Court of Appeal File No. CA037770

COURT OF APPEAL

ON APPEAL FROM: THE ORDER OF THE HONOURABLE MR. JUSTICE KELLEHER OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED THE 25TH DAY OF NOVEMBER, 2009

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 -

Court of Appeal File No.: CA037771

BETWEEN:

ERIC LAW, STEPHEN WING HONG LEUNG, ANNIE SHEUNG KAN TANG, STEPHEN CHI HIM YUEN, and WINSOR WING TAI YUNG

APPELLANTS/CROSS RESPONDENTS
(PLAINTIFFS/DEFENDANTS BY COUNTERCLAIM)

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/CROSS APPELLANTS
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Chronology of Relevant Dates and Events

1861	Anglican Church of Canada (the "ACC") is established
1889	Parish of the Church of the Good Shepherd is established
1893	First General Synod of the ACC; Adoption of the Solemn Declaration of 1893
	Incorporation of the Synod of the Diocese of New Westminster (the "Diocesan Synod")
1894	The Parish of St. Luke's is established
1900	The Parish of St. Matthew's, Abbotsford is established
1925	The Parish St. John's (Shaughnessy) is established
1932	Incorporation of St. John's (Shaughnessy)
1955	Incorporation of St. Luke's
1959	The Parish of St. Matthias is established
1974	Incorporation of St. Matthias
1976	Canadian House of Bishops ("HOB") establishes a national task force to consider the issue of homosexuality in contemporary society
1979	HOB issues a set of guidelines which in part provide: "We do not accept the blessing of homosexual unions"
1984	Incorporation of Church of the Good Shepherd
1989	Incorporation of St. Matthew's, Abbotsford
1994	The Defendant, the Right Reverend Michael Ingham is elected Bishop of the Diocese of New Westminster (the "Diocese"). He is consecrated and installed in January 1994.
1997	HOB updates the 1979 Guidelines and concludes: "We are not ready to authorize the blessing of relationships between persons of the same sex" .
May 1998	The Diocese votes 179 to 170 (52.8%) in favour of asking the Bishop to authorize the blessing of same-sex unions.

May 1998	General Synod affirms the 1979 HOB Statement
June 1998	Lambeth Conference ("Lambeth") in Canterbury passes Resolution 1.10, affirming that Anglican teaching "rejects homosexual practice as incompatible with scripture" and the bishops "could not advise the legitimising of same sex unions nor ordaining those involved in same gender unions." Also calls for further study, pastoral concern and understanding of homosexuality.
January 1999	Bishop Ingham establishes three commissions to consider various aspects of the same-sex blessing issue and implemented a "twinning" process whereby the 80 parishes in the Diocese were "twinned" to engage in dialogue on human sexuality.
June 2001	Diocesan Synod votes a second time on the issue of blessing same-sex unions, with 226 to 174 (56.5%) in favour of asking the Bishop to authorize such a rite. The Bishop withholds consent, citing a need for a stronger consensus.
June 2002	Conservative clergy urge the Bishop not to proceed, and provide him with a legal opinion advising that he is without authority to do so.
	Diocesan Synod votes 215 to 129 (62.5%) to request that the Bishop authorize a rite for blessing same-sex unions ("Motion 7"). The Bishop assents. Delegates from 8 dissenting parishes (including the 4 in this litigation), representing 25% of the Diocese, announce that they consider themselves in impaired communion with the Diocese and walk out of Synod. They form an informal coaltion called the Anglican Communion in New Westminster (the "ACiNW")
July 2002	Archbishop of Canterbury George Carey, states in a sermon at a conference in Oxford that the action in New Westminster "undermines marriage", "is schismatic" and "makes us a very embarrassing partner in ecumenical circles as well"
September 2002	Anglican Consultative Council convenes in Hong Kong, unanimously passes a motion urging individual dioceses to consult with the international communion before making such decisions.
February 2003	Parish clergy and the Diocese participate in unsuccessful mediation.

February-March 2003	Bishop Terry Buckle, Diocese of the Yukon, writes to Bishop Ingham offering to provide AEO to the ACiNW parishes.
March 2003	Conservative parishes vote at their Annual Vestry Meetings to accept AEO from Bishop Buckle.
April 2003	Chancellor of the Diocese, George Cadman Q.C. requests that the Metropolitan of the Ecclesiastical Province of British Columbia and the Yukon take disciplinary action against Bishop Buckle.
May 27, 2003	Primates Meeting in Brazil, the Primates issue a Pastoral Letter which states ". . .we as a body cannot support the authorisation of such rites." The first blessing under a form of rite authorized by the Bishop takes place at the Parish of St. Margaret's, Cedar Cottage.
June 2003	Fifteen Primates issue a statement condemning the Bishop's actions as showing "a flagrant disregard for the remainder of the Anglican Communion."
September 2003	Reverend Gene Robinson, a priest living in a common law same-sex relationship, is elected Bishop of New Hampshire, Episcopal Church of the USA (ECUSA).
October 2003	The Archbishop of Canterbury convenes an emergency meeting of the Primates at Lambeth Palace to address the events in the Diocese and ECUSA. Archbishop of Canterbury establishes the Lambeth Commission to report on the developments in the Diocese and ECUSA and their impact on the Anglican Communion. Reverend Robinson is consecrated as Bishop of New Hampshire. Chancellor Cadman lays formal charges against 7 clergy from the ACiNW parishes for, *inter alia*, "disobedience to the Bishop", "schism", "contemptuous or disrespectful conduct toward the Bishop", and "other offences against the lawful authority of the Bishop" and commences disciplinary proceedings against them. HOB meets and agrees to establish a task force to explore AEO (the "AEO Task Force") on the condition that Bishop Buckle withdraw his offer of AEO and Bishop Ingham stay the charges against the clergy. Both Bishops agree, and the

	disciplinary proceedings against the clergy are stayed.
March 2004	AEO Task Force issues its report (the "Matthews Report") offering two possible models of AEO. Neither is implemented.
June 2004	General Synod of the ACC passes Resolution A134 affirming "the integrity and sanctity of adult committed same-sex relationships".
October 2004	Lambeth Commission issues the "Windsor Report" calling for a moratorium on same sex blessings, noting that "the clear and repeated statements of the Instruments of Unity have been to advise against the development and approval of such rites".
February 2005	Primates' Meeting in Dromantine, Ireland. The Primates ask the ACC and ECUSA to voluntarily withdraw from the Anglican Consultative Council until 2008 while "they consider their place in the Anglican Communion." Primates call upon the Archbishop of Canterbury to appoint a "Panel of Reference" to consider developments.
June 2005	ACC Primate's Theological Commission issues the St. Michael's Report which concludes that the blessing of same-sex unions is a matter of doctrine, but not core doctrine "in the sense of being credal", and that the issue should not be "communion breaking".
June 2006	Anglican Consultative Council meets in Nottingham and supports and upholds the "voluntary withdrawal" of the ACC until 2008 as requested by the Primates. ACC accepts the recommendation and withdraws from the Council until 2008.
September 2006	Panel of Reference issues its report on the Diocese.
February 2007	Primates' Meeting in Dar es Salaam, Tanzania. The Primates unanimously affirm Lambeth 1.10 as foundational.
June 2007	General Synod of the ACC passes Resolution A184, accepting the conclusion of the St. Michael Report and Resolution A186, "that the blessing of same-sex unions is not in conflict with the core doctrine (in the sense of being creedal) of the [ACC]". General Synod defeats Resolution A187, which would "affirm the authority and jurisdiction of any diocesan synod, with the concurrence of its bishop, to authorize the blessing of committed same sex unions."
November 2007	Bishop Donald Harvey is appointed a bishop in the House of

	Bishops for the Province of the Southern Cone, by the Primate Archbishop Gregory Venables.
	Archbishop Venables and Bishop Harvey offer temporary and emergency oversight to orthodox Anglicans in Canada under the Anglican Province of the Southern Cone, through the Anglican Network in Canada (ANiC).
February 2008	Annual Vestry Meetings of the Parishes. The congregations vote by overwhelming majority to join ANiC and accept episcopal oversight from Bishop Harvey and primatial oversight from Archbishop Venables "in order to remain 'in full Communion with the Church of England throughout the world'".
May 2008	Bishop Ingham issues Notices of Abandonment of the Exercise of Ministry in respect of the ANiC clergy.
May 2008	ANiC clergy respond to Bishop Ingham confirming that they have voluntarily relinquished their licences to minister in the ACC and advising that they have received licences to minister from Bishop Harvey under the jurisdiction of the Southern Cone.
June 2008	Chancellor Cadman writes to certain ANiC clergy advising that they did not have "the privilege or licence to preside at worship in the buildings you continue to occupy…" and each were given dates by which to vacate the church buildings. The clergy, trustees and their congregations remained in the buildings.
July 2008	Global Anglican Future Conference ("GAFCON") is held in Jerusalem and attended by 291 bishops and 857 clergy and laity from 17 Anglican Provinces. ANiC representatives attended and Bishop Don Harvey and Rev David Short were part of the leadership team for GAFCON.
August 25, 2008	Decennial Lambeth Conference. Approximately 230 bishops, or 25% of the bishops worldwide, boycott meeting.
August 27, 2008	Bishop Ingham purports to replace the trustees of each of St. Matthias & St. Luke and St. Matthew's.
September 2008	The trustees of St. Matthias & St. Luke write to Chancellor Cadman advising that they have determined it would be inconsistent with their duties as trustees to surrender control of the church property to the Diocesan designates, absent a court determination or some other resolution.
September 9, 2008	Plaintiff trustees and clergy commence this action.

OPENING STATEMENT

This extraordinary case arises from a church division arising from a dispute as to what constitutes Anglican identity. The Plaintiff trustees and clergy claim the properties at issue are held on trust for Anglican ministry and that those doctrines and practices declared at the founding of the ACC are unchangeable and inconsistent with the doctrinal and liturgical innovations championed by the Bishop of New Westminster and concurred in by the majority of local Anglicans within the Diocese. The Plaintiffs' views are shared by the majority of Anglicans in the broader world communion. Initially the Bishop sought to persuade the Canadian and international church to change but, after failing in this, with the support of the Diocese determined to act unilaterally in authorising new ceremonies respecting same-sex unions. In the result the Plaintiffs determined they could not remain faithful to their Anglican faith and remain within the authority of the Bishop and Diocese. To do so would in their view require them to abandon the doctrine of the Anglican church and to be out of communion with fellow Anglicans.

The Trial Judge erred in concluding that it was unnecessary to consider trust principles. It will be submitted he replaced the true legal effect of the private Act in Canadian law with inconsistent principles derived from the U.S. constitution. He also erred in his alternative conclusion as to the trust because it was similarly derived from a preference for internal governance rather than accepted trust principles.

The private Act and evidence demonstrated that the officers of parish corporations are trustees of charitable religious purpose trusts for the carrying out of Anglican ministry. The unprecedented division of the Anglican communion has made the trust for Anglican ministry impracticable and therefore engages the Court's *cy-près* jurisdiction. A *cy-près* approach is respectful of both parties and acknowledges the sincere basis and important character of the religious division that has occurred and provides a remedy that is flexible, equitable, just and necessary to preserve the charitable intention with which the properties were acquired, maintained and improved by generations of Anglicans in their various parishes.

PART 1

STATEMENT OF FACTS

I. Background Facts and Evidence at Trial

1. The evidence at trial was advanced primarily through affidavits. There are some 80 affidavits in the record, including affidavits of members of the plaintiff congregations, historical affidavits and affidavits of opinion respecting the theological and organisational differences between the parties. The Trial Judge considered it unnecessary to make any findings of credibility, made very few findings of fact and largely dealt with the affidavit evidence as relevant background to the legal issues he considered determinative of the claims.

2. Because the Trial Judge did not find it necessary to deal with the plaintiffs' primary *cy-près* claim, his Reasons do not refer fully to the evidence relied on in respect of the factual evidence in support of a purpose trust for Anglican ministry and the facts relevant to the impracticability of the plaintiffs continuing within the ACC. The Appellants will submit that the evidence was not contested with respect to the material facts and no resolution of the disputed opinions was necessary for an informed exercise of the Court's supervisory jurisdiction over charities. Where the issues on appeal require, the appellants rely on additional facts and evidence from trial.

<u>The Parties</u>

3. The Appellants are Anglican priests and lay trustees of four incorporated parishes in the Lower Mainland. The Church of the Good Shepherd ("Good Shepherd") was established as a mission church to the Chinese community in 1889 and incorporated in 1984. It was the first Chinese ethnic Anglican parish within the Anglican Church of Canada. St. Matthew's, Abbotsford ("St. Matthew's") was established in 1900 and incorporated in 1989. St. John's (Shaughnessy) ("St. John's") was established in the early 1920's and incorporated in December, 1932. St. Matthias & St. Luke ("St. Matthias & St. Luke") is an amalgamation of two previous parishes, St. Matthias

(established in 1960 and incorporated in 1974) and St. Luke (established in 1894 and incorporated in 1955).

4. The respondent, the Right Reverend Michael Ingham is the Anglican Bishop of the Diocese of New Westminster (the "Diocese") within the Anglican Church of Canada and was so elected in 1993. The other respondent is the Anglican Synod of the Diocese of New Westminster (the "Diocesan Synod").

The Anglican Church of Canada (the "ACC")

5. The background and general structure of the Anglican communion is set out in part in the Reasons. The Trial Judge did not consider it necessary to decide the fundamental elements of what constitutes Anglicanism, although some of his background goes to that point. The Plaintiffs rely on the affidavits and evidence led below to establish that at a minimum Canadian Anglicanism included a commitment to to remain in mutual communion with the international Anglican communion and to maintain and pass on unimpaired the common doctrine and practices of the Church.

Reasons, paras. 7-21, 45-52, AR pp. 77-80, 84-86

6. The dispute within the Diocese of New Westminster has taken place within the context of dramatically declining attendance, resulting in many under-used churches, unsustainable parishes, and the urgent need for a retrenchment around viable church congregations. Just prior to trial the Diocese addressed the problems of declining and aging congregations and possible solutions in a strategic plan. The Bishop acknowledged that the Diocese has more than $200 million dollars in capital in the form of parish buildings, while at the same time 30 of its 78 parishes do not have the income level required to operate as a stand-alone parish. Bishop Ron Ferris' evidence was that, based on the figures from his former diocese, the Diocese of Algoma, the attendance across Canada can be roughly calculated as 120,000. The Trial Judge referred to the census figure that approximately 625-800,000 Canadian express an affiliation with the ACC.

Reasons, para. 11, AR p. 78; Exhibit 12, Transcript of Cross-Examination on Affidavit of Michael Ingham, Vol. 1, p. 81, l. 20 – p. 83, l. 34 and Vol. 2, p. 94, l. 37 – p. 97, l. 30; Exhibit 13, Tab 29, pp. 6-7, 31-32; Exhibit 11, Tab 1, pp. 8, 35-37; Trial Transcript Vol. 1, Examination in Chief of Ron Ferris, p. 108, ll. 1-17

The Solemn Declaration

7. The Solemn Declaration was the subject of considerable evidence at trial. The parties disagree over the significance to be attributed to the Solemn Declaration and the proper interpretation of its commitment to the ACC remaining "in full communion with the Church of England throughout the world", and to holding to the "one Faith" expressed in the Declaration. The Solemn Declaration was adopted in 1893 at the first General Synod of the ACC. It comprises the first of 11 "Declaration of Principles" of the General Synod of the ACC. The full text is attached as Exhibit A for convenience.

Reasons, paras. 45-52, AR pp. 84-86; Exhibit 3, Tab 1, p. 11

8. Section 6 which sets out the Jurisdiction of the General Synod, provides that, "Subject to the provisions of section 7 [Fundamental Principles] the General Synod shall have jurisdiction in all matters affecting in any way the general interest and well-being of the whole Church and in particular:

…

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

Exhibit 3, Tab 1, p. 14

9. Section 11, dealing with the process for amendments to the Declaration of Principles and other parts of the ACC constitution, provides a mechanism for changes to other parts of the Declaration of Principles but states at section 11(a)(i) it cannot be altered or amended.

Exhibit 3, Tab 1, p. 16

10. The ACC has recognized the continuing role of the Solemn Declaration in other forms.

> Exhibit 1A, Tab 10, Ronald Ferris #1, para. 28; Trial Transcript, Vol. 3, Cross-Examination of Michael Ingham, p. 326 ll. 18-47 and Exhibit 11 Tab 6

11. Very recently, the Primate's Theological Commission produced the Galilee Report which reported on its progress on dealing with the question of doctrine related to the blessing of same sex unions which it had been asked to address by General Synod 2007. The Commission reached no general agreement but confirmed the role of the Solemn Declaration.

> Exhibit 8D, Tab 27, Affidavit #1 of George Cadman Q.C., Ex. 73

12. The plaintiffs view the Declaration as a statement of the foundational principles of the church that is relevant for Canadian Anglicans today. They understand the phrase "in full communion with the Church of England throughout the world" as expressing the founders' desire that the ACC remain in full harmony with the other Anglican churches around the world, including the Church of England.

> Exhibit 1A, Tab 10, Affidavit #1 of Ronald Ferris, paras. 23-28 and 41; Exhibit 1E, Tab 4, Affidavit #2 of John Stackhouse, para. 3; Exhibit 1E, Tab 13, Affidavit #2 of Ronald Ferris, paras. 4-7; Trial Transcript Vol. 1, Examination in Chief of Ronald Ferris, pp. 85, l. 30 – 89, l. 3

13. Bishop Ronald Ferris was a Bishop in the ACC from 1981 to 2008. He described the Solemn Declaration as summing up "the ethos of what is Anglican". Bishop Ferris regarded the phrase beginning "in full communion" as meaning "the intention to maintain a mutual relationship of communion with other Anglican entities world wide."

> Exhibit 1A, Tab 10, Affidavit #1 of Ronald Ferris, paras. 23-28; Exhibit 1E, Tab 13, Ronald Ferris #2, para. 4

14. Bishop Ferris described the concept of mutual communion, or mutual interdependence, in the following terms:

> …[I]n my view full communion means that we recognize ourselves fully in one another and act as agents for one another in different parts of the globe. This relationship is a mutual relationship; it is not a matter for recognition by any one party unilaterally. In this way, full communion means that we are in perfect solidarity on the things that matter. In the Solemn Declaration, the Anglican Church of Canada took on the obligation to preserve this mutual communion with other Anglican churches. The test for whether mutual communion is maintained is not a statement by one party, even the Archbishop of Canterbury. If one side of a mutual relationship says that the communion has been impaired or broken, then that operates to end the full mutual communion.
>
> Exhibit 1E, Tab 13, Ronald Ferris #2, para. 18 [Emphasis added]; see also Trial Transcript, Vol. 1, Evidence in Chief of Ronald Ferris, p. 81, ll. 1-31

15. Reverend David Short has been the Rector at St. John's (Shaughenessy) since 1993, and an Anglican priest since 1987. Reverend Short's evidence was that historically it has been a distinctive and defining feature of Anglicanism that Anglicans believe that they should maintain full communion among Anglicans and among Anglican churches worldwide. Accordingly, a church that is true to its Anglican character cannot regard itself as independent of the worldwide communion or set its own course on matters of teaching.

> Exhibit 1D, Tab 24, David Short #1, paras. 2-3, 9

16. In the 2004 Windsor Report produced by the Lambeth Commission, the relationship was described as "multi-partied", in other words, mutual communion with all other Anglican churches. The Windsor Report also emphasizes mutuality, saying:

> Communion is, in fact, all about mutual relationships. It is expressed by community, equality, common life, sharing, interdependence, and mutual affection and respect. It subsists in visible unity, common confession of the apostolic faith, common belief in scripture and the creeds, common baptism and shared eucharist, and a mutually recognised common ministry. …
>
> Exhibit 3, Tab 15, paras. 48-49

17. The defendants' position at trial was that the Solemn Declaration was not intended to constrain future development of faith, doctrine and discipline by the Church, and that it should now be regarded as of merely historical relevance. Some of the

defendants' evidence describes the Solemn Declaration as merely "a starting point for new action". Reverend Kevin Dixon is the Rector of St. Mary's, Kerrisdale and was ordained in 1987 after completing his theological training in Ontario. He testified that the Solemn Declaration was not mentioned in his education, and that he first heard of it in 2001 while attending a lecture by Dr. J.I. Packer of St. John's. For Bishop Ingham's part, he views the Declaration as having historical relevance only.

> Exhibit 12, Cross Examination on Affidavit of Ingham, Vol. 1, p. 13, ll. 2-6; Exhibit 8C, Tab 12, Alan Perry #1, para 21; Trial Transcript, Vol. 3, Examination in Chief of Kevin Dixon, p. 381, l. 44 – p. 382, l. 14

18. The Trial Judge found it unnecessary to reconcile the competing views of the Solemn Declaration. In his view, "its interpretation ultimately falls to the General Synod" by way of s. 6(1)(i) of the Declaration of Principles.

> Reasons, para. 261, AR p. 147

The Parishes

19. A great body of undisputed evidence was advanced largely by affidavit concerning the history and life of the four parishes. The space available does not permit a detailed summary of the evidence. In general however the four parishes had for a considerable time represented conservative, orthodox congregations within the ACC and the Diocese. St. John's was acknowledged to be one of the most prominent evangelical churches within the Anglican communion, having an international reputation and reach. The Bishop acknowledged in his cross-examination the attachment of all Anglicans for their parish church and the vitality of the connections with a worshipping community that are made at the parish level. The evidence disclosed that the purchase and maintenance of the properties and facilities were enabled by the sacrifice of parishioners through several generations.

> Exhibit 1A, Tab 1, Anne Sheck #1; Exhibit 1A, Tab 3, Rebecca Fraser #1; Exhibit 1A, Tab 4, Kirstie Glasgow #1; Exhibit 1A, Tab 5, Stephen Leung #1; Exhibit 1A, Tab 7, Linda Seale #2; Exhibit 1A, Tab 8, Gail Stevenson #1; Exhibit 1A, Tab 13, Peter Pang #1; Exhibit 1B, Tab 14, Eric Law #1; Exhibit 1B, Tab 15, Raymond Kwan #1; Exhibit 1B, Tab 16, Michael Bentley #1; Exhibit 1B, Tab 17, Peter Chapman #1; Exhibit 1C, Tab 20,

Robert Yeung #1; Exhibit 1C, Tab 21, Simon Chin #1; Exhibit 1C, Tab 22, Trevor Walters #1; Exhibit 1D, David Short #1

Trial Transcript Vol. 3, Cross-Examination of Michael Ingham, p. 365, ll. 5-15

Parish Property is held on trust

20. The Trial Judge makes no comment on the evidence from both sides at trial which was relevant to the intention of the founders of the parish corporations and donors to their work as well as the expectations of Canadian Anglicans respecting how and for what purposes church property was to be held.

21. In a 2008 video posted on YouTube, called "Leaving the Diocese", Bishop Ingham stated:

> … . And so the diocese holds all property in trust for congregations who worship in that place to carry on that ministry. …

Ex. 13, Tab 30

22. Bishop Ingham in cross-examination admitted he understood a trust existed.

Exhibit 12, Cross-examination on Affidavit of Michael Ingham, May 6, 2009, p. 103, l. 44 – p. 104, l. 7; Reasons, paras. 173-179, AR pp. 47-48

23. An archived opinion given in 1979, by John Spencer, the former Chancellor of the Diocese of New Westminster, to the Diocese, regarding the character of the parish corporations, states that until a parish corporation was organized, where that parish has provided all or substantially all of the funds to purchase its property, that property was held by the Diocese on trust for the parish, and that, once a parish corporation had been established, the role of the Bishop and Diocese in the affairs of the corporation was one of persuasion, except in certain specified instances (such as selling property). Reverend David Short deposed in relation to this concept as follows:

> This seems to me entirely consistent with the normal Anglican approach. The parish is the fundamental unit of the church, and for the vast majority

of Anglicans that is where the real life of the church takes place. The role of the diocese and other church structures is to facilitate the life of the local worshipping congregations.

Exhibit 1D, Tab 24, David Short #1, para. 118, Ex. "YY"

24. Bishop Ronald Ferris deposed he always understood that individual parishes held their properties for the benefit of the parish, and not for the benefit of the diocese:

> From my experience in the Canadian Anglican Church, there are a variety of ways in which parish properties are held, but I believe the underlying church understanding as to the use and benefit of those properties remains the same.
>
> In the Diocese of Algoma, we had to deal with a wide variety of forms of property holding. The diocese was originally a missionary enterprise, in a pioneer environment. For many years, the diocese was not a legal entity. Settlers who wanted a church in their community would acquire property and build a church out of their own resources. The ways these properties were held were diverse, but it was common to see such properties held on trust. In fact, the house where I lived as bishop had been acquired in very early days, and was held on trust. I remember that when we wished to alter the landholding we were required to obtain a court order varying the terms of the trust. In relation to parish properties held on trust, I always understood that the properties were for the benefit of the parish, and not for the benefit of the diocese…. The only circumstances I am aware of where dioceses takes over parish property for their own use is when a parish has ceased to function and has been dissolved.

Exhibit 1A, Tab 10, Ronald Ferris #1, paras. 118-19

25. St. Matthew's was incorporated in 1989 at the request of the Diocese when the parish wished to place a mortgage on the church property to secure financing. When the Diocese then transferred title to the church property to the St. Matthew's Parish Corporation the Transfer document in referring to "Consideration" stated: "Nil (being transferred by the Transferor as Trustee to the Transferee as **cestui que trust**)".

Exhibit 1A, Tab 7, Linda Seale #2, Ex. "M" [Emphasis added]

26. During the residential schools litigation involving sexual and other abuse claims against the ACC and other parties, the Diocese of the Cariboo (now the Anglican

Parishes of the Central Interior) took the position that parish property in that diocese was held on trust for the parishioners and therefore shielded from seizure by residential abuse claimants. The Diocese of Huron in Ontario took a similar position during a period of sexual abuse litigation.

Exhibit 1C, Tab 23, Cheryl Chang #1, paras. 162-64, Exs. "CC" - "EE"

27. Typically, parishes generate their own funds to carry out day-to-day operations for the purpose of ministry and mission. These funds are directed to particular applications by the trustees in consultation with the vestry. Parishes also typically raise the majority of the funds to purchase and maintain capital assets, such as church buildings. The four Parishes were historically financially independent. Consultation with the congregation is vital, as the financial viability of a parish depends on the charitable donations of its parishioners, and its continued operation also depends on the willingness of its parishioners to donate their time and other in-kind support.

Exhibit 1B, Tab 16, Michael Bentley #1, paras. 33-36; Exhibit 1A, Tab 7, Linda Seale #2, para. 14, 15, 43; Exhibit 1B, Tab 17, Peter Chapman #1, para. 19; Exhibit 1B, Tab 14, Eric Law #1, paras. 40-42, 58

Anglican Division

28. The division within the Diocese had its specific origin in the Bishop's determination to change belief and practice as it related to same-sex relationships to correspond with what he considered as Gospel demands. He formed these views in the 1990's, and initially he sought to persuade the national and international Church. After being rejected in those quarters he acted once a majority consensus was formed in New Westminster.

Trial Transcript, Vol. 3, Cross-Examination of Michael Ingham, p. 332, l. 38 – p. 336, l. 42; p. 351, ll. 4 – 30

29. The Plaintiffs tendered a number of affidavits from experts qualified to speak to the nature and extent of the current dispute. Each indicated their view that the current dispute is unprecedented in the Anglican church.

Exhibit 1A, Tab 2, John Stackhouse #1, paras. 28-35; Exhibit 1A, Tab 6, James Packer #1, para. 18(b); Exhibit 1C, Tab 19, Edith Humphrey #2, para. 22; Exhibit 1E, Tab 3, Edith Humphrey #3, para. 15; Exhibit 1E, Tab 4, John Stackhouse #2, para. 12; Exhibit 1E, Tab 10, Peter Jensen #1, paras. 6-10

(i) The nature of the theological issue

30. It was admitted by Bishop Ingham that the blessing of same-sex relationships represents an important change in both the teachings and rituals of the church, and is a subject-matter which engages one's view of the gospel, the authority of Scripture, the interpretation of scripture and the traditions of the church. Bishop Ingham further acknowledged that Christians can sincerely continue to believe in the traditional teaching of the church with respect to homosexuality and same-sex relationships, and they can do so without being bigoted or homophobic.

Exhibit 12, Cross-Examination on Affidavit of Michael Ingham, Vol. 1, p. 8, ll. 13-30 and 38-43; p. 11, l. 28 – p. 12, l. 11

31. The Bishop also admitted that there is an element of Anglican identity which arises from sharing a common tradition of received teaching and liturgy, in order to allow Anglicans to recognize others as members of the same worldwide church.

Exhibit 12, Cross-Examination on Affidavit of Michael Ingham, Vol. 1, p. 45, l. 9 – p. 46, l. 4

32. The evidence before the Trial Judge was that for many orthodox Anglicans coexistence with the ACC is simply impossible. According to Reverend Short, the decision of the Diocese exposes two contradictory views of Scripture. One is the "objectivist" view consistent with the historic orthodox view that gospel is revealed to Christians and this revealed truth is grasped by letting the Bible interpret itself. The "subjectivist" position concludes that the present is wiser than the past and that the teaching of the Church must develop relative to a developing and changing society and culture. The evidence of Reverend Short is that since its inception the Anglican Church has maintained the objectivist position.

Reasons, para. 198, AR p. 127

33. The plaintiffs tendered a number of affidavits to the effect that the ceremony of blessing same sex unions and the underlying theology is in conflict with the tenets of the Anglican faith.

> Exhibit 1A, Tab 6, James Packer #1, paras. 17(c), 18(c) and 19; Exhibit 1C, Tab 19, Edith Humphrey #2, paras. 16-20; Exhibit 1A, Tab 5, Stephen Leung #1, paras. 63-64; Exhibit 1A, Tab 10, Ronald Ferris #1; Exhibit 1A, Tab 11, Donald Harvey #1; Exhibit 1C, Tab 21, Simon Chin #1; Exhibit 1C, Tab 22, Trevor Walters #1; Exhibit 1D, Tab 24, David Short #1

(ii) Unprecedented reaction following Diocesan events of 2002 and 2003

34. When the Diocese voted to authorise same-sex blessings, the clergy and a majority of the lay delegates from eight parishes representing 25% of the Diocese left the Diocesan Synod in protest.

> Reasons, para. 94, AR p. 98; Exhibit 1C, Tab 23, Cheryl Chang #1, para. 21

35. The reaction to Motion 7 was emotional. Reverend Short described his reaction this way:

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

> Reasons, para. 96, AR p. 98,

36. The next several years included a massive reaction from around the world to the events in New Westminster (and later to the ECUSA authorisation of a Bishop living in a same-sex union). This reaction took many forms, including the formation of new organisations within the international communion, the extension of support from the Primate of the Southern Cone and recognition and affirmation of the Plaintiffs' views of Anglican doctrine and practice from quarters within Canada and around the world.

Reasons, para. 100, AR p. 99

37. The response to Motion 7 extended beyond the Diocese and the ACC. Thirteen of 40 Canadian bishops signed a public statement criticizing the move to approve same-sex blessings as being in conflict with the teachings of Scripture and beyond the jurisdiction of a single diocese acting alone. 52 clergy in the Diocese of Fredericton wrote to express their support for the dissenting parishes, and 12 clergy in Brandon, Manitoba signed a letter to Bishop Ingham condemning his actions. Internationally, statements of support for the ACiNW parishes and denunciation of the Bishop and the Diocese came from the Archbishop of Rwanda, a majority of Australian bishops, 23 Episcopal Church USA bishops, and the Archbishop of Kenya.

Reasons, para. 97, AR p. 98; Exhibit 1A, Tab 10, Ronald Ferris #1, para. 66; Exhibit 1D, Tab 24, David Short #1, para. 60, Exs. “S” – “W”

38. The Bishop acknowledged that at the time of deciding whether or not to approve of same-sex blessings the substantial majority of Bishops around the world were opposed to the action. Following the announcement of Motion 7, a number of global Anglican leaders, representing a majority of global Anglicans, declared a state of broken or impaired communion with the Bishop and Diocese.

Trial Transcript, Vol. 3, Cross-Examination of Michael Ingham, p. 353, ll. 37 to 45; Exhibit 1C, Tab 23, Cheryl Chang #1, para. 19

39. The Archbishop of Canterbury was also critical. He called the action in New Westminster “schismatic” and said that it “undermines marriage” and “makes us a very embarrassing partner in ecumenical circles as well”.

Reasons, para. 98, 101-104, AR pp. 98-99

40. In other cases within the Diocese, parishes were divided following the 2002 Synod, and parishioners voted with their feet, leaving their churches and starting new ones or joining orthodox churches such as St. John’s. In other cases, church plants that would have otherwise been Diocesan plants were started independently of the Diocese.

Exhibit 1C, Tab 23, Cheryl Chang #1, paras. 21, 28-29; Exhibit 1A, Tab 12, Sean Love #1; Exhibit 1E, Tab 2, Cal Campbell #1, Tab 7, Eileen Cole #1, and Tab 12, Beverley Bender #1

41. The various tribulations in the Diocese since 2002 include the termination of church plants by the Diocese, the invocation by the Bishop of Canon 15 to remove and insert parish trustees, changing the locks on St. Martin's in North Vancouver and closing down the church in Pender Harbour. The Bishop conceded that this extent of action against parishes in the Diocese is unprecedented in its history.

Trial Transcript, Vol. 3, Cross-Examination of the Bishop, p. 361, l. 31 to p. 363, l. 41

42. In May 2003, the Bishop implemented the use of the rite for the blessing of same-sex unions, and the first blessing occurred at the Parish of St. Margaret's, Cedar Cottage on May 27, 2003. At about the same time, the Primates of the Anglican Communion issued a Pastoral Letter which read, in part:

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

Reasons, para. 119, AR p. 103 [Emphasis added]

43. In June 2003, a group of 15 Primates issued a statement in response to the Bishop's actions which was harshly critical and called them contrary to the Primates' statements, contrary to the authoritative position expressed in lambeth Resolution 1:10, far beyond the generally accepted teaching of the church and a blatantly divisive course of action that could not be ignored: Exhibit 1D, Tab 24, David Short #1, paras. 88-89 and Ex. "PP". Separate statements were issued by the Church of Nigeria (having some 17 million members) and the Anglican Church in South East Asia also severing communion with the Diocese. Exhibit 1C, Tab 23, Cheryl Chang #1, para. 83; Exhibit 1D, Tab 24, David Short #1, para. 90 and Exhibits "QQ" and "RR"

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

Reasons, para. 121, AR pp. 103-04

45. Despite the Primates' warning that the consecration "will tear the fabric of our Communion at its deepest level", Reverend Robinson was consecrated as bishop.

Reasons, para. 122, AR p. 104

46. In October 2004, the Lambeth Commission, convened by the Archbishop of Canterbury to report on the developments in New Westminster and ECUSA and their impact on the Anglican Communion Commission reported its findings in the Windsor Report. The resulting Windsor Report was critical of the Diocese of New Westminster for not further consulting the wider Province or Communion on the theological issues in question. The report reminded readers that "the clear and repeated statements of the Instruments of Unity have been to advise against the development and approval of such rites."

Reasons, paras. 126-27, AR pp. 104-05

47. The Windsor Report recommended a moratorium on same-sex blessings and recommended that bishops who had authorized such rights "be invited to express regret that the proper constraints of the bonds of affection were breached by such authorization". It also said that "pending such expression of regret, we recommend that such bishops be invited to consider in all conscience whether they should withdraw themselves from representative functions in the Anglican Communion." The Bishop did not express any regret over approving the ritual and did not order a cessation of all further uses of the rite, instead temporarily limited the use to only those parishes who had previously requested it, issuing a "partial moratorium".

Reasons, paras. 128, 132-33, AR pp. 105-06; Exhibit 3, Tab 18, The Windsor Report; Trial Transcript, Vol. 3, Cross-Examination of Michael Ingham, p. 358, ll. 1-17

48. In February 2005 the Primates accepted the Windsor Report's recommendations and asked the ACC and ECUSA to voluntarily withdraw from the Anglican Consultative Council until 2008 while they consider "whether they are willing to be committed to the inter-dependent life of the Anglican Communion". The request was supported by the Anglican Consultative Council. The ACC accepted the recommendation and withdrew until 2008.

Reasons, para. 133, AR 106

49. As a result of this ongoing controversy, the 2008 Lambeth Conference was boycotted by 230 bishops, or roughly 25% of the bishops in the worldwide church. At the same time, orthodox Anglicans organized "GAFCON", which was attended by 291 bishops and 857 clergy and laity from 17 of the 38 Anglican Provinces. Both of the above developments are without precedent in the modern history of the church.

Reasons, paras. 146-47, AR p. 111; Exhibit 12, Transcript of Cross-Examination on Affidavit of Bishop Michael Ingham, p. 77, line 46 – p. 78, line 23

(iii) The measures proposed by Bishop Ingham and the House of Bishops

50. The Trial Judge summarized the Plaintiffs' position regarding the remedial measures proposed by Bishop Ingham and the House of Bishop as follows:

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

Reasons, para. 200, AR, p. 127

51. The evidence on these issues included:

Exhibit 1E, Tab 13, Ferris #2, para. 35; Exhibit 1D, Tab 24, Short #1, para. 50; Exhibit 1D, Tab 24, Short #1, para. 50 and Exhibit "I"; Exhibit 1A, Tab

5, Stephen Leung #1, para. 50; Exhibit 1C, Tab 23, Cheryl Chang #1, paras. 96 and 97; Exhibit 1D, Tab 24, David Short #1, para. 98, Ex. SS; Exhibit 1A, Tab 7, Linda Seale #2, para. 75

(iv) The emergence of new Anglican structures

52. In November 2007, the Anglican Network in Canada ("ANiC") commenced operations as an incorporated entity. In February 2008, vestry votes were held in the four Parishes regarding episcopal oversight from the Province of the Southern Cone, facilitated by affiliation with ANiC. The motions were largely the same in each parish and the Resolution passed by the vestry at the church of Good Shepherd is attached as Appendix D. In essence they reflected the Plaintiffs' view that the ACC was required to remain in communion with the Church of England throughout the world and its doctrinal and ritual innovations had brought about a division of that communion and the Canadian church.

53. The motion passed overwhelmingly in each parish. As of April 2009, there were 28 ANiC parishes in Canada, including the four parishes in these proceedings.

Reasons, paras. 156 and 148, AR p. 114 and 111

54. In 2008 a new structure was launched called the Anglican Church in North America ("ACNA"), comprised of a number of groups in Canada and the United States who are in a state of broken communion with the ACC and ECUSA. ACNA seeks to be recognized as a Province, and in this regard it has received the support of Primates and Anglicans in many conservative provinces and dioceses around the world.

Reasons, paras.149-50, AR p. 111

55. The Plaintiffs tendered a number of affidavits to the effect that the congregations and their clergy are recognized as fully Anglican and in full communion with other faithful Anglicans around the world.

Reasons, paras. 147, 150, AR p. 111; Exhibit 1E, Tab 5, William Anderson #1, paras. 3-7; Exhibit 1E, Tab 10, Peter Jensen #1, paras. 11-18; Exhibit 1B, Tab 18, Chris Sugden #1, paras. 33-37; Exhibit 1C, Tab 23, Cheryl Chang #1, paras. 109-11 and 158

II. The Reasons of the Supreme Court

56. The Trial Judge's reasoning on the statutory and trust issues is found between para. 247 and 281 of the Reasons. They are dealt with below in Part III.

The Purported Dismissal and replacement of Trustees

57. The Trial Judge concluded that the Bishop's purported dismissal and replacement of the Trustees of St. Matthew's and St. Matthias & St. Luke in August 2008 was of no force and effect and that the respective trustees therefore continued to hold office. The Bishop's asserted authority under Canon 15 on its terms did not confer on the Bishop or the Diocese authority to terminate the appointment of trustees elected by their congregations. No appeal has been taken from this Order.

Reasons, para. 294, AR p. 159

The Chun Bequest

58. The Trial Judge also ordered a *cy-près* scheme for monies donated by bequest to the building fund of Good Shepherd by a parishioner, Dr. Daphne Wai-Chan Chun (the "Chun Bequest"). The Trial Judge concluded the funds were held on trust, and that the charitable purpose of contributing to a new church for Anglican ministry to the Chinese community would be defeated if the funds were held by the Diocese as the Diocese had no foreseeable need for such a church given the departure of the Chinese Anglican community into the ANiC.

Reasons, paras. 328-29, AR pp. 167-68

PART 2

ERRORS IN JUDGMENT

59. 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.

60. 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.

61. 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.

PART 3

ARGUMENT

Introduction and Summary of Appeal

62. This case concerns whether the Canadian law of trusts applies to the situation of a divided body of religious adherents each seeking to follow their common faith, but no longer able to do so together. The law of charity is inextricably wound up with religious purposes; indeed, for as long as there have been trusts there have been religious purpose trusts. Property intended for religious worship and practice has for centuries been subject to an implied charitable purpose trust.

63. The Anglo-Canadian approach has included requiring the trustees to hold fast to the original religious purposes governing the use and benefit of the trust property. This has required the Courts to choose which of two contending groups upheld the founding religious principles and therefore should be awarded the sole use and benefit of church property. This line of cases, exemplified by the famous *Free Church* case in the early 20th century, has been applied several times in Canada. As a result some minorities (and some majorities) have been awarded the entire benefit of church property. In determining the trust issue, the courts have, when necessary, determined what faith principles formed the foundation of the trust. In the eyes of trust law a church is defined by its faith and not its hierarchy.

> *General Assembly of Free Church of Scotland v. Lord Overtoun and Others*, [1904] A.C. 515 (H.L.) [the "*Free Church* case"]

64. In this case the Plaintiffs say the properties are held on trust for Anglican ministry; that this requires that parish ministry and liturgy be consistent with the doctrine and practice declared at the founding of the Canadian church and be in full mutual communion with the worldwide church; that the Bishop's actions have made performance of those terms by the Plaintiffs impracticable, and that therefore the Court should order a cy-pres scheme modifying the terms of the trust to permit the four

congregations to continue to use the benefit of the trust property for the purpose of Anglican ministry.

65. *Cy-près* is an ancient jurisdiction rooted in the support for charitable purposes such as the advancement of religion. The modern approach to *cy-près* recognises that a pragmatic approach responsive to the facts is appropriate when determining whether the original trust has become impracticable. The *cy-près* approach is available here because Anglican ministry has always contemplated common doctrines and practices. The novel teachings and related practices now practised by the majority in the Diocese have made it impossible for the Plaintiffs to remain in communion with the Bishop and within the ACC as a consequence. The principles and values recognised in *Varsani* v. *Jesani* [1999] Ch. 219 (Eng. C.A.) where a *cy-près* order was upheld in the case of a religious division are persuasive in informing the common law exercise in this case. This approach means the Court is not engaged in selecting winners and losers, it furthers the underlying goal of furthering the free expression of religious belief and practice, and it permits the allocation of charitable purpose assets according to need rather than power or plurality. The facts of this case demonstrate the ease with which justice may be done since the Plaintiffs represent coherent bodies of orthodox Anglicans within the Diocese and are connected with distinct assets.

66. The plaintiff trustees say that the division in the Anglican Church between those that hold to the orthodox doctrine and practice reflected in the Solemn Declaration, and those that regard it as being merely of historical interest has resulted in an unprecedented division of Anglicans along doctrinal lines that goes to the core of Anglican identity. The plaintiff trustees seek to hold to the long-standing teaching of the Anglican Church in Canada and the current standard of teaching of the Anglican Church worldwide. As a matter of conscience, the plaintiff trustees, together with about 25% of the Anglicans in the Diocese, felt required to adhere to the global Anglican standard of teaching, rather than the innovative position taken by the majority of the Diocese. The congregations associated with the plaintiff trustees have a need for the parish properties for the purpose of their ongoing Anglican ministry and mission, whereas the Diocese,

which has a surplus of church properties, does not need these four properties for the mission of the other parishes. In circumstances where the sincere differences on matters of belief and practice important to both groups of Anglicans make further coexistence impracticable, there is an occasion of *cy-près* justifying the Court's intervention.

67. The Trial Judge, however, accepted the defendants' submission that it was preferable to follow an approach derived from American jurisprudence. In the United States the courts have held since the 1870s that they would not follow the Anglo-Canadian religious purpose trust authorities because that would offend the separation of church and state under the U.S. Constitution. Instead, by necessity the U.S. has had to develop other principles. In the case of a hierarchical church the U.S. courts have deferred to the decision-making process within such a church and avoided questions of religious purpose. In the case of a division within a religious institution, this approach automatically favours the hierarchy and the majority. At the same time, many U.S. courts apply the so-called "neutral principles of law" approach, under which the courts have regard to such provisions in the law and internal constitution of a church as can be evaluated without trenching on the area of religious purpose, and will also enforce express religious purpose trust provisions.

68. The Trial Judge applied an approach which he extracted from his view of the U.S. "neutral principles" approach. This approach led the Trial Judge to defer to what he considered the decisions of the church hierarchy, and to focus his enquiry on the question of the jurisdiction of church leadership. This is of course anything but neutral as between an incumbent majority and a dissenting minority.

69. By treating the issues before him as ones of entitlement and jurisdiction rather than issues of trust and purpose, the Trial Judge effectively found that Anglicanism means whatever the current church authority considers it to be, without constitutional restraint or objective examination. This flies in the face of the ACC's constitution and identity as a religious community. His deference to the internal governance apparently extended to the question of the constitutional force of the

Solemn Declaration itself, as he held that the General Synod could impliedly determine a change to be in harmony with it in the absence of a constitutional amendment. In fact the hierarchy in Canada had not resolved the dispute through its internal processes. The judge's focus was on the forms of church governance, rather than their purpose or actual outcome. It will be submitted that this hierarchical institutional approach is inconsistent with the Anglo-Canadian jurisprudence and is unjust and regressive. The Court, in effect, rejected both approaches available to him under Canadian law. The policy approach favoured by the Trial Judge is alien to the best traditions of religious pluralism and respect in Canada and undermines the valuable contributions to charitable religious purposes being pursued by both groups of Anglicans.

The private statute

70. There is nothing in the private statute that made it unnecessary to consider the charitable purposes for which the parish corporations hold their property. Indeed, given the structure of the statute it is not only appropriate but necessary to imply such charitable purposes. The plaintiff trustees submit that these are trust purposes; however, for the result of the case it makes no practical difference. If the parish corporations are charitable corporations the Court, in its supervisory jurisdiction over charitable corporations, will apply an analogous approach to *cy-près* to that applied in the case of true trusts.

The terms of trust

71. The Trial Judge's alternate conclusion is that he would have found it preferable to have trust terms under which property was held for the purpose of Anglican ministry as defined by the Anglican Church of Canada. The Trial Judge misapprehended the nature of the trust issue before him and misdirected himself in law.

72. The Trial Judge's preferred terms of trust placed the definition of the trust in the hands of the religious institution itself. While this reflected his policy choice to uphold the internal hierarchy, it is fundamentally inconsistent with religious purpose trust law.

73. As part of an inquiry into the historical evidence, the Trial Judge should have considered the constitutional entrenchment of the basic principles of Anglicanism in the constitutions of both the Anglican Church of Canada and the Diocese. Even on a "neutral principles" approach, the Trial Judge should have found that the constitutional fundamentals exclude the possibility of the Anglican Church of Canada, or the Diocese, being self-defining bodies that can, for the purposes of civil law, define their character and purpose from time to time as they choose.

74. It will be submitted that the Trial Judge should have found, correctly applying the principles of purpose trust law in the context of the proper evidence of intention, that the parish corporations held property on trust for the purpose of Anglican ministry. The Trial Judge should further have found, consistent with the modern *cy-près* approach, that such a trust becomes impracticable in the face of a division arising from sincere and irreconcilable differences of doctrine and practice within the religious body. The Trial Judge had overwhelming evidence in front of him as to the depth of the division within Anglicanism, the fracture of the communion, and the impracticability of coexistence. In such circumstances, the Trial Judge should have gone on to consider how the *cy-près* jurisdiction could be exercised to achieve an equitable result that preserved the fundamental and original charitable intention.

STATUTE

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

75. At paragraphs 253 to 257 of the Reasons, the Trial Judge applied his "neutral principles" approach and concluded that the terms of the private statute were sufficient for him to dismiss the trust claims of the plaintiff trustees, without needing to consider whether in fact parish property was held on trust. In effect, the Trial Judge concluded that the statutory provisions relating to parish corporations were a "neutral principle" that supplanted any purpose trust.

76. It is submitted that the Trial Judge erred in his interpretation of the provisions as a private statute, and on proper principles nothing in the statute made it

unnecessary to consider the trust claim. It is submitted that on a proper interpretation the statute necessarily implies a trust for the purpose of Anglican ministry, or an equivalent purpose for the statutory parish corporations.

77. For the reasons given below, the Trial Judge's "neutral principles" approach is not consistent with Canadian law. However, even reading the statute on a "secular" basis does not support the conclusion of the Trial Judge.

"Neutral principles"

78. The Trial Judge refers to the American law as adopting two principles. The first is that secular courts must accept as binding any internal church adjudication regarding questions of faith or discipline. The second is that courts can apply neutral principles of law, scrutinizing church documents on a purely secular basis, to resolve rights and obligations of the parties so long that they do "not turn on questions of church doctrine". He found this approach was applied in the *Russian Orthodox* decision and that the notion of deference having deep provenance was reflected in the decision of Burton, J.A. in *Itter* v. *Howe*.

> *Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc. v. Protection of the Holy Virgin Russian Church (Outside of Russia) in Ottawa, Inc.* [2001] O.J. No. 438 (S.C.J.), varied in part [2002] O.J. No. 4698 (C.A.)
>
> *Itter v. Howe* (1896), 23 O.A.R. 256, [1896] O.J. No. 31 (QL) (C.A.)

79. With respect, the Trial Judge's reference to the U.S. law was incomplete and misled him as to what the 'neutral principles' approach truly means. He was wrong to hold that *Itter* v. *Howe* represents an application of that approach in any fashion and wrong to accept the *Russian Orthodox* case as helpful to the present dispute.

80. A careful reading of the American jurisprudence demonstrates that the point of departure between Canadian and American law in this respect is their different constitutional arrangements respecting church and state. The U.S. Supreme Court has never held that American Courts cannot interpret and apply a religious purpose trust to given facts: rather, the U.S. law merely requires that such a trust be express rather than

implied. In Anglo-Canadian law and in particular in relation to Anglican property both the law and the parties have always contemplated that a trust will be implied even where not evidenced by an express trust deed. In the U.S., where property is expressly devoted to the promotion of a specific form of doctrinal belief the Court has a duty to see the property is not diverted from the trust. Indeed, where an State statute provided a right analogous to *cy-près* in the event of a division the Court found recent events had divided the Episcopal Church: *In Re: Multi-Circuit Episcopal Church Property* CI 2007-0248724 (Fairfax Circuit Court, Va. 2008). The general approach to charities applies equally in ecclesiastical matters. In these cases the American law is the same as in the *Free Church* case. A religious trust will not be implied, however, for then the Courts would be failing to observe the separation of church and state guaranteed by the U.S. Constitution.

81. The US Supreme Court divided the cases into categories depending on whether there was an express religious purpose trust; whether the property is held by an independent religious congregation (where the only question is as to who is the proper successor to the property); and where the congregation is a subordinate member of a general church organization. The Trial Judge correctly observed that the U.S. law as to the third category is to defer to the internal processes of the church structure: however, he failed to note that the U.S. Court in so holding expressly observed that it was proceeding contrary to the English approach found in the 1817 case of *Pearson*, below, and later exemplified in the *Free Church* case.

> *Watson v. Jones*, (1871) 80 U.S. 679, 1871 U.S. LEXIS 1383; *Jones v. Wolf*, (1979) 443 U.S. 595, 1979 US LEXIS 16.

82. The Trial Judge erred in concluding this approach was consistent with Canadian law. The *Free Church* case has never been rejected by a Canadian Court and represents the application of centuries old principles of charity law shared by Canada and the United Kingdom. Indeed, most remarkably the decision of *Itter* v. *Howe, supra* cited by the Trial Judge represents an application of Anglo-Canadian principles and not those used in the United States even though it pre-dates the *Free Church* case itself. Indeed, the Anglo-Canadian judicial willingness to consider questions of doctrine

in the context of religious purpose trust cases is a particular example of a general principle. The courts have repeatedly said that they will show restraint before entering upon issues of faith or doctrine, but that they will do so when some civil right, such as property or employment, is in issue.

> See e.g. M.H. Ogilvie, *Religious Institutions and the Law in Canada* (2d. ed.) at pp. 292-93; *Hofer v. Hofer*, [1966] M.J. No. 63 per Dickson J. (Q.B.)

83. In *Itter v. Howe* the Trial Judge (who was upheld in the Court of Appeal) determined that the constitutional amendments passed overwhelmingly by the national governing body of the church in that case were merely fresh expressions of the same doctrine: he addressed and determined the very issue which the Trial Judge's approach rejects from consideration. In the Court of Appeal Burton, J.A. was the only Judge of the four writing who expressed approval of the American approach, and even he concurred with MacLennan, J.A. who followed the substantive approach of the Trial Judge. Chief Justice Hagarty expressly confirmed that Canadian courts will "take cognizance of [doctrinal disputes] to decide rights affecting property", and concluded the respondents had failed to establish "any substantial or important variation" to doctrine.

> *Itter v. Howe, supra*, at paras. 67, 70, 80, 82, 104 and 126.

84. The final authority relied on by the Trial Judge as applying the neutral principles approach is that in the *Russian Orthodox* case. That case concerned whether the Court should express declarations as to a purely religious question unrelated to a property dispute. The property aspect of the case was resolved on the basis of an interpretation of by-laws applicable to the dispute and hence was of no assistance.

85. In general, therefore, the Trial Judge was wrong to hold that the 'neutral principles' approach represented a deference to internal processes in all property disputes, that it was consistent with Canadian law, that it had been applied or recognised in Canada, and that it represented a useful legal structure to resolving a property dispute within the Canadian Anglican church.

(a) Section 7 of the private statute does not make it unnecessary to consider the trust law issues

86. The Trial Judge considered that he should first deal with the private statute that incorporated the Synod of the Diocese and provided for the incorporation of parish corporations, the *Act to Incorporate the Anglican Synod of the Diocese of New Westminster*, SBC 1893 c. 45 as amended (the "Act"), before considering whether a religious purpose trust "ought to be implied in the circumstances of this case". He framed the question as whether the Act, or any of the subsidiary rules created by the Diocese for the parish corporation, determined "entitlement to the parish property in question" (para 253). The Trial Judge was therefore expressly applying the second leg of his "neutral principles" approach.

87. He then noted, in paragraph 255, that parish corporations, while true corporate bodies, require diocesan consent for certain important steps, being incorporation, amendment of by-laws, and sale or other disposal of property. He said that the consent requirements, and the fact of incorporation under the Act, meant that they are intrinsically part of the Diocese and must be approached in that context.

88. The substance of the Trial Judge's analysis is found in paragraph 256. The Trial Judge starts from the proposition that it would be *ultra vires* for a parish (the Trial Judge does not distinguish between a parish and a parish corporation at this point) to unilaterally leave the Diocese. He says that the effect of the consent requirement in section 7(4)(a) is that parish property effectively remains within the Diocese unless there is diocesan consent to mortgage, sell or otherwise dispose of it. The Trial Judge then says that, when the parish properties are used for purposes related to ANiC, the parish corporations are using the properties outside the jurisdiction of the Diocese and the ACC, and this use requires consent under section 7(4)(a). Since diocesan consent has not been received, the parish properties "remain with the Diocese".

89. The reasoning of the Trial Judge was in error in two fundamental respects. First, his reading of the statute, in particular section 7(4)(a) cannot be supported on its language. Although the Trial Judge sought to apply "neutral principles", in substance he

imposed on the statute the policy conclusion he had already reached: that the corporate organization of the larger church should be respected. Second, the question of "entitlement" that the Trial Judge sought to answer from the statute, was entirely beside the point of whether there were trust obligations.

90. As to the first of these errors, no provision in the statute gives a general jurisdiction to the Diocese, let alone the ACC, with respect to parish property. The Trial Judge frames the beginning and end of his discussion in paragraph 256 by two issues: whether a parish can unilaterally leave the Diocese, and whether parish property "remains" with the Diocese. These statements reflect the Trial Judge's concern to respect the higher levels of church organization, but do not reflect any provisions in the statute, nor do they reflect with any legal precision the matters that are addressed by the statute. Indeed, since the parish corporations have not purported to "leave" the Diocese, and title to the parish properties remains in the parish corporations, these observations appear to have confused rather than assisted the analysis.

91. The core of the Trial Judge's "neutral principles" interpretation of the statute is his conclusion that parish corporations require Diocesan consent for the use of parish property for purposes related to ANiC. That, however, is a clear misreading of the subsection. Subsection 7(4)(a) grants the power:

> 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;

92. That subsection makes it very clear that the parish corporation has full power to acquire, manage and lease its own property, and only has to receive consent before it exercises its power to "mortgage, sell, or otherwise dispose of" the property. Notably, its unconditional authority expressly extends to leasing the property. The consent provision on its terms only applies to situations in which a parish corporation encumbers its property with a financial obligation (a mortgage) or alienates its property by sale or something similar. Examples of things analogous to sale are a gift or an option. Up until that point, however, the parish corporation has the authority to deal with

its property like any other owner, and this certainly extends to the management of the property and the control of the use of the property.

93. This makes sense in a church context where the parishes are responsible for raising funds to acquire property. If the members of the parish put up the funds, there is no reason why they should not acquire such property as they deem appropriate for their parish needs. In the context of a provision dealing with the power to acquire and manage property, and a consent requirement that is attached to very specific kinds of transactions with property, there was no basis for holding that the subsection imposes the consent requirement on a decision relating to the use of the property.

94. It is therefore submitted that the Trial Judge's conclusion as to the effect of section 7(4)(a) cannot be justified on the language of that subsection, nor is it in reality an application of "neutral principles of law".

RJ, paras. 253, 256, 257

95. The question of the jurisdiction of the Diocese (and the ACC) was important for the Trial Judge in his reading of the statute. However, the concept of "jurisdiction" in this sense was inconsistent with the express terms of the statute, which dealt with the powers of the parish corporation and the trustees, and was not founded on any statutory provisions. Interpreting the statute by reference to, the concept of "jurisdiction" appears to reflect the policy approach of favouring the higher-level corporate organization rather than being a secular interpretation of the statute

96. The concept of some general jurisdiction going beyond the consent requirement is inconsistent with section 7(4)(a) itself. The trustees, once incorporated, have the power to manage parish property. Under the statute, that is their jurisdiction. They also have the power to mortgage and sell the property. The Bishop is given a statutory jurisdiction to decide whether to consent to that mortgage, sale or other disposition. There is no statutory basis for imposing any other limit on the power (or "jurisdiction") of the parish corporation to deal with its property than that expressly stated in the subsection.

97. The references to an unspecified jurisdiction of the Diocese and the ACC are inconsistent with the Trial Judge's conclusion on the specific question of whether the Bishop had any power to remove and replace the trustees of a parish corporation. To answer that question, the Trial Judge examined the statute and concluded that the Bishop had no lawful power in this regard: see paragraphs 282 to 295. Since the statute does not contain any provisions giving a general jurisdiction to the Bishop or the ACC in regard to parish property, other than the specified powers to withhold consent, the Trial Judge should, consistently, have found that the Bishop, the Diocese and the ACC lacked "jurisdiction" over parish property.

98. The second fundamental error was the Trial Judge's conclusion that the scope of the consent requirement relieved the court of any need to address the trust issues. This conclusion betrayed a fundamental misunderstanding of the case put forward by the plaintiff trustees.

99. The Trial Judge in his Reasons set out a summary of the arguments in chief of the plaintiff trustees, and a summary of the arguments in defence and on the counterclaim by the Diocese (see paras. 172 to 246). The Trial Judge, however, did not, in those sections or elsewhere, discuss those arguments in any detailed way or express a view on their strengths and weaknesses. Indeed, it is apparent from the Reasons that these sections were not intended to serve any such function. The Trial Judge did not consider it necessary to summarize the Reply Argument of the plaintiff trustees, which he would have done if the intent of the section had been to evaluate the arguments. Unfortunately, having summarized without comment some of the main arguments before him, the Trial Judge in his analysis of the statute did not refer back to the content of those arguments, and instead embarked on an analysis which was non-responsive.

100. The question of "entitlement to property" is not an answer to the question as to whether a purpose trust attaches to the property. It was undisputed that, for all four parishes, legal title to the parish property was held by the respective parish corporations. That is only the start of the enquiry in equity, not the end of the enquiry.

The issue raised by the trustees for the court was whether that legal title was held subject to a charitable purpose trust, and if so what were the terms of that trust.

101. The nature of a charitable purpose trust is that the object is a purpose, rather than beneficiaries. As a matter of property law, there was no question of who held title, and “entitlement” in the normal sense was therefore not in issue. In dealing with the issue of trust law, “entitlement” is an irrelevant concept, since no person will be “entitled” other than the holder of legal title. A charitable purpose is not “entitled” to property. It was no part of the trust issue raised before the court to say that the congregations were “entitled” to the property. In asking whether the Act settled the question of entitlement to property”, therefore, the Trial Judge framed the question in a way which was irrelevant to the issue that he had to decide.

102. Further, even if the Diocese or the Anglican Church of Canada had certain jurisdiction over a parish or a parish corporation (the Trial Judge appeared to use the terms interchangeably), that would not exclude the existence of trust obligations.

103. The Trial Judge appeared to view the issue as being whether or not in some extended sense parish property could be “disposed” of by the trustees, or whether is could be said that the parish properties would be “leaving” or “outside” the Diocese. This language is not appropriate to the issue as to whether parish properties were subject to trust restrictions and whether a *cy-près* scheme would be appropriate in the circumstances.

(b) The statute both by its terms and context requires the implication of a charitable purpose

104. In summary, it is submitted that:

(a) The private Act provides for the creation of parish corporations, governed by trustees, that have the right to hold and manage their own property. That property is by definition not property of the Diocese. Section 7(4)(a) does not limit the management, leasing and use of the property by the parish corporation, and indeed gives the power of disposition, subject to the precondition of obtaining the required consent.

(b) The Act sets out the powers of the trustees of the parish corporations but does not state any objects or purposes. The legal and ecclesiastical context of the era in which the Act was passed strongly supports an interpretation of the Act that recognizes rather than excludes trust obligations on the trustees of the parish corporations.

(c) It makes no difference to the ultimate analysis in the present case whether the trustees are under trust obligations with respect to parish property, or whether charitable objects are implied into section 7 of the Act.

105. The use of a private statute to incorporate both for-profit and non-profit entities was not uncommon in 1893. In that year alone, the legislature passed 14 private acts incorporating railway, tramway, electricity and telephone companies, and five private acts incorporating non-profit entities (apart from the Act, the bodies concerned were the Columbia Methodist College (c. 49), the Roman Catholic Archbishop (c. 62), the Victoria Masonic Temple Association (c. 65) and Whetham College (c. 67). Indeed, although the *Benevolent Societies Act*, SBC 1891 c. 41 was enacted in 1891, it was not until 1898 that it was amended to provide for the incorporation of societies for religious purposes.

106. In 1893, the Diocese, including the Synod, was already operating as an Anglican religious organization, and it therefore appears that the Act was intended to provide a legal structure for an existing body. The provisions of the Act can only make sense in the context of the background of a continuing Anglican church body.

107. The provision for the creation of parish corporations is contained in one lengthy section of the Act, section 7, which is included in Exhibit B. Sections 7(1) to 7(3) provide the procedure for the creation of a parish corporation. The creation of the corporation is not automatic, but requires a decision by the parish. In this, as in its ultimate effect, the provision recognizes the reality of the life of an Anglican parish.

108. The procedure for the creation of the parish corporation is initiated, under section 7(1), by the parish officers signing a declaration that sets out, among other things, the intended corporate name of the parish, the names of those who are to be the first trustees, the mode in which the successor trustees are to be elected or appointed,

the role of the priest as a trustee, and such other particulars as the parish officers may think fit, "providing the same are not contrary or repugnant to law". This subsection therefore grants the incorporators of the parish considerable flexibility in the structure, provided certain fixed points are met.

109. Under section 7(2), the declaration must be consented to by the Executive Committee of the Synod and the Bishop, and signed by the incorporators before a Notary Public. Under section 7(3), the declaration is forwarded to the Registrar of Companies for registration, who issues a Certificate of Incorporation for the parish.

110. The introductory clause of subsection (4) makes it very clear that the parish corporations have a full corporate identity and existence. Indeed, the language used is broader than would typically be used. The persons signing the declaration are thenceforward "a body corporate and politic in fact and in name…and have all the powers, rights, and immunities vested by law in such body". The reference to "body politic" appears to be a recognition of the nature of parish leadership.

111. Section 7(4)(6) provides that the parish officers and others are not liable for the debts or other obligations of the parish corporation. The creation of the parish corporation therefore achieves a double insulation from liability: it insulates the Diocese from liability relating to the parish property, and it insulates the members of the parish.

112. Section 7 does not grant the Bishop or the Synod any jurisdiction or control over the parish corporations, beyond the three steps that require consent: the declaration of incorporation, the mortgage, sale or disposition of property, and the making or revision of the by-laws. Far from excluding the implication of objects or purposes, the Act requires such implication to have any meaningful operation.

113. As already discussed, the Act assumes the pre-existence and continuing existence of an Anglican church body. It did not seek to codify the character, teaching, forms or structures of an Anglican church. It was intended to create corporate vehicles to facilitate the operation of the Anglican Church, but it did not purport to be exhaustive. So, in approaching the interpretation of the Act, it is necessary to recognize that the

drafters of the legislation expected many Anglican matters to be implied into the limited structure given in the legislation. The statute does not define any of the key organizational terms, such as bishop, diocese, synod, parish, rector or incumbent, church wardens, vestrymen or sidesmen.

114. In the case of the parish corporations provided for under Section 7, there is a specific legal reason why it is necessary to make certain implications in the statute. The parish corporations, like Synod, were created before modern corporate legislation giving corporate bodies the powers of a natural person. Instead, the corporations were given specific powers. The issue of whether a statutory corporation exceeds such powers turns on its objects. Typically, those objects are stated for such a corporation. For example, looking at contemporary private statutes, the *Victoria Masonic Temple (Incorporation) Act*, SBC 1893 c. 65, set out the objects of the association in a schedule, incorporated into section 2 of the statute, and the *Whetham College (Incorporation) Act*, SBC 1893 c. 67 set out the objects of the college in section 27.

115. Section 7 does not contain any statement of objects, nor does it require any such statement as part of the declaration creating a parish corporation. In the result, it is necessary to imply the corporate objects.

116. The legal, factual and church background against which the Act was passed, require the conclusion that the intention was that there be trust obligations. This conclusion is supported by the language of the Act itself.

117. Section 7 itself contemplates the powers of the parish corporation lying with trustees. The declaration must set out “the names of those who are to be the first trustees,” and “the mode in which their successors are to be elected or appointed.” The rector or other priest in charge is ex officio a trustee. So the statute itself contemplates that the persons in charge are, for the life of the corporation, to be “trustees”: Section 7(1)(b), (c) and (d). There is no reason why the statute should have required an office of trustee unless it was contemplated that property would be held under trust obligations.

118. Further, this is consistent with the expectation under the Act that the Synod might act as a trustee. Section 2 provides for the transfer of any property held in trust by the Bishop to the Synod, to be held in trust by it.

119. Section 2 recognized the likelihood that persons already held property on trust for Anglican purposes, and it expressly provided for such trust property to be transferred to Synod, to be held on the same trusts. This section reflects, in part, the common Anglican understanding that properties were held on trust in the Church. This is reinforced by section 3, which empowers Synod to hold property "for or in favour of the uses or purposes of the Synod or in trust," and with section 3A, which deals with the investment and reinvestment of funds, including funds held in trust.

120. As already set out, the contemporary legal background at the time of the passage of the Act included the recognition by Canadian and British courts of religious purpose trusts. Further, the Anglican context included numerous examples of the recognition of church property being held on trust, discussed below in the section on the trust issue. The legitimate expectation of members of the Anglican Church in Canada, in the year that the Solemn Declaration was adopted, with its enduring commitment to Anglican doctrine, liturgy and structures, favoured the preservation of such purposes through the use of trusts.

121. A trust obligation on the parish corporations is also consistent with typical contemporary structures for non-profit organizations at the end of the 19th Century. For example, the *Benevolent Societies Act*, *supra*, provided for the societies to be governed by either trustees or managing officers (section 4(1)). That statute also contemplated that branches of an incorporated society might also become "a separate and distinct corporation", with the consent of the parent society (section 6). Section 8 of that statute provided that the members of any society or branch could acquire and hold property for the use of the members of the society, or of the branch society. These contemporary provisions are markedly parallel to the provisions in the Act, the only significant difference being that two additional powers (disposal of property and amendment of bylaws) required diocesan approval before their exercise. The same trust or trust-like

language can be seen in many other instances. For example, the *Whetham College Act*, *supra*, provided in sections 5 to 9 for the College to be governed by a Board of Trustees.

122. With respect the Trial Judge's approach is particularly inappropriate and ahistorical in relation to a 19th century statute passed when the expectations of the participants would have been that the Courts would assess their intent in light of Anglo-Canadian and not U.S. principles of law.

123. There is no question that the parish corporations created under the Act are charitable corporations, and therefore fall within the general jurisdiction of the Court over charities. For the reasons given above, all the indicia are that the structure contemplated such corporations holding parish property on trust. However, if the view is preferred that the statute contemplated the property being held for the unexpressed general objects of the corporations, without any general purpose trusts, then the jurisprudence establishes that the Court, in a supervisory jurisdiction, will apply principles and remedies analogous to those that it will use in the case of purpose trusts, and this extends to a *cy-près* remedy.

> *Liverpool and District Hospital for Disease of the Heart v. Attorney General* [1981] 1 Ch 193 at 214*; Re Public Trustee and Toronto Humane Society et al.,* below at 242-244
>
> *Tudor on Charities*, 9th ed. (Thomson, Sweet & Maxwell, 2003) at 371

PURPOSE TRUST ISSUES

Legal Context of the Trust Claim

124. The plaintiff trustees sought the advice and guidance of the Court with respect to these questions:

1) Did the Bishop have the power to remove and replace the trustees of the parish corporations, as he had purported to do? The Diocese has not appealed from the Trial Judge's conclusion that the Bishop did not have this power.

2) Were the assets of the parish corporation held in trust?

3) If the parish assets were held in trust, what were the terms of that trust?

4) Was the performance of those trusts impracticable in light of the fundamental division among Anglicans that has taken place, in particular in the Diocese?

5) If the performance of the trust was not practicable, should a *cy-près* scheme be ordered?

125. The fundamental relief claimed by the plaintiff trustees on behalf of their congregations was the ordering of a *cy-près* scheme to permit the continued use and benefit of the four parish Corporations' assets for Anglican ministry and worship outside the control and discipline of the Bishop and the Diocese.

126. The plaintiff trustees did not ask the Court to determine that any party was in breach of trust, and did not require the Court to find that the parish corporations were entitled to full legal and beneficial interest in the parish properties. The advice of the Court as to the terms of the trust was for the purpose of assessing whether an occasion of impracticability in the proper sense arose so as to justify a *cy-près* scheme.

127. The activity of the courts in relation to religious purpose trusts is an aspect of the courts' jurisdiction over charities. The Court has a broad inherent jurisdiction in charitable matters exercisable by virtue of its special position in the law of charities. The jurisdiction arises because purpose trusts are in principle invalid at common law as there is no particular beneficiary entitled to be called upon to enforce the trust, and there are problems with the uncertainty of terms and (formerly) the rule against perpetuities. The courts of equity developed principles to preserve trusts with no specified beneficiary when those purposes were charitable, for the obvious public purpose that charitable intentions should not being defeated. That jurisdiction has been accepted in British Columbia.

> *Tudor on Charities*, *supra* at 371; *Re Public Trustee and Toronto Humane* Society, *supra* at 244; *Rowland v. Vancouver College Ltd.*, 2000 BCSC 1221 at para. 49, aff'd 2001 BCCA 527

128. Well-established Anglo-Canadian jurisprudence has viewed issues over the property of religious organizations as resolved by the principles of trusts law. The

plaintiff trustees rely on the presumption that the property of a religious institution is subject to a religious purpose trust; that the terms of such a trust are established by a historical enquiry into the distinctive character of the particular religious institution at the date of its establishment or at the date property was donated; and that since such trusts are matters of civil law, the Court will engage in the necessary enquiry into the distinctive character of an institution. Where the issue is the property of the organization, there is no special "religious" area into which the court cannot venture. Indeed, one of the earliest examples of a generous and purposive interpretation of a bequest was the conclusion, before the Reformation, that gift of property "to the church" was held to be intended for the parish.

> Gareth Jones, *History of the Law of Charity*, 1532-1827 (London, Cambridge University Press, 1969), p. 5

129. Under its inherent jurisdiction, the court can deal with both the validity of a charitable trust and matters arising in the course of its enforcement and the administration of trust property. The inherent jurisdiction of the court over charitable purpose trusts also gives the court the jurisdiction to make schemes related to the administration of charitable trust property. Such schemes may include using an administrative scheme-making function to provide the mechanics for a trust, which initially has none, or to adjust the mechanics of a trust after the trust property has vested to ensure the purposes are carried out. The court may also invoke its scheme-making jurisdiction to rescue a trust that would otherwise fail under the principle of *cy-près* by amending the terms of the trust to give effect to the general charitable intentions.

> *Tudor*, *supra* at 372; U.K., Charitable Trusts Committee, "Report of the Committee on the Law and Practice relating to Charitable Trusts", Cmd. 8710 (1952) at 20 ("Charitable Trusts Report")

130. A charitable purpose trust does not exist for the benefit of a specific beneficiary, but for the benefit of a purpose which is found to be "charitable". Under the law of charities, an activity for the purpose of the "advancement of religion" will be presumed to have a charitable purpose unless the contrary is shown.

> *Re Johnston Estate*, 2008 BCSC 1185 at para. 17; *Waters' Law of Trusts in Canada*, 3rd ed. (Thomson Carswell, 2005) at 625, 679-80

131. The law of charitable purpose trusts has been given particular expression in the context of religious organizations. M.H. Ogilvie, in *Religious Institutions and the Law in Canada* (2nd ed.), summarizes the principle that the property of religious institutions is held in trust for the original purposes of such institutions as follows:

> It is a well-settled principle of law that the property of a religious institution must be held and applied to the original purposes for which that institution was founded, that is, for the original "trust." Such property cannot be directed to other purposes by a mere majority of members, and where a majority decides upon a diversion, the property remains in trust for the dissenting minority (even one person) who adheres to the original trust for which the property was given.
>
> *Supra* at 293-294

132. The jurisprudence on religious purpose trusts was developed in a number of British authorities, most fully in the decision of the House of Lords in the *Free Church* case, *supra*.

133. The jurisprudence on religious purpose trusts has been followed many times in Canada: see, for example, *Anderson v. Gislason* (1920) 53 D.L.R. 491 (Man. C.A.). The jurisprudence was followed in British Columbia in *Chong v. Lee*, Hinds J. set out the principle that church property is held on trust for its original religious purposes as follows:

> Where a number of people group together to establish a Christian church and it is formed for the purpose of promoting certain defined doctrines of religious faith then expressed, property which the Church acquires is impressed with a trust to carry out that purpose, and a majority of the congregation cannot divert the property to uses inconsistent with such defined religious doctrines against the opposition of a minority of the congregation, however small such minority may be.
>
> *Chong v. Lee*, *supra* at 17; see also *Hofer* v. *Hofer*, *supra*

134. The distinctive characteristics, or "defined doctrines", of the religious organization are identified by the Court by a process of historical inquiry, directed In

particular to the character of the church at the time of its formation. In *Chong v. Lee*, Hinds J. summarized the sources recognised by the authorities as including: the corporate articles or constitution of the church adopted when it was established; any relevant Act; The Declaration issued at the time of its establishment; the wording of the conveyance respecting the property.

> *Chong v. Lee*, *supra* at 14

135. The court can also have regard to the prescriptive usage of the Church in order to determine the nature of the original institution in terms of the faith, creed, doctrines, forms of worship and discipline as then established, to find the original object of the trust.

> *Attorney-General. v. Pearson*, (1817), 3 Mer. 353; *Attorney-General v. Pearson* (1835), 7 Sim. 290; *Bliss v. The Rector, Churchwardens and Vestry of Christ Church, Fredericton* (1887), Tru. 314 (N.B.Q.B.)

136. If the court must inquire into the nature of doctrine to determine the nature of the trusts underlying church property, the court should not be concerned with the soundness or unsoundness of a particular doctrine, or what is or is not important in the views held. The question is what views were held and what the founders of the trust thought important. In *Anderson v. Gislason*, Cameron J.A. referred to the *Free Church* case at page 493-494:

> Lord Halsbury, in his judgment, [1904] A.C. at 613, makes some instructive and authoritative remarks:
>
> > Now, in the controversy which has arisen, it is to be remembered that a Court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held — a question which, of course, does not arise here — a Court has simply to ascertain what was the original purpose of the trust.
> >
> > My Lords, I do not think we have any right to speculate as to what is or is not important in the views held. <u>The question is what were, in fact, the views held and what the founders of the trust thought important.</u>

[Emphasis added]

137. Those who control the religious institution do not have the power to alter the original purpose of the trust and apply the property to the new purposes. Lord Eldon, in the oft-cited case of *Attorney-General v. Pearson* (1817), said that if the Court found:

> …that the institution was established for the express purpose if (sic) such form of religious worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members, "We have changed our opinions – and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship; prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions." In such a case, therefore, I apprehend – considering it as settled by the authority of that I have already referred to – that, where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to, as the guide for the decision of the Court – and that, to refer to any other criterion – as to the sense of the existing majority, – would be to make a new institution, which is altogether beyond the reach, and inconsistent with the duties and character of this Court.
>
> [Emphasis added]

Attorney-General v. Pearson (1817), *supra* at 400-401

138. In the *Free Church* case, Lord James stated with respect to preserving the essential identity of a church:

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

Free Church, *supra* at 664, per Lord James

139. It has been accepted by the courts that those in charge of governance of a religious institution may have the jurisdiction to vary or alter the constitution and

discipline of the institution on a matter that is not of fundamental importance, such as the manner of conducting a meeting for worship, if such jurisdiction is afforded in the governing documents of the institution. However, there can be no substantial departure from the faith and doctrines of the institution such that the identity of the religious institution as carrying out the purpose of the underlying trusts is destroyed. In *Dorland v. Jones*, the court found that by the terms of the trust, the Yearly Meeting of Quakers had the authority to amend the discipline of that Society; however, any amendments had not been such that departed from the fundamental principles of the society or its discipline and form of worship to cause them to be no longer members of the society, and lose the benefit of the trust property.

Dorland v. Jones, [1886] O.J. No. 13 (C.A.), aff'd (1888), 14 S.C.R. 39

140. As discussed more fully below, the authorities are fully congruent with the typical Anglican approach to property matters in Canada. Although there may be no express trust documents, it has been commonly understood that church property is generally held on an implied trust for the purposes of Anglican ministry and not owned outright, or held in trust for a particular beneficiary, be it a congregation, a Bishop, a Diocese or the ACC.

141. The legal principles relating to an implied trust have been applied in Canada to a case concerning an Anglican church. In *Bliss v. Christ Church,* an issue arose as to the liturgical practices of the Rector – that he preached and taught doctrine opposed to the doctrine of the Church of England. Palmer J. found that the parish property was not a gift to the parish corporation, but was held on a trust for the benefit of that church as it existed at the time of endowment, in connection with the Church of England and adhering to its faith, creed, doctrine and discipline. Palmer J. framed the question this way:

> Has Christ Church, in the Parish of Fredericton, the same standard of faith and form of worship as the Church of England had when this gift was made, and, if so, have the persons who have the use of this property carried on the work of such on these principles? If they have, they have a right to this property; if not, they are taking what does not belong to them.

[Emphasis added]

Bliss v. Christ Church, Fredericton, supra at 323-324

142. The Plaintiffs' concerns respecting the Bishop's actions are constitutional in their character and susceptible to a *Free Church* analysis that would require an interpretation of the Constitution of the ACC and whether the views of the majority that the Solemn Declaration is purely of historical interest can be squared with the constitutional text itself. The Trial Judge did not engage that enquiry despite his reference to the *Free Church* cases.

143. The Plaintiffs say this is a case of church division where no useful purpose would be had in obtaining a civil court's judgment interpretation of a constitutional restraint where division on the basis of sincere and important differences of doctrine and practise has in fact happened. The plaintiff trustees' contention is that in the case of a division arising from circumstances which make it plain the original trust was no longer practicable the Court can and should take an agnostic view of the dispute itself. There is no requirement in the present case to decide whether the doctrinal beliefs held by either the plaintiffs or the defendants are true to Anglicanism or not. Both parties contend their views are faithful to Anglicanism and wish to remain in communion with other Anglicans. What the Court can and should find is that a division has occurred between two groups of Anglicans within the Anglican Church, that the division is rooted in doctrine, and that it is deep and in the foreseeable future irreconcilable. The Court need only find that the causes of the division was not contemplated within the original and enduring terms of the trust. It is submitted this is so beyond question in the present case. Once the proper legal principles are identified this case is a simple matter of a trust proving impracticable and requiring the assistance of the Court to adjust it as necessary and just.

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.

144. At paragraphs 258 to 281 of the Reasons, the Trial Judge, in an alternative finding, said that he would have found that the parish properties were held on a trust for Anglican ministry as defined as ACC. It is submitted this conclusion was

in large measure pre-determined by the "neutral principles" approach adopted by the Trial Judge. The Trial Judge set out trust terms that expressly gave control to the institution to define its own purposes, an approach that is inconsistent with the Anglo-Canadian religious purpose trust jurisprudence. The Trial Judge failed to consider the objective evidence appropriate to the identification of trust objects. Further, the Trial Judge's bases for rejecting the terms of trust suggested by the plaintiff trustees betray a fundamental misapprehension as to the case before him, since the Trial Judge approached the question as being whether a breach of trust of such terms could be established. In fact, the case for the plaintiffs was founded on the approach that it was not necessary for the court to consider that one party in the divided church was in the wrong or in breach of trust. It is submitted that the Trial Judge should simply have found that the parish properties were held for the purpose of Anglican ministry.

145. The Plaintiffs had advanced as the formulation of the purpose trust that it was for "traditional, orthodox" Anglican ministry in large part to distinguish their position from that taken by the defence which contended that any trust was to be self-defined. The Trial Judge reviews these qualifications in Para. 259 and expresses doubt as to whether these were "necessarily viable terms of trust." In doing so he committed two errors. Firstly, he overlooked the premise that purpose trusts do not need to meet the three "certainties" of other trusts: they may well be vague and unenforceable as traditional trusts. Indeed that is in part why the jurisdiction of *cy-près* exists. Secondly, he failed to assess whether those terms accurately summarised the DNA of Anglicanism disclosed in the constitution of the ACC itself. Nothing turns in the present appeal on fine points of expression: the fundamental issue is whether the properties at issue were dedicated to a purpose trust for Anglican ministry.

(a) In defining a trust for the purpose of Anglican ministry as defined by the ACC, the Trial Judge erred in misapprehending the character of a purpose trust and the role of the Court

146. The Trial Judge set out at paragraphs 273-281 of the Reasons the bases on which he would have concluded, if necessary, that the parish properties were held on trust "for Anglican ministry as defined by the ACC". It is submitted that it is apparent

from the four reasons given by the Trial Judge that his conclusion was not based on the kind of objective evidence appropriate for the identification of trust terms. Further, the trust terms preferred by the Trial Judge are inconsistent with the approach in the religious purpose trust cases to imply a trust over the property of religious institutions.

147. The first of the four reasons was that the Anglican Church is highly structured "with decision-making institutions and express spheres of authority" and that it was therefore "preferable" for the Court to defer to bodies within that structure as to what constituted Anglican ministry.

148. In relying on this first (and apparently primary) ground, the Trial Judge was in fundamental error as to the proper approach to determining the terms of a trust. The Trial Judge did not refer to either the jurisprudential or historical context for the creation of the Anglican Church of Canada or the Diocese, and the Trial Judge did not conduct an assessment of whether Anglican character was entrenched within that constitution. Further, it is fundamentally inconsistent with the concept of a purpose trust to defer to the religious institution to define from time to time as it wishes what are the purposes of the trust. In light of the religious trust cases, it is an abdication of the court's supervisory role to allow the purpose to be subject to the will of the majority or the hierarchy within an organization. Further, as discussed above, the Trial Judge erred in his fundamental policy choice, primarily deprived from U.S. jurisprudence, to show deference to the decision-making bodies of a hierarchical organization.

149. The Trial Judge's framing of the terms of trust, therefore, was driven by the first leg of his "neutral principles" approach. That approach required court deference to the decision-making tribunals of a hierarchical religious institution. The Trial Judge's first ground consists of no more than the identification that the Anglican church is such an institution, and that therefore any trust would on this approach have to allow the organization to define its own religious purposes. The form of trust chosen by the Trial Judge permits this and was chosen for this reason. However, it is in no way grounded in the evidence, the legitimate expectations of the parties, or the religious and

jurisprudential context, but instead represents a policy choice made by the Trial Judge as of the date of judgment.

150. The second reason given by the Trial Judge for the terms of trust he preferred was that s. 2 of the private Act permitted persons who held property on trust "for the uses…of the Anglican Church of Canada" to transfer such property to the Synod to be held "in trust for the same purposes". The Trial Judge took from this that this section expressed a trust in general terms, being "for the use of the ACC", and therefore the parish corporations should hold property on terms that were consistent with this.

151. It is submitted that the phrase "for the uses of the Anglican Church of Canada" properly understood supports the position of the plaintiff trustees. It confirms the expectation that Anglican property would be held on a purpose trust. The Trial Judge's reliance on this section in effect ignores the phrase "for the uses of" and treats the trust as essentially a trust for a person (the ACC) rather than a trust for purposes.

152. The third reason given by the Trial Judge is that the 1962 service for consecration of a church building contemplates that the church building will be set apart for the rites and disciplines of the ACC. The present issue, however, is not settled by the form of words used by Anglicans in the 1960's. In the context of that, or indeed an earlier time, Anglicans would readily have agreed that churches should be used for worship using the ACC Book of Common Prayer. That represented an era of common Anglican practice within Canada. That reference does not determine that a trust must be defined by the organization.

153. Finally, the Trial Judge refers to a recent document produced in the context of the global Anglican Communion, a document entitled *The Principles of Canon Law Common to the Churches of the Anglican Communion*. In relying on this document as a sources of Anglican practice, the Trial Judge acknowledged that Anglican characteristics have a global context, and that an examination of Anglican character cannot be narrowly restricted, as he did elsewhere, to Anglican entities within Canada.

154. *The Principles of Canon Law* was, as Bishop Ferris testified, tabled at the 2008 Lambeth Conference as a draft discussion paper but was not endorsed as having any official status. The sections cited by the Trial Judge are consistent with the body of evidence that Anglicans generally consider property to be held on trust for the purposes of mission and ministry.

> Exhibit 4, Transcript of Cross-Examination on Affidvait of Ronald Ferris, page 36, l. 15 – page 37, l. 24

(b) The Trial Judge wrongly characterized the issue as being breach of trust, rather than an occasion of impracticability giving rise to the cy-près question

155. The case of the plaintiff trustees in asking the Court to establish a *cy-près* scheme was not dependent on a finding that the trust had been breached by the Bishop or Diocese. The question of impracticability turned on the change in Anglican circumstances, resulting in a divided church, each part of which sincerely considers itself an authentic expression of Anglicanism.

156. The Trial Judge disclosed that he considered the issue as one of breach of trust in paras. 259, 263, 270 and 272 and throughout his discussion of the religious purposes cases in paras. 262-269. In para. 270 he states that the "core" of the plaintiffs' case was that there had been a "breach of the trust on which they say that parish properties are held."

157. 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.

158. The Trial Judge's focus on "breach of trust" indicates another fundamental misunderstanding of the case put forward by the plaintiff trustees. The case concerns the property of the four parish corporations. Any trust obligations lie on the parish corporations, or on the trustees of those corporations. The "breaches" of trust considered by the Trial Judge, however, all related to action by the Bishop or the Diocese, who, on any analysis, do not owe trust obligations with respect to property held by the parish corporations.

159. The three reasons the Trial Judge gave in paragraphs 260 to 272 for saying that there had not been a breach of the trust terms proposed by the plaintiffs are again a direct product of the first leg of the Trial Judge's "neutral principles" approach, being founded on deference to hierarchical decision-making, without addressing the relevant constitutional documents or facts. At paragraph 260, the Trial Judge said that the ACC was still part of the Anglican Communion. This failed, however, to address the concern advanced by the plaintiffs, which was that there had been in fact a division within the wider Anglican world, such that the mutual communion that the Solemn Declaration wished to preserve with all Anglicans throughout the world had been broken. The evidence established that a majority of the Anglicans throughout the world belonged to provinces that considered they were in a state of broken or impaired communion with the Diocese. The evidence also established that the majority of Anglicans throughout the world remained in communion with the congregations represented by the plaintiffs, and that the episcopal leadership of ANiC were part of the House of Bishops of one of the provinces within the Anglican Communion. Further, the members of the Network had been recognized as Anglicans with whom he was in communion by the Archbishop of Canterbury in 2005, and in his affidavit Bishop Anderson, one of the Anglican bishops within British Columbia, also affirmed his recognition of the plaintiffs as fully Anglican.

160. The second reason given by the Trial Judge, at paragraph 261, was that General Synod had jurisdiction to interpret the constitution of the church, including the Solemn Declaration, and that any bishop has control over liturgy. This conclusion is not supported by the constitutional documents themselves. The Solemn Declaration is effectively entrenched within the ACC constitution, and on any fair reading requires the church to maintain the principles set out in it from generation to generation. The only power given to General Synod is the limited power of the "definition" doctrine in harmony with the Solemn Declaration. "Definition" of doctrine, as Bishop Ferris testified, refers to the clarification of the expression of doctrine, not the changing of doctrine. This provision in fact operates as a restraint on General Synod, in that its powers are subject to the terms of the Solemn Declaration, rather than the expression of any exclusive jurisdiction over the interpretation of the Solemn Declaration.

161. The third reason given by the Trial Judge, at paragraphs 271 to 272, was that the doctrinal division between the parties was not over a matter of "core" doctrine so as to fit within the religious purpose trust cases. However, the Trial Judge conducted no independent assessment of the importance of the doctrinal division, or indeed of the fact of the division, but again deferred to what he considers to be the effect of a General Synod resolution to the effect that the doctrinal issue was "not a matter of core doctrine in the sense of being credal". Even on a deference approach, the Trial Judge fell into error with respect to this resolution, in two ways. First, it does not answer the question as to whether a characteristic of a church is to be regarded as fundamental to ask whether it comes in one of the universal Christian creeds and so is "credal". The characteristics that were found to be fundamental in the *Free Church* case, for example, were not credal, in that they were a particular interpretation of the Westminster Confession and the view that a national church should be established, in the sense of being part of the civil structure. In the case of Anglicanism, the office of bishop is a fundamental defining characteristic, but is not a credal matter. The Trial Judge also relied on resolution A186 of General Synod, but misquotes this resolution both in paragraph 137 and 272. The resolution in fact said that the blessing "is not in conflict with the core doctrine (in the sense of being creedal) of the Anglican Church of

Canada", and therefore goes no further than the other resolution. Second, there is no indication whatsoever that General Synod in any way turned its mind to or determined that the resolution was consistent with the Solemn Declaration. Indeed, the evidence at trial was that the Bishop and many who agreed with him within the ACC regarded the Solemn Declaration as only of historical relevance and not as a current principle, whereas the plaintiffs and those associated with them affirmed its constitutional character. The Trial Judge therefore found by mere implication a decision of the church hierarchy on a point which, both on the face of the resolution and on the surrounding circumstances, was not in fact addressed.

Exhibit 8B, Tab 5, Michael Pollesel #1, Ex. C at pp. 263

162. The evidence before the Trial Judge was that the Diocese had proceeded with an innovation in advance of any national or international approval. Indeed, there has as yet been no definitive action by the national church, whereas the international leadership has condemned the departure from the standard of teaching of the worldwide Anglican Church. Even on a "neutral principles" approach, the Trial Judge should have found that the issues before him had not been determined by the church hierarchy.

163. Further, whether the trust was framed as being for Anglican ministry as defined by the ACC, as being for traditional, orthodox Anglican ministry, or simply framed as a trust for the purposes of Anglican ministry (as submitted here), the Trial Judge should have continued on to consider the *cy-près* issue. However the trust was framed, the issue of impracticability arose and required to be addressed.

164. On this appeal, the plaintiffs propose that the form of trust consistent with the evidence is a trust for the purposes of Anglican ministry. This is supported by three considerations.

165. First, there was abundant evidence at trial that Anglicans typically regard parish properties as being held on trust. In part 1 of this factum, reference is made to the statements by the national church; the Diocese of Huron; and the Bishop. Indeed

the Diocese, in land title documents, represented at the time of the incorporation of the parish corporation of St. Matthews that the Diocese held title to the church property in trust for the parish. This approach is consistent with the historical background concerning trustees and non-profit organizations, referenced in the section dealing with the private Act, and in the jurisprudential background of the religious purpose trust cases.

166. Second, the evidence, on balance, suggests that in the Canadian tradition the trust obligations flowed downwards, in the sense that a higher level of the church holds property for the purpose of the parish, not vice versa. The situation in the former Diocese of Cariboo is a clear example. That diocese dissolved itself in face of liabilities arising out of a court judgment, but took the position that all the parish properties, which were held in the name of the diocese were held in trust for the particular parishes. On this basis, all parish properties were transferred by the diocese to a newly incorporated society, and the collective parishes continued their Anglican life as the "Anglican Parishes of the Central Interior." (Part 1, para. 26) In this context, giving the power of definition to the national church hierarchy is inappropriate.

167. Third, for the reasons already given, it is inconsistent with the religious purpose trust jurisprudence to give the institution control over the definition of the trust. The appropriate framing of the trust terms is therefore to eliminate the phrase "as defined by the ACC".

CY-PRÈS **RELIEF**

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 the trust exclusively within the ACC and that a *cy-près* scheme was just and necessary.

168. In Canadian law the court's jurisdiction over charity has always included the remedial power to revise a trust that has proven impracticable. In this sense charitable trusts are treated differently than all other trusts in that the Court will not only enforce the trust's terms but will act to rescue a trust by reforming its terms or replacing

its trustees where the purpose of the trust would be otherwise frustrated by impossibility or impractibility.

169. The Plaintiffs' case presented at trial was that the fundamental division made out in the evidence rendered the performance of the trust of Anglican ministry impracticable. This impractibility is evident whether viewed from the perspective of irresolvable differences of doctrine and practice, or simply from the fact that sincere bodies of believers after years of struggle to persuade one another found they could no longer coexist within one church polity. It is submitted that the proper approach in the face of such an unprecedented division is not the application of the *Free Church* analysis of determining which party within the church was right as to whether the Bishop's innovations were consistent with the Solemn Declaration and the trust for Anglican ministry.

170. In accepting that the Chun bequest could be the subject of a *cy-près* order in favour of the Good Shepherd congregation the Trial Judge recognised that the Plaintiffs remain Anglicans despite their disagreement with the Bishop. Indeed, the text of the resolutions passed by the dissenting parishes are eloquent pleas of bodies of believers earnestly seeking to remain Anglican not only according to their own lights but within an Anglican church structure recognised by the international Anglican communion: Exhibit D.

171. It is submitted this approach, taken by the English Court of Appeal in analogous circumstances in *Varsani v. Jesani, supra*, is truly and appropriately neutral to the religious dispute and avoids the court making findings which would unnecessarily exclude one group from the benefit of trust property intended to benefit all. In that case a Hindu sect had divided over the character of the successor to the founder. The Trial Judge held on limited material that both parties remained faithful adherents of the sect despite their differences and that accordingly he had jurisdiction to make a *cy-près* order dividing the assets between the two groups based on impracticability: *supra*, p. 227 G- p. 228 B. On appeal the Court of Appeal upheld the result but relied on the broader statutory terms permitted by the *Charities Act, 1993*. Since that decision an

application for a *cy-près* in the UK must go to the charity commissioners but support for such a scheme in the case of a church division has continued: *Dean v. Burne* [2009] EWHC 1250 (Ch), [2009] All E.R. (D) 234.

The scope of the *cy-près* doctrine

172. The doctrine of *cy-près* developed over the course of centuries from the practice of the ecclesiastical courts and later the Court of Chancery. The Ecclesiastical Courts, in effect, conferred three related privileges on charitable trusts and only charitable trusts: the privilege of exemption from the rule against perpetuities in relation to holding of property, the privilege of being a valid trust despite having imprecise terms, and the privilege of obtaining fresh objects if those laid down by the founder were at the outset, or later became, incapable of execution. The doctrine of *cy-près* was developed in order that these three related privileges might not be defeated. It was essentially a device for keeping in existence a gift to charity so that it may continue as a public benefit from generation to generation, while abiding by the principle that the founder's or testator's wishes must be respected and must not be disregarded.

Charitable Trusts Report, *supra* at 16-17, 71

173. Once it is ascertained that the object of a trust is charitable, then it will not fail for uncertainty, and the court may invoke its inherent jurisdiction to compose a *cy-près* scheme, whereby it removes any uncertainty and the objects of the trust are made operative.

Waters, *supra* at 762

174. The common law *cy-près* power is an important element of the court's inherent jurisdiction over charitable purpose trusts. In the case of a charitable purpose trust that was initially achievable, the *cy-près* jurisdiction of the court is triggered where the applicants can establish that due to an event or change in circumstances, the general charitable intention of a trust can no longer be carried into practical effect. The event or circumstance is sometimes referred to as a *cy-près* occasion. In *Re Stillman*

Estate, Mr. Justice Cullity adopted the description of the essence of the *cy-près* doctrine in the second edition of Picarda, *The Law Relating to Charities* as follows:

> It has been said that:
>
> … the essence of the [cy pres] doctrine is that is the new purposes should be "as near as possible" to the original purposes. … the doctrine of cy pres is one of approximation. The court must search out and ascertain the intention of the donor or testator and must exercise discretion in awarding the fund in question to such charitable institution which can most nearly give effect to that intention. Under no circumstances can the judgment of the court capriciously be substituted for that of the donor or testator. The judge must not substitute his own conception of what would be best for what can be assumed to be the testator's intention. (Picarda, The Law and Practice Relating to Charities (2nd edition, 1995), at pages 371-2)
>
> [Emphasis added]
>
> *Re Stillman Estate* (2003), 5 E.T.R. (3d) 260 (Ont. S.C.), [2003] O.J. No. 5381 (QL) at paras. 28, 29. See also, Hubert Picarda, *The Law Relating to Charities*, 2nd ed. (London: Butterworths, 1995) at 279; *Lapointe v. Ontario (Public Trustee)*, [1993] O.J. No. 2661 at para. 13

175. The legal test for determining a *cy-près* occasion in respect of a charitable purpose trust due to a supervening event is not in dispute. First, the applicants must show that to carry out the original charitable purpose according to its existing terms would be impracticable in the circumstances. Impracticability does not mean "absolute impracticability", and arises where adherence to a subject or condition of the trust would defeat the carrying out the dominant charitable intention of the trust.

> *Re Dominion Students' Hall*, [1947] Ch. 183 at 186; *Re Stillman Estate*, *supra* at para. 17; See also Albert J. McLean, *Deviation from the Terms of a Trust: A Study in English and United States Law* (Doctrinal dissertation, University of Cambridge, 1961) pp. 351-52

176. A dominant charitable intention may be said to be a paramount intention on the part of a donor or founder to effect some charitable purpose which the court can find a method of putting into operation notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his paramount intention. In *Re Lysaght*, a College refused to administer a scholarship unless its

condition of excluding Jews and Catholics was excluded from the scheme. Justice Buckley found that the trust was therefore impracticable to perform. He therefore saved the trust by ordering a *cy-près* scheme removing the offensive restriction from the scholarship fund so that the testator's intention of having the College administer the scholarship to students could be performed.

> *Re Lysaght*, [1966] Ch. 191; see also, *UBC v. British Columbia (Attorney General)*, 2008 BCCA 367
>
> *Canada Trust Co. v. Ontario (Human Rights Commission)* [1990] O.J. No. 615 (C.A.); *Re Lysagh*t, *supra* at 207

177. If the fulfillment of the charitable purpose has become impracticable and there is no reasonable possibility of future fulfillment, then a *cy-près* occasion has occurred and the court's common law *cy-près* power allows it to rescue the charitable purpose trust, which purposes would otherwise be defeated, by directing the application of the trust property to a new purpose which falls within, or as near as possible, the original charitable intention.

> *Varsani v. Jesani*, *supra*, at para. 14; *Lapointe*, *supra* at paras. 16-19; see also *Canada Trust Co.*, *supra* at para. 43

178. Courts have exercised their *cy-près* power to save a bequest to a religious institution or for other charitable purposes, which can no longer be carried out or which the religious institution prefers not to carry out. In that case, the court will, if necessary, seek out similar fitting objects, so that the intended religious institution is not disappointed, and make a *cy-près* application of the funds to that charitable object.

> Ogilvie, *supra* at 289

179. For example, in *Re Robinson* a fund was bequeathed for the endowment of a church of an evangelical character to which conditions were attached, including what was called an "abiding" condition that a black gown should be worn in the pulpit unless this should become illegal. The evidence showed that by 1923 wearing a black gown would be detrimental to the teaching and practice of evangelical doctrines and services in the church in question. Justice Lawrence held that the original condition of

wearing a black gown in the pulpit was impracticable because it would be contrary to the wishes of the people attending services and would have an injurious effect upon the evangelical teaching the testatrix desired to promote, first and foremost. Therefore, the judge sanctioned a scheme to dispense with the non-essential condition to give effect to the original purpose.

Re Robinson, [1923] 2 Ch. 332 at 336

180. These cases demonstrate that the opposition of persons to the proosed or ongoing performance of the trust may establish its impractibility. Practical considerations are not alien to an assessment of impractibility. In the present case the profound fracture of the Anglican communion here and abroad constitutes such evidence.

181. As part of the *cy-près* scheme, the Court may exercise its statutory and inherent jurisdiction to substitute new trustees, in order that the trust property may be administered by trustees holding the opinions of those for whose benefit the trust was intended.

Brewster v. Hendershot, [1900] O.J. No. 25, 27 O.A.R. 232 (C.A.); *Re Public Trustee* and *Toronto Humane Society et al.*, *supra* at 245

Waters, *supra* at 818, 819; *Trustee Act*, R.S.B.C. 1996, c. 464, s. 31.

182. In *Conroy v. Stokes*, the court reaffirmed the equitable principle set out by the Judicial Committee in *Letterstedt v. Broers*, that in exercising jurisdiction, the court's main guide should be the welfare of the beneficiaries. In this case, the beneficiary would be the purpose of the trust, and not an individual.

Conroy v. Stokes, [1952] B.C.J. No. 111 at para. 8; *Harrisburg Trust Co. v. Trusts & Guarantee Co.* [1914] O.J. No. 329 (H.C.)

183. The inherent jurisdiction of the court to appoint trustees was used in the context of a religious property dispute in the case of *Brewster v. Hendershot*, which was an action resulting from a division in a religious body called the United Brethren of Christ. Both Osler J.A. and Moss J.A. set out the power of the Court to intervene to

ensure trust property is administered by the appropriate trustees, those being trustees that hold the opinions of those for whom the trust was intended, including a minority faithful to the original purpose.

Brewster v. Hendershot, *supra*

Application to the present case

184. The general charitable intention to support Anglican Ministry is undisputable just as is the fact that (just as in *Varsani*) the dispute over the celebration of same-sex unions which has been the presenting cause of the division was not anticipated when the trust was created and was only very recently contemplated. Similarly, one fundamental identifier of Anglican ministry has been worship within a community sharing one body of doctrine and practice. The commitment to mutual communion with the worldwide body of Anglicans is another fundamental mark of Anglican identity made impracticable by the fracture of the international communion.

185. Just as in *Varsani*, the presenting cause of the division was not anticipated, and no civil court can cure or remedy the practical effects of this sincere and profound religious difference of opinion respecting the proper course of a shared faith. There is no internal mechanism for resolving fundamental questions of Anglican identity or for forcing the broader communion to accept these innovations in doctrine or practice.

186. This is the opposite of the case where a body within a church has determined to change their doctrine or practices but wishes to continue to enjoy the benefit of trust property. Here the Plaintiffs hold to the church's doctrine and common practice and should not be turned out of the benefit of the trust property for doing so. Whether one applies a conceptual approach or a factually driven analysis the conclusion is obvious: the original trust for Anglican ministry has become impracticable. The conceptual approach would recognise that the evidence established that despite sincere efforts the presenting issue of same-sex blessings has at its heart a sincere and profound difference of approach to Anglican ministry that has rendered the fundamental

goals of a mutual communion with the international church and common doctrine and practices expressed in the Solemn Declaration or any other statement of unitary Anglicanism in Canada impracticable. A fact-driven approach would recognise that this division has not been a casual or limited disagreement without reach or significance but one that has created a division not only in Canada but across the Anglican world. The court cannot avoid a determination since both parties require direction respecting the use of the church property: the Bishop no less than the Plaintiffs. The effect of the judgment below is that the Bishop will be permitted to direct the exclusive use and benefit of the purpose trust property.

187. In *Varsani* the court held that the expanded statutory jurisdiction which permitted *cy-près* to be granted where supported by the "spirit of the gift" did not even require a characterisation of the contending parties as members of the continuing faith. Here such a determination is ready to hand: the Plaintiffs remain Anglican and no more assessment is required. Here impracticability in the common law sense has been proven abundantly; accordingly, all the benefits of a *cy-près* order expressed in *Varsani* are equally applicable in the present case and no difficulty of jurisdiction arises.

Cy-près **scheme should reflect need**

188. A *cy-près* scheme in this context should support and not disable the pursuit of Anglican ministry in the area. Where the effect of declining to order a *cy-près* scheme would be to vest property in only one of two groups of coreligionists the effect is to not only ignore need but to cripple the original charitable intent by restricting the use of the property to only one of two existing Anglican communities. The reasoning in the *cy-près* decision in *Varsani v. Jesani* (trial judgment) is again helpful and the values applied there contrast favourably with those resulting from the Trial Judge's analysis. This unnecessary crippling of the general charitable intent is particularly acute here where the Diocese enjoys a surplus of churches and where its own strategic plan recognises that it is a shortage of people and not a shortage of property that is its compelling challenge. The effect of the position accepted by the Trial Judge is to deprive a significant portion of the faithful Anglican population of the benefit of their

church properties because of a step they considered necessary to preserve their religion and communion with fellow Anglicans throughout the world.

The *cy-près* result is a better result than one driven by a "hierarchical institution" policy

189. In the context of Anglo-Canadian trust principles a *cy-près* scheme permits the neutrality and deference that is appropriate to a religious dispute resulting in a division in a society where we consider tolerance and religious liberty central Canadian values. The Trial Judge's search for neutral principles in effect loaded the approach in favour of incumbency over the sother more relevant and important values of respect for sincere and important differences of conscience and respect for the connection between a worshipping community and its church. Indeed the approach required by the *Free Church* case is antithetical to the hierarchical approach adopted by the Trial Judge.

190. The observations in *Varsani* are appropriate here: the differences between the parties evident in the record and now found around the world will not be repaired or resolved by the civil courts. To pick losers and winners where there is a church division arising from sincere and important matters would be inappropriate and is not required by the law of charities.

PART 4

NATURE OF ORDER SOUGHT

191. The appeal be allowed and a *cy-près* scheme ordered whereby the parish corporations are replaced with suitable trustees holding the assets on trust for Anglican ministry. The parties should be ordered to develop the terms of the trust and appoint trustees, failing which the terms should be settled by directions of the Court.

192. The Appellant trustees seek liberty to address costs after the delivery of judgment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Counsel for the Appellants

Dated: May 13, 2010

LIST OF AUTHORITIES

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27.	*UBC v. British Columbia (Attorney General)*, 2008 BCCA 367	55
28.	*Varsani v. Jesani*, [1999] Ch. 219 (Eng. C.A.)	20, 52, 53, 54, 55, 58-59
29.	*Varsani v. Jesani*, 2001 W.L. 825210 (Ch D), [2002] 1 P. & C.R. DG 11	52, 53, 55, 57, 58-59
30.	*Watson v. Jones*, (1871) 80 U.S. 679, 1871 U.S. LEXIS 1383	25

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31.	Gareth Jones, *History of the Law of Charity*, 1532-1827 (London: Cambridge University Press, 1969) p. 5	38
32.	Albert J. McLean, *Deviation from the Terms of a Trust: A Study in*	54

	English and United States Law (Doctrinal dissertation, University of Cambridge, 1961) pp. 351-52	
33.	M.H. Ogilvie, *Religious Institutions and the Law in Canada,* 2nd ed. (Ontario: Irwin Law, 2003) pp. 221, 231, 289-94	25-26, 39, 55
34.	Hubert Picarda, *The Law Relating to Charities*, 2nd ed. (London: Butterworths, 1995) pp. 279-93	54
35.	*Tudor on Charities*, 9th ed. (London: Sweet & Maxwell, 2003) pp. 371-73	36, 37, 38
36.	U.K., Charitable Trusts Committee, *Report of the Committee on the Law and Practice relating to Charitable Trusts*, Cmd. 8710 (1952), pp. 16-20 and 71	38, 53
37.	*Waters' Law of Trusts in Canada*, 3rd ed. (Ontario: Thomson Carswell, 2005) pp. 623-25, 640-41, 679-80, 762 and 818	38-39, 53, 56

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38.	*Act to Incorporate the Anglican Synod of the Diocese of New Westminster*, SBC 1893 c. 45	27-36
39.	*Benevolent Societies Act*, SBC 1891 c. 41	32, 35
40.	*Trustee Act*, R.S.B.C. 1996, c. 464	56
41.	*Victoria Masonic Temple (Incorporation) Act*, SBC 1893 c. 65	34
42.	*Whetham College (Incorporation) Act*, SBC 1893 c. 67	34, 36