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For Public Release on Tuesday, January 12, 2021

The Anglican Communion Alliance has received a Legal Opinion concerning recent issues related to the Canons and procedure of the Anglican Church of Canada.

On January 4, 2021 the Chair of the Board of ACA wrote to the House of Bishops of the Anglican Church of Canada, letting them know about the Legal Opinion. On January 6, 2021, the Feast of the Epiphany, a further Letter and the Opinion itself were sent to the House of Bishops of the ACoC. Both of those letters and the Legal Opinion itself, which ACA received in early October, 2020, are now being released publicly.



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For Consideration, Regarding the Use of Canons in the Church

CONFIDENTIAL

Dear Bishops of the Anglican Church of Canada,

January 4, 2021

I am writing to you on behalf of the Anglican Communion Alliance, which, as you likely know, is a loose coalition of Canadian Anglicans deeply committed to Christ and to service within the Anglican Church of Canada. Our tagline is “Deepening Biblical faith in the Anglican Church of Canada.”

In the General Synods of 2016 and 2019, Anglicans entered in good faith into a process of discernment about changes to the Marriage Canon. For many of us, that process left us with questions about the relation of the church's decision making to its canons and constitution. All of us in the Church have struggled to address the pain and suffering that have arisen out of the discernment process. A pastoral provision has been introduced in some dioceses by way of a response. Our intention is not to address the response, but to focus on how we move forward constructively together.

In principle, we believe that the canons and canonical procedure must serve as safeguards in protecting the inheritance of our faith from changes that may sometimes be unduly shaped by immediate currents of public and secular thought.

We believe that our bishops, who share in the historic episcopate, are given the special charism at their consecration to be guardians of the apostles' teaching. This authority must be carefully preserved, not for its own sake, but because of the calling to uphold the Scriptures as God's word, to be faithful to truth expressed in the church's liturgies (BCP, also BAS), and to take seriously Canons and Constitutional documents that have formed the ACoC (since its beginning). This special authority does not exist in the abstract, but is expressed in the governance structures established in the Church, something that is particularly important to distinguish in cases (as in Canada) where synodical governance is well established.

The Canons of the Church, which all bishops vow to uphold, must be respected and carefully lived out. Canons on doctrine contain the teaching of the whole Church of God and cannot be changed by popular vote in a single branch or corner. The ACoC is not merely a body corporate established by the laws of the land. It is bound or circumscribed by reference to principles outside itself and which provide its quintessential identity.

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With these issues in mind, we wish to consider carefully how the Anglican Church of Canada is making use of its foundational documents, in particular, the Declaration of Principles and the Canons of General Synod. The Church will be strengthened by its proper ordering especially as it looks to the future.

Our intention in writing to you is to help the Church journey forward as properly ordered, and to give Anglicans confidence that correct procedures are being followed. As conservative Anglicans invested in the Anglican Church of Canada, we want to have healthy conversations and we want to observe processes that build trust and unity among Canadian Anglicans. Our existing canonical procedures serve to keep the church in harmony with the larger Anglican Communion, which was of course the purpose of the document, “The Principles of Canon Law Common to the Churches of the Anglican Communion” (2008), which our Church had a major role in shaping.

Because of our concerns about recent canonical processes, we arranged for a legal Opinion to be written. We solicited this Opinion as a service to the Church, without knowing what the Opinion would contain. Having now received the Opinion, we find that it has raised matters of serious concern for our Church.

On December 22, several Board members met with the Primate and five Archbishops of the Anglican Church of Canada and shared the legal Opinion with them. Our intention is not to share it publicly until mid-January, 2021.

Our plan is to provide this to you in two parts – this introductory letter about our aims for the Church’s order, followed on January 6 by the legal Opinion itself, including information about its contributors, ideas for next steps, and so forth. While the Opinion addresses the handling of Canon XXI, we want to address constructively the use of canon law as a whole. It is *not* our intention to re-open any debate about the Marriage Canon.

Thank you for taking the time to consider this letter, and the concerns we are bringing forward as we strive together to serve and strengthen Christ’s Church. We look forward to your response to this letter and also to the Opinion itself.

In Christ,

David Smith

The Rev. Dr. David Smith
Chair, Anglican Communion Alliance

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Dear Bishops of the Anglican Church of Canada,

Feast of the Epiphany, January 6, 2021

I am writing on behalf of the Board of the Anglican Communion Alliance, which, as you likely know, is a loose coalition of Canadian Anglicans deeply committed to Christ and to service within the Anglican Church of Canada. Our tagline is “Deepening Biblical faith in the Anglican Church of Canada.” Our webpage can be found here: www.anglicancommunionalliance.ca.

As we shared with you in our Letter of January 4, we are concerned with issues related to the Anglican Church of Canada’s treatment of its foundational documents, in particular, the Declaration of Principles and the Canons of General Synod. We believe the Church will be strengthened by its proper ordering especially as it looks to the future.

A point in question is the way resolutions to change a doctrinal canon were handled by recent General Synods. In particular, we were troubled by the arguments made in the Memo issued by Chancellor David Jones in June, 2016. A logical response to our questions was to seek advice from canonical experts regarding the process around discerning a possible change to Canon XXI. Thus we initiated a process of seeking a legal Opinion. We solicited this Opinion as a service to the Church, without knowing what the Opinion would say about the process the Church has undergone. Indeed, when we received the Opinion (in early October), we found that it raised serious concerns, and we were surprised at the strength of its arguments.

The ACA sought the opinion of two distinguished Canon law experts in the Anglican Communion, Professor Mark Hill, QC and Professor Norman Doe. The primary author of the report is Prof. Mark Hill, who is the leading canon law practitioner in the Church of England. Prof. Hill is by no means a radical conservative; he wrote a piece in 2009 that was generally supportive of civil partnerships for same-sex couples. Prof. Hill was suggested to us by Norman Doe, who teaches canon law at the University of Cardiff, and who is a key consultant on matters of canon law throughout the Anglican Communion.

Prof. Mark Hill’s Opinion, which comes with the full support of Prof. Norman Doe, is written to some extent in legal language and is very thorough. He makes no comment about the secular legal landscape of Canada, but confines himself to the internal logic of Canon XXI, its interaction with our other constitutional documents and our commitment to interpreting them in accordance with the principles of canon law for the entire Anglican Communion. Our existing canonical procedures serve to keep the church in harmony with the larger Anglican

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Communion, which was of course the purpose of the document, “The Principles of Canon Law Common to the Churches of the Anglican Communion” (2008), which our Church had a major role in shaping.

Several members of our Board met with the Primate and five Archbishops of the Anglican Church of Canada on December 22 and confidentially shared this information with them, as we wished to give them time to consider prayerfully and to engage with us if they wished. We are now sending you a full copy of the Opinion. Our intention (unless it is otherwise released) is not to share the Opinion publicly until mid-January, 2021.

As you will see, Prof. Hill’s and Prof. Doe’s assessment is that Chancellor Jones’ Memo (2016) is seriously flawed and makes disingenuous assertions. We believe the Church has not been well served by it.

The Hill/Doe Opinion is deeply unsettling, and the Board members have spent some time praying about how to offer this in a way which is constructive and life-giving to the Church. We hope for a new awareness among the Canadian bishops and other leaders about the process for doctrinal developments in the future and the process for changes to the Church’s constitution.

While we recognize that this Opinion will inevitably be upsetting for some, we do not want to shame or embarrass anyone, nor do we harbour personal animosities. We want to help the Church move forward on a solid footing, respecting its Canons and Constitution.

Here is a summarized version of the Hill/Doe Opinion.

We put to both Prof. Mark Hill and Prof. Norman Doe the following four specific questions. The answers in Prof Hill’s Opinion are briefly excerpted below:

1. Is there a definition of marriage within Canon XXI?

The Memorandum of Chancellor Jones is disingenuous to assert that Canon XXI “does not contain ... a definition of ‘marriage’”. It self-evidently does, clearly and in the express wording of the text of the Canon. The content of the Preface is directly incorporated by reference into the canonical definition.

2. Does the content of Canon XXI, its wording and its references to scripture and the Book of Common Prayer, rule out variants to one man, one woman marriage? [Would a doctrinal canon like Canon XXI need to specifically prohibit same-sex marriage?]



By convention, definition provisions are inclusive and descriptive, defining an object or concept by reference to what it is, as opposed to what it is not....The fact that same-sex marriage is not expressly prohibited is not authority for the proposition that it is permissible, or would have been permissible but for the civil law current at the time.

3. Can a Provincial Synod or a Provincial House of Bishops exercise its delegated power under its Provincial Constitution to approve supplemental liturgies that contravene a Canon of the General Synod?

Whilst Provincial Synods are entitled to agitate for a change in doctrine, they cannot act in defiance of, or contrary to, the Church's current doctrine. Were the Provincial Synod to do so, it would be acting *ultra vires* paragraph 7(a)(viii).

4. Is there an inherent authority in a diocesan bishop to override a Canon of the General Synod?

The simple answer to this is no. The expression 'inherent authority' appears in several of the governing instruments of the Church.... Such inherent authority cannot sensibly extend to acts or omissions which are contrary to the doctrine of the Church and would render the bishop liable to disciplinary process.

In addition to the questions above, Prof. Hill and Prof. Doe commented on a number of related matters.

On 'local option':

"One [bishop] stated that regardless of the General Synod voting, 'our Anglican conventions permit a diocesan bishop to exercise episcopal authority by authorizing liturgies to respond to pastoral needs within their dioceses, in the absence of any actions by this General Synod to address these realities'". Prof. Hill wrote, "The writer does not identify the 'conventions' nor does the statement recognise that any convention (or practice) can only be exercised in accordance with the law." And later, "The Statement cannot amend or override Canon XXI which remains binding on all clergy. A bishop has no power to act in a manner contrary to the canons of General Synod, nor do bishops enjoy any power to dispense with compliance with those canons."

On the implications of the Canon on Discipline (XVIII), Prof. Hill, supported by Prof. Doe, wrote:

Were a cleric to purport to solemnize a same-sex marriage, that person would violate the provisions of a Canon of General Synod [on Discipline], notwithstanding that the Diocesan Bishop might have issued a Statement along the lines [discussed earlier].... Were a bishop to approve for use in his or her diocese a form of liturgy which was in conflict with Canon XXI, this would be unlawful as it would evidence a departure from doctrine. The bishop would be liable to disciplinary process, as would any priest purporting to perform such a liturgy



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since this would amount to ‘teaching or advocating doctrines contrary to those accepted by The Anglican Church of Canada’, being an offence under the Discipline Canon.

Both Prof. Hill and Prof. Doe raised questions about the sufficiency of the Resolution brought to GS2019 concerning changes to Canon XXI:

There is doubt as to whether the Resolution would have been sufficient to effect the intended change: it would not have made any amendment to the Solemn Declaration or the rubrics of the Book of Common Prayer (1962). Had the Resolution been passed, there would have been mutually contradictory material within the governing instruments of the Anglican Church of Canada, some supportive of same-sex marriage and some not. This would have been highly unsatisfactory.

We need to state again, firmly and clearly, that in offering this Opinion to the Church, it is not our intention to re-open a debate about changes to Canon XXI. Our entire intention in offering this Opinion to you is to help the Church go forward as properly ordered and to give Anglicans confidence that this ordering is being followed.

Our hope in releasing this Opinion is four-fold:

1. That the ACoC commit to its lawful ordering in accordance with its foundational documents, particularly the Declaration of Principles and Canons. Memos and other correspondence that have not been widely discussed or voted on by Synod should be recognized for what they are.
2. That the ACoC recognize that any change to the doctrine of marriage (in Canon XXI) requires further discernment within the Church and within the Anglican Communion. The need for ongoing discernment has been acknowledged by the Church of England in its (November 2020) release of “Living in Love and Faith”, a carefully prepared resource for serious theological exchange and respectful listening.
3. That the ACoC acknowledge that those who hold to the received teaching on marriage represent the Church’s official teaching on the subject. Our position, supported by the Opinion, is that the efforts to use local option for same-sex marriage contravene the Canon and must be seen, at best, as provisional in nature and can perhaps be best understood as a temporary pastoral provision requiring later evaluation.
4. That in light of the differences exposed by the Opinion, the ACoC consider creating a Task Force on Communion Across Difference, similar to the one that now exists in The Episcopal Church. This Task Force would be comprised of equal numbers of members representing both sides of the debate around marriage.



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A related matter that has caused concern is the movement to revise aspects of General Synod, the effect of which could be to lessen the impact of the House of Bishops' vote. We certainly acknowledge that all institutions need to examine aspects of governance from time to time. However, taken together, 1) the adoption of the Memo that was used to undermine the Canon and now 2) the proposed changes to governance have engendered significant distrust within the Church. We are concerned that many in the Church will perceive such constitutional changes as an attempt to reach a desired outcome, rather than to engage in discussion and discernment in good faith.

We are investing a great deal of trust in you to shepherd the process well. We would be deeply disappointed if the Opinion were simply buried or if the ACA and other leaders were mischaracterized or demonized.

We are all committed to a church ordered in wisdom and motivated by what is true and honourable. We want to thank you for taking the time to consider this Legal Opinion, and to consider prayerfully its implications and how it might serve to strengthen Christ's Church. We look forward to your response.

In Christ,

David Smith

The Rev. Dr. David Smith
Chair, Anglican Communion Alliance



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Biographies of Mark Hill and Norman Doe

Prof. Mark Hill QC

King's College, University of London (1983 - 1986) LLB, AKC; Cardiff University (1992 - 1994) LLM (Canon Law). Prof. Hill has developed an expertise in the law of religious liberty and is recognized as the country's leading practitioner in ecclesiastical law. He is an Honorary Professor of Law at Cardiff University and formerly a Visiting Fellow at Emmanuel College, Cambridge. He was elected a Bencher of the Honourable Society of the Inner Temple in 2011 and appointed President of the European Consortium for Church and State Research in 2012. He sits as a Recorder (Judge) on the Midland Circuit in criminal, civil and family cases. He regularly publishes and lectures on matters of Church and State and was a contributing editor for *Jowitt's Dictionary of English Law* (2010). Prof. Hill is Consultant Editor of the *Ecclesiastical Law Journal*. He is Chancellor of the Diocese of Chichester, the Diocese of West Yorkshire and the Dales and of the Diocese of Gibraltar in Europe, as well as Deputy Chancellor of the Diocese of York. He sits on the Legal Advisory Commission of the General Synod of the Church of England. Prof. Hill is the author or editor of a number of books including *Ecclesiastical Law* Third edition (Oxford University Press, 2007); *English Canon Law* (University of Wales Press, 1998) Jointly edited with N Doe and R Ombres; *Faithful Discipleship: Clergy Discipline in Anglican and Roman Catholic Canon Law* (Centre for Law and Religion, Cardiff University, 2001); *Religious Liberty and Human Rights* (University of Wales Press, 2002); *Law and Religion in the United Kingdom* (Leuven, 2011) co-authored with R Sandberg and N Doe; and *The Confluence of Law and Religion* (Cambridge University Press, 2016) jointly edited with Russell Sandberg, Frank Cranmer and Celia Kenny.

Prof. Norman Doe

LLM (Wales), MTh (Oxford), PhD (Cambridge), DCL (Lambeth), LL.D (Cambridge), Barrister (Middle Temple). Director of the Centre for Law and Religion at Cardiff Law School. Prof. Doe was a consultant on canon law to the Primates of the Anglican Communion and member of the Lambeth Commission (2003-2004, Windsor Report (2004)). He also served on the Anglican Communion Covenant Design Group and was consultant to the Anglican Communion Network of Legal Advisers and prepared candidate principles for inclusion in its *The Principles of Canon Law Common to the Churches of the Anglican Communion* (Anglican Communion Office, 2008). Prof. Doe has written widely on Canon law: *Fundamental Authority in Late Medieval English Law* (Cambridge, 1990), *The Legal Framework of the Church of England* (Oxford, 1996), *Canon Law in the Anglican Communion* (Oxford, 1998), *The Law of the Church in Wales* (Cardiff, 2002), *An Anglican Covenant: Theological and Legal Considerations for a Global Debate* (Canterbury Press, 2008), *Law and Religion in Europe* (Oxford, 2011), *Christian Law: Contemporary Principles* (Cambridge, 2013).



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He is a co-author of *Religion and Law in the United Kingdom* (Wolters Kluwer, 2011) and co-editor, with Mark Hill and Robert Ombres OP, of *English Canon Law* (Cardiff, 1998). Prof. Doe is also on the editorial committees of the *Ecclesiastical Law Journal* and was appointed in 2013 as the Editor of the newly established Routledge *Research Series in Law and Religion*, the first series of its type in the UK, and in 2016 was the editor-in-chief of the new series *Brill Research Perspectives in Law and Religion* (published by Brill-Nijhoff, Netherlands). Prof. Doe was a member of the Legal Advisory Commission of the Church of England, and deputy chancellor, Diocese of Manchester. He was also a member of the European Consortium for Church and State Research (President in 2010), and a founding member of the Colloquium of Anglican and Roman Catholic Canon Lawyers (established in 1999). Since 1999 he has been an associate professor at the University of Paris, and 2013-16 visiting professor at KU Leuven, and was *docente invitato* Pontifical University of St Thomas (Angelicum), Rome, in 2009.

**IN THE MATTER OF THE MARRIAGE CANON IN THE
ANGLICAN CHURCH OF CANADA**

OPINION

1. I am instructed by the Reverend Ajit John on behalf of the Board of the Anglican Communion Alliance (ACA) to advise on the status and effect of Canon XXI of the Canons of the Anglican Church of Canada (the Marriage Canon). At the request of Mr John, I have consulted with Professor Norman Doe, Director of the Centre for Law and Religion at Cardiff University, who has signified his concurrence with the legal analysis and conclusions expressed in this Opinion.

The presenting issue

2. Concern has been expressed at the apparent disregard of Canon XXI both before and after the Church's General Synod held in July 2019. That Synod was required to hold the second round of voting necessary to effect a change to the wording of Canon XXI which, if passed, would permit the solemnization throughout the Church of same-sex marriage. The Resolution (A052-R2) contained three distinct elements:
 - i. *A declaration* that Canon XXI 'applies to all persons who are duly qualified by civil law to enter into marriage';
 - ii. *Amendments* to the wording of the Preface of the Canon in the following ways:
 - a. The addition of two paragraphs (9 and 10) at the end;
 - b. The deletion from paragraph 2 of the words 'of the union of man and woman in';
 - c. The substitution in paragraph 4 of the words 'the parties to the marriage' for 'husband and wife';
 - iii. *Amendments* to the wording of Regulations in the Canon in the following ways:
 - a. The substitution in Section 16(a) of words 'the parties to the marriage' for 'a man and a woman';
 - b. The substitution in Section 17(b) of words 'the parties to the marriage' for 'husband and wife';
 - c. The addition of a new sub-section (e) at the end of section 11, reading: 'A minister may only solemnise a marriage between persons of the same sex if authorised by the diocesan bishop'.

Any possible retroactive effect to the Resolution was expressly ruled out by paragraph 5 which states that, had it been passed, it would have come into effect on the first day of January after being passed by General Synod at Second Reading.

3. I am instructed that the Resolution was asked for at the General Synod of 2013, brought to a first vote at General Synod 2016 (where it was passed), and then put to

the necessary second vote at General Synod 2019 (where it failed). Canon XXI therefore continues in its unamended form.

4. Before the vote at General Synod 2019, and subsequently, several bishops made it clear that regardless of the outcome of the voting to change Canon XXI, they would proceed to authorize same-sex marriage liturgies in their respective dioceses. Some gave as a rationale the Opinion of the Chancellor of General Synod who had said in a Memorandum dated June 2016 that Canon XXI did not contain either a definition of marriage or a specific prohibition against solemnizing same-sex marriage. One stated that regardless of the General Synod voting, ‘our Anglican conventions permit a diocesan bishop to exercise episcopal authority by authorizing liturgies to respond to pastoral needs within their dioceses, in the absence of any actions by this General Synod to address these realities’. The writer does not identify the ‘conventions’ nor does the statement recognise that any convention (or practice) can only be exercised in accordance with the law.
5. The Chancellor’s Memorandum has been offered as a rationale for exercising what has come to be called a “local option”, whereby a diocesan bishop could still authorize same-sex liturgies for use in his or her diocese, notwithstanding the failure of the Resolution (above) to be adopted by General Synod 2019.
6. The Chancellor’s Memorandum makes certain claims in relation to Canon XXI, including, but not limited to, the following:
 - i. that it does not contain a definition of marriage;
 - ii. that it does not contain a specific prohibition against solemnising same-sex marriage;
 - iii. that a bishop has an inherent power which allows him or her to authorize the use of an alternative liturgy where none has been authorized for use by the General Synod.
7. These matters, briefly summarised, give rise to a number of questions concerning the Church’s doctrine of marriage, and most significantly for present purposes, the lawfulness of individual bishops purporting to approve for use within their dioceses liturgies for the solemnising of same-sex marriage, notwithstanding the failure of the proposed revision of Canon XXI to secure assent in General Synod 2019.
8. I have been asked particularly to address the following questions, which I reproduce verbatim from my instructions:
 - (1) Is there a definition of marriage within Canon XXI?
 - (2) Does the content of Canon XXI, its wording and its references to scripture and the Book of Common Prayer, rule out variants to one man, one woman marriage? [Would a doctrinal canon like Canon XXI need to specifically prohibit same- sex marriage?]
 - (3) Can a Provincial Synod or a Provincial House of Bishops exercise its delegated power under its Provincial Constitution to approve supplemental liturgies that contravene a Canon of the General Synod?

- (4) Is there an inherent authority in a diocesan bishop to override a Canon of the General Synod?

Canon Law in the Anglican Communion

9. It is helpful, to place this Opinion in context, to set out some preliminary observations regarding Canon Law in the Anglican Communion.¹ ‘As a basic principle’ writes Doe, ‘the exercise of legislative power is confined to national, provincial or diocesan assemblies’.² He adds that Resolutions of Lambeth Conferences enjoy a recommendatory rather than a binding force in individual Churches of the Anglican Communion.³ The Communion functions upon the principle of the autonomy of particular Churches based upon a common faith and order.⁴ The individual Churches are bound together not by a central legislative and executive authority but by a mutual loyalty sustained through the common counsel of the bishops in conference.⁵
10. The *Principles of Canon Law Common to the Churches of the Anglican Communion*, launched at the Lambeth Conference in 2008,⁶ sets out clear statements of principles of canon law induced from observable commonalities in the particular laws of the component Churches in the Communion.⁷ Whilst they are not themselves law, they represent clear statements of principle derived from the constitutions and governing instruments of each Church. The law of the Anglican Church of Canada is found in its governing instruments, but the *Principles* are an invaluable interpretative tool, evidencing shared practice throughout the Anglican Communion. The permissibility of same-sex marriage is a matter which, canonically, is within the exclusive cognizance of the Anglican Church of Canada, acting in accordance with its constitution and governing instruments.
11. Marriage is described in Principle 70 in the following terms:

Principle 70: Marriage: nature, purposes and responsibilities

1. Marriage, an honourable estate instituted by God, is an exclusive lifelong union, signifying the mystical union that is between Christ and his Church, effected on the free exchange of consents between one man and one woman joined together by God as husband and wife and lasting until the death of one spouse. [emphasis added]

¹ For a full treatment of the subject see Norman Doe, *Canon Law in the Anglican Communion: A Worldwide Perspective* (Clarendon Press, Oxford, 1998).

² Doe, *Canon Law in the Anglican Communion*, p 8.

³ Ibid.

⁴ The concept of autonomy, in this context, is generally implicit: Doe, *Canon Law in the Anglican Communion*, p 11. That said, it is firmly established: *ibid*, 340.

⁵ See Lambeth Conference 1930, resolution 48 and 49.

⁶ For the process and methodology leading to the drafting of the *Principles* see N. Doe, ‘The common law of the Anglican Communion’, (2003) 7 *Ecc LJ* 4-16. The full text of the *Principles* can be found on the Anglican Communion website:

<https://www.anglicancommunion.org/media/124862/AC-Principles-of-Canon-Law.pdf>

⁷ The *Principles* have been judicially recognised and applied within the Canadian secular courts: see *Bentley v Anglican Synod of the Diocese of New Westminster* [2009] BCSC 1608, Supreme Court of British Columbia.

The questions posed

12. I will address each of the questions in turn.

(1) Is there a definition of marriage within Canon XXI?

13. I find myself in respectful disagreement with the assertion of Chancellor David Jones QC, in paragraph 32(b) of his Memorandum, that Canon XXI ‘does not contain ... a definition of “marriage”’. This bold statement is not preceded by any introductory discussion, nor does Chancellor Jones QC explain either his reasoning or his justification for this statement which runs contrary to the text of the Canon, which elucidates definitional elements of what constitutes marriage.

14. The text of Canon XXI should be afforded its ordinary and natural meaning. Legal texts should be given their plain meaning unless a particular and specific meaning is required and given.⁸ Part III, paragraph 16 has a clear definition section (sub-headed as such) which expressly incorporates by reference the Preface to the Canon.

III. Determination of Marital Status Under This Canon

16. Definitions

a) “Marriage” as defined by this Canon means that union described in the Preface of this Canon and further described in section 17 of this part. With respect to marriage so defined, man and a woman may nevertheless, for reasons of age or health or other serious cause agree to marry upon condition that there shall be no sexual intercourse between them permanently or for a limited time or from time to time. [emphasis added]

15. As directed by this definition section, it is necessary to consult the description of the union as set out in the Preface to the Canon,⁹ the salient parts of which reads as follows (underlining added):

Preface

1. The Anglican Church of Canada affirms, according to our Lord’s teaching as found in Holy Scripture and expressed in the Form of Solemnization of Matrimony in the Book of Common Prayer,¹⁰ that marriage is a lifelong union in faithful love, and that marriage vows are a commitment to this union, for better or for worse, to the exclusion of all others on either side. This union is established by God’s grace when two duly qualified persons enter into a covenant of marriage in which they declare their intention of fulfilling its purposes and exchange vows to be faithful to one another until they are separated by death. The purposes of marriage are mutual fellowship, support, and comfort, and the procreation (if it may be) and nurture of children, and the creation of a relationship in which sexuality may serve personal fulfilment in a community of faithful love. This covenant is made in the sight of God and in the presence of witnesses and of an authorized minister.

2. The Church affirms in like manner the goodness of the union of man and woman in marriage, this being of God’s creation.¹ Marriage also is exalted as a sign² of the redeeming purpose of God to unite all things in Christ,³ the purpose made known in the reunion of divided humanity in the Church.⁴

⁸ This principle of universal application for law generally is expressly recognised in relation Anglican canon law in the *Principles* (above), particularly 8(1): ‘Laws should be interpreted by reference to their text and context’; and 8(2): ‘Laws are to be understood according to the proper meaning of their words’.

⁹ The Preface is an integral part of the Canon. This is plain on its face. The suggestion that it is merely introductory text does not bear scrutiny.

¹⁰ Which I understand to mean the Book of Common Prayer of the Anglican Church of Canada (1962).

1. Cf. Gen. 1:27–31
2. Eph. 5:31f.
3. Eph. 1:9f.
4. Eph. 2:11–16

16. I rely on the following features, either alone or in combination, as conclusively refuting the unsupported assertion of Chancellor Jones QC that Canon XXI ‘does not contain ... a definition of “marriage”’.
- i. Part III, paragraph 16 expressly provides a definition of marriage under the unambiguous heading ‘Definitions’;
 - ii. Part III, paragraph 16(a) makes express reference to “a man and a woman” (in the context of consummation);
 - iii. Paragraph 2 of the Preface makes express reference to “the union of man and woman”;
 - iv. Paragraph 1 of the Preface “our Lord’s teaching as found in Holy Scripture” which is generally taken to refer to a lifelong union between one man and one woman;
 - v. Four passages of scripture are referred to in the footnotes to paragraph 2 of the Preface. They read as follows:

Gen. 1:27–31

So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. And God said, Behold, I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in the which is the fruit of a tree yielding seed; to you it shall be for meat. And to every beast of the earth, and to every fowl of the air, and to every thing that creepeth upon the earth, wherein there is life, I have given every green herb for meat: and it was so. And God saw every thing that he had made, and, behold, it was very good. And the evening and the morning were the sixth day.

Eph. 5:31f.

For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh. This is a great mystery: but I speak concerning Christ and the church. Nevertheless let every one of you in particular so love his wife even as himself; and the wife see that she reverence her husband.

Eph. 1:9f.

[Not directly relevant for present purposes]

Eph. 2:11–16

[Not directly relevant for present purposes]

- vi. Paragraph 1 of the Preface makes express reference to “our Lord’s teaching ... expressed in the Form of Solemnization of Matrimony in the Book of Common Prayer”. The following extracts from the rubric and introductory words of welcome are taken directly from the Book of Common Prayer of the Anglican Church of Canada (1962):

At the day and time appointed for solemnization of the Marriage, the persons to be married shall come into the body of the Church, with their friends and neighbours, during which time

a Psalm or Hymn may be sung; and there standing together, the man on the right hand and the woman on the left, the Priest shall say:¹¹

DEARLY beloved, we are gathered together here in the sight of God, and in the face of this Congregation, to join together this man and this woman in holy Matrimony; which is an honourable estate, instituted of God in the time of man's innocency, signifying unto us the mystical union that is betwixt Christ and his Church. This holy estate Christ adorned and beautified with his presence, and first miracle that he wrought, in Cana of Galilee; and is commended in holy Scripture to be honourable among all men: and therefore is not by any to be entered upon, nor taken In hand, unadvisedly, lightly, or wantonly; but reverently, discreetly, advisedly, soberly, and in the fear of God; duly considering the causes for which Matrimony was ordained.

Matrimony was ordained for the hallowing of the union betwixt man and woman; for the procreation of children to be brought up in the fear and nurture of the Lord; and for the mutual society, help, and comfort, that the one ought to have of the other, in both prosperity and adversity.

Into which holy estate these two persons present come now to be joined. Therefore if any man can show any just cause, why they may not lawfully be joined together, let him now speak, or else hereafter for ever hold his peace.¹²

17. The Memorandum of Chancellor Jones is disingenuous to assert that Canon XXI “does not contain ... a definition of ‘marriage’”. It self-evidently does, clearly and in the express wording of the text of the Canon. The content of the Preface is directly incorporated by reference into the canonical definition. There may be a legitimate difference of opinion as to the precise terms of the definition; but to say the canon does not contain a definition is plainly wrong and readily demonstrable to be such.

(2) Does the content of Canon XXI, its wording and its references to scripture and the Book of Common Prayer, rule out variants to one man, one woman marriage? [Would a doctrinal canon like Canon XXI need to specifically prohibit same- sex marriage?]

18. I do not need to rehearse the material I have set out in answer to question (1). For the reasons given, Canon XXI does rule out variants to the traditional biblical understanding of marriage as a union of one and one woman. Both the definition itself, and the additional interpretative material I have cited, are predicated upon the concept of marriage being a union of one man and one woman. All variants to that concept are incompatible with the clear definition and are therefore ‘ruled out’ to adopt the terminology of the question.
19. The Memorandum of Chancellor Jones (paragraph 32(b), (c)) seems to place a degree of reliance upon the fact that Canon XXI does not contain “a specific prohibition against solemnizing same-sex marriages”. This assertion should be treated with caution for the following, non-exhaustive, reasons:

¹¹ This section (in red) comprises the rubric (emphasis added).

¹² Again, emphasis added. It is of significance that none of the amendments to Canon XXI (summarised at paragraph 2 above) affect this wording. The Preface (even as amended) would still incorporate by reference ‘our Lord’s teaching ... as expressed in the Form of Solemnisation of Matrimony in the Book of Common Prayer’, The passage here cited from the BCP (1962) is as it appears on the Church’s website as at 18 September 2020.

- i. It is a continuation of the sentence asserting that Canon XXI does not contain a definition of marriage which, for the reasons set out above, is demonstrably false;
- ii. By convention, definition provisions are inclusive and descriptive, defining an object or concept by reference to what it is, as opposed to what it is not: see generally *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edition, 2020)
- iii. The fact that same-sex marriage is not expressly prohibited is not authority for the proposition that it is permissible, or would have been permissible but for the civil law current at the time.

(3) Can a Provincial Synod or a Provincial House of Bishops exercise its delegated power under its Provincial Constitution to approve supplemental liturgies that contravene a Canon of the General Synod?

20. The answer to this depends upon the interpretation of governing instruments of the Anglican Church in Canada. One needs to start from first principles.

Clerical misconduct

21. It is helpful to look at other relevant provisions of the Constitution of the Anglican Church in Canada as tools of interpretation. In determining what an office holder or institution has power to do, a useful touchstone is the disciplinary process of a church, which declares what may not be done. In the Anglican Church of Canada, the Canon on Discipline (Canon XVIII), part III, paragraph 7, deals with ecclesiastical offences as follows:

III. Ecclesiastical Offenses

7. Disciplinary Action Regarding Offenses

All persons who are subject to ecclesiastical jurisdiction in the Church shall be liable to discipline for any of the following offenses:

[...]

iv) violation of any lawful Constitution or Canon of the Church, whether of a diocese, province or the General Synod by which the person is bound;

22. Were a cleric to purport to solemnize a same-sex marriage, that person would violate the provisions of a Canon of General Synod, notwithstanding that the Diocesan Bishop might have issued a Statement along the lines of the Bishop's Statement referred to in paragraph 4 above. The Statement cannot amend or override Canon XXI which remains binding on all clergy. A bishop has no power to act in a manner contrary to the canons of General Synod, nor do bishops enjoy any power to dispense with compliance with those canons.¹³

¹³ The absence of such a power is implicit from the wording of proposed new sub-section (e) at the end of section 11 which would have read: '(e) A minister may only solemnize a marriage between persons of the same sex if authorised by the diocesan bishop'. This is clearly indicative of a change in the law to create permissive power. The fact that this amendment was considered necessary is cogent evidence that such a power did not previously exist. Otherwise the 'for the avoidance of doubt' convention would have been adopted.

23. The Statements of several bishops, referred to in paragraph 4 above, are flawed in a number of particulars. First, they perpetuate the error contained in Chancellor Jones' Memorandum that the marriage canon does not contain a definition of marriage. It does. Secondly, one Statement speaks of "the absence of any actions by [the] General Synod to address these realities [namely authorizing liturgies to respond to pastoral needs]". To suggest that General Synod has not taken any action is to misrepresent the situation. In truth, General Synod has been very active on the matter in 2013, 2016, and 2019 and has addressed the matter carefully and prayerfully on each occasion. The reality is that despite that action, the amended canon did not secure the level of support within General Synod necessary for it to pass in accordance with the Constitution, Canons and other Governing Instruments of the Anglican Church of Canada. In consequence, Canon XXI remains in force, and is both authoritative and determinative.
24. The Declaration of Principles which appears in the *Handbook of the General Synod of The Anglican Church of Canada* (18th Edition, 2016) and *Governance Manual* (19th Edition, 2019) sets out in paragraph 6 the 'Jurisdiction of the General Synod'. This included the following:
6. Subject to the provisions of section 7 the General Synod shall have authority and jurisdiction in all matters affecting in any way the general interest and well-being of the whole Church and in particular: [...]
- (i) the definition of the doctrines of the Church in harmony with the Solemn Declaration adopted by this synod;¹⁴
25. The power to define doctrine expressly resides in General Synod. Neither a Provincial Synod nor a diocesan bishop has the power or the jurisdiction to define doctrine. The Memorandum of Chancellor Jones QC clearly (and correctly) states that 'the Marriage Canon deals with doctrine'.¹⁵ There is no power to define doctrine at provincial, diocesan or parish level: doctrine is not a matter of local choice.
26. The doctrine underlying marriage is expressed, inter alia, in Canon XXI, in Biblical texts and in the rubrics of the Book of Common Prayer (1962). Unless and until Canon XXI is amended¹⁶ through lawful process in General Synod, the doctrine of the

¹⁴ The Solemn Declaration appears at paragraph 1 of the Declaration of Principles. It includes 'We declare this Church to be, and desire that it shall continue, in full communion with the Church of England throughout the world': a revision to Canon XXI might result in impaired communion. The Solemn Declaration continues: '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" [ie the 1662 Book of Common Prayer]; and in the Thirty-nine Articles of Religion; and to transmit the same unimpaired to our posterity'.

¹⁵ See paragraph 16, and footnote 12.

¹⁶ The BCP would also require amending. It is anomalous that the resolution to amending Canon XXI (which failed at General Synod 2019), did not seek to remove from Canon XXI reference to the BCP which (as set out above) continues to speak of marriage in terms of a union between one man and one woman. Jurisdiction to revise and adapt the BCP vests exclusively in the General Synod: Declaration of Principles, para 7(j).

Anglican Church of Canada remains that marriage is a union of one man and one woman. Liturgical texts are expressive of the doctrines of the Church. Were a bishop to approve for use in his or her diocese a form of liturgy which was in conflict with Canon XXI, this would be unlawful as it would evidence a departure from doctrine.¹⁷ The bishop would be liable to disciplinary process, as would any priest purporting to perform such a liturgy since this would amount to ‘teaching or advocating doctrines contrary to those accepted by The Anglican Church of Canada’, being an offence under the Discipline Canon.¹⁸

The position of the Provincial Synod

27. Paragraph 7 of the Declaration of Principles (above) sets out ‘Fundamental Principles’ which include the following:

- 7(a) Provincial synods shall have authority and jurisdiction in all matters affecting the general interests and well-being of the Church within their respective jurisdictions in the following matters: [...]
- (viii) the authorization of special forms of prayers, services, and ceremonies for use within the province, for which no provisions have been made under the authority of the General Synod or of the House of Bishops of The Anglican Church of Canada.¹⁹

28. I understand there are four ecclesiastical provinces which together comprise the Anglican Church of Canada.²⁰ This provision, self-evidently, does not give *carte blanche* to authorise prayers and ceremonies in respect of matters which are contrary to the doctrine of the Church.²¹ There is a flaw in paragraph 32(e) of the Memorandum of Chancellor Jones QC, which implies that because there is no express prohibition against same-sex marriage in Canon XXI, then paragraph 7(a)(viii) of the Declaration of Principles can be invoked. It cannot. As demonstrated above, same-sex marriage currently remains contrary to the doctrine of the Church. Whilst Provincial Synods are entitled to agitate for a change in doctrine, they cannot act in defiance of, or contrary to, the Church’s current doctrine. Were the Provincial Synod to do so, it would be acting *ultra vires* paragraph 7(a)(viii).

(4) Is there an inherent authority in a diocesan bishop to override a Canon of the General Synod?

29. The simple answer to this is no. The expression ‘inherent authority’ appears in several of the governing instruments of the Church. By way of example only, the Constitution of the Provincial Synod of the Ecclesiastical Province of Ontario includes the following:

¹⁷ See above.

¹⁸ Canon XVIII, part III, paragraph 7(vii).

¹⁹ The Constitution of the Provincial Synod of the Ecclesiastical Province of Ontario prescribes its jurisdiction which includes, as paragraph 1(i) a provision in identical terms.

²⁰ Namely, the Ecclesiastical Province of Canada; the Ecclesiastical Province of Rupert’s Land; the Ecclesiastical Province of Ontario; and the Ecclesiastical Province of British Columbia and Yukon.

²¹ See the *Principles of Canon Law Common to the Churches of the Anglican Communion* (2008), Principle 55.5: ‘A form of service must be such as is neither contrary to, nor indicative of a departure from, the doctrine of the church in any essential matter’.

Nothing contained in section one shall limit or affect the powers, jurisdiction and authority inherent in the office of bishop, or exercised collectively by the bishops of the Church sitting as the House of Bishops of the Province or of The Anglican Church of Canada.²²

30. Such inherent authority cannot sensibly extend to acts or omissions which are contrary to the doctrine of the Church and would render the bishop liable to disciplinary process as discussed above. The function of the bishop is to teach and uphold the doctrine of the church, not to depart from it whether by word or deed, or to be complicit in the departure from doctrine by others.

Conclusions

31. This Opinion has been structured to answer the four particular questions posed in my instructions. It might be helpful if I conclude with a series of clear statements of general application.
- i. Each Church within the Anglican Communion is autonomous and self-governing.
 - ii. The legality of actions and process within the Anglican Church of Canada depends on their compliance with its governing instruments.
 - iii. The Solemn Declaration (at paragraph 1 of the Declaration of Principles) incorporates into the doctrine and law of the Anglican Church of Canada both the Church of England's 1662 Book of Common Prayer and the Thirty-Nine Articles of Religion and states that the Church is determined to hold and maintain that Doctrine and to transmit it unimpaired to posterity.
 - iv. Only the General Synod of the Anglican Church of Canada has authority to define the doctrines of the Church. Neither a Provincial Synod nor a diocesan bishop has the power to define doctrine.
 - v. The current doctrine of the Anglican Church of Canada unambiguously defines marriage as a union between one man and one woman.
 - vi. The Memorandum of Chancellor David Jones QC is inaccurate and misleading in a number of respects but particularly in its assertion that Canon XXI does not contain a definition of marriage. It clearly does.
 - vii. The Resolution (A052-R2) was intended to make changes to some of the governing instruments of the Anglican Church of Canada so as to permit the solemnisation of same-sex marriage.
 - viii. There is doubt as to whether the Resolution would have been sufficient to effect the intended change: it would not have made any amendment to the Solemn Declaration or the rubrics of the Book of Common Prayer (1962).²³ Had the Resolution been passed, there would have been mutually contradictory material within the governing instruments of the Anglican Church of Canada, some supportive of same-sex marriage and some not. This would have been highly unsatisfactory.
 - ix. However, the Resolution did not pass General Synod 2019 and none of the proposed amendments took effect.
 - x. Accordingly, same-sex marriage remains contrary to the doctrine of the Anglican Church of Canada.

²² Provincial Synod of the Ecclesiastical Province of Ontario, Jurisdiction, para 2.

²³ It would have put the Anglican Church of Canada in breach of the Solemn Declaration (a pivotal element of its governing instruments) which expressly declares 'this Church to be, and desire that it shall continue, in full communion with the Church of England throughout the world'. At best, it would be in impaired communion.

- xi. A cleric purporting to solemnise a same-sex marriage would be liable to disciplinary process under Canon XVIII.
- xii. Neither a Provincial Synod nor a diocesan bishop has power to authorise a liturgy to be used for the solemnisation of same-sex marriage unless and until the Church changes its doctrine through proper process as prescribed in its governing instruments.
- xiii. Anyone purporting to authorise a liturgy for the solemnisation of same-sex marriage would be liable to disciplinary process under Canon XVIII.

32. If I can assist further in relation to this matter, please contact me in Chambers.

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1 October 2020

**IN THE MATTER OF THE
MARRIAGE CANON IN THE
ANGLICAN CHURCH OF CANADA**

OPINION

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