

No. S086372
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MICHAEL BENTLEY, ETHEL MARION CAMPBELL, PETER CHAPMAN,
ZENIA CHENG, SIMON CHIN, KRISTA FRIEBEL,
R. PATRICK GREENWOOD, MARIE CHRISTINE KLUKAS,
JOHNNY LEUNG, DAVID LEY, RUTH LIN, LANNY JAMES REEDMAN,
LINDA SEALE, ANNE SHECK, DAVID KENNETH SHORT,
TREVOR HOWARD WALTERS and SHIRLEY WIEBE

PLAINTIFFS

AND:

ANGLICAN SYNOD OF THE DIOCESE OF NEW WESTMINSTER,
and MICHAEL INGHAM in his capacity as the Anglican Bishop of the Diocese of
New Westminster

DEFENDANTS

AND:

No. S087230
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFFS

AND:

ANGLICAN SYNOD OF THE DIOCESE OF NEW WESTMINSTER,
and MICHAEL INGHAM in his capacity as the Anglican Bishop of the
Diocese of New Westminster

DEFENDANTS

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OPENING STATEMENT

I. Introduction

1. The parties before the Court are all Anglicans. Much of the history of Anglicans in Vancouver has excited little attention. Since 2003 however, when the Defendant Bishop authorised the performance of a liturgy for same-sex blessings Vancouver has been the source of controversy which has spread throughout the Anglican world. That unprecedented act of an Anglican Bishop and Diocese has brought division not only to the Diocese, but to the Anglican church across Canada and throughout the world. This is a deep and pain filled division concerning issues which define any church community including doctrine, liturgy and church governance.
2. The Plaintiffs' prayer for relief invokes the ancient and inherent jurisdiction of this Court over trusts and charities and asks that the Court make orders that would permit the Plaintiffs and their congregations to continue the faithful exercise of the Anglican faith in the Parish properties consistent with the trusts intended by the church community and the law. Put another way, the question before the Court is whether the division created by the Defendants' doctrinal and liturgical innovations justifies the expulsion of the plaintiff congregations from the church properties they funded, maintained and have long considered their church homes.
3. The Plaintiffs say that the properties are held pursuant to a trust for "historical, orthodox Anglican doctrine and practice." The Plaintiffs say that the doctrines of the church cannot be understood to embrace same-sex blessings and that such an innovation constitutes an abandonment of the authority of the Christian Scriptures and other principles of the Christian Religion which the Anglican Church of Canada (the "ACC") dedicated itself to preserve as part of the international Anglican communion for posterity in the Solemn Declaration of 1893.
4. This Declaration is the authoritative Protest of the founding principles of the Anglican Church in Canada and a declaration of trust which the Plaintiffs say the Defendants have failed to respect and observe. This is no obscure or forgotten instrument but is placed at the beginning of every Book of Common Prayer authorised by the ACC since its inception. The Plaintiffs say that, however that Declaration is interpreted, it was and remains a limitation on the authority of the Bishops and Diocese of the church. The Bishop and his advisers were wrong to disregard it as having any authority over his decisions.
5. The Plaintiffs also say that apart from doctrine the Solemn Declaration was a formal commitment on the part of the church to maintain itself in full communion with the "Church of England throughout the world". The central importance of being in full communion will be explained in the evidence but is an essential part of what it means to be Anglican. The Plaintiffs say that this commitment was breached when the Bishop chose to proceed on the basis of his Diocesan Synod's votes alone and without securing a consensus within Canada generally, and in the face of firm opposition internationally.

6. No better proof of the central importance of consensus to the Anglican Communion is the unprecedented division on an international scale that the Bishop's actions have produced. Much of the international Anglican Communion have declared themselves to be in broken or impaired communion with this Diocese. The Anglican Church is having to address and deal with fissures and divisions which will permanently change the form and character of relationships within the church.
7. The Defendants deny that any trust is relevant to the dispute but say that if there is a trust it is for the "promulgation of the Christian faith as interpreted by the Anglican Church of Canada." Based on the voluminous exchange of affidavits the principal differences appear to arise from the question of what authority the ACC has reserved for itself in questions of doctrine. Put plainly the Defendants' experts appear to say that the Solemn Declaration is of merely historic interest and the power of the ACC to "interpret" doctrine is plenipotentiary: in other words what the Diocese now interprets is Christian doctrine is made such for the parishioners if they wish to stay within the Church or for that matter within their churches.
8. In answer the Plaintiffs will argue that the ACC's own constitution does not provide such an unlimited power to reform or develop new doctrines for the church. The Solemn Declaration was intended to and remains immune from amendment, governing in respect of the doctrinal and liturgical identity of the church, and expresses foundational principles that cannot be departed from by any majority of the church body. The Plaintiffs do not say it is immune from reasonable interpretation and application, but say that the Defendants' innovations go beyond the exercise of interpretation.
9. The very function of a trust for religious purposes is to place a judicially enforceable restraint on a majority which has determined to abandon the foundations of the faith. Indeed the common law's refusal to interfere with legal title in respect of property dedicated to religious purposes brought into being the Court of Chancery's jurisdiction over charity in the 16th century. Thus the Court's jurisdiction is not only inherent, but historic and central to how religious purposes trusts perform in Canadian law. To this extent the Court must have regard to the religious purposes of the trust.
10. The Defendants also plead that the answer is to be found in the hierarchy of the ACC and its internal processes, which are said to exhaust and exclude the Court's jurisdiction in charity. But to examine this requires an examination of the relationship of the church structure to the church's doctrines. The Plaintiffs say that structure is secondary to doctrine and faith and the former serves the latter and not the reverse.
11. However in our submission both pleadings require some examination of the principles and doctrine of the Anglican Communion of which the ACC is a self-declared part.
12. Historically our Courts have answered questions of religious doctrine and in a case where that is necessary the Court must do its best. In this case however the Plaintiffs submit that there is an approach that commends itself to a *Cy prè*s Order and that permits a judicial approach that avoids judging the correctness of either party's position.

13. Both parties here hold sincere and genuine convictions as Anglicans as to what represents the proper view of Scripture and the importance of remaining part of the international Communion.
14. The Bishop is of the view that the call in the Christian gospel to love all persons requires that gay and lesbian unions be solemnised and celebrated within the Christian church. The Plaintiffs hold to the traditional view of the Anglican Church expressed in international statements of its Bishops from around the world in 1998 and by the Canadian House of Bishops in 1979 that same-sex blessings cannot be reconciled with the doctrines and usages of the Christian church held by Anglicans throughout the world and in Canada.
15. The Bishop is of the view that obedience to him is a higher value than adhering to what the dissenters consider necessary for their faith and communion with other Anglicans. The dissenters consider the faith and communion more important than continuing under the jurisdiction of a Bishop whose actions in their view are inconsistent with the doctrines of the church and the principles of the Solemn Declaration.
16. These differences have brought about a genuine division about important matters: this being so the Plaintiffs say that such a division does not involve them electing to become Baptists, or Congregationalists but rather Anglicans outside the jurisdiction of the Bishop. The division has made the original intent of the Anglican purpose trust incapable of performance: it contemplated a unified Diocese and a common doctrine, but that has now proved no longer possible.
17. This being so the Plaintiffs say that the duty of the Court is to ensure the trust is performed as close to its original purpose as possible in the circumstances. It is the purpose which is the beneficiary of the properties and no body of persons. There is no owner before the Court with the right to dictate the use and benefit of the property without limit. What that means here is that the Plaintiff congregations ought to be held to be appropriately serving the trust's purpose in their teaching and worship and the Bishop's expulsion of them from their offices and premises would operate to defeat rather than preserve the over-all purpose of the trust.
18. Canadian law concerning the Court's exercise of its inherent jurisdiction over trusts and charities is flexible and adjusts to meet the needs of the case. Generations have created trusts to ensure that the purposes for which they are dedicating a religious body will not be abandoned by successive generations. Trustees have been replaced by more appropriate persons. Minorities who have lost the internal battle over doctrine or direction have successfully obtained the Court's assistance in continuing to use the property and assets of the church. Similarly when trusts have become impracticable to continue as intended then the courts have made changes to the trusts themselves to accommodate changes in the circumstances or the beliefs of the parties. In one case this has resulted in the division of assets between two divided parties within one congregation. The appropriate order here will depend on what the Court determines to be the terms of the trust and the extent to which its trustees or terms require change to

preserve the over-all purposes of the trust. What is critical is that the Court's jurisdiction here is inherent, flexible and adaptable to the circumstances.

19. In the case involving a Hindu congregation in the United Kingdom the English courts determined that if possible in these modern times an agnostic approach should be adopted. In that case differences arose respecting the nature of the deity and the court ordered the property sold and divided proportionally between the two contending parties within the congregation. (*Varsani v. Jesani, below*)
20. It will be submitted that such an agnostic approach should be taken here because:
 - (a) This is a case of church division and not church departure;
 - (b) An agnostic approach would permit both parties to continue to use the various properties within the territorial area of the Diocese for identifiably Anglican purposes and not require the court to decide upon a winner as to who represents the Anglican faith sought to be preserved in the Solemn Declaration;
 - (c) Ultimately the free exercise of religious belief is a public good that is recognised in this culture and our Constitution. In the face of genuine and irreconcilable differences of conscience the Court should prefer an approach that preserves free exercise of religion rather than assisting one party in excluding its dissidents.
21. There is a distinctive issue in the case of the Parish of the Good Shepherd, as the Plaintiff Trustees in that action also seek a declaration that funds bequeathed to the church building fund by a former member of that congregation are held on a charitable trust by them for a specific purpose for construction of a church building to benefit the congregation.

II. Factual Background

The Anglican Church

22. Starting from the division of the Church of England from the Roman Catholic Church in sixteenth century England, Anglicanism has now spread worldwide, with its greatest strength naturally in the former British colonies. The great majority of Anglicans in church on any given Sunday are today in the Global South.
23. Anglicans throughout the world value their connection to other Anglicans. The Anglican Communion includes 38 "provinces", meaning the church of a country or group of countries. Anglicans describe their relationship in terms of interdependence and mutual communion; the various pan-Anglican offices and bodies may have moral authority, but not legal authority, over the various provinces. The evidence on behalf of the Plaintiffs is that the relationship of communion between different Anglican churches is premised on the sharing of the same faith, worship, doctrine and discipline. A church that is true to its Anglican character cannot regard itself as independent of the worldwide church or set its own course on matters of teaching. The interdependence of the Communion has been stressed at several Lambeth Conferences.

24. The principal pan-Anglican bodies are the Archbishop of Canterbury, who is recognized as first among equals among the Primates; the Primates, the presiding bishops of the various provinces, who hold regular meetings, chaired by the Archbishop of Canterbury; the Lambeth Conference, held every 10 years and intended to include all the bishops of the Anglican Communion; and the Anglican Consultative Council, meeting more frequently.
25. Anglicans throughout the world share a number of characteristics. Anglicanism is episcopal, in the sense of being led by bishops, and liturgical, in the sense of using a formal book of services. The current 1962 Book of Common Prayer in Canada is a lineal descendant of the sixteenth century English Book of Common Prayer. In terms of church structure and teaching, Anglicans look, among other things, to Scripture and to the Thirty-Nine Articles.

Anglican Church of Canada

26. The Anglican Church in Canada began as an extension of the English established church. However, in the nineteenth century it evolved to a national, non-established church, but still linked by the bonds of communion to Anglicans throughout the world.
27. The DNA of the Anglican Church of Canada (at first known as the Church of England in Canada) was set at its first General Synod in 1893, when those assembled adopted the Solemn Declaration, the foundational document of the church. The Solemn Declaration committed the Canadian church to maintaining full communion with the Church of England throughout the world; holding to the One Faith revealed in the Bible and defined in the creeds; maintaining the Doctrine, Sacraments and Discipline of Christ; and transmitting these unimpaired to posterity. It stated:
28. We, the Bishops, together with the Delegates from the Clergy and Laity of the Church of England in the Dominion of Canada, now assembled in the first General Synod, hereby make the following Solemn Declaration:

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

And we are determined by the help of God to hold and maintain the Doctrine, Sacraments and Discipline of Christ as the Lord hath commanded in His Holy Word, and as the Church of England hath received and set forth the same in “The Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the Church, according to the Use of the Church of England; together with the Psalter or Psalms of David pointed as they are to be sung or said in churches; and the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests and Deacons;” and in the Thirty-nine Articles of Religion; and to transmit the same unimpaired to our posterity.

29. Under the Constitution of the Anglican Church of Canada, any definition of doctrine by General Synod must be in harmony with the Solemn Declaration.
30. The Anglican Church of Canada is one of the 38 provinces within the Anglican Communion. The Church is headed by a senior bishop known as the Primate.
31. The bishops of the national Church are called collectively the House of Bishops, and meet together twice a year.
32. The rule-making body is the General Synod, which meets every three years. It is composed of three orders: the House of Bishops; clergy; and lay delegates from the various dioceses.
33. Within the Anglican Church of Canada are four internal “provinces”, each including a group of dioceses. One of the diocesan bishops is elected as the Metropolitan of the province, with a supervisory jurisdiction over the other bishops, and is thereafter called the “Archbishop” of his or her diocese.

Diocese of New Westminster

34. The Diocese of New Westminster is one of the dioceses in the Anglican Church of Canada. The Synod was incorporated under a private BC statute in 1893, *An Act to Incorporate the Anglican Synod of the Diocese of New Westminster*, S.B.C. 1893, c. 45 (the “Act”). A private statute does not have the force of general law, but was a common vehicle for incorporation of non-profit (and often for profit) bodies before BC had a Society Act or modern company legislation.
35. The foundational provision of the Diocesan Canons is Article 1 of the Constitution, under the heading “Principles”, which says:

We hold and maintain the doctrine and Sacraments of Christ, as the Lord has commanded in His Holy Word, and as the Anglican Church of Canada has received and explained the same in “The Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the Anglican Church of Canada, together with the Psalter, as

it is appointed to be said or sung in Churches, and the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests and Deacons,” and in the Thirty-nine Articles of Religion. And the Synod shall hold and maintain the same, and shall have no power to make any alteration in the Authorized Version of Scripture or in the above named Formularies of the Church.

Provided that nothing herein contained shall prevent the Synod from accepting any alteration of the above named Formularies and Version of the Bible as may, from time to time, be adopted by the General Synod of the Anglican Church of Canada.

Provided also that it shall be lawful for the Bishop, from time to time, to authorize and order to be used any special form of Prayer or Thanksgiving.

36. Michael Ingham is the current Bishop of the Diocese. An Anglican bishop is seen as exercising an apostolic ministry, in the sense of “being one with the apostles in proclaiming Christ’s resurrection and interpreting the Gospel”, and is sworn to guard the faith, unity and discipline of the church.
37. The Diocesan Synod, which normally meets annually, is the rule-making body.
38. The local churches within the Diocese are the parish churches. The Diocese currently counts 78 parishes, although attendance at many of these is low: aggregate Sunday attendance at the congregations within the Diocese is about 6,600.

Parish structures

39. In the Canadian Anglican pattern, the clergy at a parish church are appointed by the diocesan bishop, and given a licence by the bishop. Their oaths require them to maintain the faith and to give the bishop obedience in all things “lawful and honest”.
40. Those who attend a parish church, “parishioners”, are typically the donors who provide the capital and operating funds for the church; the parish, in turn, remits a portion of its revenues to the diocese, which remits a portion to the national church.
41. A parish has a parish council or church committee, which includes lay parishioners who share in the leadership of the parish. The major parish decisions are taken by the congregation members at what are called vestry meetings. Among other things, the vestry meeting elects most parish officers. The procedure at vestry meetings, and the role of the members of parish council, are dealt with under diocesan canons.
42. The Act provides for a further form of parish structure: parishes in this Diocese may become incorporated. Under section 7, the parish corporation is formed by filing a declaration of incorporation with the Registrar of Companies, typically signed by the rector of the parish and the senior lay officers. The declaration, which must be first approved by the bishop and the executive committee, sets out the names of the first

persons to serve as trustees of the parish corporation, and the mode of appointment or election of successor trustees. The rector or priest in charge is ex officio a trustee. Parish corporations adopt by-laws, which must be approved by the bishop and the executive committee of Synod.

43. The evidence is that the Diocese has encouraged parishes to incorporate, because the Diocese wishes to insulate itself from the risk of legal liability. About 70 of the parishes in the Diocese are incorporated.
44. Canon 15 of the Diocesan Canons gives the bishop the power to institute “a new or alternative form of Parish or Congregational Organization structure”. This power was relied upon by Bishop Ingham to justify the action described later in which he purported to remove the trustees of the four Parish Corporations and appoint replacement trustees. There is nothing in the Act or Canon XV that refers to the diocesan bishop having such a power.

The four parishes

45. The four parishes concerned in these proceedings (collectively, the “Parishes”):
 - (a) St. John’s (Shaughnessy) (“St. John’s”), located on Nanton Avenue in Vancouver. St. John’s is the largest Anglican parish in Canada.
 - (b) the Parish of St. Matthew, Abbotsford (“St. Matthews”), located on Guildford Drive in Abbotsford;
 - (c) the Parish of St. Matthias & St. Luke (St. Matthias & St. Luke”), an amalgamation of two parishes now located on West 49th Avenue in Vancouver; and
 - (d) the Parish of the Good Shepherd (“Good Shepherd”), located on E. 19th Avenue in Vancouver, whose congregation is principally Chinese.
46. The Parishes are all incorporated under the Act:
 - (a) St. John’s incorporated in December, 1932, under the name “The Parish of St. John’s (Shaughnessy)” (“the St. John’s Parish Corporation”);
 - (b) Good Shepherd incorporated in January , 1984, through a declaration of incorporation pursuant to s. 7 of the Act, under the name “The Parish of the Church of The Good Shepherd, Vancouver B.C.” (“the Good Shepherd Parish Corporation”);;
 - (c) St. Matthew’s incorporated in January, 1989, under the name “The Parish of St. Matthew’s Abbotsford” (“the St. Matthew’s Parish Corporation”);;
 - (d) The amalgamated parish of St. Matthias & St. Luke consists of two separate parish corporations.

- (i) St. Luke incorporated in March, 1955, under the name “The Parish of St. Luke” (“the St. Luke’s Parish Corporation”);; and
- (ii) St. Matthias incorporated in March, 1974, under the name “The Parish of St. Matthias (Oakridge)” (“the St. Matthias Parish Corporation”).

47. The declarations of incorporation of the Parish Corporations set out how the successor trustees will be elected or appointed each year. Although different wording is used, the declarations of all four Parish Corporations provide that trustees shall be elected or appointed each year at the annual vestry meeting and shall continue to hold office until their successors are appointed. For example, the St. John’s Declaration provides:

5. That the successors of the said trustees shall be elected and appointed at the annual vestry meeting of the electors of the Church. The retiring trustees shall be eligible for re-election. Any casual vacancy occurring in the Board of Trustees may be filled up by the Church Committee.

6. That the Rector or other priest in charge of the Parish shall be ex officio a Trustee and presiding officer of the Parish corporation of St. John’s Shaughnessy.

Michael Bentley #1, Ex. F

48. Each Parish Corporation has filed a set of by-laws. The by-laws state that the members of the Corporations are the Trustees, and that the Rector or incumbent, who is an ex-officio trustee shall be the presiding officer of the Corporation. The by-laws of some of the Parish Corporations set out the procedure used by the vestry to elect trustees. For example, the by-laws of St. Matthews read in part as follows:

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

Linda Seale #1 at Ex. L

49. The plaintiffs are all persons who are (or were, in some cases, according to the Diocese), trustees of their respective Parish Corporations.

Fundamental issues in the Anglican Church of Canada and the Diocese

50. The affidavit evidence on behalf of the Plaintiffs demonstrates that there have been growing differences between the conservative and liberal streams within the Anglican Church of Canada (and, indeed, within the worldwide church).
51. In Canada, the concern over the direction of the church in Canada led to the Essentials Movement, launched by a conference in 1994 in Montreal that prepared an affirmation of the “essentials” of the faith known as the Montreal Declaration. This conference represented the coming together of three different strands: the Anglo-Catholics (the high church, committed to traditional forms and liturgy); the evangelicals; and the charismatics.
52. The differences between conservatives and liberals extended to many areas of the church’s teaching. One of the areas was human sexuality. In 1979, the National House of Bishops considered the issues of homosexuality, ordination of homosexual people as clergy and same-sex unions and issued Guidelines, stating “[w]e believe as Christians, that homosexual persons, as children of God, have a full and equal claim with all other persons, upon the love, acceptance, concern, and pastoral care of the church”; however, the Guidelines said that the bishops “do not accept the blessing of homosexual unions”(the “1979 Guidelines”).

New Westminster: 1993 to 2001

53. In 1993, the former bishop, Archbishop Hambidge, retired, and the Diocese began the process for the selection of a new bishop. Michael Ingham was one of three candidates. Reverend Harry Robinson, the former rector of St. John’s, wrote to all candidates about their views on celibacy of clergy and the 1979 Guidelines. Michael Ingham responded that he would require celibacy of all clergy outside the confines of heterosexual marriage, and that he would abide by the 1979 Guidelines until they were amended. Michael Ingham was later elected and installed as bishop (the “Bishop”) of the Diocese in 1994.
54. Differences between Bishop Ingham and the conservative churches in the Diocese emerged. In 1995, he refused to allow a second Essentials conference to be held in Vancouver. In 1997, Bishop Ingham published his book, *The Mansions of the Spirit*, in which he expressed views on issues regarding the uniqueness of Christ that created controversy. Conservative Anglicans in the Diocese were concerned that Bishop Ingham had embraced the “pluralist” view that all faiths are equally valid, and that this is inconsistent with historic orthodox Christian teaching, which insists on the uniqueness of Christ. A group of conservative clergy met with Bishop Ingham to express their concerns.
55. In 1997, the House of Bishops met and voted to direct a task force to amend the 1979 Guidelines in light of new pastoral awareness, while retaining the original intent of the guidelines. Following extensive consultation, discussion and prayer, the House issued a Pastoral Statement, in which they said “We are not ready to authorize the blessing of

relationships between persons of the same sex”. In 1998, the General Synod of the ACC passed a motion commending the 1997 Pastoral Statement.

56. Despite the 1997 Pastoral Statement, a motion was put forward at the Diocesan Synod in May 1998 calling for the Bishop to approve a rite for the blessing of same-sex unions. Bishop Ingham had advised the House of Bishops in May, 1988 of the process in the Diocese; there was anger that the guidelines that had been worked on collegially were being defied. The motion narrowly passed by a 51% majority. However, the Bishop said he would not act on the motion as there was insufficient consensus within the Diocese and he wanted to consult with the House of Bishops and with the world bishops at the Lambeth Conference later in 1998.
57. The 1998 Lambeth Conference met in Canterbury, where the question of human sexuality in the Biblical context was the dominant issue . Over 800 bishops attended from over 160 countries attended. As a result of study and discussion throughout the Conference, the sub-section on Human Sexuality drafted the 1998 Lambeth Resolution 1.10, which was passed by an overwhelming majority of 88% of the bishops in attendance at the Conference. Resolution 1.10 called for further study, pastoral concern, and understanding of homosexuality. Among other resolutions, it states:

This Conference: ...

d. while rejecting homosexual practice as incompatible with Scripture, calls on all our people to minister pastorally and sensitively to all irrespective of sexual orientation and to condemn irrational fear of homosexuals, violence within marriage and any trivialisation and commercialisation of sex;

e. cannot advise the legitimising or blessing of same sex unions nor ordaining those involved in same gender unions;

58. Despite the Lambeth Resolution 1.10 and the 1997 Pastoral Statement, in January 1999 Bishop Ingham announced that, before there was a further Synod vote on the issue of a rite for same-sex blessings, the Diocese would undergo an 18-month long dialogue process for discussion of the issue.
59. On June 2001, after the mandated dialogue process, the Diocesan Synod voted for the second time in favour of a motion to authorize same-sex blessings. The motion passed by a majority of 56.5%, but again the Bishop said he would act on the request. The Bishop made it known, however, that he would act if there was a vote of 60% or more in favour of same-sex blessings at the 2002 Diocesan Synod.

New Westminster: 2002 Synod vote and its consequences

60. In 2002, the conservative clergy sought to dissuade Bishop Ingham from proceeding on the issue of same-sex blessings. On May 23, 2002, the Bishop met with conservative clergy and presented a proposal for a form of “conscience clause” and an opportunity for limited pastoral care by another bishop, or “Episcopal Visitor”, if approval was given for

same-sex blessings. On June 6, 2002, twelve clergy, including Trevor Walters, met with the Bishop to provide a counter-offer to the Episcopal Visitor proposal, which would provide that the Visitor not be accountable to the Bishop, but to other Canadian Bishops, including Bishop Terry Buckle of the Yukon. The Bishop rejected the counter-offer.

61. On June 14, 2002, prior to the Synod vote, five Primates of the Communion sent an open letter to the members of Synod urging that the motion to approve a rite for same-sex blessings be defeated, and stating that the Lambeth Conference in 1998 and successive Primates meetings had been clear in affirming Anglican teaching against the blessing of same-sex unions. In hopes of persuading the Bishop not to proceed with the motion, the parish leaders of St. John's gave the Bishop a legal memorandum they had obtained that concluded that as a canonical matter the Bishop did not have the jurisdiction to proceed to authorize same-sex blessings. Despite the Primates' letter and legal opinion, a motion was put on the agenda for Diocesan Synod 2002, requesting that the Bishop approve a rite for same-sex blessings.
62. At Diocesan Synod on June 15, 2002, Motion 7, the motion asking the Bishop to authorize same-sex blessings, was passed by just over 60%. Bishop Ingham announced he would authorize a rite for the blessing of same-sex unions. This was the first time any Anglican diocese and bishop in the world had formally authorized such blessings.
63. When Motion 7 was passed at Diocesan Synod, dissenting synod members and parish delegates from eight parishes in the Diocese walked out of Synod, including St. John's, St. Matthias & St. Luke, Good Shepherd, St. Matthews, Church of Emmanuel, St. Simon's North Vancouver, St. Martin's North Vancouver, and St. Andrew's Pender Harbour, and representing approximately 25% of the membership of the Diocese at that time. They wanted to mark the profound division between the orthodox and historic Anglican position and the position now officially adopted by the Diocese. At Synod, Reverend Trevor Walters spoke on behalf of the eight dissenting parishes and announced that they considered themselves in "impaired communion" with the Diocese.
64. After the results of the June 2002 Synod became known publicly, there was an immediate reaction within the ACC and within the Anglican Church worldwide. Within the ACC, 13 Canadian bishops issued a public statement on June 17, 2002, challenging the action in New Westminster as being contrary to the 1997 House of Bishops Statement and the 1998 Lambeth Conference, and outside the jurisdiction of a single diocese acting alone. The Archbishop of Canterbury criticized the action, but asked other Primates to exercise restraint in their response while he attempted to deal with the situation. International statements of support for the dissenting parishes and denunciation of the actions of the Bishop and the Diocese came from the Archbishop of Rwanda, a majority of Australian bishops, 23 bishops of the Episcopal Church of the United States, and the Archbishop of Kenya.
65. On or about June 19, 2002, clergy of the Parishes received letters from Bishop Ingham asking whether they wished to remain licensed by him in the Diocese, under his jurisdiction and authority. The clergy responded that they did wish to remain part of the Diocese, but that the relationship with the Diocese had been seriously strained by the

passage of Motion 7, which, if implemented, could put them in a position of conflict with their ordination vows and the teaching of the worldwide Anglican Communion. The Wardens of the Parishes, who had been copied on the letter to clergy, also responded, stating that they believed that the passing of Motion 7 was beyond the legal and moral authority of the Diocese and that the safeguards included in the conscience clause were inadequate to address their concerns, necessitating a continuing search for alternative episcopal oversight to remain in communion with the global Church.

66. In July 2002, at special vestry meetings, the eight dissenting parishes who opposed Motion 7 voted to form an informal coalition called the Anglican Coalition in New Westminster (“ACiNW”) (collectively, “the ACiNW Parishes”), registering their desire to remain in full communion with the Anglican Church throughout the world as set out in the Solemn Declaration of 1893, while avowing a state of impaired communion with the Bishop and Synod. The coalition was for mutual support and encouragement and coordination during what they foresaw as a difficult time, and as a vehicle for the search for alternative episcopal oversight within the Anglican Church of Canada from another Canadian bishop.
67. In July 2002, the Oxford Consultation on the Future of Anglicanism was held in Oxford, England. In a sermon given there on July 3, the Archbishop of Canterbury said that the action in the Diocese of New Westminster “undermines marriage” and “is schismatic”. The next day, a number of attendees at Oxford, including three Primates and eight other bishops, issued a letter of solidarity with ACiNW, and the “The Oxford Declaration” was produced, which described the action in the Diocese as “unconstitutional”, and “schismatic”. In September 2002, at the meeting of the Anglican Consultative Council in Hong Kong, the Archbishop of Canterbury again spoke to the events in the Diocese, stating that he was deeply concerned that such unilateral action ran the risk of splitting the Anglican Church.
68. The next regular meeting of the National House of Bishops was in October 2002. The House called on all bishops to adhere to the 1997 Guidelines. However, Bishop Ingham made it clear that he would not retreat from the action he had taken. The House of Bishops was deeply divided and could not agree on any substantive response. However, the House issued a statement signalling the level of disagreement concerning the action that had been taken, requesting that the Diocese and the ACiNW Parishes engage in mediation, and initiating a conversation about alternative episcopal oversight for the Parishes. In obedience to the request of the House of Bishops, the Parishes engaged in a mediation process with the Diocese in early 2003, however, no progress was made or agreement reached.
69. Since 2002, the Parishes have had essentially no relationship with the Bishop or Diocese and have considered themselves to be in a state of broken or impaired communion. The Bishop has not visited the Parishes, participated in parish life or provided pastoral care to the clergy. Clergy have not attended clergy conferences or retreats in the Diocese since 2002; no Parish delegates have attended the Diocesan Synods since January 2003; the Parishes have not sent any candidates for confirmation by the Bishop; and the Parishes have not made any statistical or other reports to the Diocese. In addition, the Parish

vestries voted to stop paying assessments to the Diocese as it would be contrary to the purposes for which the members of the congregation had donated those funds. However, the Parishes knew that a portion of that diocesan assessment was forwarded by the Diocese in turn to the national church. In order to show their desire to continue as faithful Anglicans within the ACC, the ACiNW Parishes calculated the amount of the assessment that would have been forwarded by the Diocese to the ACC, and sent cheques directly to the ACC in those amounts. The ACC, on the advice of the Diocese, did not cash the cheques, and later returned them.

70. In 2003, some of the ACiNW leaders approached the Anglican Bishop of Yukon, Terry Buckle, who had previously taken some conservative Alaskan parishes under his jurisdiction, with the consent of the Alaskan Bishop, over their difference of positions on same-sex blessings, and asked him to provide them with alternative episcopal oversight. The Diocese of New Westminster and the Diocese of Yukon are both within the ecclesiastical Province of British Columbia and Yukon. It was hoped that a similar process would work for the ACiNW Parishes as had worked with the Alaska parishes. In February 2003, Bishop Buckle made an offer of alternative episcopal oversight to Bishop Ingham and the ACiNW Parishes, which the ACiNW Parishes were willing to accept.
71. In February or March 2003, the congregations of the Parishes of St. John's, St. Matthew, St. Matthias & St. Luke, and Good Shepherd voted in favour of accepting an offer of oversight from Bishop Buckle. However, Bishop Ingham immediately rejected Bishop Buckle's offer and on February 24, 2003, issued a Notice of Inhibition against him.
72. In or about March 24, 2003, the clergy of the ACiNW Parishes received letters from Bishop Ingham requesting them to answer certain questions as to whether they would affirm the offer of Bishop Buckle and whether they would acknowledge their canonical obedience to Bishop Ingham. The letter also threatened disciplinary proceedings. In a joint response signed by Reverend Trevor Walters on behalf of the ACiNW clergy, they stated that they believed Bishop Buckle's offer represented a sincere effort to preserve communion within the ACC in the face of the difficult issues raised by the Bishop's determination to proceed with the blessing of same-sex unions before the matter had been considered at General Synod. Over the next month, Bishop Ingham summoned each of the ACiNW clergy to meet with him individually and asked them whether they would acknowledge his canonical obedience to him as bishop. In each case, Bishop Ingham also referred to the possibility of disciplinary proceedings if the clergy did not so acknowledge their obedience.

2003: The authorization of the use of the rite and the international crisis

73. In May 2003, the Primates held their regular meeting, in this case in Gramado, Brazil. The Primates discussed the 2002 decision of the Bishop and the situation in the Episcopal Church of the United States, where a partnered gay man, Gene Robinson, was standing for election as Bishop of New Hampshire. The Primates issued a Pastoral Letter which affirmed Lambeth Resolution 1.10, and said in part: "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”.

74. At the same time as the Primates Meeting, on May 23, 2003, Bishop Ingham went ahead with the authorization of the use of the rite for the blessing of same-sex unions, and gave certain parishes within the Diocese permission to hold such ceremonies. The first same-sex blessing was celebrated very shortly afterwards, on May 27, 2003.
75. The authorization of the use of the rite provoked a strong international reaction. A group of 15 Primates issued a statement saying that the action showed “a flagrant disregard for the remainder of the Anglican Communion” and that it took the Diocese “far beyond the generally accepted teaching of the church”, and referred to a prior statement that as a consequence communion had been severed with the Diocese. The Primates strongly supported the conservative parishes who had remained faithful to the witness of scripture and tradition.
76. A second crisis point was emerging in the Anglican Communion, as Gene Robinson had been elected Bishop of New Hampshire and his consecration as bishop was due to take place. The Primates held an emergency meeting at Lambeth Palace in London and issued an urgent call for the consecration not to proceed, reaffirming the 1998 Lambeth Resolution 1.10. They said “as a body we deeply regret the actions of the Diocese of New Westminster and the Episcopal Church (USA) which . . . could be perceived to alter unilaterally the teaching of the Anglican Communion on this issue” and that “these decisions jeopardise our sacramental fellowship with each other”. If the consecration proceeded, “this will tear the fabric of our Communion at its deepest level”.
77. Despite the call from the Primates, the consecration of Gene Robinson proceeded, and Bishop Ingham was one of the bishops who participated in the consecration.
78. On or about October 15, 2003, the Bishop advised the clergy of the Parishes that he was commencing disciplinary process against them based on ecclesiastical charges laid against them by his Chancellor (the legal officer of the Diocese). At the same time, the Metropolitan of the ecclesiastical province was attempting to pursue disciplinary proceedings against Bishop Buckle.
79. During the fall and winter of 2003, the Bishop took action against two of the ACiNW parishes. He invoked Canon 15 as authority to fire the lay officers and lock the congregation of St. Martin’s North Vancouver out of their church. He also pulled the funding and purported to terminate the mission church of Holy Cross, Abbotsford, a planted church of St. Matthew. Both of those churches had joined ACiNW in 2003 and had accepted Bishop Buckle’s offer of oversight. A majority of the congregation of St. Martin’s formed the new church of St. Timothy’s, while the congregation of Holy Cross simply continued as such.
80. From October 28-31, 2003, the ACC House of Bishops held its regular meeting and debated the Bishop’s actions in consenting to Motion 7 in 2002. The House agreed to establish a task force, chaired by Bishop Victoria Matthews, to report on alternative

episcopal oversight, on the condition that Bishop Terry Buckle withdraw his offer and Bishop Ingham stay the ecclesiastical charges against the clergy. Both bishops agreed, and the ACiNW parishes agreed to cooperate with the task force process, including engaging in mediation with the Diocese with the goal of reconciliation.

81. In March 2004, the House of Bishops task force produced a paper for the ACC on adequate episcopal oversight for dissenting minorities known as the “Matthews Report”. The Matthews Report provided considered recommendations for three possible models of oversight. The Primate of the ACC requested the ACiNW Parishes wait for a resolution from the ACC before taking further action; however, ultimately, the report was never adopted by the House of Bishops.
82. Five of the ACiNW Parishes proceeded to leave the ACC and formed the Anglican Coalition in Canada (“ACiC”). The ACiC parishes received alternative episcopal oversight from certain Global South Primates. The remaining six ACiNW Parishes, including the four Parishes, remained engaged with the ACC processes, hoping to obtain alternate episcopal oversight that would be sanctioned by the ACC or the Anglican Communion.

General Synod 2004

83. The issue over same-sex blessings was taken up by the national church at General Synod 2004. The ACiNW churches hoped that a resolution would be reached. However, General Synod passed two motions that suggested that the national church position was changing. First, Resolution A134 included a clause which said that General Synod affirmed “the integrity and sanctity of committed adult same sex relationships”. Second, Resolution A135 requested the Faith Worship and Ministry Committee to “prepare resources for the church to use in addressing issues relating to human sexuality, including the blessing of same sex unions and the changing definition of marriage in society”. A motion to affirm a “local option”, under which dioceses would each be allowed to make their own decisions on the blessing of same sex unions, was deferred to General Synod 2007, pending a determination by the Primate’s Theological Commission on whether same sex blessings were a matter of doctrine (and thus within General Synod jurisdiction).
84. In 2004, the Essentials Movement was restructured, establishing the Anglican Essentials Network (“AEN”), which the Parishes joined. AEN was also known as the Anglican Network in Canada (although not strictly the same legal entity as the Parishes later joined).

International developments, 2004-2005

85. In November 2004, the Lambeth Commission, established by the Archbishop of Canterbury upon the request of the Primates at their meeting in October 2003, presented their recommendations on the future of the Anglican Communion in the light of recent developments in North America in the “Windsor Report”. The Windsor Report urged the adoption of a common Anglican Covenant which would govern relationships between the

provinces or churches of the Communion to avoid “the crippling prospect of repeated worldwide inter-Anglican conflict such as that engendered by the current crisis.” It also stated that the unilateral decision to authorize the blessing of same-sex unions “goes against the formally expressed opinions of the Instruments of Unity and therefore constitutes action in breach of the legitimate application of Christian faith as the churches of the Anglican Communion have received it, and of bonds of affection in the life of the Communion, especially the principle of interdependence”. The Windsor Report called for a moratorium on same-sex blessings, recommended that bishops who had authorised such rites in the US and Canada be invited to express regret that the proper constraints of the bonds of affection were breached by such authorisation, and stated that “[p]ending 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”. Finally, the Windsor Report called upon the ACC to recognize the dissenting groups in their midst who are trying to be faithful Anglicans, and to provide for sufficient alternative episcopal oversight for those parishes to “provide a credible degree of security on the part of the alienated community, so that they do not feel at the mercy of a potentially hostile leadership”. Finally, the Windsor Report solemnly warned that there was a very real danger that the churches of the Communion would not choose “to walk together” but would “walk apart”.

86. In February 2005, the Primates held a meeting in Dromantine, Ireland. The Primates accepted the recommendations in the Windsor Report, and they issued a Communiqué which, among other things, commended the proposal of a common Anglican covenant; asked the ACC and the Episcopal Church to voluntarily withdraw from the Anglican Consultative Council until 2008 while “they consider their place within the Anglican Communion” and “whether they are willing to be committed to the interdependent life of the Anglican Communion”; called for a moratorium on same-sex blessings and on the consecration of any bishop living in a sexual relationship outside Christian marriage; and reaffirmed the 1998 Lambeth Resolution 1.10 as the current position of the Anglican Communion.
87. In response to the call for a moratorium in the Windsor Report, the Diocese did not implement a moratorium on the performance of same-sex blessings, but only a limited moratorium on authorizing any new parishes to conduct same-sex blessings.
88. At the June 2005 hearing of the Anglican Consultative Council in Nottingham, Council supported and upheld the “voluntary withdrawal” of the ACC until 2008 as requested by the Primates in Dromantine, as neither the Diocese, nor the ACC had expressed regret, or abided by the moratorium on same-sex blessings in the Windsor Report.

“Shared Episcopal Ministry” model

89. In April 2005, the House of Bishops attempted to address the call for alternative episcopal oversight in the Windsor Report and to forestall the crisis in church unity in Canada by recommending a model for temporary alternative episcopal oversight called Shared Episcopal Ministry (“SEM”). SEM involved a temporary and transitional scheme

under which a visiting bishop was appointed to provide pastoral care for dissenting parishes, subject to the consent of the diocesan bishop. The diocesan bishop retained his authority over all parishes and licensed clergy, including jurisdiction for all episcopal acts, appointments and discipline. The visiting bishop would be accountable to the diocesan bishop. The model failed to meet the needs, as they saw them, of the ACiNW parishes.

90. In May 2005, the Canadian Primate's Theological Commission issued the St. Michael's Report, which concluded the blessing of same-sex unions was a matter of doctrine, though not core doctrine "in the sense of being credal". The Commission's view was that the issue should not be "communion breaking".

2005 to 2007

91. During this period, the Global South Anglican provinces continued their collective activities.
92. In October 2005, representatives of the AEN were invited to send representatives to the "South to South Encounter", the third official gathering of the Global South provinces, held in Egypt. Twenty provinces were represented, from Africa, south and South East Asia, West Indies and South America, provinces which in aggregate include about two-thirds of the active Anglicans in the world. The Archbishop of Canterbury attended, and acknowledged that the dissenting parishes in Canada and the United States were part of the Anglican Communion:

On the status of the networks of dissenting parishes in the United States and Canada, he said that he was happy to recognise them as part of the Anglican Communion:

"There is no doubt in my mind that these networks are full members of the Anglican Communion; that is to say that their bishops, their clergy and their people are involved with the Communion which I share with them, which we all share with them. Now formal ecclesial recognition of a network as if it were a province is not so simply in my hands or the hands of any individual. But I do want to say quite simply yes of course; these are part of our Anglican fellowship and I welcome that."

93. The different groups of conservative, dissenting Anglicans in North America began to work on common structures. Under the leadership of two Primates, a Council of the Anglican Provinces of the Americas and Caribbean was announced in July 2005. From this emerged (in 2007) the Common Cause Partnership, uniting the various orthodox Anglicans who could not conscientiously remain with the Anglican Church of Canada or the The Episcopal Church in the United States.
94. In September 2006, the representatives of 20 provinces of the Global South, meeting in Kigali, called for recognition of a new ecclesial structure in North America for orthodox Anglicans.

95. A Primates Meeting was held in February 2007 in Dar es Salaam. Prior to the Primates Meeting, representatives of the Parishes met with the Global South Primates, who collectively agreed that, if necessary, it would be appropriate for Archbishop Venables to extend primatial oversight to them.
96. In their statement following their meeting, the Primates reaffirmed Lambeth Resolution 1.10 as foundational as “a standard of teaching which is presupposed in the Windsor Report and from which the Primates have worked.... The Primates have reaffirmed this teaching in all their recent meetings.” The Primates unanimously recommended a robust scheme for an alternate structure in America, involving a Pastoral Council to act on behalf of the Primates. This proposal was later rejected by The Episcopal Church.

General Synod 2007

97. On Good Friday 2007, 26 Anglican academics issued an open letter to the bishops of the ACC out of “grave concern for the integrity of our Christian community”, indicating that they were disturbed by the proposed Synod motions that did not reflect the implications of the St. Michael’s Report. Among other things, the letter stated that sexual ethics is a doctrinally serious matter and should not be dealt with by the General Synod in the manner of a simple resolution, and the way the matter is treated could cause the ACC to be perceived to be walking apart from the Anglican Communion.
98. In June 2007, General Synod passed Resolution A186 on a simple majority vote of 50% plus one. A186 affirmed the conclusion in the St. Michael’s Report that the issue of same-sex blessings was a matter of doctrine, but not “core doctrine”, and that such blessings were not in conflict with the “core doctrine” of the ACC. The General Synod narrowly defeated Resolution A187, a motion to approve same-sex blessings on a “local option”. (The implication of the conclusion that same sex blessings are a matter of doctrine is that the issue is within the jurisdiction of General Synod, not any one diocese such as New Westminster.) The General Synod rejected an amendment to Motion A183 which would have committed the ACC to uphold Lambeth Resolution 1.10 as the current standard of Anglican teaching, and to uphold a moratorium on same-sex blessings.
99. Despite the rejection of the local option motion at General Synod 2007, six more dioceses (Ottawa, Niagara, Huron, Rupert’s Land, Montreal and the Assembly of Anglican Churches of the Central Interior in B.C.) have all voted to authorize the blessing of same-sex marriages. In addition, the bishops in the diocese of Toronto have recently decided to approve same sex blessings at a limited number of parishes without the approval of their diocesan Synod.

Anglican Network in Canada

100. In November 2007, the Anglican Network in Canada (“ANiC”) commenced operations as an incorporated charitable society and separate ecclesial structure in November 2007, with two bishops, two priests, two deacons and two parishes. One year later, when it held its first Synod, the numbers had grown to include in excess of 60 clergy and 25 parishes extending from St. John’s, Newfoundland to Victoria, B.C.

101. After General Synod 2007, Bishop Donald Harvey, the retired Bishop of the Diocese of Eastern Newfoundland and Labrador, concluded that he would have to leave the ACC. He wrote to both the Primate and the Metropolitan of the ACC and advised them of his decision to relinquish his licence within the ACC, but not his Anglican orders. He made it clear that he would be seeking reinstatement in another Province of the Communion.
102. Because it was important to him to remain a bishop in the Anglican Communion, Bishop Harvey welcomed the opportunity to come under the jurisdiction of Archbishop Gregory Venables, Primate of the Province of the Southern Cone. To be recognized by Archbishop Venables and his House of Bishops as a bishop under his jurisdiction meant that Bishop Harvey would continue to be a bishop of the Anglican Communion. The Province of the Southern Cone is a Province in the Anglican Communion encompassing much of South America and including Bolivia, Chile, Paraguay, Peru, Uruguay and Argentina.
103. In November 2007, Archbishop Venables offered to provide temporary jurisdictional oversight for orthodox Anglicans in Canada belonging to ANiC. Bishop Donald Harvey came out of retirement to serve as a bishop under Archbishop Venables' jurisdiction, and provide episcopal oversight for the ANiC parishes. In February 2008, the congregations of the four Parishes, St. John's, St. Matthew, St. Matthias & St. Luke, and Good Shepherd, voted almost unanimously in favour of the motion to accept the episcopal oversight of Bishop Donald Harvey under the jurisdiction of the Primate of the Southern Cone. The clergy of the four Parishes relinquished their licences for ministry in the Anglican Church of Canada (or in one case retired) and accepted licences from Bishop Harvey. During February 2008, ten Canadian parishes in total voted to accept episcopal oversight from Bishop Harvey.
104. In August 2008, Bishop Ingham purported to replace the clergy and trustees of the Parishes of St. Matthew and St. Matthias & St. Luke, relying on Canon 15, with clergy and trustees of his choosing. Around the same time, the Diocese contacted the banks at which the two Parishes held accounts, had the banks change the signing authorities on the accounts, and had the funds in those accounts effectively frozen. The Diocese indicated that the same action would be taken against the other two parishes.

The Chun Bequest

105. A distinct issue in the *Law* action is the bequest of property "to the building fund of the Church of the Good Shepherd" in the will of Dr. Daphne Wai-Chan Chun, a former member of Good Shepherd who died on June 29, 1992 (the "Chun Bequest").
106. Dr. Chun, a renowned professor and medical doctor at Hong Kong University, was a lifelong Anglican who first attended St. Paul's Anglican Church of Glenealy in Hong Kong, a parish with a conservative theology and worship style, before she emigrated to Canada in about 1984. Like many Anglican immigrants from Hong Kong to Vancouver, Dr. Chun chose to attend Good Shepherd, and was a member of the congregation under Reverend Peter Pang, Reverend Robert Yeung and then Reverend Steven Leung.

107. By about 1989, Dr. Leung, who suffered from health problems and whose mobility was limited as a result, was unable to attend church at Good Shepherd regularly. Reverend Yeung visited Dr. Chun at her home once or twice per month to care for her pastorally and to take her Holy Communion. During one of these visits, Dr. Chun told Reverend Yeung that she was thinking of leaving property she owned in Hong Kong to St. Paul's Anglican Church there and asked his opinion about it as her minister. Reverend Yeung asked Dr. Chun to consider leaving the property to Good Shepherd, as it was her home congregation, a thriving ministry for the Chinese community in Vancouver, and was in need of a new building to accommodate its current ministries and allow for future expansion. Reverend Yeung suggested that she could designate the bequest specifically for the building fund of Good Shepherd. Dr. Chun later confirmed that she would leave the property to Good Shepherd because it needed the money more than St. Paul's and it was more relevant to her current life.
108. When he became rector, Reverend Stephen Leung visited Dr. Chun at her home a few times before her death. Dr. Chun passed away in 1992, and Reverend Leung conducted her funeral. Later, Good Shepherd was informed that Dr. Chun had left her property in Hong Kong "to the building fund of the CHURCH OF THE GOOD SHEPHERD".
109. Good Shepherd set up an ad-hoc committee to deal with the property. The sale took four or five years to complete, as the committee tried to secure the best possible sale price. The net proceeds of sale were \$1,587,691.00. At the Good Shepherd Annual Vestry Meeting in 2002, the congregation passed a motion to establish a separate building fund for the proceeds of the Chun Bequest, as it was understood that the use of the funds was very restricted under the terms of the bequest. The proceeds of the Chun Bequest held by Good Shepherd now total \$2,274,850.00 as of December 31, 2008.

Parish Property

110. The property held by the Parishes consists of real and personal property, including money in bank accounts owned by the Parish Corporations (the "Parish Property").
111. The Parish Property is held on charitable purpose trusts by the Parish Corporations, which act as an incorporated boards of trustees, or which function as the trustee directed by the individual trustees, who are elected or appointed each year by the Parish vestries, and serve in office until the next annual vestry meeting.
112. The Plaintiffs are the current trustees, or officers, of the Parish Corporations as elected or appointed by the Parish vestries at an annual vestry meeting.
113. As charitable purpose trusts require no identifiable individual beneficiary, the original charitable purpose which benefits from the use of the trust property must be gathered from the terms of the trust set out in documents and from the surrounding circumstances and practice that existed at the time the trust was established.
114. There have been numerous acknowledgements of the existence of a trust, and it is a common understanding by many Anglicans that church property is held on trust. In fact, the underlying principle respecting property in the Anglican Church is that property is

held on the basis of a shared belief system and a shared commitment to the constitution of the church. Priests and bishops are sworn to uphold these commitments when they enter office.

115. The trustees of the four Parish Corporations (including the rectors as ex-officio trustees) understand that they are elected by their congregations to ensure that the Parish resources are used for the purpose of carrying out ministry consistent with historic and orthodox Anglican teaching and practice. They are accountable to the congregation to see that the Parish Property, including ongoing donations, are applied for those proper purposes and to ensure that the Parishes remain in full communion with other faithful Anglicans worldwide. Part of the trustee role involves leadership, guided by the will of the congregation and by Scripture, to ensure that the Parishes continued to benefit from the use of the buildings, and other assets contributed by parishioners for the purpose of Anglican worship. The trustees also understand that the day-to-day operations of the Parishes depend almost entirely on charitable donations made by the parishioners; therefore, if the trustees act inconsistently with the wishes of the parishioners, then they would be less likely to donate, and the Parish operations and ministry would suffer or eventually stop altogether.
116. Bishop Ingham recently admitted in cross-examination that there is a trust relationship in relation to parish property, which is commonly understood throughout the Anglican Communion to be for the mission and ministry of Christ:

Q. In your affidavit you say that you misspoke when you referred to congregations in this discussion, and you ought to have referred to parishes, and I'm not going to deal with that issue so much as to ask you this question. It does reflect, does it not, your understanding that there's a trust relationship -- and forgetting for the moment its terms and otherwise -- that there's a trust relationship in relation to parish property. You've always understood that to be the case.

A. Yes.

Cross-examination of Michael Colin Ingham, T: p. 103, ll. 44-47 – p. 104, ll. 1-7

117. Archived opinions given by the former Chancellor of the Diocese, John Spencer, to the Diocese in 1979, on the character of the parish corporations state that until a parish corporation was organized, parish property was held by the Diocese on trust for the parish. This is entirely consistent with the normal Anglican approach. The parish is the fundamental unit of the church, and where the real life of the church takes place. The role of the Diocese is to facilitate the life of the local worshipping congregations. Once a parish corporation had been established, the role of the Bishop and Diocese was one of persuasion, except in certain specified instances, such as selling property. Typically, all the parish funds are given by the congregation, who will give funds for ministry and purposes of which they approve, and not otherwise. Members of the congregation regard the parish property as theirs, and expect to have the say over how that property is used.

As between the parish and Diocese, the parish gives funds to the diocese, rather than the other way around.

118. In October 2002, the clergy and trustees of St. John's received a letter from the Chancellor alleging that all Parish property is held for the benefit of the Diocese.

119. The March 2008 "Topic", the monthly newspaper of the Diocese of New Westminster reported Bishop Ingham as saying:

Parishes are created by diocese to further the mission of Christ according to the Anglican tradition. In this joint venture parish and diocese work together to further the mission of Christ. The diocese holds all property in trust for congregations who worship in that place to carry on that ministry.

120. In a letter dated May 29, 2008, the Chancellor of the Diocese stated that he wished to remind the trustees of their obligations under the Act, Constitution and Canons of the Diocese as being entrusted with the care and preservation of the assets of the Parish, including but not limited to its lands, buildings and bank accounts, for the benefit of all, not those within the congregation of the Parish who seek to follow its current clergy.

121. In a letter dated August 25, 2008, from the Dean and Commissary of the Diocese informed parishioners that the church buildings were held in trust for the ministry of the Anglican Church of Canada, and that the Bishop, Synod and Diocesan Council have a legal and fiduciary responsibility to be faithful to this trust. The Dean and Commissary stated that this was not simply an administrative matter. It was a matter of both civil and canonical law in compliance with the Act, the Constitution and Canons of the Diocese.

122. Within other dioceses of the Anglican Church of Canada, it appears that the Diocese of Cariboo, a Diocese of the ACC in British Columbia, took the position during residential schools litigation involving sexual and other abuse claims against the ACC, among other parties, that the parish churches and property in the Diocese of the Cariboo were held on trust for the parishioners and therefore shielded from seizure by residential abuse claimants. The ACC reported in a news releases dated October 15, 2000 and 2001 respectively, that "the diocesan chancellor, Bud Smith, said the diocese may hold properties in trust for the parishes, and may not have the legal authority to surrender them", and "Parish properties held in the name of the diocese, but held in trust for the congregations, will be placed in a new Society".

123. The Diocese of Huron in Ontario, also during a period of sexual abuse litigation, took the position that the parish properties within the Diocese were held in trust for the parishes or congregation. The Chancellor of the Synod of the Diocese of Huron wrote a letter to a diocesan priest in November 2001, indicating that the Diocese "has no beneficial or legal interest entitlement to parish property and accordingly in the unlikely event that judgment is obtained against the Incorporated Synod of the Diocese of Huron, parish property would not be available to any execution creditors".

124. Archbishop Fred Hiltz, the Primate of ACC, issued a public letter dated February 13, 2007, in which he took the position that the property of parish churches is held in trust for the ACC and its continuing mission and ministry.
125. The particular terms of the trusts over the Parish Property may be discerned from the documents, and from usage and practice that have existed in the Diocese and the Anglican Church of Canada. In examining the two pleadings, it may be said that the differences between the parties are narrow in their views of what constitutes the terms of the trust.
126. The Plaintiffs plead at para. 79 of the Amended Statement of Claim in the Bentley Action, (para. 37 in the Law Action), that the property of the Parishes is held by the respective Parish Corporations, or alternatively, the trustees, on trust for the charitable purpose of ministry that is consistent with historic, orthodox Anglican doctrine and practice. The purpose requires, *inter alia*, that such ministry take place within the context of a diocese and national church whose members are in full communion with each other and with the other members of the Anglican Communion.
127. The Defendants plead at para. 9 of the Amended Statement of Defence in the Bentley Action (para. 10 of the Law Action) that if the Parish Corporations hold property on trust as a matter of course, then it is held by the Parish Corporations for the promulgation of the Christian faith as interpreted by the ACC and the Synod.
128. Both parties plead that the trusts are purpose trusts – the Defendants do not say that the Diocese, Synod or the ACC is the institutional beneficiary of the trusts. Therefore, any difference in the terms of the trust would lie in the purpose, namely what is the Christian faith as promulgated and interpreted by the ACC.
129. The plaintiffs plead that the purpose of the trust may be found in the collective character of the Anglican Communion, and the historic character of Anglicanism as expressed in the Book of Common Prayer and the Thirty-nine Articles of Religion adopted in 1563. Within the ACC, the purpose is set out in its foundational document, the Solemn Declaration of 1893.
130. The effect of the Solemn Declaration is that the ACC is intended and required to remain fully part of the Anglican Communion and must adhere to historic, orthodox Anglican doctrine and teaching. By virtue of the stated requirement to transmit such matters unimpaired to posterity, the ACC may not depart from such historic, orthodox Anglican doctrine and practice.

Amended Statement of Claim, Bentley Action at paras. 21-25

131. The purpose is also found at the Diocesan level in the Canons and Constitution. The Bishop, by virtue of his obligations under the Act and the constitution of the Diocese, by virtue of his consecration oath, and in his role as an Anglican bishop, is under a duty to maintain and defend historic, orthodox Anglican teaching and practice within the Diocese, underlying the purposes of the trusts.

Amended Statement of Claim, Bentley Action at paras. 27, 28

132. Since the establishment of the trusts, the trustees of the Parishes have carried out their duties to apply the Parish Property in a manner consistent original purpose as set out in the documents and circumstances above, and as such, the congregations continue properly benefit from the use of the Parish Property.

III. Witnesses and Affidavits

133. The bulk of the evidentiary record upon which the Plaintiffs will rely contained in affidavits of expert Anglican theologians, and Bishops, clergy, trustees and parishioners, past and present.
134. In addition to the affidavit evidence, over the next week, the Plaintiffs will call the following witnesses to give evidence in person in court: John Stackhouse, Bishop Donald Harvey, Ronald Ferris, Reverend David Short, Reverend Simon Chin, Linda Seale, Peter Pang and Gail Stevenson.
135. John Stackhouse is the Professor of Theology and Culture at Regent College in Vancouver, and is a recognized expert on the history and theology of Christianity in North America. Mr. Stackhouse's evidence is intended to place the current dispute in context of the modern history of Canadian Protestantism.
136. Bishop Donald Harvey, retired Bishop of Eastern Newfoundland & Labrador in the Anglican Church of Canada, was appointed by Archbishop Vables, the primate of the Province of the Southern Cone, to provide alternative episcopal oversight to the Parishes, and other Anglican parishes in Canada that requested it, as a temporary emergency measure pending the resolution of the issues dividing the Anglican Communion. It is anticipated that Bishop Donald Harvey will give evidence about why he left the Anglican Church of Canada, and about how he and the Parishes remain within the Anglican Communion.
137. Bishop Ronald Ferris is a life long Anglican. He was formerly Bishop of British Columbia and the Yukon, and the National House of Bishop in the Anglican Church of Canada. Since February 2009 has been a Bishop in the Anglican Network in Canada. It is anticipated that Bishop Ferris will comment on the structure of the National Church, the jurisdiction of the General Synod to change doctrine in harmony with the Solemn Declaration, the fundamental constitutional document of the Anglican Church of Canada. In addition, it is anticipated that Bishop Ferris will give evidence about the evolution of the worldwide crisis and division, its crystallization as a result of the actions of the Bishop, and why current internal processes within the Anglican Church of Canada are inadequate to resolve the dispute.
138. Gail Stevenson is a long-time parishioner of St. John's.
139. Linda Seale is a Trustee of the St. Matthew's Parish Corporation.

140. Peter Pang is a long-time parishioner of Good Shepherd, and a former Warden and Trustee of that parish.
141. Reverend Simon Chin is the Rector of St. Matthias & St. Luke and ex officio trustee of the St. Matthias & St. Luke Parish Corporation.
142. Reverend David Short is the Rector of St. John's and ex officio trustee of St. John's Parish Corporation.
143. The Plaintiffs expect that these witnesses will provide additional assistance to the court in understanding the complex questions of fact and law at play in these proceedings, and the impact of these issues on the Anglican Communion locally and worldwide.

IV. Applicable Legal Principles

Jurisdiction over Charity

144. It is clear from a line of authorities stretching back to the 16th century that the courts exercise an inherent supervisory jurisdiction over charities and thus over trusts for charitable purposes, stemming from the original jurisdiction of the Court of Chancery. There is broad inherent jurisdiction in the court in charitable matters exercisable by virtue of its special position in the law of charities. The jurisdiction arose because purpose trusts were in principle invalid at common law as there was no particular beneficiary entitled to be called upon to enforce the trust. The Courts of Equity developed principles to preserve trusts with no specified beneficiary when those purposes were charitable, for the obvious public purpose of charitable intentions not being defeated. Of interest for present purposes is the observation in Baker that one of the examples of a generous and purposive interpretation of a bequest was the holding that gift of property "to the church" was held to be intended for the parish--before the Reformation.

Tudor on Charities, 9th ed. (Thomson, Sweet & Maxwell, 2003) at 371

Re Public Trustee and Toronto Humane Society et al. (1987), 60 O.R. (2d) 236 at 244.

Baker, History of the Law of Charity, 1969, p. 5

145. That jurisdiction has been accepted in British Columbia.

Rowland v. Vancouver College Ltd., 2000 BCSC 1221 at para. 49, aff'd 2001 BCCA 527

146. 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. For example, the court may, *inter alia*, discover the legal representatives of the original founder, substitute trustees, identify beneficiaries, recover trust property from wrongful possessors, set aside improvident contracts, order trustees to account, or order the distribution of the 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. As will be discussed below, the court may also invoke its scheme-making jurisdiction to rescue a trust that is otherwise doomed to fail under the principle of *cy præs* 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”)

147. A charitable purpose trust does not exist for the benefit of a specific beneficiary, but exists for the benefit of a purpose which is found to be “charitable”.

Waters’ Law of Trusts in Canada, 3rd ed. (Thomson Carswell, 2005) at 625

148. 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. The test as to whether a trust has a “charitable purpose” recognized by law was recently summarized by Mr. Justice Barrow in *Re Johnston Estate*:

Generally, a charitable activity is one that “seeks the welfare of the public...and is not concerned with the conferment of private advantage” (see *Waters’ Law of Trusts in Canada, 3rd ed., 2005, Thomson Carswell at p. 679 [Waters]*). Further, there is something approaching a presumption that if an activity falls within one or more of four categories, it is considered charitable. The four categories are the relief of poverty, the advancement of education, the advancement of religious purposes, and other purposes that enure to the general benefit of the community (see *Pemsel v. Special Commissioners of Income Tax, [1891] A.C. 531 (H.L.)*). In order for a gift to be charitable in the sense of advancing religious purposes, the gift must:

...contribute to the advancement of religion as that word is interpreted by the courts. Secondly, the gift must promote the religion instruction or education of the public. It is well settled, however,...a gift for religious purposes is prima facie charitable, the necessary element of public benefit being presumed unless and until a contrary intention is shown. (see *Tudor On Charities (9th ed.)*, London: Sweet & Maxwell, 2003 at p. 381).

Re Johnston Estate, 2008 BCSC 1185 at para. 17

Waters, supra at 679-680

149. In terms of the Chun Bequest, Madame Justice Levine briefly examined the law of specific charitable purpose trusts in *Rowland v. Vancouver College Ltd.*, stating: “It is a matter of construction of a bequest or gift in trust for a charitable purpose to determine whether it is for the general purposes of the charity or for a specific or restricted purpose”. Bequests for specific purposes are distinct from and may not be used for the general purposes of the charity, but must be applied for that particular purpose. In order to determine whether a bequest gives rise to a specific charitable purpose trust, the courts will look to the intention of the testator, the subject matter of the trust, and its object, or purpose.

Rowland (S.C.), supra at paras. 74, 75

150. The British Columbia Supreme Court recently dealt with the procedure for determining the testator’s intention in *Re Johnston Estate*:

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

Re Johnston Estate, supra at para. 18

151. The advancement of religion, as interpreted by the courts is very broad, and has been defined generally as: “the promotion of spiritual teaching in a wide sense and the maintenance of the doctrines on which it rests and of the observances which serve to promote and manifest it”. The law does not prefer one religion to another in finding the existence of a charitable trust for religious purposes. It assumes that it is good for people to have and practice a religion, and must accept the position that it is right that different religions should each be supported irrespective of whether or not all its beliefs are true.

Re Anderson Estate, [1943] 4 D.L.R. 268 at 271 (Ont. H.C.), rev’d on other grounds, [1943] O.W.N. 698 (C.A.)

Gilmour v. Coates, [1949] A.C. 426 at 446(H.L.) at 458-459

Religious Purpose Trusts

152. When a religious institution, formed for the purpose of practicing certain fundamental doctrines of religious faith then expressed, the property is held on a charitable purpose trust for the original purposes of that institution. Those purposes incorporate the fundamental doctrines and tenets of that institution. Secular courts will intervene in a church property dispute based on the principles of trust law to enforce a trust for its

original purposes. The court will treat the church as if it was a charity properly created, holding its property on trust, and will examine the unalterable, fundamental doctrines underlying the terms of the trust to determine its original purpose. If the original purpose of the trust can be determined, the court will enforce it by ordering that the property be appropriated to the use and benefit of those members the court identifies as adhering to those original principles. In identifying the purposes of the trust, the court will first look to whether the object of the trust is clear on the face of the trust documents. If it is not, then the court will look to the founding documents and the usage or practice of the church at the time of its establishment, in order to determine if a trust should be implied.

A.G. v. Pearson (1817), 3 Mer. 351

General Assembly of Free Church of Scotland v. Overtoun, [1904] A.C. 515 (H.L.)

Chong v. Lee (1981), 29 B.C.L.R. 13 (S.C.-Ch.)

153. One of the leading statements on the application of the original purpose trust doctrine is found in the decision of Lord Davey in *General Assembly of Free Church of Scotland v. Overtoun*, which was adopted by Justice Dickson in *Hofer v. Hofer*:

The law is clear. It is laid down by Lord Davey in *General Assembly of Free Church of Scotland v. Lord Overtoun*, [1904] A.C. 515 at pp. 643-4, in these words:

The law on this subject is free from doubt. It has been settled by numerous decisions of the Courts both in Scotland and in England, and has been affirmed by judgments of this House. The case of *Craigdallie v. Aikman*, 1 Dow, 1, 16; 2 Bli 529, at pp. 539, 541, came twice before this House. In the second appeal Lord Eldon thus stated the principle on which the House proceeded: "When this matter was formerly before the House we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel we should hold the building appropriated to the use of persons who adhere to the same religious principles." And after stating the result of the inquiries directed by the former judgment Lord Eldon said: "Supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be which of them adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to those religious principles being more properly to be considered as the cestuis que trust of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it."

Hofer v. Hofer (1966) 59 D.L.R. (2d) 723 (Man. Q.B.), *aff'd*, 65 D.L.R. (2d) 507 (Man. C.A.), *further aff'd*, (1970) 13 D.L.R. (3d) 1 (S.C.C.)

154. In the *Free Church of Scotland*, the Earl of Halsbury L.C. stated in relation to the court's role in dealing with religious doctrine:

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.

General Assembly of Free Church of Scotland v. Overtoun, *supra* at 613, *per* Earl of Halsbury L.C.

155. In the British Columbia case of *Chong v. Lee*, Mr. Justice Hinds provided a review of the law of the original purpose trust doctrine in his reasons after hearing a petition brought by a minority of the congregation of the Christ Church of China, who were in a doctrinal dispute with the majority concerning methods of baptism. The minority sought relief under the *Society Act* in respect of possession and use of church property. Hinds J. first stated that:

Generally speaking, a court has no jurisdiction to inquire into the religious belief of any person or the religious doctrine of any church except, as here, where such inquiry may be necessary to determine property rights of some kind.

Chong v. Lee, *supra* at 14

156. Hinds J. set out that church property is held on trust for 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

157. These “defined doctrines” or fundamental doctrines may be ascertained from many different sources. Justice Hinds summarized the authorities regarding the relevant sources of doctrine:

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

1. The corporate articles or constitution of the Church adopted at the time of its establishment, see *Anderson v. Gislason (supra)*.
2. An Act of Parliament incorporating a church, where its articles of association spell out the purpose for which the church was established -- see *Hofer v. Hofer* (1966) 59 D.L.R. (2d) 723 (Man. Q.B.), affirmed on appeal, 65 D.L.R. (2d) 507 (Man. C.A.), further affirmed on appeal (1970) 13 D.L.R. (3d) 1 (S.C.C.).
3. The Claim, Declaration and Protest issued at the time of the establishment of a new church -- see *General Assembly of Free Church of Scotland v. Lord Overtoun and Others*, [1904] A.C. 515 (H.L.)
4. The wording of the conveyance which established the trust upon which trustees were to hold property in trust for a church -- see *Dorland v. Jones* [1885] 12 O.A.R. 543 (Ont. C.A.).

Chong v. Lee, supra at 14

158. 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 must 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.

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

159. In the *Free Church of Scotland* case, Lord James stated:

... 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**

160. The principle that those who manage the religious institution do not have the power to alter the original purpose of the trust and apply the property to the new purposes was expressed by Lord Eldon in the leading case of *Attorney General v. Pearson*, 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.

A.G. v. Pearson, supra at 400-401

The *Cy prè*s Jurisdiction of the Courts

161. Before proceeding further it must be noted that the Court has an inherent jurisdiction over trustees of charitable trusts. If the issue here is not the statement of the trust but rather who is appropriate to discharge that purpose the court may exercise its inherent jurisdiction and its jurisdiction under the *Trustee Act* to effect the removal and appointment of trustees in order that the trust property be administered by trustees holding the opinions of those for whose benefit the trust was intended.

***Brewster v. Hendershot*, [1900] O.A.R. 232 (C.A.)**

***Re Public Trustee and Toronto Humane Society et al.*, supra at 245**

162. The doctrine of *cy prè*s evolved in 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 prè*s 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

163. 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 prè*s scheme, whereby it removes any uncertainty and the objects of the trust are made operative. In England, the scheme-making power of the courts was rendered statutory; however, in Canada there is no statutory *cy prè*s power, and the common law continues to apply.

Waters, *supra* at 762

164. Picarda states that the most satisfactory modern formulation of the definition of *cy prè*s is from the Restatement of Trusts (2d) s. 399, which was accepted by Justice Rutherford in *Lapointe v. Ontario (Public Trustee)*. The Restatement provides:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

Picarda, *supra* at 279

***Lapointe v. Ontario (Public Trustee)*, [1993] O.J. No. 2661 at para. 13**

165. The common law *cy prè*s 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 prè*s 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 prè*s occasion. In *Re Stillman Estate*, Mr. Justice Cullity adopted the description of the essence of the *cy prè*s doctrine in the second edition of Picarda as follows:

It has been said that:

... the essence of the [*cy prè*s] doctrine is that is the new purposes should be "as near as possible" to the original purposes. ... the doctrine of *cy prè*s 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)

The question is, therefore, not simply whether I am of the opinion that adoption of the total return model is likely to be a more efficient method of investing than that chosen by the testatrix. A *cy près* order must depart from the intentions of the testatrix only to the extent required to remove the problem that has caused the future administration of the Trust to become impracticable. However, as the same learned author recognized, proximity is not the sole criterion. The relative efficiency of possible changes must be considered.

***Re Stillman Estate* (2003), 5 E.T.R. (3d) 260 (Ont.S.C.); [2003] O.J. No. 5381 (QL) at paras. 28, 29**

166. 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**

167. 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*, where by her will, the testatrix bequeathed funds to the Royal College of Surgeons for a scholarship to male students who was a British born subject and not of the Jewish or Roman Catholic faith. Justice Buckley held that the paramount charitable intention was to found medical scholarships to be administered by the Royal College for the purposes of enabling students to attend medical school, and the term excluding students of Roman Catholic or Jewish faith was inessential to that intention. The judge stated:

The impracticability of giving effect to some inessential part of the testatrix’s intention cannot, in my judgment, be allowed to defeat her paramount charitable intention.

***Re Lysaght*, [1966] Ch. 191 at**

168. If the applicants succeed in showing that carrying out the charitable purpose was initially practicable, but by a supervening event, has now become unworkable, the court will inquire further to determine whether there is any reasonable prospect that the purpose will become workable again at some point in the future.

***Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (C.A.)**

Re Lysaght, supra at 207

169. If the fulfillment of the charitable purpose has become impracticable and there is no reasonable possibility of future fulfillment, then a *cy prè*s occasion has occurred and the court's common law *cy prè*s 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, [1999] Ch. 219 (C.A.) at para. 14

Lapointe, supra at paras. 16-19

170. If the offending condition to practical fulfillment of the charitable purpose is subsidiary to the general charitable intention, then it is open to the court to amend the terms of the trust by severing that condition. In *Canada Trust Co. v. Ontario (Human Rights Commission)*, Mr. Justice Robins held:

Put another way, while the trust was practicable when it was created, changing times have rendered the ideas promoted by it contrary to public policy and, hence, it has become impracticable to carry it on in the manner originally planned by the settlor.

In these circumstances, the trust should not fail. It is appropriate and only reasonable that the court apply the *cy-pres* doctrine and invoke its inherent jurisdiction to propound a scheme that will bring the trust into accord with public policy and permit the general charitable intent to advance education or leadership through education to be implemented by those charged with the trust's administration.

Canada Trust Co. v. Ontario (Human Rights Commission) (1990), 74 O.R. (2d) 481 (C.A.)

171. Courts have exercised their *cy prè*s 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 prè*s application of the funds to that charitable object.

M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 2nd ed. (Toronto: Irwin Law, 2003) at 289

172. 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. By 1923, although not illegal, the evidence showed that 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 condition of wearing a black gown in the pulpit was impracticable and that it was subsidiary to the original

paramount purpose of the bequest to provide funds towards the endowment of an evangelical church at Bournemouth, which would be practicable on its own. 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

173. *Varsani v. Jesani* involved a trust with the purpose of promoting the faith of a particular Hindu sect as practiced in accordance with the teachings and tenets of its leader. A dispute arose between two groups (a majority and a minority) within the sect and developed so that they could no longer worship together in the same temple. Each group conscientiously believed that they alone continued to profess the true faith. The trustees sought declarations regarding the use and benefit of the assets of the trust and a scheme for the administration of the trust.

Varsani v. Jesani, *supra* at paras. 226, 232

174. Lord Justice Morritt found that the following circumstances existed:

First, there is no doubt what the original purpose of the Charity was and is. It was and is the promotion of the faith of Swaminarayan according to the teachings and tenets of Muktajivandasji. Second, until the problems disclosed by the events of 1984 arose those original purposes were both suitable and effective as a method of using the property for both the Majority and Minority Group were agreed on all relevant matters and therefore able to worship together in the Temples provided by the Charity. Third, the exposure of differing beliefs by the events of 1984 has produced a situation in which neither group is able to worship in the same Temple as the other so that the Minority Group has been excluded from the facilities for the worship the Charity was established to provide. Fourth unless the impasse can be resolved as a matter of faith, so that both groups reunite to embrace the faith the Charity was established to promote, the impasse will remain so long as the original purpose remains. Fifth the impasse cannot be resolved as a matter of faith because the teachings and tenets of Muktajivandasji did not deal with whether a belief in a particular successor to Muktajivandasji or in the divine attributes of a successor were or are essential tenets of the faith. I do not accept that the parts of the 1969 Constitution on which Counsel for the Minority Group relied resolve the question. And a decision of the Helping Committee or this court is not binding as a matter of faith. Thus the impasse and the original purpose of the Charity go together. If the original purpose leads in the present circumstances to such an impasse then in my view it is self-evident that the original purpose has ceased to be a suitable and effective method of using the available property.

Varsani v. Jesani, supra at 233

175. The court exercised its *cy prè*s jurisdiction to order scheme, specifically, that the church assets be divided so as to facilitate the effective carrying out of two new charitable purposes that were as near as possible in nature to the original intent of the founder. In his conclusion, Lord Justice Chadwick held that “[g]iven jurisdiction, it would plainly be appropriate to make a scheme”. He reasoned:

... the community is now divided and cannot worship together. Nothing that the court may decide will alter that. To hold that one group has adhered to the true faith and that the other group has not will not alter the beliefs of that other group. The position will remain that the community cannot worship together. To appropriate the use of the property to the one group to the exclusion of the other would be contrary to the spirit in which the gift was made.

Varsani v. Jesani, supra at 238

176. In that case, it was a condition of the trusts on which the property was held that the members of the church would remain unified in their faith and did not contemplate such a division. The court in *Varsani* stated that it was enjoined by s. 13 of the *Charities Act* to have regard to the “spirit of the gift”. Similarly, at common law, a court must have regard to the general charitable intent of the trust. Lord Justice Morritt held that the spirit of the gift support the making of a *cy prè*s order. Morritt L.J. reasoned:

The choice lies between directing such a scheme for the benefit of all those who down to 1984 shared the belief for the promotion of which the Charity was established and, no doubt, in many cases supported the Charity financially as well, even though some of them may no longer do so, and requiring a substantial proportion of the trust property to be spent in litigation which can never finally resolve the problems which divide the two groups. I do not minimise the strength of feeling which arises in connection with disputes such as this. In such cases either or both groups often litigate in preference to permitting a benefit to be conferred on the other. But the spirit of the gift to which the court is to have regard is that which prevailed at the time of the gift when the two groups were in harmony.

Varsani v. Jesani, supra at 234

177. The *cy prè*s order was that the church assets be divided so as to facilitate the effective carrying out of two new charitable purposes that were as near as possible in nature to the original intent of the founder. It was held by Mr. Justice Patten at the Chancery Court who facilitated the scheme for division of property: “where the assets of a religious charity fall to be divided following a rift on theological grounds the court has no choice but to assume an agnostic role”.

Varsani v. Jesani, 2001 W.L. 825210 (Ch D), [2002] 1 P. & C.R. DG 11

178. Although the court that ordered the division was exercising a statutory *cy prè*s power, which did not require the court to determine whether the purpose of the trust had become impracticable; however, it is the Plaintiff's position that this division of property would be equally available under the common law *cy-près* jurisdiction.

V. Issues

Parish Properties

179. What is the original charitable purpose of the trusts on which the property of the Parishes is held?
180. Are the Plaintiffs or representatives of the Plaintiffs' congregation appropriate trustees of those trusts?
181. Have the actions of the Bishop since 2002 rendered the achievement of the purpose of the trusts impracticable?
182. If the purpose of the trusts has become impracticable to achieve, should the court exercise its inherent jurisdiction to make a *cy prè*s order to preserve the charitable intent of the trusts by directing the application of the trust property to new purposes as near as possible to the original charitable intent?
183. In the alternative, are the actions of the Bishop within the Diocese since 2002 inconsistent with the original purpose of the trusts, and are the actions of the Parishes in realigning themselves under the jurisdiction of the Southern Cone consistent with that original purpose?
184. Were the actions of Bishop in purporting to replace the trustees at two of the Parishes unauthorized and of no force and effect?

Chun Bequest

185. Does the will of Ms. Chun create a specific charitable purpose trust for the benefit of the building fund of the current congregation of Good Shepherd?
186. If so, have the actions of the Bishop rendered impracticable the achievement of the specific charitable purpose?
187. If, because of the actions of the Bishop, it has become impracticable to carry out the specific charitable purpose of the Chun Bequest, should the court exercise its inherent jurisdiction to make a *cy prè*s scheme in order that Ms. Chun's general charitable intent not be defeated?

VI. Summary of the Plaintiff's Position

The Property of the Parishes

188. The Plaintiffs expect to prove that the Parishes hold their property on trust for the primary purpose of ministry that expresses traditional, orthodox Anglican doctrine and practice. Those trusts were originally conditioned on the Diocese constituting the body that represented the Anglicans in its geographic area, all of whom were in full communion with each other.
189. The trusts on which the Parishes hold their property are charitable purpose trusts under the head of the advancement of religion, and have historically been and remain for the purpose of the promotion of spiritual teaching and maintenance of the doctrines of traditional, orthodox Anglicanism for the benefit of the public.
190. It is the Plaintiffs' position that the general purpose of the trusts is for ministry that expresses traditional, orthodox Anglican doctrine and practice. This historic character of Anglicanism is expressed in the Book of Common Prayer and the Thirty-Nine Articles. The application of the trust is conditioned on and subject to the original intention that the members of the Diocese constituting the body that represented Anglicans in the Lower Mainland of British Columbia be in full communion with one another, as has been a historic and defining feature of Anglicanism.
191. It is submitted that the terms of the trust on which the Parishes hold their property may be implied from fundamental tenets of the Anglican faith, which are unalterable, and are set out in the foundational documents of the Parishes and the Anglican Church, including *The Anglican Synod of the Diocese of New Westminster Incorporation Act, 1893* (the "Act"), the Solemn Declaration of 1893, the Constitution and the Diocesan Canons.
192. Until 2002, the charitable purposes of the property held on trust by the Parishes have been carried out in full communion, meaning that members of the Anglican Communion, and each body of Anglicans maintained and professed the body of doctrine and practice accepted by Anglicans as expressing the orthodox standards of teaching. This ecclesial structure did not anticipate a situation where a division would place within and between bodies of Anglicans.
193. Since 2002, the Anglican Communion has faced an unprecedented crisis created by the actions of the Defendants in 2002 and 2003, which have been recognized by primates of the Anglican Communion worldwide as being inconsistent with the international standard of historic, orthodox Anglican doctrine and practice and inconsistent with the maintenance of full communion within the Anglican Church.
194. It will be shown that the actions of the Defendants have been described by the Archbishop of Canterbury as "schismatic", and led to an irreparable division within the Diocese such that the Parishes have considered that they have been in a state of impaired or broken communion with the Bishop and have functioned as parishes without interaction with the Bishop or Diocese. Instead, the Parishes have joined the body of 18 congregations known as the Anglican Network in Canada under the episcopal supervision

of Bishop Donald Harvey under the primatial jurisdiction of Archbishop Gregory Venables, the primate of the Anglican Province of the Southern Cone, as a temporary emergency measure to ensure the Parishes would continue with ministry according to historic orthodox Anglican teaching and practice under orthodox Anglican leadership. By reason of the Bishop's actions, the Bishop and the Diocese are no longer in communion with all member churches of the Anglican Communion, and do not consider themselves in communion with the Parishes. However, the Parishes remain Anglicans and are recognized as Anglicans by the majority of Anglicans within the worldwide Church.

195. As the purpose of the trusts is conditioned on the concept of there being one body of Anglicans in the Diocese who are in full communion with each other and does not contemplate a division, it is the Plaintiffs' position that the effect of the conduct of the Bishop within the Diocese, within Canada and throughout the world has made it impracticable to carry out that condition of the trust. Further, there is no reasonable prospect that it will become practicable to carry out the purpose anytime in the future.
196. It is submitted that in these circumstances of broken communion with the Diocese, a supervening impracticability exists, and the Plaintiffs submit that the court may exercise its inherent jurisdiction to rescue the trusts on which the Parishes hold their property by ordering a *cy près* scheme directing the modification of the terms of the trust to give effect as nearly as possible to the general charitable intention of ministry in the orthodox Anglican tradition while in communion with the Anglican Church on a larger scale. To do otherwise in the present circumstances, would be to allow that general intention to be defeated.
197. In the alternative, it is submitted that the terms of the trust are inconsistent with the requirement that the Parishes accept and receive episcopal jurisdiction and oversight from the Bishop of the Diocese. The conduct of the Bishop in respect of his departure from the international standard of teaching is contrary to the charitable purposes of historic, orthodox Anglican doctrine and practice upon which the trusts were founded. In furtherance of such conduct, the Bishop has interfered in the trust property held by the Parishes, including purporting to replace of the Parish Trustees and freeze the assets of certain Parishes. The Plaintiffs expect to prove that these actions demonstrate an attempt to divert the trust property held by the Parishes from its original charitable purpose. As a result, the Plaintiffs ask the Court to intervene to restrain the Defendants from diverting trust property, and order the appropriation of the trusts to the use and benefit of the Parishes who, by realigning themselves under the jurisdiction of Archbishop Venables, continue to adhere to the original purpose. Further, the Plaintiffs seek a declaration that any purported appointment of trustees by the Bishop was invalid, and to declare the Plaintiffs to be the valid trustees of the Parish property.
198. In the alternative, in purporting to remove the duly elected or appointed Parish Trustees and appoint new trustees, the Plaintiffs will endeavour to show that the Bishop was acting without legal authority under the Act or under the Constitution, and the purported removal and appointments of trustees are nullities and of no force and effect.

Chun Bequest

199. It is submitted that the language in Dr. Chun's will, in which she bequeathed property in Hong Kong to "the building fund of the Church of the Good Shepherd" created a specific charitable purpose trust, and the Good Shepherd, or its Trustees are the intended trustees of the Chun Bequest. The specific purpose of the Chun Bequest is held is distinct from the trusts for general purposes upon which the Parishes hold their property, and must only be applied in furtherance of that specific purpose.
200. The Plaintiffs expect the evidence to show that the intention of the Testatrix in creating the trust was that the Chun Bequest be used for the benefit of the congregation of the Parish of the Church of the Good Shepherd as she knew it when she was a parishioner there, namely as an orthodox Anglican church serving the ethnic Chinese community. As such, the original intention of the Chun Bequest can only be fulfilled by the present congregation under the leadership of the Plaintiff Trustees and should be appropriated for the use and benefit of that congregation.
201. Conversely, if Good Shepherd was under the control of the Bishop through his appointed trustees, the specific charitable purpose of the trust on which the Chun Bequest is held would then become impracticable to perform, because the character of the current congregation will be changed and the church building would not be used for carry on the ministry of Good Shepherd to the ethnic Chinese community consistent with the traditional, orthodox Anglican practice. Therefore, the Chun Bequest would fail.
202. In the event that this Court finds that it is impracticable to carry out the purpose of the Chun Bequest, then the Plaintiffs seek an order establishing a *cy près* scheme to fulfil the Testatrix's charitable intent, and if necessary, an order pursuant to the *Trustee Act* appointing the Plaintiffs of the Church of the Good Shepherd as Trustees of the Chun Bequest.

VII. Relief Sought

203. In these proceedings, the Plaintiffs seek a declaration that the Parish of St. John's (Shaughnessy), the Parish of St. Matthew, Abbotsford, the Parish of St. Matthias & St. Luke, and the Parish of the Church of the Good Shepherd ("Good Shepherd"), (collectively, the "Parishes"), or in the alternative the Parish Trustees, hold their parish property in trust for the congregations for the purpose of ministry consistent with historic, orthodox Anglican doctrine and practice, and that the original purpose of those trusts is unalterable and requires the Diocese of New Westminster (the "Diocese") and its members to be in full communion with each other, and with other Anglicans throughout Canada and throughout the world.
204. The Plaintiffs submit that this is an appropriate situation for the Court to exercise its *cy près* jurisdiction to order a scheme to fulfil the general charitable intent of the trusts over the Parish Property. In that regard, the Plaintiffs seek a declaration by the court that events since 2002 have rendered impracticable the carrying out of the purpose of the trust over the Parish Property, and in particular the condition of the trust requiring full

communion within the Church. The Plaintiffs then seek an order for a *cy prè*s scheme to rescue the trust from defeat due to the supervening impracticality.

205. The Plaintiffs submit that the necessary specifics of such a scheme may be addressed after entitlement is declared.
206. In the alternative, the Plaintiffs seek a declaration that the terms of the trusts are inconsistent with the requirement that the Parishes accept and receive episcopal jurisdiction and oversight from the Bishop of the Diocese, and that the realignment of the Parishes to receive episcopal oversight from Bishop Donald Harvey under the primatial jurisdiction of Archbishop Gregory Venables, is consistent with the terms of the trusts, and that the trusts must be applied to the use and benefit of the Plaintiffs who continue to adhere to the original purposes of the trusts.
207. The Plaintiffs also seek a declaration that the actions of the Bishop purporting to dismiss the Parish Trustees and to appoint new trustees of his choosing were of no force and effect, and a declaration that the persons elected or appointed at the annual vestry meetings of the Parishes of St. Matthew and St. Matthias & St. Luke still hold their positions as trustees of the respective Parish Corporations.
208. In respect of the issue concerning Parish of the Church of the Good Shepherd, the Plaintiffs seek a declaration that Good Shepherd holds the proceeds of the property bequeathed by Ms. Chun (the "Chun Bequest") in trust for the congregation for the purpose of purchasing or constructing a new church to carry on the ministry of Good Shepherd to the ethnic Chinese community. In the event that this Court finds that it is impracticable to carry out the purpose of the Chun Bequest, then the Plaintiffs seek an order establishing a *cy prè*s scheme to fulfil the testatrix's charitable intent, and if necessary, an order pursuant to the *Trustee Act* appointing the Plaintiffs as trustees of the Chun Bequest for the purposes set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Per:

Dated: June 2, 2009

Counsel for the Plaintiffs