File No.:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

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

APPLICANTS
(Appellants in the Court of Appeal)

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
(Respondents in the Court of Appeal)

APPLICANTS' MEMORANDUM OF ARGUMENT

SOLICITORS FOR THE APPLICANTS
MICHAEL BENTLEY AND OTHERS

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
2900 – 550 Burrard Street
VANCOUVER, BC V6C 0A3
Tel: (604) 631 3131
Fax:(604) 631 3232

COUNSEL FOR THE APPLICANTS:
D. GEOFFREY COWPER
W. STANLEY MARTIN

OTTAWA AGENT FOR THE APPLICANTS
MICHAEL BENTLEY AND OTHERS

SCOTT PRESCOTT
FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
55 Metcalfe Street
OTTAWA, ONTARIO K1P 6L5
Tel: (613) 236 3882
Fax: (613) 230 6423

SOLICITORS FOR THE RESPONDENTS

FARRIS, VAUGHAN, WILLS & MURPHY LLP
Barristers and Solicitors
2500 – 700 Georgia St W
P.O. Box 10026 Pacific Centre
Vancouver, B.C. V7Y 1B3
Tel: (604) 684 9151
Fax:(604) 661 9349

COUNSEL FOR THE RESPONDENTS:
GEORGE K. MACINTOSH, Q.C.
LUDMILA B. HERBST

PART I
STATEMENT OF FACTS

1. This case has arisen out of an unprecedented division in the Anglican Church, which has roots in the Diocese of New Westminster (the "Diocese") in British Columbia and has spread across Canada and throughout world (BCSC RJ, paras. 53-154, Leave Book Tab D-1; Affidavit of Ephraim Radner, para. 2, Leave Book Tab B-3). This historic division in Anglicanism is based on sincerely held religious beliefs and has resulted in the present dispute between trustees of parish corporations and the Diocese over the use of parish trust assets. Similar disputes have arisen across the nation as parishes and dioceses in the Anglican Church of Canada (the "ACC") find themselves on different sides (Affidavit of Cheryl Chang, paras. 10-16, Leave Book Tab B-1).

2. The Applicants are the trustees of four parish corporations in the Diocese. The parish corporations (the "Parish Corporations") are: (a) the Parish Corporation of St. John's (Shaughnessy), ("St. John's); (b) the Parish Corporation of the Church of Good Shepherd, (the "Church of the Good Shepherd"); (c) the Parish Corporation of St. Matthias and the Parish Corporation of St. Luke, which together operate as one parish ("St. Matthias & St. Luke"); and (d) the Parish Corporation of St. Matthew, Abbotsford ("St. Matthew's"). The Parish Corporations are incorporated pursuant to the private Act of the British Columbia legislature that incorporated the Diocese, the *Act to Incorporate the Anglican Synod of the Diocese of New Westminster*, S.B.C. 1893, c. 45, as amended (the "Act").

3. The Respondents are the Diocese and Michael Ingham, in his capacity as the Anglican Bishop of New Westminster (the "Bishop"). The Diocese is under the leadership of the Bishop and is one of 38 dioceses of the ACC. (BCSC RJ, paras. 19-21, Leave Book Tab D-1.)

4. The Court of Appeal said that the facts are largely uncontroversial (BCCA RJ para. 8, Leave Book Tab B-5). The evidence at trial was provided mainly by way of affidavits from approximately 80 witnesses. In addition, some affiants also gave oral evidence at the trial.

Property Arrangements within the Anglican Church of Canada

5. The typical arrangement in the ACC is that local congregations are organized in parishes that generate their own funds to carry out day-to-day operations, purchase and maintain capital assets, such as church buildings, and pay assessments to the diocese. Each of the four parishes in this case were historially financially independent (BCSC RJ, paras. 22-24; e.g., Affidavit of Linda Seale #2, paras. 14, 15, and 40-56, Leave Book Tab F-4).

6. The ACC has traditionally used trusts to hold properties dedicated to Anglican ministry. Bishop Ferris testified that it was common practice in the ACC to hold property in trust for the benefit of the parishes (Affidavit of Ronald Ferris #1, para. 119, Leave Book Tab F-5). The Bishop and the Chancellor of the Diocese said that the ACC has proceeded on the basis that parish properties are held on trust (BCSC RJ, para. 63). The Diocese showed its transfer of title over the church property to St. Matthew's as being from the Dicoese as Trustee to its cestui que trust (Land Title Act Form "A" Freehold Transfer executed May 23, 1990, Leave Book Tab F-1).

7. The trustees have authority over the property of the respective Parish Corporations. The evidence is that the congregations have need of the property for their continuing ministry, which is in all substantive respects the same ministry as before (e.g. Affidavit of Michael Bentley #1, paras. 37-45, 91, 106-108, Leave Book Tab F-6). The Diocese has been losing attendance and is in a strategic process that will involve closing many non-viable parishes (Ingham Cross on Affidavit, Vol. 1, p. 81, l. 20 – p. 83, l. 34 and Vol. 2, p. 94, l. 37 – p. 97, l. 30, Leave Book Tab F-9; The Diocesan Strategic Plan 2018 (Draft April 2009), Leave Book Tab F-3; Affidavit of Cheryl Chang, paras. 21 to 22, Leave Book Tab B-1). The Diocese led no evidence that it needed any of the property of the Parish Corporations for its continuing ministry.

Anglicanism

8. Anglicanism derives historically from the Church of England and in its modern form is a worldwide communion with, subject to recent events, a common liturgical tradition and doctrine. The unity of the worldwide Anglican Church was historically maintained through the role of the Archbishop of Canterbury as "first among equals" among the Primates (the leaders of the various provinces of the Anglican Church); the meetings of the Primates; the Anglican Consultative Council; and the meetings of all Anglican bishops held every 10 years at the "Lambeth

Conference". Anglican bishops are consecrated to the worldwide church, not simply a national church, and the collective decisions of the bishops at Lambeth Conferences have been viewed as having the highest moral authority in the Anglican Church. (BCSC RJ, paras. 7-10, Leave Book Tab D-1; Affidavit of Ronald Ferris #1, para. 50, Leave Book Tab F-5; Affidavit of Ronald Ferris #2, Leave Book Tab F-12.)

9. The provinces within the Anglican communion are typically national churches and are recognized as autonomous but interdependent. The ACC is one of the provinces. The first General Synod of the ACC, held in 1893, adopted the Solemn Declaration, now entrenched as the first article of the Declaration of Principles of the ACC and not subject to revision. (BCCA RJ, Schedule II, Leave Book Tab D-5.) The Solemn Declaration arose out of a concern that the church in Canada retain its identity as an Anglican church. It committed the ACC to continuing mutual communion with other Anglican churches thoughout the world; to teaching and maintaining the same doctrine, liturgy and discipline that characterized Anglican churches; and undertook to transmit these principles "unimpaired to our posterity". General Synod, and not diocesan synods, has jurisdiction with respect to doctrine, and its jurisdiction is constitutionally limited to "the definition of doctrine in harmony with the Solemn Declaration." (BCSC RJ, paras. 11-18 and 45-52, Leave Book Tab D-1.) Bishop Ferris explained that General Synod can only clarify the definition of doctrine where that definition is consistent with the Solemn Declaration (Affidavit of Ronald Ferris #1, para. 8, Leave Book Tab F-5).

10. Under the Act, parishes in the Diocese can choose to incorporate, under the leadership of officers described as "trustees". Once incorporated, parishes have all the rights and privileges of any corporate body and have the power to deal with the property of the parish corporation. This power is conditional in two situations on obtaining the consent of the Bishop and the Executive Council of the Diocese: the mortgage, sale or other disposition of parish property, and the amendment of by-laws. (BCSC RJ, para. 254; BCCARJ, Schedule I.)

History of the Division

11. The traditional position of the ACC on the issue of same-sex unions was stated in 1979 by the House of Bishops in the 1979 Guidelines, which said: "We do not accept the blessing of homosexual unions." (BCSC RJ, para. 54). The Bishop admitted that the blessing of same-sex

relationships represents an important change in the teachings and rituals of the church, and is a subject matter that engages one's view of the gospel, the authority of Scripture, the interpretation of scripture and the traditions of the church (Ingham Cross on Affidavit, Vol. 1, p. 8, ll. 13-30 and 38-43; p. 11, l. 28 – p. 12, l. 11, Leave Book Tab F-8).

12. In the 1990s, the Diocese began to consider whether the Bishop should authorize a rite for the blessing of same-sex unions. In 1997, the House of Bishops revised the 1979 Guidelines, but did not accept the blessing of same-sex unions. The 1998 Lambeth Conference, which the Bishop attended, considered the question of Anglican teaching on the subject of same-sex unions. The assembled bishops confirmed by an overwhelming majority that the Church would not bless same-sex unions. This resolution was referred to thereafter by the Primates at their meetings as the "standard of teaching" of the Anglican Communion. (BCSC RJ, paras. 56-58 and 67; Ingham Cross on Affidavit, Vol. 1, p. 47, l. 45 – p. 48, l. 45, Leave Book Tab F-10).

13. In May 2002, the Bishop determined that he would implement a resolution of the 2002 Diocesan Synod calling on him to authorize a rite for the blessing of same-sex unions. (The Bishop had previously refused to implement two similar resolutions.) (BCSC RJ, paras. 63-66, 81 and 92-95.) The Bishop approved a form of rite and authorized its use in selected parishes in May 2003 (BCSC RJ, 119). The Bishop acknowledges that at the time of his decision a substantial majority of bishops around the world were opposed to same-sex blessings and that the Archbishop of Canterbury wrote to him with a warning that his decision "represented a danger to the unity of the communion." (Trial Transcript, Evidence of Michael C. Ingham, June 2, 2009, Cross Examination, p. 66, l. 7 to p. 67, l. 46, Leave Book Tab F-14).

14. A significant number of the Anglicans in the Diocese saw the development as an innovation in Anglican doctrine that they could not in conscience accept. The trial judge referred to the evidence of the rector of St. John's, who described his reaction to the decision at Synod 2002 as follows: "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…" (BCSC RJ para. 96, Leave Book Tab D-1.)

15. Following the decision at Synod in May 2002, nine churches within the Diocese withdrew from participation in diocesan affairs, and formed a coalition called the Anglican

Communion in New Westminster (ACiNW), which included the four parishes in this case (BCSC RJ, paras. 100-105). At that time the ACiNW churches represented approximately 25% of the Anglicans in the Diocese. (Affidavit #1 of Cheryl Chang, para. 21, Leave Book Tab F-7.)

International Reaction

16. The decision to authorize the rite in the Diocese reverberated throughout the Anglican Communion around the world. The then Archbishop of Canterbury described it as "schismatic". Thirteen out of the forty bishops of the ACC itself issued a public letter criticizing the action saying that such an innovation was beyond diocesan power. (BCSC RJ, para. 97-98, Leave Book Tab D-1.)

17. In October 2004, the Lambeth Commission, convened by the Archbishop of Canterbury to consider the developments in the Diocese and the Episcopal Church of the USA ("ECUSA" or "TEC"), delivered the Windsor Report. The Report was critical of the Diocese for not further consulting the wider Communion on the theological issues in question, and said that "the clear and repeated statements of the Instruments of Unity have been to advise against the development and approval of such rites." (BCSC RJ, paras. 126-127.) The Report said the authorization of the rite "constitutes action in breach of the legitimate application of the Christian faith as the churches of the Anglican Communion have received it". It recommended a moratorium on same-sex blessings and 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". The Bishop did not institute the moratorium called for, but temporarily limited the rite's use to only those parishes who had previously requested it. (BCSC RJ, para. 128 and 132; Affidavit of Cheryl Chang #1, paras. 93-94, Leave Book Tab F-7.)

18. 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, conservative Anglicans organized "GAFCON", a conference that was attended by 291 bishops and 57 clergy and laity from 17 of the 38 Anglican Provinces. Both these developments are without precedent in the history of the Anglican church. (BCSC RJ, paras. 146-147.)

Canadian Developments

19. As a result of the actions of the Bishop and the Diocese, the ACiNW churches concluded that in conscience they could no longer remain under the authority of the Bishop and sought alternative episcopal oversight, first nationally, then internationally. (BCSC RJ, para. 111-118.) In 2004, 4 churches left the ACiNW and formed the Anglican Coalition in Canada (the "ACiC") under the episcopal oversight of the Anglican Province of Rwanda, a Province of the Anglican Communion (BCSC RJ, para. 124). ACiC now has 9 parishes and 3 church plants in British Columbia and 4 in Alberta, Saskatchewan, Ontario and Quebec (Affidavit of Ed Hird, paras. 3-6, at Leave Book Tab B-2).

20. Since 2002 the action that the Diocese has taken against its parishes in response to their search for alternative episcopal oversight is unprecedented in its history (Trial Transcript, Evidence of Michael C. Ingham, June 2, 2009, Cross Examination, p. 75, l. 32 to p. 77, l. 42, Leave Book Tab F-13). The Bishop purported to remove and replace a number of parish trustees, including some of the Applicants. The trial court found that this action by the Bishop was, in respect of the Applicants, unlawful (BCSC RJ, para. 286-293). This result came too late for others removed as trustees by the Bishop, such as those of of St. Simon's, North Vancouver and St. Andrew's, Pender Harbour (Affidavit of Ed Hird, paras. 7-12, at Leave Book Tab B-2).

21. In 2007, the leaders of many Anglican provinces of the Global South, representing the majority of the Anglicans in the world, authorized one of their number, Archbishop Venables of the Province of the Southern Cone in South America, to offer episcopal oversight to Canadian Anglicans who could no longer in conscience accept the oversight of their diocesan bishop. Later that year, the Anglican Network in Canada ("ANiC") was organized and established an ecclesial structure through which parishes could accept and receive the oversight of an orthodox bishop by realignment with the Province of the Southern Cone. (BCSC RJ, para. 141; Affidavit of Cheryl Chang, para. 2, Leave Book Tab B-1.)

22. In February 2008, vestry votes were held in the four Parishes of the Applicants regarding episcopal oversight from the Province of the Southern Cone, facilitated by affiliation with ANiC. The motions reflected the Applicants' view that the ACC was required to remain in communion with the Church of England throughout the world and its doctrinal innovation had brought about

a division of that communion and the Canadian church. The motion passed overwhelmingly in each parish (97.7%, 97.9%, 94.3% and 100%). As of April 2009, there were 28 ANiC parishes in Canada, including the four parishes in these proceedings. (BCSC RJ, paras. 148, 155-156.)

23. There are now 38 ANiC parishes located across Canada, in British Columbia, Alberta, Manitoba, Ontario, Quebec, New Brunswick and Newfoundland and Labrador, and one parish in the U.S. (Affidavit of Cheryl Chang, para. 3, Leave Book Tab B-1.)

24. In 2008 a new Anglican provincial structure was launched, called the Anglican Church in North America ("ACNA"). ACNA unites approximately 100,000 Anglicans in 700 parishes in 28 dioceses into a single Church and is comprised of a number of churches in Canada and the United States, including ANiC and ACiC. ACNA seeks to be recognized as the 39th Province of the Anglican communion, and it has received the support of Primates and Anglicans in many conservative provinces and dioceses, representing the majority of Anglicans in the world, and recognition is being considered by the Church of England. (BCSC RJ, 149-150; Affidavit of Cheryl Chang, paras. 7-9, Leave Book Tab B-1.)

25. The Applicants led evidence that the congregations and their clergy are recognized as fully Anglican and in full communion with other faithful Anglicans around the world. Bishop Anderson of the ACC Diocese of Caledonia in B.C. stated that in his view he was in full communion with the ANiC clergy (Affidavit of William Anderson #1, Leave Book Tab F-11).

26. The deep theological division that currently exists in the global Anglican community is unprecedented in Anglican history in its scope and depth and threatens the integrity and viability of the Anglican Communion as a uniting structure for Anglicans. (Affidavit of Ephraim Radner, para. 2, Leave Book Tab B-3.)

The Lower Courts

27. The Applicants' case below was that the division of the Anglican church, arising from sincere and important differences of faith and practice within the church, has made the performance of the charitable purpose trust for which the parish properties are held by the Parish Corporations no longer practicable. The trust for Anglican ministry contemplated an undivided international communion and a shared doctrine and liturgy that no longer exist. In Vancouver

there are congregations on both sides of the profound division in the Anglican church. The Applicants (in the minority in Vancouver but the majority around the world) called in aid the courts' ancient remedial jurisdiction of a *cy-près* scheme, in this case to preserve the use of their churches for Anglican ministry and worship rather than sitting empty or underused.

28. At trial, three principal issues were before the court: the determination of the terms of the trusts, if any, on which the property of the Parish Corporations were held, and the question of whether a *cy-près* scheme was appropriate; the validity of the Bishop's purported dismissal and replacement of the trustees of two of the Parish Corporations; and the determination of the status of a fund of approximately $2 million, the proceeds of a bequest by a Dr. Chun to the building fund of the Church of the Good Shepherd (the "Chun Bequest").

29. The trial judge found that he did not need to address the trust issue, because the use of parish property was restricted by the terms of the section of the private Act that gave the parish corporations their powers (BCSC RJ, para. 255-256). He concluded that the appropriate approach to a doctrinal issue within a religious institution was akin the American "neutral principles of law" approach (BCSC RJ, para. 249 and 253). He found that, if he needed to address the trust issue, the parish properties were held on a trust for Anglican ministry as defined by the ACC and that there had been no breach of such a trust (BCSC RJ, paras. 273-281).

30. The trial judge found that the Bishop had no lawful authority for his purported dismissal and replacement of the trustees of the Parish Corporations (BCSC RJ, paras. 286-293). The Diocese did not appeal this finding. He found that the Chun Bequest was held on trust by the Church of the Good Shepherd for its building purposes; that in the circumstances there was no likelihood that the funds would be used for this purpose; and that a *cy-près* scheme should be ordered, under which the funds are to be made available for the building purposes of the ANiC congregation (BCSC RJ, paras. 328-329). The Diocese cross-appealed this finding.

31. The Court of Appeal largely disagreed with the analysis of the trial judge. It rejected the adoption of US principles derived from the constitutional separation of church and state (BCCA RJ para. 55). It held that the Applicants were trustees of religious purpose trusts for Anglican ministry (BCCA RJ para. 65). It rejected, however, the application of the Court's jurisdiction to replace the trustee or amend or change the terms of the trust, on the basis that the Court should

imply that the trust was subject to internal processes for doctrinal change within the ACC. The Court held that even though the effect of the actions of the Bishop and Diocese might prove to be "schismatic" and result in empty or underused churches, they had the authority to make those decisions. (BCCA RJ paras. 74-76)

Relevance of this case to other Anglicans in Canada

32. The present theological division is a significant issue that has caused parishes and clergy to leave the ACC. Bishop Ferris believes that it is reasonable to predict that between 15% and 25% of parishes and clergy will eventually decide they cannot remain with ACC because of this issue (Affidavit of Ferris #1, para. 101, Leave Book Tab F-5).

33. Litigation has commenced between ANiC churches and four other dioceses of the ACC. In Victoria, an interlocutory injunction was sought to prevent the Diocese of British Columbia from interfering with a congregation's use of its church building, but was refused. The congregation has left the building, but has struggled to find an adequate place of worship. In Hamilton, Ontario, litigation has commenced between the Diocese of Niagara and three ANiC churches. The Ontario Superior Court ordered that the three church buildings be shared until the litigation is resolved but the parties subsequently re-negotiated, giving exclusive use of 2 church buildings to the ANiC congregations and exclusive use of 1 church building to the diocese. Litigation has also commenced in Windsor, Ontario between the ANiC church of St. Aidan's Windsor and the Diocese of Huron. In Ottawa, litigation has commenced between the ANiC churches of St. Alban's and St. George's and the Diocese of Ottawa. The two Ottawa churches are currently in negotiations with the Diocese after several mediation sessions. (Affidavit of Cheryl Chang, paras. 10-16, Leave Book Tab B-1.)

34. In other situations, parishes have chosen not to litigate. The parishes of ACiC and other parishes in Canada have chosen to walk away from their buildings and have had varied success in finding alternate facilities. Other Anglican congregations are awaiting the decision of the courts before considering whether to leave the ACC. (Affidavits of Chang, paras. 6, 17-20, Hird, paras. 3-12, Hayton, and Cocoran, Leave Book Tabs B-1, B-2, B-4 and B-5, respectively.)

35. For Anglicans on both sides of the division, a decision of the Supreme Court of Canada will provide guidance and help to resolve the disputes over church properties that are harming

the ministry of all Anglicans. (Affidavit of Radner, paras. 3-4, Leave Book Tab B-3; Affidavit of Ed Hird, para. 2, Leave Book Tab B-2.)

PART II
QUESTIONS IN ISSUE

36. The question in issue is whether this court should grant leave to appeal on the grounds that the appeal will raise the following issues of national and public importance:

(a) An important question as to the court's exercise of its supervisory jurisdiction over charities in the context of a sincere division of a religious body.

(b) An important question as to whether in the face of actual division an approach that favours the authority of the majority who are in control of the religious institution is consistent with the law of charities and with principles of religious freedom.

(c) The issues to be raised on the appeal are of importance for all members of religious bodies, and are of direct impact on Anglicans throughout Canada, whether they have already divided from the Anglican Church of Canada, or have decided to remain, or are considering their decision.

PART III
ARGUMENT

Introduction

37. After many years of debate Canadian Anglicans are now divided into two Anglican communities arising out of differences that were never contemplated at the time of the organization of the ACC. The division is sincere, profound and unprecedented in its results. Unlike previous disputes involving the Anglican church, Anglicans here and throughout the worldwide Anglican communion have affirmed the Anglican identity and Anglican ministry of those bishops, priests and laity, including the plaintiffs, who have chosen to no longer exercise ministry under the oversight of the bishops of the ACC.

38. The Court of Appeal found that the property of the Parish Corporations of which the Applicants are trustees is held on charitable trusts for the purpose of Anglican ministry. The Applicants' case is that those who provided money and assets for these religious purpose trusts for Anglican ministry never contemplated the performance of these trusts in the context of

divided Anglican communities within Canada and that an order should be made to preserve those religious purposes.

39. The appeal will raise an important question for the law of charities, whether the courts in the exercise of their general supervision of charitable trusts should order a *cy-près* scheme in the circumstances of a sincere religious division in which both parties maintain their religious identity. The Applicants will submit that the supervisory jurisdiction of the court should be used to enable rather than frustrate legitimate Anglican ministry.

40. The Court of Appeal considered that the law did not offer this remedy, and that it was restricted to only two options. The first, which it rejected as lopsided and impractical, was the application of the longstanding Anglo-Canadian jurisprudence on religious purpose trusts that has sought to identify the adherents to the original purposes of the institution and to entrust only those adherents, however few, with the use of the institution's property. The second, which it adopted, was to imply into the trust the power of the majority to control and change the doctrines of the institution, and to entrust the majority with the use of all the property.

41. The Applicants will submit on an appeal that the third option, the ordering of a *cy-près* scheme, is both available and appropriate. The Court of Appeal erred in believing that English authority precluded a *cy-près* scheme in these circumstances. In fact, the decision of the English Court of Appeal in *Varsani v. Jesani* [1999] Ch. 219 (C.A.) ("*Varsani*") supports the ordering of a scheme in these circumstances. Further, a *cy-près* scheme is consistent with the purposes of the law of charities and with the modern developments of *cy-près* in the UK and the US. This case will allow this Court to consider the modern principles of *cy-près*.

42. A *cy-près* scheme in the circumstances of this case is consistent with the concern of the English courts as to the respective need for the use of the trust property, and consistent with the US concern to avoid wastefulness in the use of charitable trust property. On the evidence, the Diocese has no need for the property of the Parish Corporations. The Court of Appeal recognised this but granted the Diocese the power to choose the path of schism and to empty those churches that could not accept the direction of the Diocese. This remarkable conclusion truncates the continuation of Anglican ministry rather than seeking to preserve the purposes of the trusts as best as possible, and can itself be called lopsided and impractical.

43. An appeal will also allow this Court to consider the important question of the appropriate policy approach to be taken by the courts in the case of a division in a religious institution. The trial judge expressly adopted an approach similar to the "neutral principles of law" approach taken by courts in the US, and considered that the court should automatically defer to the decisions of the hierarchy of the religious institution. The Court of Appeal correctly rejected this approach as inconsistent with Anglo-Canadian law, but nonetheless adopted an approach that came to the same result, by implying into the religious purpose trust the power of the majority to change doctrine (BCCA RJ, paras. 55, 74 and 76). In addition, the Court of Appeal gave weight to the governance power of the hierarchy of the institution, in this case the authority of local bishops (BCCA RJ, paras. 74 and 76). On the approach of either the trial judge or the Court of Appeal, the result is that a minority that cannot in conscience accept an innovation in doctrine imposed by the majority is left without relief. This result is inconsistent with the court's role in the preservation of the purposes of religious trusts, in that it deprives Anglicans of the resources for their legitimate ministry, and fails to reflect the principles of religious freedom.

44. Beyond its importance for all members of religious bodies, the appeal will be of direct significance for Anglicans throughout Canada. The plaintiffs represent only some of those that have been unable in conscience to continue their Anglican ministry under the oversight of the Bishop. The same division is now taking root in other dioceses within the ACC, and many other Anglicans have faced or will face the same difficult issues of conscience and belief. There is pending litigation elsewhere in Canada to which the decision in this case is directly relevant. Other Anglicans chose not to pursue the issue through the courts, and others will have to weigh this choice. (Affidavit of Cheryl Chang, paras. 6, 17-20, Leave Book Tab B-1; Affidavit of Ed Hird, paras. 2-6, Leave Book Tab B-2.) The decision on this appeal would allow all Anglicans in Canada to move forward with guidance and assurance as the legal rights and remedies available. (Affidavit of Ephraim Radner, paras. 3-4, Leave Book Tab B-3.)

The court's exercise of its supervisory jurisdiction over charities in the context of a sincere division of a religious body

45. The Applicants' case is that the *cy-près* approach most closely preserves the charitable religious purposes and allows the trust property to continue to be used most effectively for the purposes of ministry. The court does not need to decide that one party to the division is right and

the other wrong; the court can accept that both parties are right, in the sense that they represent legitimate expressions of the original religious purpose. A trust scheme allows the trust property to be used in ways that reflect this. The Applicants accept that other trust property within the Diocese can continue to be used for the ministry purposes of those who accept the doctrinal innovation of the Diocese.

46. The courts have a broad inherent jurisdiction over charities and have developed equitable principles to preserve the purposes of charitable trusts, of which religious purpose trusts are a species. While private purpose trusts have been regarded as invalid, the courts have upheld charitable purpose trusts and have developed rules to foster them. In particular, even if the original terms of the trust become impossible or impracticable of performance, the courts will preserve the underlying charitable intention by amending the original trust: this is the *cy-près* jurisdiction. This recognizes the public purpose in seeing that charitable purposes are not defeated. The courts also have the jurisdiction to make an administrative scheme, providing any missing mechanics for the administration of a trust or adjusting those mechanics after a trust has vested to ensure the purposes can be carried out.

> *Tudor on Charities*, 9th ed. (Thomson, Sweet & Maxwell, 2003) at 371-372; *Re Public Trustee and Toronto Humane* Society, (1987), 60 O.R. (2d) 236 at 244 (H.C.J.); *Rowland et al. v. Christian Brothers et al.*, 2000 BCSC 1221 at para. 49, aff'd 2001 BCCA 527; 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").

47. In previous cases in Canada involving religious disputes, the courts have adopted approaches that lead to a "winner takes all" result. In general terms, this is the result of applying either the "religious purpose trust" principle or an approach that defers to the internal decisions of the religious institution.

48. The religious purpose trust approach is summarized by M.H. Ogilvie, in *Religious Institutions and the Law in Canada* (2nd ed.) at 293-294 ("Ogilvie, *Religious Institutions*"):

> It is a well-settled principle of law that the property of a religious institution must be held and applied to the original purposes for which that institution was founded, that is, for the original "trust." Such property cannot be 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.

49. The dissenting minority successfully asserted the religious purpose trust in *General Assembly of Free Church of Scotland v. Lord Overtoun and Others* in the House of Lords and, in Canada, in *Anderson v. Gislason*. The jurisprudence was followed in British Columbia in *Chong v. Lee*, although the minority failed to show there had been any departure from the original trust, and in *Bliss v. Christ Church, Fredericton*, an early case in New Brunswick accepting that the property of an Anglican parish was held on the terms of a religious purpose trust.

General Assembly of Free Church of Scotland v. Lord Overtoun and Others, [1904] A.C. 515 (H.L.) (the "*Free Church* case"); *Anderson v. Gislason* (1920) 53 D.L.R. 491 (Man. C.A.); *Chong v. Lee*, (1981), 29 B.C.L.R. 13 (S.C.) at 17; *Bliss v. Christ Church, Fredericton* (1887), Tru. 314 (N.B.Q.B.).

50. The alternative "winner take all" approach is to defer to the internal decisions of the religious institution. In practice, this means allowing the majority of members to control the result. The successful plaintiffs in religious purpose trust cases are by definition the minority who have been unable to convince the majority. This approach reflects the approach applied by United States courts, and is illustrated in Canada in the reasons for judgment of Burton J.A. in *Itter v. Howe*, [1896] O.J. No. 31 (QL) (C.A.).

51. The Court of Appeal found that the properties of the Parish Corporations are held on trust; that the trust purpose is "for Anglican ministry"; that the doctrinal change by the Diocese has resulted in a division among Canadian Anglicans; and that the Court's rejection of the *cy-près* approach may well mean that the trust property would not be effectively used, as the churches may have "vastly reduced or non-existent congregations" (BCCA RJ paras. 1, 2, 63, 65, 74). The Court of Appeal did not find the *Free Church* approach helpful, describing the result in that case as "famously lopsided and impractical" (BCCA RJ, para. 66). The Court considered that the *cy-près* approach was not available, for reasons discussed below. Instead, the Court of Appeal implied in the trusts a power in the ACC to change doctrine. The Court thus gave priority to what it described as internal processes for change.

52. On appeal, the plaintiffs will argue that *Itter v. Howe* does not support the implication of a general power to make any and all doctrinal changes; indeed, such an implication is

inconsistent with the very notion of a religious purpose trust. Further, such an appeal to a process for doctrinal change does not resolve the issue in this case, since the power in the ACC to define doctrines is constitutionally limited; has not been exercised to affirm action at the diocesan level; and, critically, is irrelevant to the Court of Appeal's erroneous assumption that the ACC has an exclusive power to define what is Anglican ministry in Canada.

53. However, the more significant issue is the Court of Appeal's rejection of the third alternative – the use of the *cy-près* jurisdiction. The Court of Appeal (RJ, para. 72) erred in reading the English Court of Appeal in *Varsani* as saying that *cy-près* is not available in the case of a church division where both parties continue to represent the true faith. Chadwick L.J. said that "if the view of both groups continues to represent the true faith, there would be no cy-pres occasion as it would still be possible to carry out the original purposes of the trust. The parties could seek an administrative scheme if difficulties arose in the sharing of the property". Chadwick L.J. was saying that *cy-près* was not necessary because an administrative scheme (which adjusts by Court order the mechanics of the trust administration) should be sufficient to remedy the impracticability of joint use by a divided body of worshippers. He did not say that the court was excluded from considering the issue of *cy-près*. If the BC Court of Appeal had correctly understood this comment, it should have gone on to consider whether an administrative scheme would be sufficient in the present case, and if it concluded that it was not then it was required to consider *cy-près*. Nothing in *Varsani* rules out the common law application of *cy-près* in the case of a sincere division where both parties can be viewed as maintaining the true faith. Indeed, that very circumstance creates a situation not contemplated by the original trust – here, the situation of two bodies carrying on Anglican ministry within Canada – and thus an occasion of impossibility or impracticability within the normal meaning of the *cy-près* rule.

54. On an appeal, this court will be able to consider the exercise of the *cy-près* jurisdiction in the context of a religious division. The *cy-près* route is a more equitable and flexible approach to these situations, and would be appropriate in the present case. First, the *cy-près* approach is consistent with the principles and concerns of the law of charities that underlie the imposition of a religious purpose trust. It allows the court to focus on the best way to fulfil the original charitable intentions, rather than selecting a winner. By contrast, the "internal process" approach

is focussed on the religious institution rather than the religious purpose, and indeed effectively removes the "religious purpose" from the religious purpose trust.

55. Second, the *cy-près* approach allows a resolution that is more consistent with the faith-based character of a religious body. The internal processes approach is focussed on structure and power, not on belief and conscience. The *cy-près* approach allows the court to take into account the legitimate expectations and sincere beliefs of the members, as the present case illustrates. The Applicants adhere to the historic position of the Anglican church, which remains the standard of teaching recognized by Anglicans worldwide. They became members of the ACC on the basis of the historic identity of that church, constitutionally enshrined in the Solemn Declaration of 1893. They contributed to the church and their parishes on the basis of that identity. The Diocesan innovation has resulted in a division of the church and made it impossible for the Applicants to remain true to their understanding of their faith and Anglican identity and at the same time continue in full communion with and under the oversight of the Bishop. It is manifestly inequitable and unfair that the plaintiffs, whose Anglicanism remains unchanged, should be deprived of the resources they in large part contributed and require for continued Anglican ministry.

56. Third, the *cy-près* approach allows the court to consider the efficient and non-wasteful use of the trust property in furtherance of the charitable purpose. The concern that charitable trust property should not lie unused is the basic concern in the *cy-près* cases. In the present case, the Court of Appeal recognized that its approach might well mean the parish properties were not used at all for the intended purpose of Anglican ministry. The Applicants led evidence as to the need of their congregations for resources for Anglican ministry. The Diocese did not lead evidence of a need for the properties in question; indeed, the evidence was that there are many surplus parish properties within the Diocese. The *cy-près* approach allows trust property to be used most effectively for the charitable purpose.

57. Fourth, the adoption of the *cy-près* approach is consistent with the development of the law in the United Kingdom and the United States. In the UK, the court has been given an expanded jurisdiction by section 13 of the *Charities Act 1993*, as discussed in the *Varsani* decision. That decision also discussed the common law doctrine and reflected the proper role of

an assessment of respective needs. A more recent English case, *White v. Williams*, [2010] EWHC 940 (Ch.), confirms that *Varsani* remains the leading case on schism within a religious organization with associated charitable trusts (see para. 18). The decision in *White* is of particular interest in that the court affirmed that the *cy-près* jurisdiction was available even though some of the dissenters had left the parent church and formed autonomous bodies. Even on the assumption that they were no longer members of the original body, to exclude the members of the congregations from any form of benefit under the trust would be completely at variance with the spirit of the gift of the particular properties (paras. 103, 105). The court ordered a scheme under which each congregation, whether it had left or not, received the benefit of the use of its church building (para. 121).

58. In the United States, academic commentary has called for an expanded concept of the principle (see, for example, Alex M. Johnson and Ross D. Taylor, "Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy près and America's Cup Litigation" (1988-1989) 74 Iowa L. Rev. 545; Alex M. Johnson, "Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy près Doctrine" (1999) 21 Haw. L. Rev 353 1999). In the US, the *Uniform Trust Code* and the *Restatement (Third) of the Law of Trusts* now have been changed to include "wastefulness" to the circumstances where the doctrine is applied (see Eric G. Pearson, "Reforming the Reform of the Cy près Doctrine: A Proposal to Protect Testator Intent" (2006-2007) 90 Marq. L. Rev. 127 at 140).

59. In Canada, the doctrine of *cy-près* is ripe for the Court's judicial reconsideration. It does not appear that any of the cases in this Court where the doctrine has been referenced required consideration of the doctrine in a substantive way. Further, the lower court decisions that discuss the doctrine rely either on the old English cases (see, for example, *The Fort Sackville Foundation v. Darby Estate*, 2010 NSSC 27 at paras. 19-22) or on the American *Restatement of the Law of Trusts* (see *Christian Brothers of Ireland in Canada (Re)*, [2000] O.J. No. 1117 at para. 71 (QL) (C.A.)).

The appropriate judicial policy in a case of church division

60. This case also raises an issue of general importance respecting the courts' policy with respect to disputes arising out of a division of a religious body.

61. The trial judge applied a rule that he called akin to the US "neutral principles of law" approach (BCSC RJ, paras. 248-252). The effect of this approach is that the court does not inquire into the substance of any dispute that turns on an issue of doctrine, but simply defers to the decision of any decision-making body within the religious institution.

62. In the seminal case in the United States, *Watson v. Jones*, 1871 U.S. LEXIS 1383, the US Supreme Court expressly observed that it was rejecting the English religious purpose trust cases, later exemplified in the *Free Church* case. However, the trial judge referred to comments in *Itter v. Howe* and *Balkou v. Gouleff*, [1989] O.J. 655 (QL) (C.A.), which adopted in effect the American approach.

63. The BC Court of Appeal correctly saw that this approach as inconsistent with the Anglo-Canadian law and declined to follow the Ontario Court of Appeal in *Balkou v. Gouleff*. The Court of Appeal (at para. 55) quoted M.H. Ogilvie, "Church Property Disputes: Some Organizing Principles", (1992) 42 U.T.L.J. 377, to the effect that it is fundamental in a parliamentary system that courts cannot decline jurisdiction or defer to some body other than a sovereign Parliament. The courts must deal with property disputes, including their doctrinal aspects.

64. However, although the Court of Appeal rejected the "neutral principles" approach, the approach it adopted effectively came to the same result. It implied into the religious purpose trust the power to change doctrine by following current internal processes. This approach has been criticized earlier for its inconsistency with the trust principles in issue. Fundamentally, however, it represents a policy choice by the Court of Appeal: to prefer the structure and hierarchy of a religious organization over its purposes. This policy choice became more evident when the Court added as part of the basis for its conclusion that the Applicants had left the episcopal authority of the Bishop (see para. 75). On the evidence, they had done so in order to come under the episcopal authority of another Anglican bishop whose oversight they could in conscience accept. There is a sharp contrast between the Court of Appeal reasoning, focussed on hierarchy and

authority, and the reasoning of the English court in *White*, concerned about the equitable result in light of the trust founders' original expectations. It will be argued that the judicial retreat from its supervisory jurisdiction effectively carried out by the Court of Appeal results in an abdication of an ancient and still valuable judicial jurisdiction with important public benefits.

65. The appeal will therefore raise, beyond the immediate question of the proper approach in the law of charities, a question as to the appropriate judicial policy in a case of church division. In the submission of the Applicants, both the trial court and the appeal court in this case erred in adopting judicial policies that favour those who control the hierarchy and processes of a religious institution. This approach runs opposite to the concerns of trust law, directed to the most equitable fulfilment of the charitable intent in the changed circumstances.

66. It is difficult to reconcile the differing approaches taken at the provincial appellate level to this issue, as illustrated by the decision in this case and the decisions in *Anderson v. Gislason*, *Itter v. Howe*, and *Balkou v. Gouleff*. No unity of approach emerges from these cases.

67. Further, it is inconsistent with Canadian concepts of freedom of religion and conscience to impose a rule as a matter of judicial policy that has the effect of penalizing adherence as a matter of conscience to religious belief. The value of freedom of conscience enshrined in the Charter should inform any decision as to the proper scope of the *cy près* jurisdiction as it relates to religious bodies. The Applicants will argue that the interests of freedom of conscience are furthered by an approach that is both faithful to the ongoing ministry to which assets were impressed with a trust and that recognises that differences may arise that require changes to that trust to enable the ministry to be continued by all those adherents of that religious purpose. The Court of Appeal's approach narrows the scope of *cy-près* unnecessarily, ignores the central value of the public benefit of the ongoing use of charitable assets for their intended purpose, and defers to an internal process never intended or capable of addressing this unprecedented division in a way satisfactory to both groups of Anglicans.

Importance for all Anglicans in Canada and other religious institutions

68. As the evidence discloses, Anglicans in Canada generally are divided over the underlying issues. There is pending litigation before other courts. The issue affects those who have left

their buildings, and those who are making a decision about their buildings. It potentially affects entire dioceses.

69. This Court's authoritative decision as to the appropriate legal and equitable approach to these purpose trusts is of critical interest to those who have determined to continue their Anglican ministry outside the structure of the ACC. It should also however be of interest to those faithful and sincere adherents within the majority who would benefit from an authoritative decision as to their rights and obligations to their fellow adherents who have concluded they cannot continue together within the same episcopal structure. The authoritative guidance of this Court is particularly important here where the minority considers itself as being as faithful and appropriate users of the Anglican trusts as the majority.

70. The question also has importance for members of other religious institutions, whether churches or other forms of societies. The commitment to a common set of beliefs is characteristically foundational, and the process of change presents many of the same difficulties in other structures.

PART IV
SUBMISSIONS CONCERNING COSTS

71. Given the character of the issues, and their position as trustees, the Applicants submit that the appropriate order would be that no costs of this leave application should be awarded, in any event.

PART V
ORDER SOUGHT

An order that this application for leave to appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

D. Geoffrey Cowper, Q.C.
Counsel for the Applicants

January 13, 2011, Vancouver, B.C.

PART VI
LIST OF AUTHORITIES

	VOLUME I	**PARA. NO.**
	CASES	
1.	*Anderson v. Gislason* (1920), 53 D.L.R. 491 (Man. C.A.).	49, 66
2.	*Balkou v. Gouleff*, [1989] O.J. No. 655 (QL) (C.A.).	62, 63, 66
3.	*Bliss v. Christ Church, Fredericton* (1887), Tru. 314 (N.B.Q.B.).	49
4.	*Chong v. Lee* (1981), 29 B.C.L.R. 13 (S.C.).	49
5.	*Christian Brothers of Ireland in Canada (Re)*, [2000] O.J. No. 1117 (QL) (C.A.).	59
6.	*General Assembly of Free Church of Scotland v. Lord Overtoun and Others*, [1904] A.C. 515 (H.L.).	49, 51, 62
7.	*Itter v. Howe*, [1896] O.J. No. 31 (QL) (C.A.).	50, 52, 62, 66
8.	*Re Public Trustee and Toronto Humane Society et al.* (1987), 60 O.R. (2d) 236 (H.C.J.).	46
9.	*Rowland et al. v. Christian Brothers et al.*, 2000 BCSC 1211.	46
10.	*The Fort Sackville Foundation v. Darby Estate*, 2010 NSSC 27.	59
	VOLUME II	
11.	*Varsani v. Jesani,* [1999] Ch. 219 (C.A.).	41, 53, 57
12.	*Watson v. Jones*, 1871 U.S. LEXIS 1383 (U.S.S.C.).	62
13.	*White v. Williams*, [2010] EWHC 940 (Ch.).	57, 64
	TEXTS AND SCHOLARLY ARTICLES	
14.	Alex M. Johnson, "Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy près Doctrine" (1999) 21 Haw. L. Rev 353.	58
15.	Alex M. Johnson, and Ross D. Taylor, "Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy près and America's Cup Litigation" (1988-1989) 74 Iowa L. Rev. 545.	58