analysis of Morritt L.J. for the majority, "[i]t could not be said that it was either impossible or impractical to carry out the purposes of the charity so long as either or both of the groups professed the faith of Swaminarayan according to the teaching and tenets of Muktajivandasji." Thus before determining whether it had jurisdiction to make an equitable *cy-près* order, the Court would have to conduct a detailed inquiry into whether each party remained a "true adherent". The cost of such an inquiry was likely to deplete the sect's funds.

[49] Rather than proceeding with that task, the Court invoked s. 13(1)(e)(iii) of the *Charities Act, 1993*, which allows the original objects of a charitable gift to be altered where those objects, in whole or in part, have ceased to "provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift". In deciding that the facts came within this 'pigeonhole', the Court emphasized that the disagreement could not be resolved by reference to the sect's constitution, nor as a matter of faith, and that neither group was able to worship in the same temple as the other. The schism was likely to remain for as long as the original purpose of the charity existed. Morritt L.J. said he had no

hesitation in concluding "that the spirit of the gift supports the submission that the court should accept and exercise the jurisdiction conferred by s. 13(1)(e)(iii) by directing a scheme for the division of the property of the charity between the majority and minority groups." (Para. 25; see also *Dean v. Burne et al.* [2009] E.W.H.C. 1250 (Ch.).)

[50] For their part, the defendants urge this court to take the "neutral principles of law" approach adopted in the United States in connection with church disputes. Counsel emphasized the autonomous nature of the ACC as one of the provinces of the Anglican Church world-wide, and referred to specific provisions of the constating documents of the ACC and the Diocese, including in particular:

1. Section 6(i) of the Declaration of Principles, which as noted earlier allocates to the General Synod of the ACC authority and jurisdiction "in all matters affecting in any way the general interest and well being of the whole Church" and in particular the definition of the doctrines of the Church "in harmony with the Solemn Declaration adopted by this synod";

2. The Diocesan Canons, which among other things give the Bishop the authority to appoint and license all priests ministering in the Diocese – a principle echoed in Canon XVII of the Canons of the General Synod;

3. The Diocesan Constitution, which adopts the "doctrine and Sacraments of Christ, as the Lord has commanded in His Holy Word, and as the Anglican Church of Canada has received and explained the same in the 'Book of Common Prayer' ..."; and

4. The provisions of the Act discussed earlier, which among other things require parish corporations to obtain the Bishop's consent to any sale or disposition of property, or to the adoption or amendment of by-laws.

[51] Counsel for the ACC were reluctant to state their position on appeal as to whether the parish properties are held on a trust or not, preferring to emphasize the

contractual relationship between the ACC as a voluntary association[ii] on the one hand, and on the other, its members who as such adhere to the Church's canons and rules. At the same time, they support the trial judge's conclusion that if the parish properties are held on trusts, the trusts are for purposes of Anglican ministry "as defined by the ACC". Finally, they distinguish *Free Church* on the basis that the case at bar does not involve two opposing factions, each claiming to be "the true Church." Instead, they submit, the plaintiffs have chosen to leave the Church (i.e., the ACC) and establish a new one under the auspices of ANiC – even though the plaintiffs have made oversight arrangements by which they intend to remain in communion with the wider Church. On this point, the defendants rely in particular on a powerful passage from the reasons of Burton J.A. for himself in *Dorland v. Jones*, the Quaker "Monthly Meeting" case:

> If, in consequence of some local disagreement among the members of the Monthly Meeting the defendants had separated and applied to the Canada Yearly Meeting for recognition and been admitted by that body as the West Lake Monthly Meeting, a very different question would have been presented; instead of doing so they have legally or illegally – it is not important which – sought and obtained admission to a Yearly Meeting with which the West Lake Monthly Meeting never could have had any relations, and as they never have been recognised as an organised body by the Canada Yearly Meeting within whose territorial jurisdiction they sought to organise, they have no rights as such organisation which a court of law can recognise or enforce.
>
> If this view be correct it must necessarily be of no importance, whether the doctrines and practices of the members of the Meeting as practised by the plaintiffs be regular and orthodox or the reverse.
>
> These are fortunately matters upon which in the view I take of the question, we are not called upon to express any opinion. The dissatisfied members not only withdrew from the organisation, but endeavoured to form a new association in violation of the usages of the Quaker body, and they cannot therefore properly claim to be the West Lake Monthly Meeting for whose use and benefit this property was purchased. [At 560; emphasis added.]

[52] I could not help but feel that counsel's respective submissions were like two ships passing in the night, as were the legal authorities on which they relied. *Free Church* and the cases following it, for example – most of which involved non-hierarchical churches – did not directly address what I will call the 'internal governance' approach advocated by the defendants. As they point out in their factum, the House of Lords of Scotland certainly did not sanction the breakup or

variation of the trust at issue in that case. As for *Varsani*, while it has obvious factual similarities to the case at bar, the Court of Appeal did not affirm the granting of an equitable *cy-près* order. Equally important in my view, *Varsani* did not involve a highly structured organization such as the ACC, whose internal rules provide for doctrinal questions to be decided by internal authorities.

[53] In response to the issue of "fundamental" doctrine, counsel for the plaintiffs submitted that the matter making continued performance of the trusts impracticable for purposes of a *cy-près* order need not be a highly important one (see e.g., *In Re Robinson* [1923] 2 Ch. 332). Provided the trust in question cannot in practice be carried out, they say a *cy-près* scheme can and should be granted. However, even the plaintiffs seemed uncertain as to how such a scheme would work. Originally they had sought an order that:

> 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. [Emphasis added.]

Perhaps because a court may not contravene or ignore a statutory provision (here, the requirement for the Bishop's approval to any transfer of a parish corporation's assets) in a *cy-près* scheme, they modified their position somewhat on appeal, to seek an order that "the parish corporations [be] replaced with suitable trustees holding the assets on trust for Anglican ministry" and that the parties "develop the terms of the trust and appoint trustees", failing which the matter should be referred back to the Supreme Court of British Columbia. No effort was made to come to grips with the many questions, practical and theoretical, that such an exercise would entail.

[54] Conversely, the authorities referred to by counsel for the defendants – in particular *Itter v. Howe*, *Dorland v. Jones* and *Hofer v. Hofer,* all *supra* – did not involve *cy-près* applications. One can only speculate what the results might have

been if they did. Further, despite the endorsement by some Canadian courts of a "neutral" approach to church disputes, the caselaw relied on by the defendants involved determinations by the court (rather than by church authorities) as to whether the doctrinal change proposed by one group or the other was fundamental. As I suggested earlier, the trial judge here seems to have accepted that because the General Synod of the ACC does not regard same-sex blessings as "in conflict with the core doctrine (in the sense of being creedal)", the Court was bound to proceed on the basis that fundamental doctrine was not engaged. (Ironically, the logical consequence of the Synod's position is that the plaintiffs and defendants do not differ on a doctrinal point that is fundamental.)

Analysis

[55] Although the issues raised in this appeal are difficult, I do not consider that we should follow the lead of the Court in *Balkou v. Gouleff*, *supra,* where judicial reluctance to become involved in church disputes was taken to its extreme: citing *Jones v. Wolf,* the Court stated at 576 that questions of church doctrine are "inappropriate subjects for judicial intervention." In fact, as Professor Ogilvie observes ("Church Property Disputes: Some Organizing Principles*"* (1992) 42 U.T.L.J. 377), most disputes that appear to be about church property are almost invariably the final result of an "irreparable rift within a church about a fundamental doctrinal matter." She notes that while expressing reluctance to resolve such matters, courts in the U.K. and Canada have ultimately done so, in contrast to the non-interventionist approach taken in the United States. She continues:

> The effect of this deference [in the U.S.] in the interests of the free exercise of religion has been to create a quasi-sovereign or virtually autonomous sphere for churches, justified by the *de facto* legislative power of the American Supreme Court, which has no parallel in a parliamentary system. Even an entrenched Charter neither permits such zones to be created in Canada nor forbids courts to hear all disputes brought before them. Rather, it is fundamental to the common law that courts cannot decline jurisdiction or defer to some body, other than a sovereign parliament, within the Anglo-Canadian political system. Whether Canadian courts wish to do so or not, they are obliged to deal with church property disputes, including their doctrinal aspects, and the position taken by the Ontario Court of Appeal [in *Balkou*] is not only at variance with previous cases of higher authority but is

> founded on apparently inappropriate American constitutional law principles. (*Supra,* at 393.)

I respectfully adopt the author's view that the "neutral principles of law" approach taken by American courts, with all the complexities it has acquired in the American caselaw,[iii] is not of assistance to us.

First Three Conclusions

[56] Before addressing the broad issues arising under Anglo-Canadian law, I turn to some of the underbrush surrounding the trial judge's first three substantive conclusions. The first is his conclusion at para. 256 that:

> ... 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) [of the Act] 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. [Emphasis added.]

As I read it, the trial judge was not referring to a trust but was construing s. 7(4)(a) to mean that the consent of the Bishop and Executive Committee are necessary not only for the mortgaging or disposition of property but for the "use" of property for a purpose "outside the jurisdiction of the Diocese." I find the final sentence of para. 256 puzzling. It may mean that the properties may not be used for "ministry outside the Diocesan structure" – wording that had been used by the Chancellor of the Diocese in a letter to the St. John's parish in July 2002. Alternatively, it may mean that parish properties are held for the benefit of the Diocese – which would seem to endorse an implied trust in each parish corporation.

[57] If the trial judge was stating as a matter of statutory interpretation that changes in the use of parish properties generally require the consent of the Bishop and Executive Committee, I am doubtful as to the correctness of this proposition, especially in the absence of a trust. (The Church of the Good Shepherd, for example, leased its church building to a non-Anglican congregation some years ago without the Bishop's approval and it was not said the lease was invalid.) In any event, as Mr. Cowper suggested, the trial judge's reasoning was unresponsive to the

plaintiffs' prayer for a *cy-près* order. The whole point of seeking such an order is for a new scheme to be imposed that would permit the plaintiffs to use the properties free, or largely free, of the authority of the Bishop and Executive Committee.

[58] In approaching his second substantive conclusion, the trial judge expressed the view that a trust for purposes of ministry consistent with "historic" or "orthodox" Anglican doctrine would not meet the criterion of certainty of objects. It is almost trite law, however, that charitable purpose trusts are not subject to this requirement. Thus Waters, Gillen and Smith state in *Waters' Law of Trusts in Canada* (3d. ed., 2005):

> Charitable or public trusts are exempted from the requirement of that form of certainty of objects. As a concession to charity, and provided the settlor has wholly devoted the trust property to the furtherance of charitable objects, the law permits the settlor to describe the trust objects simply as for charitable purposes or for one type of charitable activity, without particularizing further as to the specific purposes which are to be pursued or the specific charitable institutions which are to receive benefit from the trust. The certainty required of the objects of a charitable trust is that the purpose or range of purposes or institutions contemplated by the settlors is within the legal concept of charity. Has the settlor enabled his trustees to do anything which would be non-charitable? – that is the question. (At 640-1.)

It follows that the reservations expressed by the trial judge at para. 258 are not fatal to the existence of a trust.

[59] Even if the three requirements of orthodox Anglicanism advanced by the plaintiffs could form the basis of a viable trust, the trial judge found that the impugned actions of the Diocesan Synod and Bishop were not inconsistent with a trust on those terms because the ACC is still accorded membership in bodies such as the Lambeth Conference and retains the status of the "one ecclesial body in Canada." (Para. 260, quoting the Archbishop of Canterbury in 2008.) It is likely, on the other hand, that a ministry that does not include same-sex blessings is also consistent with "orthodox Anglican ministry" and indeed with "Anglican ministry" as practised in most of Canada under the aegis of the ACC. The General Synod's carefully-worded resolution to the effect that the blessing of same-sex unions is "not in conflict with the core doctrine (in the sense of being creedal) of the [ACC]" does

not determine this issue; nor does the General Synod's jurisdiction over the interpretation of the Solemn Declaration for purposes of internal Church doctrine obviate the fact that the plaintiffs find themselves unable in good conscience to submit to the Bishop's direction on the issue of same-sex blessings. As I understand the plaintiffs' position, it is that this fact, and the purported expulsion or departure (it matters not which) of the four congregations, have made Anglican ministry impracticable at those locations.

[60] Unfortunately, the trial judge seems to have equated the issue of impracticability with that of breach of trust. His third main conclusion was that because the blessing of same-sex unions did not engage "core or fundamental doctrine", the plaintiffs had not shown any breach of trust even on the terms they proposed. (Para. 272.) Again, with respect, I agree with counsel for the plaintiffs that this conclusion was not responsive to his clients' case in favour of a *cy-près* scheme. As they summarize their position at para. 157 of their factum:

> This misapprehension is fundamental since the plaintiff trustees were not asking the Trial Judge to select between the plaintiffs' and defendants' views of contested religious beliefs or practices. Rather, the plaintiff trustees' contention was that the sincerity and character of those differences supported the conclusion that the performance of the trust as intended was no longer practicable. Although the plaintiffs forcefully believe that the Bishop and Diocese's actions depart from the constitution of the ACC and its founding principles as reflected in the Solemn Declaration, the case as presented at trial did not require the conclusion that there had been a breach of trust. For this reason the Trial Judge's observations respecting the jurisdiction of the Diocese and the general observations respecting the role and function of the Solemn Declaration proceed from an incorrect premise.

The Larger Issues

[61] This brings us to the trial judge's final substantive conclusion – that if there was a trust, it was for purposes of the Anglican ministry as defined by the ACC. It raises the larger and more difficult questions in the appeal that I have already touched upon. I will attempt below to determine how these passing ships may at least be brought within speaking distance.

[62] *Are the Properties Held on Trust?* The trial judge did not determine whether a trust existed or should be implied, preferring to state his conclusions in the alternative and further alternative. The reluctance of counsel for the defendants to be pinned down was perhaps due to their reliance on the statement at para. 100 of *Rowland et al. v. Vancouver College et al.* 2000 BCSC 1221, ***aff'd***. 2001 BCCA 527, to the effect that charitable corporations now "generally do not hold property on trust for any of their objects or purposes, but are presumed to hold their assets beneficially". Even in respect of such corporations, however, it has been held that a "trust" exists in the sense that their assets must be used for their charitable objects and that courts do retain *cy-près* jurisdiction: see *Liverpool and District Hospital for Diseases of the Heart v. Attorney General* [1981] 1 Ch. 193 at 213-15; *Tudor on Charities* (9th ed., 2003) at 371-73; *Re Christian Brothers of Ireland in Canada* (2000) 47 O.R. (3d) 674 (Ont. C.A.) at 702; and *Wasauksing First Nation v. Wasausink Lands Inc*. [2002] O.J. No. 164 (S.C.J.) at para. 351.

[63] Nevertheless, I agree with the plaintiffs that the historical and statutory context of the incorporation of the four parish corporations militates clearly in favour of implied trusts in this instance. As Mr. Cowper noted, for centuries before the Act was passed in 1893, trusts were commonly used by churches for the holding of property, a concept reflected by the provisions of the Act regarding the transfer of property "held in trust by [the Bishop of the Diocese or any other person] for the uses of the ... Anglican Church of Canada, to the Synod, to be held in trust for the same purposes." The provisions relating to the property of the parish corporations were less clear,[iv] but the ACC generally seems to have proceeded on the basis that parish properties are held on trust. Even the Bishop and the Chancellor of the New Westminster Diocese have stated this was their understanding. Finally, as the defendants emphasized in their factum, the existence of trusts is consistent with the original wording of the *Religious Institutions Ordinance*, 1869, 32 Vict., c. 140, now carried forward in the *Trustee (Church Property) Act*, R.S.B.C. 1996, c. 465, s. 1 of which provides for the property of church congregations to be held on trust.

[64] *Free Church and the Trusts in this Case*: The plaintiffs take issue with each of the four reasons given by the trial judge for finding that the purpose of the trusts was to further Anglican ministry as defined by the ACC. In their submission, implying terms that allow the ACC to "define its own purposes" is inconsistent with the Anglo-Canadian jurisprudence on religious purpose trusts, in particular the *Free Church* principle. The trial judge's "policy" decision to defer to the hierarchical authorities in the ACC is said to be inconsistent with the concept of a purpose trust, which exists not for the benefit of a person (here the ACC) but for its purposes only. It is also said to run contrary to the worldwide nature of the Anglican Church, with the legitimate expectations of the parties, and with the general "religious and jurisprudential context". Finally, the plaintiffs note that *The Principles of Canon Law Common to the Churches of the Anglican Communion*, relied upon by the trial judge at paras. 278 and 280 was, according to the testimony of Bishop Ferris, a draft discussion paper tabled and not endorsed officially at the 2008 Lambeth Conference.

[65] I agree that the parish assets are held on trusts and that those trusts may be described as for "the purpose of Anglican ministry." I also agree that if *Free Church* were to be applied in this case, it would not be for the ACC or Diocesan authorities to direct the court as to which doctrinal changes are fundamental and which are not. On the other hand, *Free Church* and the cases their Lordships relied on – *Craigdallie v. Aikman* and *Attorney General v. Pearson* – are double-edged swords from the point of view of the plaintiffs. While they cite these cases for the notion that the plaintiffs remain true to orthodox doctrine and should therefore not be deprived of their rights to the use of properties held by the parish corporations, the defendants rely on them for the notion that because the plaintiffs have allegedly left the Church and removed themselves from its supervision, and are in fact attempting to form a new conservative group in opposition to the Church, they have ceased to be true adherents to Anglican doctrine.

[66] At the end of the day, I do not find *Free Church* to be a helpful precedent in deciding the case at bar. The facts of *Free Church*, and the context in which it

arose, are very different from those before us. Their Lordships' reasons seem to look back at least to the 19th century rather than forward, and the result of the judgment was famously lopsided and impractical, giving a tiny minority of the Church some 800 churches, three universities and over £1 million. Eventually it was redressed by legislation. On a more theoretical level, *Free Church* does not allow for the institution in question to adopt changes in doctrine, or at least fundamental doctrine (except perhaps with the unanimous approval of its members.) As Hagarty C.J.O. stated in *Dorland,* the *Free Church* principle traps the institution "in a most helpless state under a cast iron rule forbidding all variation or change". (At 553.) Or, as Professor Ogilvie writes:

> ... the implied trust approach fails to take account of a church or congregation as an evolving organism and forces members who desire change to leave or overtly comply. It also forces courts to search for the original doctrinal principles on which the church was founded or on the basis of which the property was donated. While that is not beyond judicial abilities, reluctance may result in less than competent assessment. Where this is simply inaccurate – a well-known risk of litigation – it may amount to excessive judicial interference in ecclesiastical affairs; and where accurate, it may preclude doctrinal evolution. Curial attempts to accommodate some development by distinguishing fundamental, unchangeable doctrinal standards from immaterial changes of practice merely add an extra layer of difficulty to the problem. [42 U.T.L.J., 394.]

[67] *Internal Processes for Change*: Professor Ogilvie explains that in reaction to the result in *Free Church*, churches in England and Scotland began to make "express provision for future changes to constitutions, church laws, doctrinal standards and formulas." (42 U.T.L.J., at 384.) In *Religious Institutions, supra,* at 296, she notes that some years later, courts in Canada began to uphold doctrinal changes made in accordance with the internal processes established by the church in question. She cites *Dorland v. Jones* as the earliest example of cases where "courts awarded property to the majority of a congregation in a dispute, regardless of whether the proposed changes amounted to a fundamental change of doctrine, on the basis either that the majority was empowered by the congregational constitution to make changes, or that the changes had been made in accordance with the denomination's hierarchical processes for so doing." (42 U.T.L.J. at 390; see also

Itter v. Howe, supra; Pauli v. Huegli (1912) 4 D.L.R. 319 (Ont. H.C.); *Dwirnichuk v. Zaichuk* [1926] 3 W.W.R. 508 (Sask. K.B.); and *Edmonton Korean Baptist Church v. Kim* (1996) 41 Alta. L.R. (3d) 21 (Q.B.).)

[68] But even the *Free Church* authorities have imbedded in them an exception or qualification that supports deferring to the internal laws and rules of churches regarding doctrinal change. It will be recalled that their Lordships relied strongly on the words of Lord Eldon in *Craigdallie* quoted above at para. 32. Lord Eldon had suggested that if it had been distinctly intended that "Synod should direct the use of the property, that ought to have been matter of contract, and then the court might act upon it". Elsewhere he observed that "with respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C *etc.* forming a congregation for religious worship; if the instrument provided for the case of schism, then the court would act upon it ...". (My emphasis.) Similarly, in *Craigie v. Marshall* (1850) 12 D. 523, Lord Eldon's remarks were quoted and applied:

> If it were distinctly intended that Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none. [At 560, quoted in *Free Church* at 614; emphasis added.])

(See also Dennistoun J.A. in *Anderson, supra,* at 501.)

[69] This approach was not available in *Free Church* because there was "no such provision in the instrument". The same would appear to have been the case in *Varsani*. Neither involved a highly-structured and bishop-regulated body, such as the ACC, whose doctrine is not 'cast in stone' but is subject to modification and amendment from time to time by church authorities in accordance with the constating documents. In circumstances such as this, Ogilvie suggests that giving effect to the 'governance' structures of the institution is "not a true exception" to the judicial enforcement of the original trust. She continues:

> Where the constitution of a congregation or denomination provides that fundamental changes may be made by a majority vote or by some other procedure and where those procedures have been properly complied with, then a court will not disturb the decision of the religious institution and will order that the property go to the majority or other lawfully mandated group or

> organ of the religious institution. Where the trustees in actual possession of the property of a religious institution are part of the dissenting or minority group, they will be treated in law as holding the property in trust for those who represent the "true body" of the institution. [*Religious Institutions*, 296; emphasis added.]

[70] Mr. Cowper seeks to distinguish this case from those such as *Itter v. Howe* and *Dorland v. Jones* on the ground that they involved one group leaving a church in order to pursue a different set of beliefs than that espoused by the remaining true adherents to the original doctrine. In this instance, he says, both groups before the Court may be regarded as committed Anglicans. The plaintiffs may have thrown off the authority of the Bishop and Diocesan Synod of New Westminster, but they have not thrown off episcopal authority. They have placed themselves in the care of a different bishop who is in communion with the Anglican Church worldwide, and they are (presumably) receiving Anglican ministry in buildings of some kind in other locations. Meanwhile, if the Diocese prevails, the church buildings in the four parishes will remain nearly empty, if they are used at all for worship.

[71] The plaintiffs argue that in such circumstances, "where the sincere difference on matters of belief and practise important to both groups of Anglicans make further co-existence impracticable, there is an occasion of *cy-près* justifying the Court's intervention." This is not a *Free Church* argument: the plaintiffs are not insisting that they, rather than the defendants, are entitled to the properties in question as they have continued to adhere to the fundamental tenets of Anglicanism while the defendants have fallen away from that faith. The plaintiffs' claim that the trust has become impracticable is based on an internal disagreement in the Church concerning the Bishop's endorsement of same-sex blessings.

[72] There is little authority to support the notion that internal disagreement on a doctrinal issue can support a *cy-près* claim. In my view, *Varsani* does not assist the plaintiffs. As seen above, Morritt L.J. speaking for the majority was of the view that as long as either or both of the groups assessed the faith of the sect according to the teachings and tenets of its founder, one could not say it was impracticable to carry out the purposes of the charity. In concurring reasons, Chadwick L.J. noted that had

Varsani been decided prior to the enactment of the *Charities Act*, there would have been four possible outcomes:

i. If the view of both groups continue to represent the true faith, there would be no *cy-près* occasion as it would still be possible to carry out the original purposes of the trust. The parties could seek an administrative scheme if difficulties arose in sharing the property;

ii. If the views of the majority group reflected the true faith and the views of the minority did not, then there would be no *cy-près* occasion as it would still be possible to carry out the original purpose of the trust. The majority would remain beneficiaries and the minority would lose their interest in the trust property;

iii. If the views of the minority group reflected the true faith and the views of the majority did not, then there would be no *cy-près* occasion as it would still be possible to carry out the original purposes of the trust. The minority would remain beneficiaries and the majority would lose their interest in the trust property; or

iv. If neither group's views reflected the true faith, both having departed from the fundamental teachings and tenets of the sect, then the court would have equitable jurisdiction to direct a scheme of *cy-près*, as in those circumstances, it would be clear that the original purposes of the trust could not be carried out.

[73] On this analysis, the plaintiffs' request for a *cy-près* order in this case could not succeed. If the court's *cy-près* jurisdiction depends on whether one party, both parties, or neither has remained true to the faith, this court could not grant the relief sought by the plaintiff without determining whether one, both or neither party has broken from the foundational principles of Anglicanism. The plaintiffs' argument, while commendably creative, fails to create a bridge between the division in the ACC that has resulted from the actions of the Bishop and Diocesan Synod, and the issue of whether the continued performance of the trusts has become impracticable. *Varsani* does not contemplate the possibility of a *cy-près* order as long as one or both groups remain "true adherents" to the foundational principles of Anglicanism.

[74] If the plaintiffs believed that the Bishop's policy represented a break from fundamental aspects of the Anglican faith, and their goal was to retain the church properties for their own orthodox Anglican worship, it would have been sounder, from an analytical perspective, for them to seek full entitlement to the properties on the basis of *Free Church* principles. But even if one assumes the parish properties

are held for purpose of "Anglican ministry" without more, I am not convinced that Anglican worship or 'Anglicanism' can be separated in Canada from the notion of the ACC's episcopal authority. As Mr. Dickson observed, the Anglican Church of Canada is a "quintessentially hierarchical" body. It sends bishops to international conferences and its members accept certain creeds and beliefs shared by other Anglicans around the world, but in terms of substantive decision-making power, the organizational structure in Canada is clear: the ACC is autonomous and doctrinal change is a matter for the General Synod. That body has chosen to permit same-sex blessings, albeit in the rather unenthusiastic wording of the 2007 resolution, and the Bishop and Diocesan Synod of New Westminster have chosen to pursue the matter to the extent they have – despite the opposition of many of their parishioners. Presumably the Bishop and the Synod have chosen to take the risk that the policy allowing same-sex blessings will indeed prove to be 'schismatic'; or that clergy in the Diocese will for the foreseeable future find themselves ministering to vastly reduced or non-existent congregations. That, however, is their decision to make in the structure that the Anglican Church takes in Canada. Anglican ministry in Canada <u>is</u> "as defined by the ACC."

[75] Thus I conclude, after much anxious reflection, that the trial judge did not err in declining to grant a *cy-près* order in the main action. It is antithetical to the nature of Anglicanism to contemplate "Anglican ministry" in a parish that has withdrawn from the authority of its diocese and bishop. I must also add that there are also practical reasons why a court in Equity would be reluctant to grant the order sought by the plaintiffs in this case. It is trite law that equitable remedies are discretionary. Whereas common law decisions generally turn on the application of strict rules to the facts, equitable decisions are made by taking into account all relevant matters that tend towards the justice or injustice of granting the remedy sought. No court in Equity is likely to grant a remedy that imports more uncertainty, and may cause more turmoil and conflict than already exist. In this instance, it is almost impossible to anticipate all the consequences that would be set into motion on an institutional level by a *cy-près* order. The concept of having four parishes located within the Diocese (which is a geographical unit) but not belonging to the Diocese, and

receiving episcopal oversight from a bishop in South America, would insert the Court into the internal affairs of the ACC in a manner that has no precedent. Even an order restricted to the more mundane aspects of how the properties of the four parishes may be used would trench onto the practical operation of the Diocese and parish corporations in a way that cannot be entirely foreseen. Many questions would arise that would likely necessitate further litigation and judicial involvement.

[76] I prefer to rest my conclusion that the appeal must be dismissed, however, on the basis that the purpose of the trusts on which the parish corporations hold the church buildings and other assets is to further Anglican ministry in accordance with Anglican doctrine, and that in Canada, the General Synod has the final word on doctrinal matters. This is not to say that the plaintiffs are not in communion with the wider Anglican Church – that is a question on which I would not presume to opine. I do say, however, that members of the Anglican Church in Canada belong to an organization that has subscribed to "government by bishops." The plaintiffs cannot in my respectful opinion remove themselves from their bishop's oversight and the diocesan structure and retain the right to use properties that are held for purposes of Anglican ministry in Canada.

THE CHUN ACTION

[77] Moving to the second action tried below, I will again assume that the reader is familiar with the facts of the case and with the parties' respective positions, all of which were summarized by the trial judge at paras. 296-318 of his reasons. At para. 319 he noted that there was no serious dispute between the parties that the bequest was held on trust for the building fund specifically, as opposed to the more general trust on which parish property was held. The parties did diverge as to whether Dr. Chun had bequeathed that property "to the congregation or to the parish corporation as part of the Diocese." The trial judge found that her intention had been to make a gift to the parish and as I understand it, that finding is not seriously challenged.

[78] Was this, then, an appropriate case for the application of the *cy-près* doctrine? The trial judge began by noting a decision of the Nova Scotia Supreme Court, *Parish of Christ Church v. Canada Permanent Trust Co*. (1984) 66 N.S.R. (2d) 132, 18 E.T.R. 150, in which the testator had left part of his estate in trust for a parish corporation on terms that the trust income could be used for repairs to the church but the capital could only be used for constructing a new church, whenever that might occur. The parish corporation argued that the performance of the trust was impracticable in the foreseeable future, since the church was an historic building. Even if it were accidentally destroyed, the costs of rebuilding would be covered by insurance. Although sympathetic to the aims of the church, the Court was unwilling to grant the requested order, relying in part on *Canadian National Institute for the Blind, B.C. – Yukon Division v. Royal Trust Corp. of Canada* (1981) 9 A.C.W.S. (2d) 327 (B.C.S.C.). In that instance, Stewart L.J.S.C. (as he then was) had found that the testator had clearly foreseen that his bequest would not necessarily be used all at once, and that there was "nothing invalid about the direction for accumulation for the period stated."

[79] As we have seen, the trial judge found that Dr. Chun had intended the proceeds to be applied to the building needs of the Chinese community. (Under the parish corporation's constating documents, the Chinese community is the intended constituency of the Church of the Good Shepherd.) On the evidence, three parishes in the area with substantial Chinese congregations had left the Diocese, leaving only a small parish approximately half of whom are Chinese. (Indeed, the parishioners of the Church of the Good Shepherd voted unanimously to leave the Diocese and to join the ANiC.) It was unlikely there would be need for a new building for the Chinese community in the Diocese. Thus the proceeds of Dr. Chun's bequest, as written, were likely to remain in trust, rendering the bequest useless. The trial judge found that the fulfilment of the purpose of the bequest had become impracticable and that this was an appropriate instance for the application of *cy-près*. In his words:

> 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.
>
> 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. [At paras. 329-30.]

[80] In the result, the portion of the Court's order relating to the Chun bequest declared:

> 2. There shall be a *cy-près* scheme whereby the proceeds of the sale of property known as apartment 10A and Car Park 16, 92 Pokfulam Road, Hong Kong bequeathed by Daphne Wai-Chan Chun in or about 1992, including interest (the "Funds") are to be held on trust for the building needs of the congregation affiliated with the Anglican Network in Canada which at the time of the trial of this action was worshipping at property owned by the Anglican network Church of the Good Shepherd at 189 West 11th Avenue in Vancouver British Columbia.
>
> 3. The parties shall develop the terms of the trust on which the Funds are to be held pursuant to paragraph 2 above (the "*cy-près* Trust") and shall appoint trustees of the *cy-près* Trust.
>
> 4, The parties are at liberty to apply for further orders if necessary regarding the terms of the *cy-près* Trust and the appointment of trustees of the *cy-près* Trust.

On Appeal

[81] The defendants appeal in the "*Chun*" action on the basis that the trial judge erred in:

> (a) determining that a *cy-près* scheme should be ordered in respect of the Chun Bequest and ordering such a scheme; and
>
> (b) alternatively, concluding that a "scheme whereby the funds are held in trust for the building needs of the ANiC congregation" would fulfill, or best fulfill, Dr. Chun's charitable intent.

In oral argument, the defendants clarified their position, which is that the trial judge was wrong to conclude that Dr. Chun's intentions would best be carried out under a

scheme in which the bequest is held on trust for the building needs of the ANiC congregation; and alternately, that the *cy-près* scheme adopted by the trial judge is not one that is "as near as possible" to the original trust terms.

[82] With respect, it seems to me that both of these conclusions, which are largely if not entirely ones of fact, are supported by the evidence which the trial judge summarized in his reasons. He found that the vast majority of members of the Chinese community in the Diocese have elected to leave the Diocese and join the ANiC network and that accordingly, no new buildings will be required in or for the parish of the Church of the Good Shepherd for the foreseeable future. As Mr. Martin pointed out, the defendants did not adduce any evidence to the contrary. In these circumstances, it was open to the trial judge to conclude both that the continued fulfilment of the trust had become impracticable and that making the funds available to the ANiC congregation would come closest to fulfilling Dr. Chun's charitable intent.

[83] I would dismiss the *Chun* appeal.

DISPOSITION

[84] In summary, I would dismiss the plaintiffs' appeal in the main action and the defendants' appeal in the *Chun* action. In so doing, I acknowledge with thanks the very able submissions of all counsel.

[85] The parties are agreed that they should bear their own costs of the appeals.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Garson"

Schedule I

ACT OF INCORPORATION

An Act to incorporate the Anglican Synod of the Diocese of New Westminster [Statutes of British Columbia 1893, Chapter 45 with amendments to 1961 (1900, 1915, 1961)]

[18th April 1893]

Preamble

Whereas a petition has been presented from the Bishop and the Synod of the Diocese of New Westminster, such Diocese consisting of the Districts of New Westminster, Yale, Kootenay and Lillooet, and a large portion of the Cariboo District, praying that the Synod should be incorporated, and it is expedient to grant the prayer of the said Petition:

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:--

Incorporation

1. The Lord Bishop of the Diocese of New Westminster, the licensed Clergy of the said Diocese, the Diocesan officials and the Lay Delegates at present being the members of the Synod of the Diocese of New Westminster, and such other persons as may hereafter become or be elected members thereof, according to the constitution and canons of the said Synod, shall be and they are hereby constituted and declared to be a body politic and corporate by the style and title of "the Synod of The Diocese of New Westminster," hereinafter called "the Synod." *[S.B.C. 1893, c.45, s.1]*

Boundaries of Diocese

(a) Provided always that the 120th Meridian of West Longitude shall hereafter be deemed to be and shall be the eastern boundary of the said Diocese of New Westminster for all purposes whatsoever, and that none of those portions of the said Diocese of New Westminster lying east of the said Meridian shall hereafter form part of the said Diocese, and all licensed clergy, lay delegates and other persons of such eastern portions of the said Diocese, now being members of the said Synod, shall hereafter be divested of all property and membership rights in the said Synod. *[S.B.C. 1900, c.45, s.1]*

(b) Provided further that the portion of the said Diocese of New Westminster described as follows: Commencing at a point where the summit of the Cascade Range touches the present north-west boundary of the Diocese of New Westminster, and following the summit of the Cascade Range east of Lillooet Lake to the mouth of

the Fraser Canyon, one mile north-east of the Town of Yale; thence running due east to the one hundred and twentieth meridian; thence due north following the present eastern boundary of the Diocese of New Westminster to its northernmost point; and thence following the present northern boundary of the Diocese of New Westminster to the point of commencement, is hereby excluded from and shall not hereafter form part of the said Diocese, and all the licensed clergy, lay delegates and other persons of such excluded portion of the said Diocese, now being members of the said Synod, shall, subject to the provisions of section 16 of an Act of the Legislature for the year 1915, entitled `An Act to incorporate the Anglican Synod of the Diocese of Cariboo,' hereafter be divested of all property and membership rights in the said Synod. *[S.B.C. 1915, c.5, s.17]*

Transfer of property to Synod

2. 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. *[amended S.B.C. 1961, c.72, s.2]*

Synod may acquire lands, &c

3. The Synod may from time to time and at all times hereafter acquire by purchase, lease, gift, devise, bequest, or otherwise, and may hold, possess, and enjoy, real and personal property of every nature and kind and of any and every estate and interest situate within or without the Province for or in favour of the uses or purposes of the Synod or in trust, and from time to time may sell, convey, exchange, lease, or otherwise deal with or dispose of such property or any part thereof. *[re-enacted S.B.C. 1961, c.72, s.3]*

Authorized investments

3A. The Synod may invest and reinvest any of its funds, including funds held in trust, in

(a) any investments in which trustees are authorized form time to time under the laws of the Province to invest trust funds; and

(b) any investment authorized from time to time under the laws of Canada for the investment or lending by life insurance companies of their funds.*[S.B.C. 1961, c.72, s.4]*

The Synod may borrow and give security

3B. The Synod may borrow such sum or sums of money from time to time as it may deem necessary for its purposes, either with or without security, and may

mortgage or pledge any or all of its real or personal property and issue or become party to promissory notes, bills of exchange, bonds, debentures, or other securities for the securing any sum or sums so borrowed or for securing any part of the purchase money of any real or personal property. *[S.B.C. 1961, c.72, s.4]*

Constitution, Canons and Rules of Order

4. (1) The Synod may from time to time adopt and make a Constitution, Canons and Rules of Order of the Synod, and may alter, amend or annul the same or any of them form time to time.

(2) The Constitution, Canons and Rules of Order of the Synod as at present in force shall be the Constitution, Canons and Rules of Order of the Synod until the same be altered, amended, or annulled by the Synod. *[S.B.C. 1961, c.72, s.5]*

Certified copy of the canons &c, to be received in Courts

5. (1) The said Constitution, Canons and Rules of Order as altered and amended from time to time shall be entered in a book kept for such purpose by the Registrar of the Synod, and such book shall be deposited among the records of the Synod.

(2) A copy of the said Constitution, Canons and Rules of Order or any part thereof or extract therefrom certified under the hand of the Registrar or the Clerical or Lay Secretary of the Synod shall be admitted an received as evidence of the same or part thereof or extract therefrom, as the case may be, and of the contents thereof, in any Court of the Province, and for all purposes, without proof of the signature of the said Registrar or Clerical or Lay Secretary. *[S.B.C. 1961, c.72, s.6]*

Church of England, Church of England in Canada and Anglican Church of Canada

6. The term "Church of England", "Church of England in Canada" or "Anglican Church of Canada" when used in this Act and in all deeds, documents, or writings that have heretofore or may hereafter be executed, shall for the purposes of this Act be taken to mean and include that body of Christians in Canada which is acknowledged by the Archbishop of Canterbury as a body in full communion with the Church of England, as by law in England established. *[amended S.B.C. 1961, c.72, s.7]*

Incorporation of Parishes

7. 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

church wardens, 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; *[amended S.B.C. 1961, c.72, s. 8(1)]*

(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. *[S.B.C. 1961, c.72, s. 8(2)]*

(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; *[amended S.B.C. 1961, c.72, s. 8(3)]*

(5) A copy of such by-laws, rules, and regulations so made and assented to and as altered and amended from time to time shall be delivered to the Registrar of the Synod to be deposited among the records of the Synod; and a copy thereof or of any part thereof or extract therefrom certified under the hand of the said Registrar or the Clerical or Lay Secretary of the Synod shall be admitted and received as evidence of the same or part thereof or extract therefrom, and the case may be,

and of the contents thereof, in any court of the Province, and for all purposes, without proof of the signature of the said Registrar or Clerical or Lay Secretary. *[S.B.C. 1961, C.72, S. 8(4)]*

(5a) All documents now on file with the Registrar-General of Titles for the Province or the Registrar of Titles at the City of Victoria, pursuant to the provisions of this Act, shall be transmitted to and filed with the Registrar of Companies. *[S.B.C. 1961, c. 72, s. 8(5)]*

(6) The real and personal property and other assets of such Corporation only shall be liable for the debts of the Corporation, and no officer, church wardens, or vestrymen shall be individually or personally liable for any debt or other liability of such Corporation;

(7) The fees payable under this Act shall be paid into the Consolidated Revenue Fund of the Province.

8. This Act may be cited as *The Anglican Synod of the Diocese of New Westminster Incorporation Act, 1893. [S.B.C. 1961, c.72, s. 9]*

SCHEDULE A

Filing declaration.....$5.00
Filing by-laws or amendments thereto... 2.50

Publication in the British Columbia Gazette, according to the scale of charges defined in Schedule A of the "Statutes and Journals Act."

Schedule II

DECLARATION OF PRINCIPLES

A1

Consolidates 1) the Solemn Declaration, 2) Basis of Constitution, and 3) Fundamental Principles previously adopted by the synod in 1893 and constitutes the foundation of the synod structure (1934).

1. Solemn Declaration

In the Name of the Father, and of the Son, and of the Holy Ghost, Amen.

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 Rites 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.

2. The General Synod

The General Synod shall consist of the bishops of The Anglican Church of Canada and of members chosen from the clergy and the laity.

3. The Orders

a) The General Synod of The Anglican Church of Canada shall be organized in three Orders: the Order of Bishops, the Order of Clergy, and the Order of Laity.

A2

b) The Order of Bishops shall consist of:

i) The Primate
ii) Provincial Metropolitans
iii) Diocesan bishops
iv) Coadjutor and suffragan bishops
v) Assistant bishops who have been so designated by the synod or executive of their respective dioceses and who exercise episcopal functions within that diocese
vi) The Bishop Ordinary to the Canadian Forces.

Bishops who have retired and who live in Canada, provided that they are not engaged in remunerative work outside the ordained ministry, may attend the General Synod but shall not have the right to vote.

c) The Order of Clergy shall consist of clerical members of The Anglican Church of Canada or of a church in full communion with The Anglican Church of Canada elected by the several diocesan synods according to such rules as they may adopt, subject to the provisions of subsection f). In a diocese that has no synodical organization such appointments shall be made by the bishop; and

d) The Order of Laity shall consist of communicant lay members of The Anglican Church of Canada, elected by the several diocesan synods according to such rules as they may adopt. In a diocese that has no synodical organization such appointments shall be made by the bishop.

e) Members of the Orders of Clergy and Laity shall be members of the diocesan synod, or eligible to be members of the diocesan synod, of the diocese they represent.

f) Dioceses shall be entitled to elect clerical and lay members of the General Synod as follows:

i) for dioceses having fifteen licensed members of the clergy or less, one member of each Order;
ii) for dioceses having sixteen to twenty-five licensed members of the clergy, two members of each Order;
iii) for dioceses having twenty-six to fifty licensed members of the clergy, three members of each Order;
iv) for dioceses having fifty-one to one hundred licensed members of the clergy, four members of each Order;
v) dioceses having more than one hundred licensed members of the clergy shall be entitled to one additional member of each Order for each additional fifty licensed members of the clergy or fraction thereof;
vi) the words "licensed members of the clergy", as used in this section and elsewhere in the Constitution, shall mean all clerical members of The Anglican Church of Canada or of a church in full communion with The Anglican Church of Canada holding the license of the bishop of a diocese to perform the functions of the ordained ministry within the diocese, excepting and excluding those who are resident in the diocese but are on leave from another diocese, and those who are in receipt of benefits from the pension funds of the Church (other than for temporary disability) and who are not in charge of a parish or fully engaged in the work of the ordained ministry.

A3

g) In addition to the persons elected or appointed under subsections c) and d), the Bishop Ordinary to the Canadian Forces shall appoint two licensed members of the clergy and two communicant lay persons, all from the Canadian Forces, to represent the chaplains, military personnel and their dependents, and one representative who will be at least sixteen years of age upon the opening of General Synod and under the age of twenty-six years upon the prorogation of General Synod, who shall be a communicant member of The Anglican Church of Canada.

h) In addition to the persons elected or appointed under subsections c) and d), each diocese shall be entitled to elect or appoint one representative who will be at least sixteen years of age upon the opening of General Synod and under the age of twenty-six years upon the prorogation of General Synod as a member of the General Synod, who shall be a communicant member of The Anglican Church of Canada.

i) In addition to the persons elected or appointed under subsections c) and d), there may be appointed two representatives of Anglican Religious Orders with communities in Canada recognized by the House of Bishops, such representatives to be appointed by the Superiors of the religious orders acting in concert.

j) The Chancellor and the General Secretary of the General Synod, if not otherwise members of the synod, shall be ex-officio members of the General Synod.

4. The President

The President of the General Synod shall be the Primate of The Anglican Church of Canada, who shall be elected and hold office under, and have such privileges, powers, authority and duties as are defined by the Constitution, Canons and Rules enacted by the synod.

5. Sessions and Voting

a) The three Orders shall sit together.

b) Bishops shall vote independently as one Order and members of the clergy and laity shall vote together unless a vote by Orders is called for.

c) If a vote by Orders is required on any question, the question must be approved by each Order.

d) The vote shall be put first to the Order of which the mover of the motion is a member.

e) If a question is approved by each Order a vote by dioceses may be demanded in accordance with the Rules of Order and Procedure.

f) If a vote by dioceses is required on any question and if a majority of the dioceses vote in the negative, the question shall be declared in the negative.

g) The agenda of the General Synod may provide for separate meetings of the three Orders.

46. Jurisdiction of the General Synod

Subject to the provisions of section 7 the General Synod shall have authority and jurisdiction in all matters affecting in any way the general interest and well-being of the whole Church and in particular:

a) the constitution and organization of the General Synod including the regulation of the time and place of its meeting, the order and conduct of its proceedings, and the appointment, functions and duties of its officers, committees, councils, boards, commissions and divisions, for the proper conduct of its affairs;

b) the national character, constitution, integrity and autonomy of The Anglican Church of Canada;

c) the relations of the Church to other religious bodies in Canada and elsewhere;

d) the relations of the Church to other Churches of the Anglican Communion;

e) with the consent of the ecclesiastical provincial synod or synods concerned, the creation and constitution of new provinces within Canada;

f) the election, retirement and resignation of the Primate of The Anglican Church of Canada;

g) structural uniformity in relation to the episcopal prerogative of licensing clergy;

h) the constitution and powers of a Supreme Court of Appeal, with original and appellate jurisdiction, including procedure therein and the enforcement of its decrees and judgments;

i) the definition of the doctrines of the Church in harmony with the Solemn Declaration adopted by this synod;

j) the revision, adaptation and publication of a Book of Common Prayer and a Hymnal for the Church;

k) all divisions employed in the carrying on of the work of the Church;

l) the basic standards of theological education, and the qualifications and training of candidates for the ministry of the Church;

m) the establishment, operation and maintenance of a general pension fund;

n) the administration of a group insurance plan for the benefit of the clergy and lay employees of the Church;

o) the regulation of the inter-diocesan transfer of clergy;

p) the relinquishment or abandonment of the ministry of the Church; and

q) the administration of all funds and trusts established in respect of the Church.

A57. **Fundamental Principles**

a) The organization and constitution of a General Synod for the Church does not involve any change in the existing system of ecclesiastical provincial synods.

b) Provincial synods shall have authority and jurisdiction in all matters affecting the general interests and well-being of the Church within their respective jurisdictions in the following matters:

i) subject to the provisions of any Canon enacted by the General Synod for the erection of any provincial synod, the constitution and organization of the provincial synod, including the regulation of the time and place of its meeting, the order and conduct of its proceedings, and the appointment, functions and duties of its officers, executive boards and committees for the proper conduct of its affairs;

ii) with the consent of the General Synod, and of any diocese affected, the adjustment of the boundaries of the province, and the creation, division and rearrangement of provinces;

iii) with the consent of the General Synod and the dioceses affected, the division of the provinces into dioceses, the establishment of missionary dioceses within the province, the division of existing dioceses and the adjustment or rearrangement of diocesan boundaries;

iv) the confirmation of the election, consecration, and resignation of bishops within the province;

v) the election of a metropolitan bishop and the definition of metropolitan duties, powers and authority;

vi) the constitution of a Provincial Court of Appeal, with original and appellate jurisdiction, including procedure therein and enforcement of its decrees and judgments;

vii) the regulation of the ministrations of the clergy and others within the province, including the oaths and subscriptions of clergy within the province;

viii) the authorization of special forms of prayers, services, and ceremonies for use within the province, for which no provisions have been made under the authority of the General Synod or of the House of Bishops of The Anglican Church of Canada;

ix) the relations of the Church to the civil authorities and to public education within the province;

x) the administration of any fund or trust established in respect of the synod;

xi) the formation and constitution of provincial branches of organizations and societies established by the General Synod for the promotion of the work of the synod; and

xii) the consideration, promotion and advancement of any object or matter for the general advantage of the Church in Canada or in a province, referred to the synod of a province by the General Synod.

A6 **8. Ecclesiastical Offenses and Disciplinary Proceedings**

a) The General Synod shall have authority and jurisdiction with regard to:

i) the definition of ecclesiastical offenses;
ii) the penalties for ecclesiastical offenses;
iii) principles and general procedures to be observed in disciplinary proceedings in The Anglican Church of Canada;
iv) rights of appeal in disciplinary proceedings; and
v) the procedures to be followed in the Supreme Court of Appeal for The Anglican Church of Canada in disciplinary proceedings in respect of which it has jurisdiction.

b) Each provincial synod shall have authority and jurisdiction with regard to the procedures to be followed by the provincial court of appeal for the province in disciplinary proceedings in respect of which it has jurisdiction.

c) Each diocesan synod shall have authority and jurisdiction with regard to the procedures to be followed by the diocesan court in disciplinary proceedings in respect of which it has jurisdiction.

9. Saving Provisions

a) Nothing contained in sections 6, 7 and 8 shall limit or affect the powers, jurisdiction and authority inherent in the office of bishop, or exercised collectively by the bishops of the Church sitting as the House of Bishops of any province or of The Anglican Church of Canada.

b) Except in so far as the provisions of sections 6, 7 and 8 are the same in effect as the legislation now in force, those sections shall not come into force in such ecclesiastical province until approved by the provincial synod thereof.

c) The words "ecclesiastical province" shall mean any group of dioceses under the jurisdiction of a provincial synod

10. Union with Other Churches

Union of The Anglican Church of Canada with one or more other Churches may be effected in accordance with procedures set out in the Constitution.

11. Amendments

a) *Declaration of Principles*

i) The Solemn Declaration of the Declaration of Principles, while continuing to be part of the Declaration of Principles, belongs in a particular historic context and therefore cannot be altered or amended.
ii) A change in the Declaration of Principles (except for section 1) can be considered when a majority of each Order is present at a session of the General

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Synod. To take effect it shall require a two-thirds majority in each Order voting at two successive sessions of the General Synod, the change proposed having been referred for consideration to all diocesan and provincial synods following the first approval by the General Synod.

iii) No change in sections 6, 7 and 8 of the Declaration of Principles can be effected without the consent of all provincial synods, except that if a vote on the proposed amendment has not taken place in any provincial synod prior to the next regular session of the General Synod, such provincial synod shall be deemed to have approved the amendment.

iv) Any proposed amendment to the Declaration of Principles which has been defeated by a vote of the General Synod, or of a provincial synod with respect to sections 6, 7 and 8, may be introduced again at any subsequent session of the General Synod.

b) *Constitution*

The Constitution of the General Synod may be amended by a two-thirds majority of each Order voting at a session of the General Synod, except that any section of the Constitution which has its origin in the Declaration of Principles must be consistent with the Principle concerned.

c) *Canons*

i) All Canons dealing with doctrine, worship, or discipline, and all alterations to such Canons, shall require to be passed by a two-thirds majority in each Order voting at two successive sessions of the General Synod, the Canons and alterations proposed having been referred for consideration to diocesan and provincial synods, following the first approval of the General Synod.

ii) All other Canons may be approved or amended by a two-thirds majority of the Order of Bishops, and of the Orders of Clergy and Laity voting together.

d) *Rules of Order and Procedure*

The Rules of Order and Procedure may be amended at any regular session of the General Synod by a two-thirds majority of the members voting in the normal manner.

e) *Amendments on Second Reading at Synod*

i) Where a proposed change to the Declaration of Principles (other than to sections 6, 7 or 8 thereof) or to a Canon dealing with doctrine, worship, or discipline has been:

a) passed at one session of the General Synod,
b) referred for consideration to all diocesan and provincial synods, and
c) brought before a second session of the General Synod for consideration,

it shall be in order for the General Synod to adopt any amendment to the proposed change which would have been in order when the proposed change was considered at the first session of the General Synod and the proposed change shall take effect if passed by the required majority at the second session with or without such amendment.

A8 ii) Where a proposed change to sections 6, 7 or 8 of the Declaration of Principles has been:

a) passed by the required majority at one session of the General Synod,
b) referred for the consideration of all diocesan synods,
c) referred for consent to all provincial synods, and
d) brought before a second session of the General Synod for consideration,

it shall be in order for the General Synod to adopt any amendment which does not alter the proposed change in any substantive way but which merely improves the clarity or form of the proposed change and the proposed change shall take effect if passed by the required majority at the second session with or without such amendment.

Schedule III

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 therefore, 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.

Endnotes

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[i] The *Oxford English Reference Dictionary*, *supra,* defines "creed" to mean a "brief formal summary of Christian doctrine, esp. Apostles' Creed." Mr. Cowper explained the term as relating to the confession required of an Anglican upon joining the Church, and counsel for the defendants did not take issue with that reference.

Various church documents to which we were referred differed on the spelling of "creedal".

[ii] Outside the church context, the law of unincorporated associations is clear that "[a] member's interest in the association's property continues only so long as he remains a member and, subject to any rules of the society to the contrary, it terminates if he ceases to be a member." See *Organization of Veterans of the Polish Second Corps of the Eighth Army v. Army, Navy & Air Force Veterans in Canada* [1978] O.J. No. 3438, 87 D.L.R. (3d) 449 (Ont. C.A.) at para. 57. In that case, Blair J.A. for the majority also stated at para. 60:

> The tempestuous history of religious denominations, fraternal societies and trade unions affords many examples of local congregations or units seeking to break away from the parent body either to affiliate with another organization or achieve independence. It has been held many times that, unless authorized by the organization's constitution, a mere majority of members cannot cause property to be diverted to another association having different objects: *Vick v. Toivonen* (1913) 4 O.W.N. 1542, 12 D.L.R. 299. In that case, Maclaren, J.A., said at p. 1543 O.W.N., p. 301 D.L.R.:
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> > It is a well-settled principle of law that the property of a voluntary society like this cannot be diverted by a majority of its members from the purposes for which it was given by those who contributed to it, or devoted to purposes that are alien to or in conflict with the fundamental rules laid down by the society ...
>
> ... A majority of members may, nevertheless, dispose of property and change affiliations without unanimous approval where provided by the constitution and rules: *Heine v. Schaffer* (1905) 2 W.L.R. 310 (Man.); *Re Trustees of Westminster Congregation Smith's Falls and Ferguson* (1924) 27 O.W.N. 52.

[iii] See. e.g., Troy Harris, "Neutral Principles of the Law and Church Property in the United States", (1988) 30 J. Church & St. 515; John E. Fennelly "Property Disputes and Religious Schisms: Who is the Church?" (1997) St. Thomas. L. Rev. 319; Wm. G. Ross, "The Need for an Exclusive and Uniform Application of 'Neutral Principles' in the Adjudication of Church Property Disputes", (1987) 32 Saint Louis ULJ. 263; and Kathleen E. Reeder, "Whose Church is it, Anyway? Property Disputes and Episcopal Church Splits", (2006) Columbia J. Law and Soc. Prob. 125.

[iv] I note parenthetically that the statute under which the United Church of Canada was created in 1924 was considerably clearer than the Act as to the existence of trusts and the purposes of those trusts: see *United Church of Canada v. Anderson* [1991] O.J. No. 234, 2 O.R. (3d) 304 (Ont. Gen. Div.). The Court's reasons in that case, the facts of which are otherwise similar to the facts of the instant case, were concerned wholly with the interpretation of the 1924 statute and various deeds of land.