In Re: Multi-Circuit Episcopal Church Property Litigation,
(CL 2007-0248724)

Letter Opinion on the Applicability of Va. Code § 57-9(A)

April 3, 2008

Judge Randy I. Bellows

Fairfax County Circuit Court

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Re: *In Re: Multi-Circuit Episcopal Church Property Litigation* (CL 2007-0248724)

Dear Counsel:

Of the several issues now before the Court, the sole issue that is ripe for decision, and the one that therefore shall be decided today, is whether the powers and the authorities of Va. Code § 57-9(A) [hereinafter "57-9(A)"] may be invoked in the instant litigation.

That matter requires the resolution of four questions:

First, what are the definitions of "church" and "religious society," as those terms are used in 57-9(A), and do either of these terms apply to the Protestant Episcopal Church in the Diocese of Virginia [hereinafter "Diocese"], the Protestant Episcopal Church in the United States of America, [hereinafter "ECUSA"] or to the Anglican Communion?

Second, what is the definition of "attached," as that term is used in 57-9(A), and does the term apply to the congregations that are the plaintiffs in this litigation [hereinafter "CANA Congregations"], in that they are "attached" to the Diocese, the ECUSA, or the Anglican Communion?

Third, what is the definition of "branch," as that term is used in 57-9(A), and are any of the following entities—the Convocation of Anglicans in North America [hereinafter "CANA"], the American Arm of the Church of Uganda, the Church of Nigeria, or the Anglican District of Virginia [hereinafter "ADV"]—"branches" of the Diocese, the ECUSA, or the Anglican Communion?

Fourth, and perhaps most importantly, what is the definition of "division," as that term is used in 57-9(A), and has such a "division" occurred in a "church or religious society" to which the CANA Congregations were attached?

For the reasons stated in this opinion, the Court finds in the affirmative as to each of these questions. In other words, the Court finds adequate support in the record to conclude that 57-9(A) has been properly invoked. The Court notes that it does not decide today any issue related to the constitutionality of 57-9(A), except in one discrete respect.[1] The Court will hear

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[1] That one discrete respect relates to the ECUSA/Diocese's assertion that constitutional jurisprudence requires the Court to interpret a statute, if possible, in a way that preserves its constitutionality. See, e.g., Opp'n Br. for the Episcopal Church and the Diocese 9 (stating that "the principle of constitutional avoidance dictates that statutes be interpreted to avoid potential constitutional issues whenever possible.") While there is nothing remarkable or controversial in this approach to statutory interpretation, the Court finds it unavailing in this case, for the reasons stated in this opinion.

oral argument on the constitutional issues in accordance with the Order issued today. The obvious advantage to the Court and the parties in bifurcating the issue of statutory interpretation and applicability, on the one hand, and constitutionality, on the other, is that the parties at oral argument on the constitutional issues will not have to engage in speculation regarding the Court's interpretation of the statute but, rather, will know the precise contours of the Court's reasoning.

Second, the Court does not address or decide in this opinion the validity of the various votes taken by the CANA Congregations to disaffiliate from the ECUSA and the Diocese. The Court will reach that decision, as necessary, at a later point in time.

Finally, this opinion does not address the merits of the ECUSA's and the Diocese's declaratory judgment actions, which have been set for trial in October 2008.

Summary

The only way in which this Court could find a "division" *not* to exist among the pertinent entities in this case is to define the term so narrowly and restrictively as to effectively define the term out of existence. The ECUSA and the Diocese urge upon this Court just such a definition and further assert that any definition other than the one for which they argue would render the statute unconstitutional.[2] The Court rejects this invitation. Whether or not it is true that only the ECUSA's and the Diocese's proposed definition can save 57-9(A) from constitutional infirmity, there is no constitutional principle of which this Court is aware that would permit, let alone require, the Court to adopt a definition for a statutory term that is plainly unwarranted. Rather, the definition of "division" adopted by this Court is a definition which the Court finds to be consistent with the language of the statute, its purpose and history, and the very limited caselaw that exists. Given this definition, the Court finds that the evidence of a "division" within the Diocese, the ECUSA, and the Anglican Communion is not only compelling, but overwhelming. As to the other issues in principal controversy, the Court finds the Anglican Communion to be a "church or religious society." The Court finds each of the CANA Congregations to have been attached to the Anglican Communion. Finally, the Court finds that the term "branch" must be defined far more broadly than the interpretation placed upon that term by ECUSA and the Diocese and that, as properly defined, CANA, ADV, the American Arm of the Church of Uganda, the Church of Nigeria, the ECUSA, and the Diocese, are all branches of the

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[2] See Opp'n Br. for the Episcopal Church and the Diocese 9 (stating that "[c]onstitutional avoidance compels the [ECUSA]'s and the Diocese's interpretation of §57-9.")

Anglican Communion and, further, CANA and ADV are branches of ECUSA and the Diocese.

I. BACKGROUND

This litigation arises out of profound discord within the Diocese, the ECUSA, and the Anglican Communion itself. By all accounts, this internal conflict has been brewing for many years.[3] However, the evidence produced at trial indicates that the ultimate catalyst of the conflict, triggering a series of events culminating in the present litigation, was the ECUSA 2003 General Convention.

This letter opinion sets forth, in chronological order, an account of key events that have occurred within all levels of the Anglican Communion, the ECUSA, and the Diocese. This letter opinion also includes excerpts from letters and correspondence between clergy and other leaders within the Anglican Communion, ECUSA, and the Diocese, which have become part of the record in this litigation. This factual background serves as the foundation for the Court's legal analysis and conclusions. First, however, this opinion describes the structural nature of ECUSA, the Diocese, and the Anglican Communion.

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[3] See, e.g., Defs.' Ex. 68 at 29, "Deposition of Bishop-Elect David Anderson," in which Bishop Anderson, the President and Chief Executive Officer of the American Anglican Council, and a Bishop-Elect of CANA, states that

> [T]he division, starting small, as like a hairline crack on your windshield, has just—as things have gone on and more things have happened, the crack, the division, has simply gotten more pronounced.
>
> Q: So this is not a new thing, the division of the church?
>
> A: It is--it is a growing, ongoing one that became more clearly observable in the, probably, late '90s.
>
> Q: Is it possible to pinpoint when the division in the church occurred or began?
>
> A: It would be difficult to pick a moment. I would use a comparison about when a marriage fails and it's hard to say this is the moment that the marriage-where it started, but usually the significant, observable phenomena are preceded by smaller things leading up to that.

A.) Structural Context

1. ECUSA

The Protestant Episcopal Church in the United States of America ("ECUSA") is "a constituent member of the Anglican Communion . . . ." (Defs.' Ex. 2, "Constitution and Canons of the Episcopal Church in effect since January 1, 2007," at 1.) It considers itself to be "a Fellowship within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Book of Common Prayer." (Defs.' Ex. 2 at 1.) ECUSA's governing body is the General Convention, which consists of the House of Bishops and the House of Deputies. (Defs.' Ex. 2 at 1.) Essentially, the General Convention is a bicameral legislature, in that "[e]ither House may originate and propose legislation, and all acts of the Convention shall be adopted and be authenticated by both Houses." (Defs.' Ex. 2 at 1.) Each ECUSA bishop has a "seat and a vote in the House of Bishops," (Defs.' Ex. 2 at 1) while the House of Deputies is composed of a mix of "ordained persons," Presbyters, Deacons, and laypeople.[4] The House of Bishops elects ECUSA's Presiding Bishop, which is ECUSA's "Chief Pastor and Primate," (Defs.' Ex. 2 at 28) by majority vote (Defs.' Ex. 2 at 1).

ECUSA is further subdivided into either Dioceses, or Missions.[5] See (Defs.' Ex. 2 at 5-6.) Each Diocese chooses its Bishop or Bishop Coadjutor according to "rules prescribed by the Convention of that Diocese," while Bishops of Missionary Dioceses are "chosen in accordance with the Canons of the General Convention." (Defs.' Ex. 2 at 3.) Dioceses are grouped into

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[4] See Defs.' Ex. 2 at 2 ("The Church in each Diocese which has been admitted to union with the General Convention, each area Mission established as provided by Article VI, and the Convocation of the American Churches in Europe, shall be entitled to representation in the House of Deputies by not more than four ordained persons, Presbyters or Deacons, canonically resident in the Diocese and not more than four Lay Persons, confirmed adult communicants of this Church, in good standing in the Diocese but not necessarily domiciled in the Diocese; but the General Convention by Canon may reduce the representation to not fewer than two Deputies in each order. Each Diocese, and the Convocation of the American Churches in Europe, shall prescribe the manner in which its Deputies shall be chosen.").

[5] A Mission may be established "in any area not included within the boundaries of any Diocese of [ECUSA] or of any Church in communion with [ECUSA] . . . ." (Defs.' Ex. 2 at 6.)

geographical Provinces (Defs.' Ex. 2 at 42-43), except that, pursuant to ECUSA's Constitution, "no Diocese shall be included in a Province without its own consent." (Defs.' Ex. 2 at 7.) Each Province has a Synod, which has its own House of Bishops and House of Deputies. (Defs.' Ex. 2 at 43.) Also of note is that, by the terms of its Constitution, ECUSA requires that the Book of Common Prayer be used in all its Dioceses. (Defs.' Ex. 2 at 8.)

2. Diocese of Virginia ("Diocese")

The Diocese's Constitution states that "[t]he order, government, and discipline of the Protestant Episcopal Church in the Diocese of Virginia shall be vested in the Bishop, and in the Council of the Diocese . . . ." (Defs.' Ex. 3, "Constitution and Canons of the Diocese in effect until the adjournment of the Annual Council on January 27, 2007 (including throughout December 2006)," at 6.) The Council is comprised of the "Clerical order" and the "Lay order." The Clerical order is composed of "the Bishop or Bishops and all other ministers canonically resident in the Diocese of Virginia," while the "Lay order consist[s] of both the "Lay Delegates," and the "Lay members ex officio." The Lay Delegates consist of delegates from each church, as chosen by its Vestry. (Defs.' Ex. 3 at 6.) The Lay members ex officio include "the Lay members of the Standing Committee, the Lay members of the Executive Board, the Chancellor, the Presidents of the Regions, the President of the Episcopal Church Women of the Diocese, and five lay persons, not over 21 years of age at the time of election, to be elected on or before May 1 as Youth Delegates by five of the Regional Councils designated on an annual rotating basis by the Standing Committee." (Defs.' Ex. 3 at 6-7.) The Council conducts annual meetings. (Defs.' Ex. 3 at 6.)

In addition to the Bishop, officers of the Diocese include a Secretary, Treasurer, Chancellor, and a Registrar. The Diocese's Constitution also mandates that a Standing Committee and an Executive Board "conduct . . . the affairs of the Diocese." (Defs.' Ex. 3 at 7.) The Standing Committee "consist[s] of twelve members, six of the Clerical order, and six of the Lay order," (Defs.' Ex. 3 at 10) while the Executive Board consists of "[o]ne member elected by each Regional Council,"[6] and "[t]he Bishop, the Bishop Coadjutor if there be one, and the Suffragan Bishops if there be such." (Defs.' Ex. 3 at 15-16.)

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[6] The Diocese of Virginia is divided into Regions, of which every Church in the Diocese is a member. Each Region has its own Regional Council. (Defs.' Ex. 3 at 17-18.)

At the local level, each Church[7] within the Diocese has a Vestry, which consists of three (3) to twelve (12) members who are elected by the Church's adult communicants. (Defs.' Ex. 3 at 21.) The Church's head pastor, known as the Rector, presides at Vestry meetings, and is in fact elected by the Church's Vestry, with "the advice of the Bishop and in compliance with General Convention Canon III.17." (Defs.' Ex. 3 at 22, 24.)

3. The Anglican Communion

The Anglican Communion is described as a "family of churches . . . shar[ing] a kind of historical relationship, one with another . . . understanding and seeing [their] common ancestry in the Church of England through the See of Canterbury."[8] (Trial Tr. 862:10-15, Nov. 13th-20th, 2007.) It is "a family of

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[7] The Diocese defines "Church" as

> [a] group of people (1) which acknowledge the jurisdiction of the Bishop or Ecclesiastical Authority of the Diocese of Virginia, (2) among whom there is a regular program of identifiable Episcopal services (including regular celebration of the Holy Communion) at a designated place or places of worship, (3) which as a group shares in the support of the Episcopate of the Diocese, (4) which makes provision for the pastoral administrations of the church to its members, and (5) which functions under the supervision of a Priest or Deacon . . . .

(Defs.' Ex. 3 at 19.) The Diocese's Canons further state that "The Rector and Vestry of a Church as herein defined are expressly designated as the 'Rector and Vestry of a Parish' for purposes of the Constitution and Canons of the Episcopal Church." (Defs.' Ex. 3 at 20.)

[8] This description of the Anglican Communion was provided by ECUSA/Diocese expert witness Ian Douglas. Dr. Douglas is the Angus Dun Professor of Mission and World Christianity at the Episcopal Divinity School in Cambridge, Massachusetts. He received a Ph.D. in Religious Studies from Boston University, and a Master of Divinity from Harvard Divinity School in Cambridge, Massachusetts. (Defs.' Ex. 41, "Curriculum Vitae of the Rev. Dr. Ian Douglas," at 2.) Dr. Douglas stated that his "proved discipline is missiology," which is the "study of the theology, history and anthropology of [C]hristian mission." (Tr. 831:10-14, 833:6-8.) Dr. Douglas is an ordained priest of the Episcopal Church, and is currently a Priest Associate at St. James Episcopal Church in Cambridge, Massachusetts. (Tr. 834:12-14.) His various positions, appointments, and honors include: Member of the Design Group for the 2008 Lambeth Conference of Anglican Bishops; Clergy Member-Elect for ECUSA; Co-editor of the Oxford University Press: Handbook of Anglican Studies; Editorial Board Member of the Journal of Anglican Studies; Member of

. . . 38 . . . regional and national churches that share a common history of their understanding of the Church catholic through the See of Canterbury," (Trial Tr. 846:4-8) and "a way by which . . . Anglicans say [they] are related to, [they] have a historic relationship with the Archbishop of Canterbury." (Trial Tr. 848:21-849:2.) The Anglican Communion has also been described as "a widely diverse international society of churches." (Trial Tr. 928:20-21.) In the Lambeth Commission on Communion's 2004 Windsor Report, it formally referred to itself as

> that *part* of the Body of Christ which shares an inheritance through the Anglican tradition, that is, from the Church of England, whose history encompasses the ancient Celtic and Saxon churches of the British Isles, and which was given fresh theological expression during the period of the Reformation in the sixteenth and seventeenth centuries. . . . The very fact that the family of churches which traces its roots back to the ancient churches of the British Isles should call itself an Anglican Communion is itself indicative of the twin fundamental concepts on which the community is built: our shared inheritance ('Anglican') and our worldwide fellowship as God's children ('communion').

(Pls.' Ex. 61, "The Lambeth Commission on Communion's 2004 Windsor Report," at 25.)

Further, the Anglican Communion states that it believes

> Communion clearly makes demands on all within it. It involves obligations, and corresponding rights, which flow from the theological truths on which the life of the Christian community rests. . . . The commitments of communion provide objective criteria by which to understand the rights and responsibilities that go with the relationship and which promote and protect the common good of the worldwide community of churches. Many obligations are implicit in the foundation, purposes, forms, subjects and substance of communion, and thus relate to matters of critical common concern to the global Anglican fellowship. For instance, the divine foundation of communion should oblige each church to avoid unilateral action on contentious issues which may result in broken communion. It is an ancient canonical principle that what touches all should be decided by all. . . . Communion

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the Executive Council of ECUSA; Clerical Deputy from the Diocese of Massachusetts to the House of Deputies of the General Convention of ECUSA; and Member of the Jubilee Committee of the Diocese of Massachusetts. (Def. Ex. 41 at 3-5,7.)

> obliges each church . . . to act interdependently, not independently.

(Pls.' Ex. 61 at 26-27.)

The core structures of the Anglican Communion include the Archbishop of Canterbury, who is known as the Anglican Communion's "focus of unity," along with three "Instruments of Communion," that are also known as "Instruments of Unity." (Pls.' Ex. 61 at 41; Trial Tr. 849:16-850:3.) These are: 1.) the Lambeth Conference [hereinafter "Lambeth"]; 2.) Anglican Consultative Council [hereinafter "ACC"); and 3.) the Primates' Meeting.

a. The Archbishop of Canterbury

The Archbishop of Canterbury is known as the "chief pastor of the entire Communion."[9] (Pls.' Ex. 61 at 31.) "From the beginning, the Archbishop of Canterbury, both in his person and his office, has been the pivotal instrument and focus of unity; and relationship to him became a touchstone of what it was to be Anglican." (Pls'. Ex. 61 at 41.) Thomas Cranmer was the first Archbishop of the Reformation period, and wrote the first *Book of Common Prayer.* (Pls.' Ex. 61 at 41 n.55.) Following the American Revolutionary War, American Anglicans looked to the Archbishop of Canterbury to consecrate new bishops, and "[t]hereafter it was successive Archbishops of Canterbury who consecrated bishops for Canada, the West Indies, India and the developing English colonial territories, and it was to Archbishops of Canterbury that these churches tended to turn for assistance both in spiritual and political matters when problems arose." (Pls.' Ex. 61 at 41-42.)

b. The Lambeth Conference

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[9] To illustrate the role of the Archbishop of Canterbury, the Lambeth Commission on Communion's 2004 Windsor Report states that

> [i]t is important to note that these Bonds of Unity are different in kind from those which operate in the Roman Catholic Church, in which the Pontiff, with the support of the Curia, enjoys 'supreme, full, immediate and universal ordinary power,' which he can always freely exercise. The Anglican way, theological, symbolic and practical, is diffused among the different aspects of the life of the Communion precisely in such a way as to give supreme authority, in the sense outlined above, to scripture as the locus and means of God's word, energizing the Church for its mission and sustaining it in its unity.

(Pls.' Ex. 61 at 34 (footnotes omitted)).

The Lambeth Conference is a once every ten years conference of all of the Bishops of the Worldwide Anglican Communion. (Trial Tr. at 396:9-12.) The Lambeth Conference passes various "resolutions," which are described as "non-binding" upon the various churches that serve as members of the Communion. (Trial Tr. at 851:21-852:15.) It was begun in 1867, but did not become the "Lambeth Conference" until 1877, when a second meeting of the conference was held. (Trial Tr. at 1035:5-11.) From its beginnings, "the Lambeth Conference has proved to be a powerful vehicle for the expression of a concept central to Anglican ecclesiology, the collegiality of the bishops." (Pls.' Ex. 61 at 43.)

c. Anglican Consultative Council ("ACC")

The Anglican Consultative Council is described as "a consultative body made up of members—sometimes understood as representatives . . . from the 38 churches who come together every two or three . . . years, in various parts of the world to . . . take counsel to consider the initiatives and hopes and dreams before the Anglican Communion as a family of churches, to pray together, to worship together, to study [the scriptures] together." (Trial Tr. at 853:20-854:7.) The ACC was established in 1968. (Pl. Ex. 61 at 43.) The ACC's "powers" include the following:

> a. To facilitate the co-operative work of the member churches of the Anglican Communion.
>
> . . . .
>
> c. To advise on inter-Anglican, provincial, and diocesan relationships, including the division of provinces, the formation of new provinces and of regional councils, and the problems of extra-provincial dioceses.
>
> d. To develop as far as possible agreed Anglican policies in the world mission of the Church and to encourage national and regional churches to engage together in developing and implementing such policies by sharing their resources of man power, money, and experience to the best advantage of all.
>
> e. To keep before national and regional churches the importance of the fullest possible Anglican collaboration with other Christian churches.
>
> f. To encourage and guide Anglican participation in the ecumenical movement and the ecumenical organisations, to co-operate with the World Council of Churches and the world confessional bodies on behalf of the Anglican Communion, and to make arrangements for the conduct of pan-Anglican conversations with the Roman Catholic Church, the Orthodox churches, and other churches.
>
> . . . .

> j. to obtain, collect, receive, and hold money, funds, and property, old and new, by way of contributions, donations, subscriptions, legacies, grants, and any other lawful method, and accept and receive gifts of property of any description (whether subject to any special trust or not).

(Defs.' Ex. 42, "The Constitution and Bylaws of the Anglican Consultative Council," at 449.)

The ACC's membership consists of the Archbishop of Canterbury, as well as a combination of bishops, priests, and laypersons from each of the member churches. (Defs.' Ex. 42 at 451-52.) The ACC also appoints a Standing Committee, composed of nine members, which meet annually. (Defs.' Ex. 42 at 450.)

d. The Primates' Meeting

The Primates' Meeting is composed of the head or "top" Bishops from each church or province in the Anglican Communion. Since 1979, the Primates have scheduled meetings for every other year, at which they "come together . . . to . . . take counsel, to pray together, to worship together for the sake of building relationships across the Anglican Communion under the Presidency of the Archbishop of Canterbury." (Trial Tr. at 858:9-22.)

B. Chronology of Major Events[10]

1. Genesis of the Conflict

At ECUSA's 2003 General Convention, the three major points of controversy included: 1.) confirmation of the election of the Rev. Gene Robinson as a Bishop within ECUSA; 2.) a resolution that recognized the blessings of same-sex unions; and 3.) the rejection of a resolution concerning the "historic formularies of the Christian faith." See Trial Tr. at 313:9-314:20; Pls.' Ex. 262, "Letter dated August 15, 2003 to Most Rev. and Rt. Hon. Rowan Williams from Peter James Lee," at 1.

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[10] This Court describes in considerable detail the evidentiary foundation for its finding that a "division" under 57-9(A) has occurred. In doing so, this Court emphasizes that no statement, expression or comment in this opinion is intended by the Court to express a view on the substance or the merits of the matters giving rise to the division. The Circuit Court is a secular institution of government and it is not entitled or permitted to have any view or opinion on a matter of religious orthodoxy.

Subsequent to the Convention, on August 15, 2003, Bishop Peter James Lee, the Bishop of the Diocese of Virginia, wrote a letter to then-Presiding Bishop of ECUSA, the Most Rev. Frank T. Griswold, and praised Presiding Bishop Griswold for the "impressive . . . way [Bishop Griswold] led [the House of Bishops] through the vote for consent on Canon Robinson." (Pls.' Ex. 160, "Letter from Peter James Lee to The Most Reverend Frank T. Griswold, 8/15/2003," at 1.) However, Bishop Lee further informed Presiding Bishop Griswold that Bishop Lee was concerned about the reaction within his Diocese to the events of the 2003 Convention, in that Bishop Lee was "[r]eceiving hundreds of letters, most of which [wer]e negative, including some from vestries of some of [the] larger parishes, putting their pledges in escrow so neither the diocese nor the national church is supported." (Pls.' Ex. 160 at 1.) Further, Bishop Lee stated that he "hope[d] that David Beers,[11] under [Presiding Bishop Griswold's] direction, w[ould] convene some sort of cabinet of thoughtful chancellors in the next few weeks to brainstorm what possible responses might be made should there be an attempt to create a parallel province." (Pls.' Ex. 160 at 1.)

That same day, Bishop Lee wrote directly to the Archbishop of Canterbury, the Most Rev. and Rt. Hon. Rowan Williams, stating that

> The worldwide publicity given to our recent General Convention is spinning the reports in ways that are not entirely accurate.
>
> . . . .
>
> A number of the congregations of the Diocese of Virginia are unhappy with me because I consented to Canon Robinson's consecration. . . . [a]s I understand it, they are planning to draft plans for a parallel province of the Communion and hope to convince you and the other Primates when you meet in London in October to support such a plan.
>
> I appeal to you not to support such a divisive effort. Surely we can arrange some form of flying bishops for congregations that are unhappy with their diocesans but to create a parallel province would create havoc in the American Church and raise all sorts of

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[11] David B. Beers, Esq., is counsel to the law firm of Goodwin Procter in Washington, D.C., and is the Chancellor to the Presiding Bishop of the ECUSA. He has held the position of Chancellor since November of 1991. Mr. Beers testified that the position of Chancellor entails being the Presiding Bishop's "counsel for ecclesiastical matters and secular matters." (Trial Tr. at 1218:19-1219:17.)

questions regarding property, pensions, the authority of existing canons and the like.

. . . .

Please know that you are in my daily prayers as you wrestle with this fractious Communion.

(Pls.' Ex. 262 at 1-2.)

Similarly, on October 1, 2003, Bishop Lee wrote to one of the Anglican Communion's Primates, the Most Rev. Robin Eames of Northern Ireland, stating that Bishop Lee was "appeal[ing] for pastoral understanding of the breadth of the Episcopal Church in the United States (ECUSA). . . ." (Pls.' Ex. 164, "Letter from Peter James Lee to The Most Reverend Robin Eames, 10/1/2003" at 1.) Bishop Lee stated that he wanted "to ask that the primates take no action at [their] London meeting in October that [would] damage the unity of ECUSA or encourage intrusions of foreign bishops into [ECUSA's] life that [would] undermine the integrity of [ECUSA's] dioceses." (Pls.' Ex. 164 at 1.) The other pertinent portion of this correspondence reads as follows:

The Diocese of Virginia is the largest diocese in ECUSA in terms of baptized members. Because I and a 6-2 majority of our lay and clergy deputies at the General Convention voted to confirm Gene Robinson as Bishop of New Hampshire, some of our people and congregations are upset.

. . . .

I can understand if the primates need to convey some sense of disappointment over ECUSA's confirmation of the bishop-elect of New Hampshire. I plead for your patience as we seek to work out our own differences and ask your help in preventing any single primate or group of primates from creating a dissident ecclesial body in the United States that will confuse our people and distract us from mission.

As one of the first Anglican communities outside the British Isles, the Church in Virginia cherishes our partnership with the Anglican Communion. We hope the Primates' Meeting will continue to recognize our loyalty to the communion and honor our self-governing tradition.

(Pls.' Ex. 164 at 1-2.)

Despite Bishop Lee's entreaties, however, the dispute continued to broaden, spilling over into all parts of the Anglican Communion. On April 27, 2004, then-Presiding ECUSA Bishop, the Most Rev. Frank T. Griswold, wrote a letter to the Archbishop of Kenya, The Most Rev. Benjamin Nzimbi, which reads in pertinent part as follows:

> I am grieved that you have reached the decision that we can no longer walk this path together. You recognize the long history of our partnership in the Gospel, which has never been about anything less than the advancement of God's kingdom, whether in Kenya or in the United States.
>
> Nonetheless, I respect your decision and that of the church in whose name you speak. Our sharing of resources has never come with strings attached.
>
> Our partnership has many dimensions, ranging from the sharing of financial resources, whether from the General Convention budget, Episcopal Relief and Development or the United Thank Offering, to the sharing of people, whether through missionaries, companion dioceses or theological students. . . . Financial resources shared . . . derive both from dioceses that consented to the consecration of Bishop Robinson and from dioceses that withheld consent; we do not make a distinction.

(Pls.' Ex. 268, "Letter dated April 27, 2004 to Most Rev. Benjamin Nzimbi from Most Rev. Frank T. Griswold," at 1.)

Back in Virginia, Bishop Lee attempted to address the concerns raised by several congregations by making arrangement for "alternate Episcopal care." On September 7, 2004, the Diocese sent out a press release entitled, "Former Archbishop of Canterbury Accepts Bishop Lee's Invitation to Preside at Supplemental Confirmations." This press release reads in its entirety as follows:

> The former Archbishop of Canterbury, Lord Carey of Clifton, has accepted an invitation from the Rt. Rev. Peter James Lee, Bishop of the Episcopal Diocese of Virginia, to preside at two supplemental confirmation services on Wednesday, September 15, 5:30 p.m. and 8:30 p.m. at Truro Church in Fairfax, Va. The services are especially provided for those congregations that are unhappy with Bishop Lee's consent of the consecration of the Bishop of New Hampshire and feel the need for alternate Episcopal ministry.
>
> "Lord Carey is coming at my invitation as an expression of pastoral outreach from the office of the Bishop," said the Rt. Rev. Peter

James Lee. "My hope is that this pastoral gesture will be seen as a way of accommodating people who have differing views within the Diocese of Virginia. I'm grateful to Lord Carey for his willingness to come."

The special services are in keeping with a pledge Bishop Lee made in his pastoral address to the Annual Council of the Diocese in January, in which he stated that he would make provisions for alternate Episcopal care for any congregation that requested it.

Speaking of his upcoming visit, Lord Carey said, "I feel deeply touched by Bishop Peter Lee's invitation to conduct two confirmation services in his diocese. The present strains on the Anglican Communion demand firm leadership, generosity and kindness. I have accepted his invitation to be his representative out of my respect for him and for the Rev. Martyn Minns [rector of Truro Church], both of whom are good friends."

In an August 25 letter to the editor of *The Daily Telegraph* (London), Lord Carey wrote, "The Diocese of Virginia is pioneering a way of responding to the deep divisions in Episcopal Church of the U.S. I salute Peter Lee's spirit of generosity and humility as a demonstration that in these critical days for the Anglican Communion it is possible to avoid schism, if American bishops pay attention to the many Episcopalians who are exceedingly distressed by the consecration of Gene Robinson.

(Pls.' Ex. 74, " 'Former Archbishop of Canterbury Accepts Bishop Lee's Invitation to Preside at Supplemental Confirmations,' The Diocese of Virginia Press Release, 9/7/2004," at 1.)

2. The Windsor Report

A month later, in October of 2004, the escalating conflict within the whole of the Anglican Communion was addressed in a landmark document entitled the "Windsor Report," issued by the Lambeth Commission.[12] The

[12] Due to increasing discord relating to issues of human sexuality within the Anglican Communion, in October of 2003, the Archbishop of Canterbury established the "Lambeth Commission" upon the suggestion of the Anglican Primates. The described "mandate" of this Commission was to "seek a way forward which would encourage communion within the Anglican Communion. . . . [I]t requested consideration of ways in which communion and understanding could be enhanced where serious differences threatened the life of a diverse worldwide Church." (Pls.' Ex. 61 at 5.)

Foreword to the Windsor Report, authored by the Most Reverend Dr. Robin Eames, Archbishop of Armagh, and Chairman of the Lambeth Commission, reads in pertinent part as follows:

> Since the 1970s controversies over issues of human sexuality have become increasingly divisive and destructive throughout Christendom. Within the Anglican Communion the intensity of debate on these issues at successive Lambeth Conferences has demonstrated the reality of these divisions.
>
> The decision by the 74th General Convention of the Episcopal Church (USA) to give consent to the election of bishop Gene Robinson to the Diocese of New Hampshire, the authorizing by a diocese of the Anglican Church of Canada of a public Rite of Blessing for same sex unions and the involvement in other provinces by bishops without the consent or approval of the incumbent bishop to perform Episcopal functions have uncovered major divisions throughout the Anglican Communion. There has been talk of crisis, schism and realignment. Voices and declarations have portrayed a Communion in crisis.
>
> Those divisions have been obvious at several levels of Anglican life: between provinces, between dioceses and between individual Anglican clergy and laity. The popular identification of 'conservatives' and 'liberals,' and 'the west' as opposed to 'the global south,' has become an over-simplification – divisions of opinion have also become clear within provinces, dioceses and parishes. . . .
>
> What could be termed 'the human face' of these divisions has become clear to the Commission. Within provinces, dioceses and parishes, where individual Anglican Christians have experienced degrees of alienation and exclusion due to difference of opinion between leadership and members, there has been much pain and disillusionment. Further questions have surfaced about Episcopal oversight within a diocese where significant groups of Anglicans have become alienated from their bishop.
>
> . . . .
>
> The depth of conviction and feeling on all sides of the current issues has on occasions introduced a degree of harshness and a lack of charity which is new to Anglicanism. A process of dissent is not new to the Communion but it has never before been expressed with such force nor in ways which have been so accessible to international scrutiny.

> The 'bonds of affection' so often quoted as a precious attribute of Anglican Communion life, as well as the instrument of communion and unity, have been threatened by the current divisions.
>
> . . . .
>
> [I]f realistic and visionary ways cannot be agreed to meet the levels of disagreement at present or to reach consensus on structures for encouraging greater understanding and communion in [sic] future it is doubtful if the Anglican Communion can continue in its present form.

(Pls.' Ex. 61 at 4-6.)

The Windsor Report embarked upon an extensive analysis of the current difficulties within the Communion, noting that one of the reasons for the Communion's present problems was that "it was assumed by [ECUSA] and the Diocese of New Westminster [Canada][13] that they were free to take decisions on matters which many in the rest of the Communion believe can and should be decided only at the Communion-wide level."[14] (Pls.' Ex. 61 at 22.) The Windsor Report reflects upon the balance within the Anglican Communion between independence of the various provinces on the one hand, versus the interdependence mandated by the fact that the various provinces are part of a "Communion," stating that, "Since autonomy is closely related to interdependence and freedom-in-relation, there are legitimate limits (both substantive and procedural) on the exercise of this autonomy, demanded by the relationships and commitments of communion and the acknowledgement of common identity. Communion is, in fact, the fundamental limit to autonomy." (Pls.' Ex. 61 at 36.)

The Windsor Report made various "recommendations" to the Anglican Communion. These included that ECUSA "be invited to express its regret that the proper constraints of the bonds of affection were breached in the events

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[13] See supra p. 16 (stating that a diocese of the Anglican Church of Canada had authorized a public Rite of Blessing for same sex unions.)

[14] The Windsor Report further commented that the actions of various bishops within ECUSA "raise[] the question of their commitment to [ECUSA]'s interdependence as a member of the Anglican Communion to which its own Constitution and Canons makes reference." (Pls.' Ex. 61 at 52.) In the corresponding footnote to this statement, the Windsor Report states that "[t]he Preamble to the ECUSA *Constitution and Canons* characterises the church as '. . . a constituent member of the Anglican Communion. . .'" (Pls.' Ex. 61 at 52 n.91.)

surrounding the election and consecration of a bishop for the See of New Hampshire," and that "pending such expression of regret, those who took part as consecrators of Gene Robinson should be invited to consider in all conscience whether they should withdraw themselves from representative functions in the Anglican Communion." (Pls.' Ex. 61 at 53-54.) The Windsor Report acknowledged that the Diocese of New Westminster and ECUSA might argue that the Windsor Report's recommendations and advice have "only moral authority," but nevertheless the Report still declared that:

> we believe that it must be recognized that actions to move towards the authorisation of such rites in the face of opposition from the wider Anglican Communion constitutes a denial of the bonds of Communion. In order for these bonds to be properly acknowledged and addressed, the churches proposing to take action must be able, as a beginning, to demonstrate to the rest of the Communion why their proposal meets the criteria of scripture, tradition and reason.

(Pls.' Ex. 61 at 56.)

On the other hand, the Windsor Report also had criticism for those bishops from various provinces within the Anglican Communion who disagreed with the actions of ECUSA and "who believe[d] it [wa]s their conscientious duty to intervene in provinces, dioceses and parishes other than their own." (Pls.' Ex. 61 at 59.) The Windsor Report called on these bishops who had seen fit to intervene to "express regret for the consequences of their actions," and "to affirm their desire to remain in the Communion," as well as "to effect a moratorium on any further interventions." (Pls.' Ex. 61 at 59.) The Windsor Report concluded with the following warning:

> There remains a very real danger that we will not choose to walk together. Should the call to halt and find ways of continuing in our present communion not be heeded, then we shall have to begin to learn to walk apart. We would much rather not speculate on actions that might need to be taken if, after acceptance by the primates, our recommendations are not implemented. However, we note that there are, in any human dispute, courses that may be followed: processes of mediation and arbitration; non-invitation to relevant representative bodies and meetings; invitation, but to observer status only; and, as an absolute last resort, withdrawal from membership.

(Pls.' Ex. 61 at 60.)

The Windsor Report proved disappointing to some Primates within the Anglican Communion. For example, on October 19, 2004, the Primate of All Nigeria, the Most Rev. Peter J. Akinola, expressed his dissatisfaction as follows:

> After an initial reading [of the Windsor Report] it is clear to me that the report falls far short of the prescription needed for this current crisis. It fails to confront the reality that a small economically privileged group of people has sought to subvert the Christian faith and impose their new and false doctrine on the wider community of faithful believers. We have watched in sadness as sisters and brothers who have sought to maintain their allegiance to the "faith once delivered to the saints" have been marginalized and persecuted for their faith. We have been filled with grief as we have witnessed the decline of the North American Church. . . .
>
> Where [in the Windsor Report] are the expressions of deep concern for the men and women whose witness is jeopardized and whose lives are at risk because of the actions of ECUSA [Episcopal Church of the United States of America]? Where are the words of "deep regret" for the impact of ECUSA's actions upon the Global South and our missionary efforts? . . .
>
> The report correctly notes that the Episcopal Church and the Diocese of New Westminster have pushed the Anglican Communion to the breaking point. It rightly states that they did not listen to the clear voices of the Communion and rejected the counsel of all four Instruments of Unity. . . . they are hell bent on destroying the fabric of our common life and we are told to sit and wait.
>
> We have been asked to express regret for our actions and "affirm our desire to remain in the Communion." How patronizing! We will not be intimidated. In the absence of any signs of repentance and reform from those who have torn the fabric of our Communion, and while there is continuing oppression of those who uphold the Faith, we cannot forsake our duty to provide care and protection for those who cry out for our help.
>
> The report rightly observes that if the "call to halt" is ignored "then we shall have to begin to learn to walk apart." The Episcopal Church and Diocese of New Westminster are already walking alone on this and if they do not repent and return to the fold, they will find that they are all alone. They will have broken the Anglican Communion.

(Defs.' Ex. 63A, "Redacted copy of portions of Christ's Ambassadors Church webpage, http://www.uncompromisedgospel.org (as printed November 6, 2007)," at 584-85.)

Between February 20th and 25th of 2005, the Anglican Primates met at the Dromantine Retreat and Conference Centre, Newry, in Northern Ireland, at the Archbishop of Canterbury's invitation. The primary purpose for this meeting was to analyze, discuss, and consider the 2004 Windsor Report. [15] On February 24, 2005, the Primates issued a communiqué[16] through the Anglican Communion News Service, which summarized the proceedings of their Northern Ireland meeting. The communiqué stated that the Primates "welcome[d] the general thrust of the Windsor Report as offering a way forward for the mutual life of [the Anglican] Communion." (Defs.' Ex. 19 at 1.) The most relevant provisions of this communiqué as they relate to the instant litigation are as follows:

> 12. We as a body continue to address the situations which have arisen in North America with the utmost seriousness. Whilst there remains a very real question about whether the North American churches are willing to accept the same teaching on matters of sexual morality as is generally accepted elsewhere in the Communion, the underlying reality of our communion in God the Holy Trinity is obscured, and the effectiveness of our common mission severely hindered.
>
> 13. We are persuaded however that in order for the recommendations of the Windsor Report to be properly addressed, time needs to be given to the Episcopal Church (USA) and to the Anglican Church of Canada for consideration of these recommendations according to their constitutional processes.
>
> 14. Within the ambit of the issues discussed in the Windsor Report and in order to recognize the integrity of all parties, we request that the Episcopal Church (USA) and the Anglican Church of Canada voluntarily withdraw their members from the Anglican Consultative Council for the period leading up to the next Lambeth Conference. During that same period we request that both churches respond through their relevant constitutional bodies to

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[15] See Defs.' Ex. 19, "The Anglican Communion Primates' Meeting Communiqué, February 2005," at 1 ("The most pressing business facing the Primates' Meeting was consideration of the Windsor Report 2004, in which the Lambeth Commission on Communion had offered its recommendations on the future life of the Anglican Communion in the light of developments in Anglican life in North America." (endnotes omitted)).

[16] A "communiqué" is "a communication at the close of [a Primates'] meeting that talks about what was discussed." (Defs.' Ex. 70, "Videotaped Deposition of Bishop Katharine Jefferts Schori, Tuesday, October 30, 2007, New York, New York" at 118.)

the questions specifically addressed to them in the Windsor Report as they consider their place within the Anglican Communion.

15. In order to protect the integrity and legitimate needs of groups in serious theological dispute with their diocesan bishop, or dioceses in dispute with their Provinces, we recommend that the Archbishop of Canterbury appoint, as a matter or urgency, a panel of reference to supervise the adequacy of pastoral provisions made by any churches for such members in line with the recommendation in the Primates' Statement of October 2003. Equally, during this period we commit ourselves neither to encourage nor to initiate cross-boundary interventions.

16. Notwithstanding the request of paragraph 14 of this communiqué, we encourage the Anglican Consultative Council to organise a hearing at its meeting in Nottingham, England, in June 2005 at which representatives of the Episcopal Church (USA) and the Anglican Church of Canada, invited for that specific purpose, may have an opportunity to set out the thinking behind the recent actions of their Provinces, in accordance with paragraph 141 of the Windsor Report.

. . . .

19. These strategies are intended to restore the full trust of our bonds of affection across the Communion.

(Defs.' Ex. 19 at 2-3 (internal citations and endnotes omitted).)

3. Discord within the Diocese

Meanwhile, events were continuing to unfold at the level of the Diocese of Virginia, which had witnessed the appointment of a "Reconciliation Commission," whose purpose was to address the ongoing conflict within the Diocese.

Dr. Paul Julian[17] testified that, following the 2003 Convention, the Diocese developed a "Reconciliation Commission." This Commission "was established by a resolution of the 209th Diocesan Council in 2004, and its task

[17] Dr. Julian was called as a witness for the CANA Congregations. Dr. Julian is a member of Truro Church, where he has served on its Vestry, and as its Senior Warden between 2001 and 2004. In addition, Dr. Julian served as a delegate to the Diocese's Annual Council from 2001-2006. (Trial Tr. 399:4-402:21.)

was to find ways to bring about some peaceful conflict resolution in the Diocese [following] the rather controversial events of the [2003 ECUSA] Convention." (Trial Tr. 403:18-404:1.) Resolution R-24sa set up the Reconciliation Commission,[18] whose members were appointed by Bishop Lee. This

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[18] This Resolution reads in its entirety as follows:

> Whereas, we in the Diocese of Virginia as members of the worldwide Anglican Communion are united in Christ and are called to live out our witness in our workplaces, churches and communities; and
>
> Whereas, profound differences have arisen over issues addressed at the 74th General Convention, specifically the consent to the election of the Rev. Canon V. Gene Robinson and Resolution C051 dealing with the blessing of same sex unions, and
>
> Whereas, these differences go beyond the issue of homosexuality to the interpretation of Scripture; and
>
> Whereas, following the October 2003 meeting of the Primates, the Archbishop of Canterbury established a Commission to address the dangers to the Anglican Communion, of which we are members, raised in part by actions of the 74th General Convention, and that that Commission was directed to report back to the Primates by October 2004; and
>
> Whereas, that Commission is chaired by the honored guest of the 209th Annual Council of the Diocese of Virginia, the Most Rev. Robin Eames, Archbishop of Armagh and Primate of All Ireland; and
>
> Whereas, the Primates urged "a lengthy process of prayer, reflection and substantial work in and alongside the Commission which we have recommended"; now therefore be it
>
> Resolved, that in response to the Primates' call for a period of prayer and reflection, this Council respectfully requests the Bishop to appoint a Reconciliation Commission to offer guidance over the next 12 months for how members of the Diocese can prayerfully reflect on our differences and discern God's will in addressing those differences; and be it further
>
> Resolved, that this Commission periodically over the next 12 months offer guidance through the Virginia Episcopalian, the diocesan web site and other diocesan communications for ways

Commission first met on March 15th, 2004. Ten meetings were conducted between March 2004 and January of 2005. See (Trial Tr. 414:2-415:22.)

In January of 2005, the Reconciliation Commission made its report to the 210th Diocesan Council, which was distributed to each of the delegates at that Council.[19] (Trial Tr. 420:21-421:2.) The Reconciliation Commission

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> that parishes and missions can offer meaningful opportunities for reflection, prayer, worship, and discussion of the aforementioned issues; and be it further
>
> Resolved, that this Commission report to the 210th Annual Council ways that the Diocese of Virginia can increase trust and respect for conscience, thereby helping to maintain unity; and be it further
>
> Resolved, that in making its recommendations, this Commission should draw from the work of the ongoing diocesan Sexuality Dialogue Group; and be it further
>
> Resolved, that the Diocese of Virginia reaffirm to truly live its formal vision and mission statement – "Empowered by the Holy Spirit and under the leadership of the Bishops, our mission as the Diocese of Virginia is to provide direction and support to every member in witnessing to the world God's love in the living Christ; so that daily we are called to live out our witness in our workplaces, churches and communities;" and be it further
>
> Resolved, that these actions reflect the hope of this Council that the Diocese of Virginia will serve as a model for civil, candid and prayerful discussion during these challenging times in our Church and society.

(Pls.' Ex. 147, "Journal of the 209th Annual Council," at 210-11.)

[19] The 210th Annual Council also witnessed the passage of Resolution R-22s, "Diocesan Response to the Windsor Report." (Pls.' Ex. 148, "Journal of the 210th Annual Council," at 210-11.) This Resolution reads:

> Whereas, We in the Diocese of Virginia are members of the Anglican Communion, are united in Christ and are called to live out our witness in our workplaces, churches and communities; and
>
> Whereas, We desire to serve as a model of civility to the Anglican Communion for resolution of the present divisions by working

together and honoring conscience through a process that is respectful and peaceful; and

Whereas, We respect the Windsor Report of the Lambeth Commission on Communion, which has recommended to the Episcopal Church concrete ways to strengthen the Anglican Communion; and

Whereas, The 210th Annual Council recognizes that the Windsor Report admonishes the Episcopal Church for failing, in its recent actions regarding the approval of the election of the Bishop of New Hampshire and the adoption of Resolution C051 pertaining to the blessing of same gender unions, to give adequate consideration to the impact that these decisions had on bonds of affection with other parts of the Anglican Communion; and

Whereas, The 210th Annual Council recognizes that the Windsor Report admonishes those bishops throughout the Anglican Communion who have intervened in dioceses and provinces other than their own; and

Whereas, The Lambeth Conference of 1998 commends us to listen to the experience of homosexual persons and to assure them that they are loved by God and that all baptized, believing and faithful persons, regardless of sexual orientation, are full members of the Body of Christ; and

Whereas, Bishop Lee has served as a model of civility and generosity and has called us to embrace the concept of mutual submission, which—according to the New Testament—means that we voluntarily refrain from actions that hurt our brothers and sisters or create stumbling blocks for others in the life of faith; now therefore be it

Resolved, that the 210th Annual Council of the Diocese of Virginia expresses regret that the proper constraints of the bonds of affection were breached through the actions of the 74th General Convention and for the consequences which followed; and be it further

Resolved, That the 210th Annual Council of the Diocese of Virginia formally requests that the 75th General Convention of the Episcopal Church effect a moratorium on the election of and consent to the consecration of any candidate to the episcopate who

declared that "[a]fter 10 meetings, the 13 members of the Reconciliation Commission have wrestled with how we might come to a civil and gracious response to the bitter divisions in parts of our diocese that have arisen in response to these decisions [of ECUSA]." Their report further declared that:

> Even as we struggle with the painful reality that polarizing conflict draws energy and attention from mission and ministry, we cannot avoid the difficult question: "Can we continue to live together?"
>
> We understand from some of those among us that the answer may ultimately be 'No,' and that in this case there must be provision for an amicable divorce. We do not see it as our charter to delve into this possibility, other than to acknowledge that at some point our church and our diocese may need to explore this eventuality.

(Pls.' Ex. 15, "Statement concerning the work of the Diocese of Virginia's Commission on Reconciliation, 1/14/05," at 1.)

Of note is the fact that the thirteen members of the Reconciliation Commission, within this statement, affirmed the fact that, despite their differences of opinion, they "profess[ed] a common commitment to the basic

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> is living in same-gender union, until some new consensus in the Anglican Communion emerges; and be it further
>
> Resolved, That all Anglicans have a moral responsibility to acknowledge and respond with compassion and understanding to the pain and suffering of those who, because of their sexual orientation, endure marginalization and rejection; and be it further
>
> Resolved, That the 210th Annual Council calls upon the member churches of the Anglican Communion to maintain faith with the traditions and polity of the Anglican Communion and the Episcopal Church while the implications of an Anglican Covenant are being studied; and be it further
>
> Resolved, That the congregations and regions of the Diocese of Virginia be urged to use the Report of the Diocese of Virginia's Commission on Reconciliation as a vehicle to further theological conversation; and be it further
>
> Resolved, That this resolution represents the desire of the Diocese of Virginia to remain together and a part of the Anglican Communion.

(Pls.' Ex. 148 at 210-11).

principles of Anglicanism, as articulated in the *Book of Common Prayer* . . . [and] a desire on the part of each person on the commission to remain in the Anglican Communion." (Pls.' Ex. 15 at 2.) The Commission further

> "acknowledge[d] that the church is currently struggling with differences in interpretation of the Biblical narrative in regard to human sexuality. These differences today—like ones that have come before—are profoundly real and threaten to divide not only our diocese, but also the Episcopal Church and the Anglican Communion itself.
>
> Although the election and consecration of a person in a same-sex relationship to be the Bishop of New Hampshire has become the flash point of difference, we believe that the issues of difference between us transcend conversation regarding human sexuality.
>
> There are larger issues of the interpretation of scripture, the apostolic tradition, and the relationship of the Episcopal Church with the Anglican Communion. In the context of our apostolic tradition and our relationship with the Anglican Communion, these differences have led to genuine pain, fear, confusion, and impaired communion.
>
> . . . .
>
> We note that there has been little significant reconciliation, and many in the church are stuck in a "level 5 conflict."

(Pls.' Ex. 15 at 2-3.) The report concludes by declaring that "[w]ith this report, we conclude our work as the Reconciliation Commission. But the work of the diocese is far from over. The same issues that have divided this Commission continue as points of disagreement in the larger body." (Pls.' Ex. 15 at 11.)

4. Formation of CANA

On August 2, 2005, the Convocation of Anglican Nigerians in America was incorporated to "operate as a convocation or association of Anglican churches in North America as a part of the Church of Nigeria within the Anglican Communion . . . ." (Pls.' Ex. 69, "August 2, 2005, Articles of Incorporation for the Convocation of Anglican Nigerians in America (CANA)," at 3.)

As Registrar Abraham Yisa[20] testified, CANA began with a protest launched by the Church of Nigeria upon the consecration of Bishop Robinson. In Registrar Yisa's words:

> Bishops, particularly our Primate, protested to the then primate of ECUSA. Our Synod wrote a peace compact. [The] General Synod, the Standing Committee protested, they [all] protested to the Archbishop of Canterbury. They protested to all instruments of unity.
>
> Nigeria took exception to that interpretation of the Holy Scriptures which we believed was not . . . [the] historic faith delivered to the saints.

(Trial Tr. 556:13-21.)

Subsequently, the Church of Nigeria's Standing Committee adopted a resolution authorizing the Primate of the Church of Nigeria to explore ways and means of providing oversight to Anglican Nigerian priests and laity who were living in the USA but who had grown disillusioned with the ECUSA. This "resolution called for a Primate to give Episcopal oversight to . . . members of congregations in America that had broken off of ECUSA." (Trial Tr. at 580:1-3.) Upon receiving this resolution, Registrar Yisa decided "that it would require [a] [c]onstitutional amendment to be able to give effect to [the] resolution, and [he] advised the General Synod" accordingly. (Trial Tr. 580:6-18.)

In September of 2005, Registrar Yisa proposed his amendments to the General Synod of the Church of Nigeria. (Trial Tr. 581:2-9.) These

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[20] Registrar Yisa is a member of the Church of Nigeria, a province within the Anglican Communion. The Church of Nigeria is headed by the Primate of all Nigeria, and is subdivided into 10 regional provinces, each of which is headed by a regional archbishop. These provinces are also subdivided into dioceses—the Church of Nigeria is composed of 122 dioceses in all. Registrar Yisa is from Minna, a diocese under the province of Abuja. He is the Chancellor of the Diocese of Minna, and has been so since that Diocese was created. (Trial Tr. at 541:17-544:11.) In 2005, Registrar Yisa was elected Registrar of the entire Church of Nigeria, which means that Registrar Yisa is the chief legal advisor of that church. (Trial Tr. at 544:19-545:2.) He also serves on the Standing Committee of the Church of Nigeria, and on its General Synod (the highest legislative body of the Church of Nigeria). (Trial Tr. at 549:8-550:3.) He also represents the Church of Nigeria at the ACC. (Trial Tr. at 552:8-11.) Registrar Yisa was involved in the establishment of CANA, and currently serves in an official capacity with CANA, as the Chairman of CANA's Board of Trustees. (Trial Tr. at 609:18-610:3.)

amendments altered the structure of the Church of Nigeria within the Anglican Communion as follows: While the Church of Nigeria had formerly described itself as being "in full Communion with the See of Canterbury and with all Dioceses, Provinces and Regional Churches which are in full Communion with the See of Canterbury," (Pls.' Ex. 137, "Constitution of the Church of Nigeria, Authenticated by the Primate, Archbishop & Metropolitan 9/20/1997," at 1) it now considered itself to be, following the passage of the constitutional amendment, only "in full communion with Anglican Dioceses and Provinces that hold and maintain the historic faith, doctrine, sacrament and discipline of the One Holy, Catholic, and Apostolic Church as the Lord has commanded in His holy word and as the same are received as taught in the Book of Common Prayer and the ordinal of 1662, and in the 39 Articles of Religion." (Trial Tr. 585:1-8.) Thus, Registrar Yisa testified, "this amendment changed the legal relationship between the Church of Nigeria," and ECUSA, as well as with other provinces [within the Anglican Communion.]" (Trial Tr. at 585:15-18.)

The Church of Nigeria further amended its constitution to state that: " 'The General Synod shall have power . . . to create convocations, chaplaincies of like-minded faith[ful] outside Nigeria, and to appoint persons within or outside Nigeria to administer them, and the Primate shall give Episcopal oversight.'" (Trial Tr. 587:2-8.) Registrar Yisa describes this amendment as necessary in order to give the Church of Nigeria the constitutional authority "to create convocations outside [the] Church of Nigeria," since "[t]here was no provision for that in [the Church of Nigeria's former Constitution]." (Trial Tr. at 589:15-21.)

Finally, the third amendment consisted of altering the definition of "convocation" to " 'mean [a] non-geographic connection[21] of churches and mission[s].'" (Trial Tr. 590:2-9.) Registrar Yisa considered the Church of Nigeria and ECUSA to be in "broken communion" with each other, meaning that "a number of things like the fellowship, exchange of visits by our clergy, by the Primates, training programs, retreats, workshops, indeed financial assistance in some cases were no longer there."[22] (Trial Tr. 591:13-592:1.)

Registrar Yisa further testified that, following the adoption of these amendments, the Church of Nigeria established CANA (Trial Tr. 592:16-19),

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[21] In Pls.' Ex. 138, which contains the full text of the Church of Nigeria's Constitution following the amendments referred to above, the definition of "convocation" is stated as follows: "Convocation" shall mean non-geographic collection of Churches and Missions." (Pls.' Ex. 138 at 22.)

[22] Registrar Yisa testified that the Church of Nigeria now refuses financial contributions from ECUSA, and he stated that there is no longer any exchange of Bishops between the Church of Nigeria and ECUSA. (Trial Tr. 592:6-15.)

and he stated that "[a]s of 2005, [the Church of Nigeria] had about 16 CANA churches that had registered . . . but that number is much, much more than that now" (Trial Tr. 595:4-6).

During the trial, Registrar Yisa read from a statement from the Province of the Southern Cone,[23] which declared that " 'ECUSA's action has forced painful division in the Communion and is a schism of their own making. . . . As a consequence, this Province now shares only a profoundly impaired communion with the ECUSA . . . ." (Trial Tr. 600:4-601:2.) Registrar Yisa confirmed that the provinces that have declared broken communion with ECUSA include the Province of Uganda, the West Indies, Kenya, and the Church of Nigeria, as well as the entire Southern Cone. (Trial Tr. 602:7-12.)

Registrar Yisa testified that he believed CANA was necessary, due to the "division" in the ECUSA:

> Q: You've testified that it was the division in the Episcopal Church that led to the establishment of CANA.
>
> A: [Y]es.
>
> Q: What led you to conclude that there was a need for the establishment of CANA?
>
> A: I said it before, that the Nigerian Anglicans in America who were at issue with ECUSA left. They appealed for spiritual care, and the Church of Nigeria decided to give them that spiritual care through the Primate of the Church of Nigeria, and also to provide structures for them. That is the reason.
>
> Q: In your experience with the Church of Nigeria and the Anglican Communion, has there ever been a comparable division within the Communion?
>
> A: Not like this.
>
> . . . .
>
> A: They have had what are called differences in opinion which, through the instruments of . . . Communion we've been able to resolve. Like the issue of ordination of women. It was a difference but we resolved it.

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[23] Dr. Douglas, an expert witness for the ECUSA/Diocese, stated that the Southern Cone includes Argentina, Peru, and Uruguay. (Trial Tr. 846:22-847:1.)

(Trial Tr. 613:1-614:1.)

Registrar Yisa confirmed that at the present time, the Church of Nigeria has no relationship with the [ECUSA]. (Trial Tr. 684:2-11.)

5. Formation of the "Special Committee" and its Aftermath

The Court now turns its attention back to the Diocese of Virginia, and to the individual congregations involved in the instant litigation. On September 27, 2005, the Reverend Dr. John Yates,[24] wrote to Bishop Lee to express his concerns regarding the anticipated controversy, stating:

> Here is the pressure: If it becomes clear that ECUSA will not turn back on this issue, we are pained to say that we believe we will have to find a way to separate from ECUSA, while remaining Anglicans. We have no plan, no timetable of action. Our great hope is that here in Virginia there may be an opportunity to forge a better way, perhaps a middle way. This has always been your hallmark. What such a plan might look like I do not care to speculate about, but we would very much like to pursue with you and any whom you would designate as your representatives, just how we might achieve what could be seen to be a win-win solution.
>
> Our people are extremely upset. We have all lost key church members and more are leaving all the time. We don't know how long we can hold together.

(Defs.' Ex. 51A, "Redacted version of "Notes from a meeting between Bishop Peter James Lee and clergy from 19 parishes and missions in the Diocese of Virginia, September 20, 2005," at 1.)

Rev. Yates testified that in September of 2005, following the issuance of the Reconciliation Commission's report, he chaired a group of about 25 clergy who met for an afternoon with Bishop Lee to express the level of discord that

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[24] Rev. Yates is the Rector of the The Church at the Falls—the Falls Church, and a graduate of Princeton Theological Seminary, and the Fuller Theological Seminary. He was ordained as a deacon within the ECUSA in 1971, then a priest within ECUSA in 1972. (Trial Tr. 462:11-464:2.) He was received by the Church of Nigeria as a priest to serve in CANA in December of 2006. (Trial Tr. 464:8-10.) Rev. Yates testified that, following the ECUSA General Convention of 2003, many Episcopal clergy and laypeople "felt it was time to begin giving consideration to a new expression of Anglicanism in North America." (Trial Tr. 466:18-466:20.)

was occurring in their respective churches. (Trial Tr. 476:9-22.) At this meeting, Rev. Yates "made a request of Bishop Lee asking if he would appoint a special diocesan committee to give attention to this rising threat of division in the Diocese," since "[Yates] knew that . . . some Rectors were talking about the possibility of leaving the Episcopal Church." (Trial Tr. at 478:6-14.) Bishop Lee agreed to do so, and established this committee, known as the "Special Committee." The committee was composed of Russell Palmore, Chancellor of the Diocese of Virginia; Carolyn Parkinson, a Rector from the Plains; Andrew Merrow, a Rector from Arlington; Hugo Blankenship, former Chancellor of the Diocese of Virginia, from Fairfax; Tom Yates, a former Vestry member of Truro Church; and Rev. Yates. (Trial Tr. 479:11-480:6.) These six members of the Special Committee proceeded to meet every three to five weeks from December of 2005 through September of 2006. Yates described their purpose as to

> seek[] to discern in what ways [they] could maintain a sense of common mission [during their] time of division, and . . . also seek[] to discern if there was a way that . . . should a church decide that they wanted to leave the Episcopal Church . . . to discern a way in which that decision could be reached and that step could be taken that would be done in a fair way that was reasonable and would be acceptable to all those involved.

(Trial Tr. 480:9-481:6.)

On September 23, 2006, the Special Committee issued its Report. The Report stated that "we candidly and regretfully acknowledge that we may be entering a period in the history of the Anglican Communion when we (the Church, the Body of Christ) will be walking the way of the Cross together, but apart." (Pls.' Ex. 67, "September 2006 Diocesan Special Committee Report," at 1.) The Report confirmed the common threads holding the six committee members together, "essentials both of the Faith and of Anglicanism drawn from the Bible, the Book of Common Prayer, the Hymnal, [and] the 39 Articles." (Pls'. Ex. 67 at 1.) The Report set forth a "Protocol for Departing Congregation[s]," which included specific criteria that would govern any congregational vote to leave the Diocese. In regard to the issue of whether a departing congregation would take with it its real and personal property, the Protocol provided that "the amount of the payment to the Diocese for its claim to . . . property and the terms of such payment shall be determined by agreement, after disclosure of the nature and amount of parish assets, between representatives of the departing congregation and representatives of the Diocese, appointed by the Bishop," and that further, "[a]ny agreement will require the further consent of the Bishop, Standing Committee, and Executive Board." (Pls.' Ex. 67 at 2-3.)

On October 3, 2006, Bishop Lee wrote a letter to each member of the Special Committee, thanking them for their service, and for their report, and

stating further that, "The report reflects the gracious and respectful pattern characteristic of Virginia Episcopalians as we deal with differences. I am grateful for your leadership in bringing this report forward and I will share it in due course with the Standing Committee and the Executive Board." (Defs.' Ex. 64, "Letters from Bishop Peter James Lee to members of the Special Committee, Oct. 3, 2006," at 1-6.)

On November 17, 2006, the Diocese of Virginia issued a press release entitled, "Standing Committee Takes Further Review of Special Committee Report." This press release reads as follows:

> At a regularly scheduled meeting of the diocesan Standing Committee today in Fredericksburg, the Standing Committee further considered the report of the Special Committee appointed by Bishop Lee in late 2005 to help those churches continuing in conflict over the decisions of the 74th General Convention in 2003 to get on with their mission in as close a union as possible with the Diocese of Virginia.
>
> Though the Standing Committee today did not approve or endorse the report, the Standing Committee views the report as a potentially useful way forward for those congregations in a period of deliberate discernment over their future relationship with the Episcopal Church.
>
> "We view the report of the Special Committee as one of several possible approaches to achieve in [sic] a mutually acceptable agreement," said Col. Jean Reed, president of the Standing Committee.
>
> . . . .
>
> At a joint meeting Nov. 9 of the Executive Board with the Standing Committee, both bodies voted to receive the report but did not endorse or approve the report.
>
> "The Standing Committee intends to meet with those churches proposing to separate from the Episcopal Church and review their situations on a case by case basis," said Col. Reed.

(Pls.' Ex. 130, " 'Standing Committee Takes Further Review of Special Committee Report,' The Diocese of Virginia Press Release, 11/17/2006," at 1.)

On December 1, 2006, Bishop Lee wrote another letter, one quite different in nature from that of October 3, 2006. This December 1st letter was addressed "to the rectors, vestries and wardens of congregations" who were

choosing to take votes to determine whether to leave ECUSA and the Diocese. Stating that the letter's purpose was "to outline ways forward and potential consequences of decisions," Bishop Lee declared that the congregations contemplating leaving ECUSA and the Diocese "should not assume the Episcopal Church w[ould] endorse or approve the steps outlined in [the Special Committee's report]." (Defs.' Ex. 66, "Letter from Bishop Peter James Lee to rectors, vestries, and wardens of congregations, December 1, 2006," at 1.) Further, Bishop Lee warned that

> absent a negotiated settlement of property, an attempt to place your congregation and its real and personal property under the authority of any ecclesial body other than the Diocese of Virginia and the bodies authorized by its canons to hold church property will have repercussions and possible civil liability for individual vestry members.

(Defs.' Ex. 66 at 2.)

Five days later, on December 6, 2006, Bishop Lee sent a letter to those congregations who were preparing to gather to take a vote as to whether or not to depart from the Diocese. That letter reads in pertinent part as follows:

> Dear Friend in Christ,
>
> In a few days, your congregation will gather to discuss its future in the Episcopal Church and in the Diocese of Virginia. I write you today with this prayerful appeal that you affirm your ministry in the Episcopal Church and in the Diocese of Virginia.
>
> Since the Reformation, our Anglican tradition has included persons with different theological emphases in one community of faith, affirming the same creeds, participating in the same sacraments, honoring Scripture as the basis of our faith, interpreted across the centuries through Reason and Tradition. The Diocese of Virginia, in particular, has affirmed the Windsor Report, issued in 2004 by the Lambeth Commission, as a way forward for our worldwide communion by actions of the Annual Council in 2005 (Resolution R22) and 2006 (Resolution R17). In addition, the Diocese of Virginia, following the recommendations of the Windsor Commission, continues to refrain from public rites of blessing of same gender unions. Since 1607, Anglicans in Virginia have been united in common worship and in common faith and I invite you to affirm that commonality when you gather in your parish meeting. Are there differences among us? Yes. And learning from one another in our differences is, instead of a threat

> to our mission, an opportunity to learn from each other about what mission in the 21st century requires of us.
>
> American Christianity has been punctuated over the years by frequent divisions, with one group choosing to separate because they believed the separated group might be more pure than their former identity. That has not been characteristic of the way we Anglicans have dealt with differences.
>
> I encourage you when you vote, to vote for the unity and mission of the church, therefore remaining one with your diocese, and reject the tempting calls to division . . . .

(Pls.' Ex. 68, "December 6, 2006 letter from Bishop Peter J. Lee to the members of the Voting Congregations," at 1.)

At or around December 7th, 2006, shortly after the issuance of Bishop Lee's letter, a meeting was held between the Standing Committee of the Diocese, and the Rectors and Wardens of churches that had announced they would conduct votes regarding possible departure from the Diocese. (Trial Tr. 499:2-13.) Rev. Yates testified that Bishop Lee explained that there had been some "changes in the environment by that time":

> [Bishop Lee] told [those in attendance at the meeting] that there was [sic] some changes in the environment by that time. He [said] that since the work of the Special Committee had been completed, that a new Presiding Bishop of the Episcopal Church had been installed, and that the new administration brought in a rather different view about division.
>
> The former Presiding Bishop had said that in matters of division of churches leaving Diocese, [sic] that was going to be left up to the Bishop. But now it was going to be—it was going to become a matter of concern to the national church. The Bishop said there's a new sheriff in town, the situation is different.

(Trial Tr. 499:16-500:9.) This was described by CANA Congregation witness Rev. Yates as a "total departure from the tenor of [the previous meetings]," that "was totally unexpected." (Trial Tr. 501:10-12.)

By December 18, 2006, twelve churches within the Diocese of Virginia voted both to separate from the Diocese and to retain their church property.[25]

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[25] These churches are:

> All Saints' Church, Dale City

By the time of the 57-9 trial in November of 2007, fifteen individual congregations had voted to leave the Diocese (Pls.' Ex. 301, "Deposition Designations of Peter James Lee," at 15),[26] and twenty-two clergy had been removed[27] in the Diocese. (Pls.' Ex. 301 at 23.)

6. Evolution of CANA and the Formation of the Anglican District of Virginia ("ADV")

As the conflict within the Diocese escalated, CANA continued to evolve. In 2006, CANA's purpose broadened to encompass all Anglicans within North America who had broken away from the Episcopal Church. Thus, CANA changed its name to "Convocation of Anglicans in North America." (Trial Tr. 312:4-8.) At the time of trial, about 100 clergy had affiliated with CANA, 80% of whom were formerly affiliated with ECUSA. CANA allowed ECUSA bishops to transfer in, while non-ECUSA bishops were first required to be consecrated. (Trial Tr. 320:3-18.) In addition to CANA's Bishop, Martyn Minns, who was a witness for the CANA Congregations at trial, other CANA bishops include David Bena, formerly of the ECUSA Diocese of Albany. At the time of trial, CANA had plans to consecrate four other bishops, all of whom were formerly with ECUSA. (Trial Tr. 320:19-322:4.) Sixty congregations have affiliated with CANA, resulting in a membership of 12,000, with over 10,000 of those members coming directly from ECUSA. CANA has congregations in eighteen states, and the congregations of CANA that were formerly affiliated with ECUSA come from

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Christ our Lord, Lake Ridge
Church of the Holy Spirit, Ashburn
South Riding Church, Fairfax
Church of the Apostles, Fairfax
Church of the Word, Gainesville
Truro, Fairfax
The Falls Church, Falls Church
St. Stephens, Heathsville
St. Margaret's Church, Woodbridge
Potomac Falls Episcopal, Sterling
Christ the Redeemer, Centreville

(Pls.' Ex. 132, " 'News Update from the Diocese of Virginia,' 12/18/2006" at 1.)

[26] In addition to the twelve churches listed above, the other three are: Church of our Saviour at Oatlands, Church of the Epiphany, Herndon, and St. Paul's Church, Haymarket. See Pls.' Ex. 301 at 15-16.

[27] Bishop Lee described this "removal" as a process by which a member of the clergy would first be "inhibited," and then, "unless they returned to the Episcopal Church within six months, they were removed." See Pls.' Ex. 301 at 20-22. The process of removal is called "deposing." (Pls.' Ex. 301 at 22.)

eight different dioceses, ranging from California to Connecticut. (Trial Tr. 324:1-325:17.) At the time of the trial, the latest church to join CANA was the Bishop Seabury Church in Connecticut, a church formerly affiliated with ECUSA. (Trial Tr. 325:18-326:5.)

The Anglican District of Virginia ("ADV") was incorporated on December 5, 2006. The ADV's Articles of Incorporation state that the ADV

> is an association of Virginia churches, together with their clergy and laity, who join together to realign traditional Anglicans in Virginia displaced by the election of The Episcopal Church to walk apart from the Anglican Communion . . . . The Corporation forms a discrete ecclesiastical and legal structure and will provisionally come under the ecclesiastical jurisdiction of the Convocation of Anglicans in North America . . . . [by this] affiliation . . . the Corporation formally and immediately brings itself and all of its member churches, clergy and laity into full communion with the foregoing constituent members of the Anglican Communion.

(Pls.' Ex. 70, "December 4, 2006, Articles of Incorporation for the Anglican District of Virginia, an Association of Churches," at 1.)

Since 2006, twenty congregations, comprising 7,500 members, affiliated with ADV, and almost all of ADV's members were former members of ECUSA congregations within the Diocese. All twenty of the ADV congregations are led by former ECUSA clergy.[28] (Pls.' Opening Post-Trial Mem. Concerning

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[28] Similar to the churches that affiliated with CANA, some ECUSA/Diocese churches joined the Church of Uganda. The Rt. Rev. John Guernsey, who is the Rector of All Saints Church in Woodbridge, Virginia, the Dean of the Mid-Atlantic Convocation of the Anglican Communion Network, and the Church of Uganda Bishop for Congregations in America (Trial Tr. 382:16-19), testified that, prior to its affiliation with the Church of Uganda, All Saints was affiliated with the Diocese. All Saints contemplated leaving after the General Convention of 2003. Bishop Guernsey testified that All Saints decided to join the Church of Uganda, as opposed to operating independently, because it wanted to remain a part of the Anglican Communion; this was "very important" to All Saints, since it "wanted to be a part of the worldwide church that [it] understood that [it] always had been a part of." (Trial Tr. 384:7-387:4.)

In January of 2004, the Church of Uganda first began providing ecclesiastical oversight for congregations that wished to leave ECUSA. The first church to leave ECUSA to join the Church of Uganda was a Kentucky church that left in January of 2004. Bishop Guernsey became bishop of the American congregations of the Church of Uganda on September 2, 2007. Thirty-nine congregations have come under his ecclesiastical oversight. Ninety percent of

Application of Va. Code § 57-9 at 44.) Of these twenty congregations, eleven are affiliated with CANA, and four are affiliated with the American Arm of the Church of Uganda. Four others are "church plants," or "new churches."[29] (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 44 n.25.)

7. Post-Separation Events within the Anglican Communion

Turning back to the events unfolding within the Anglican Communion, on February 15th, 2007, the Primates met in Dar es Salaam, Tanzania. Following this meeting, the Primates issued a communiqué, stating that "[s]ince the controversial events of 2003, [they] ha[d] faced the reality of increased tension in the life of the Anglican Communion—tension so deep that the fabric of [their] common life together ha[d] been torn." (Pls.' Ex. 12A, "The Communiqué of the Primates Meeting in Dar es Salaam, 2/19/07," (Redacted) at ¶9.) The communiqué expressed dissatisfaction with the "response" of ECUSA to the whole controversy, and stated that ECUSA "ha[d] not persuaded this meeting that we are yet in a position to recognize that The Episcopal Church has mended its broken relationships." (Pls.' Ex. 12A at ¶24.) Further, the communiqué stated:

> It is also clear that a significant number of bishops, clergy and lay people in The Episcopal Church are committed to the proposals of the Windsor Report and the standard of teaching presupposed in it. These faithful people feel great pain at what they perceive to be the failure of The Episcopal Church to adopt the Windsor proposals in full. They desire to find a way to remain in faithful fellowship with the Anglican Communion. They believe that they should have the liberty to practice and live by that expression of Anglican faith which they believe to be true. We are deeply concerned that so great has been the estrangement between some of the faithful and The Episcopal Church that this has led to recrimination, hostility and even to disputes in the civil courts.

(Pls.' Ex. 12A at ¶25 (internal citation omitted).) The communiqué further concluded that it "believe[d] that the establishment of a Covenant for the Churches of the Anglican Communion in the longer term may lead to the trust required to re-establish [its] interdependent life." (Pls.' Ex. 12A at ¶29.) The communiqué concluded: "We do not underestimate the difficulties and heart-

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the membership of those thirty-nine congregations came from ECUSA. (Trial Tr. 389:5-391:12.)

[29] The twentieth church is said to have come "from another [ECUSA] diocese in Virginia." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 44 n.25.)

searching that our proposals will cause, but we believe that commitment to the ways forward which we propose can bring healing and reconciliation across the Communion." (Pls.' Ex. 12A at ¶37.)

On April 30, 2007, ECUSA Presiding Bishop Katherine Jefferts Schori wrote to Nigerian Primate Peter J. Akinola, requesting that Archbishop Akinola not install the Rev. Martyn Minns, former Rector of Truro, as a bishop of CANA, since this " 'would display to the world division and disunity . . . .'"[30] (Pls.' Ex. 3, " 'Presiding Bishop urges Nigerian Primate to Reconsider plans to install bishop,' 5/1/07," at 2.) Archbishop Akinola replied to Presiding Bishop Schori's letter by stating that the reason he was preparing to install Rev. Minns was that,

> [a]t the emergency meeting of the Primates in October 2003 it was made clear that the proposed actions of the Episcopal Church would 'tear the fabric of our Communion at its deepest level, and may lead to further division on this and further issues . . .' Sadly, this proved to be true as many provinces did proceed to declare broken or impaired communion with the Episcopal Church. Since that time the primates have established task forces, held numerous meetings and issued a variety of statements and communiqués but the brokenness remains, our Provinces are divided, and so the usual protocol and permissions are no longer applicable.
>
> You will also recall from our meeting in Dar es Salaam that there was specific discussion about CANA and recognition—expressed in the Comuniqué itself—of the important role that it plays in the context of the present division within your Province. CANA was established as a Convocation of the Church of Nigeria, and therefore a constituent part of the Communion, to provide a safe place for those who wish to remain faithful Anglicans but can no longer do so within the Episcopal Church as it is currently being led.
>
> It is my heartfelt desire—and indeed the expressed hope of all the Primates of the Communion—that the Episcopal Church will reconsider its actions—and make such special measures no longer

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[30] Bishop Schori also stated in her letter that if Archbishop Akinola were to travel from Nigeria to the United States to install Rev. Minns as a bishop of CANA, this would "violate the ancient customs of the church which limits the Episcopal activity of a bishop to only the jurisdiction to which the bishop has been entrusted, unless canonical permission has been given." (Pls.' Ex. 3, "Presiding Bishop urges Nigerian Primate to Reconsider plans to install bishop, 5/1/07," at 2.)

necessary. This is the only way forward for full restoration into fellowship with the rest of the Communion.

. . . .

You mention the call to reconciliation. As you well know this is a call that I wholeheartedly embrace and indeed was a major theme of our time in Tanzania. You will also remember that one of the key elements of our discussion and the resulting Communiqué was the importance of resolving our current differences without resorting to civil law suits. You agreed to this. Yet it is my understanding that you are still continuing your own punitive legal actions against a number of CANA clergy and congregations. I fail to see how this is consistent with your own claim to be working toward reconciliation.

Once again please know that I look forward to the day when this current crisis is behind us and we can all be reunited . . . .

(Pls. Ex. 13, "Letter from the Most Rev. Peter J. Akinola to the Rt. Rev. Katharine Jefferts Schori, 5/2/07," at 1-2.)

On May 6, 2007, Archbishop Akinola proceeded to write a letter directly to the Archbishop of Canterbury, Rowan Williams, in which Akinola declared that the Anglican Communion was "deeply divided," with the "decisions, actions, defiance and continuing intransigence of The Episcopal Church" being at the heart of the division. Of the formation of CANA, Archbishop Akinola stated the following to the Archbishop of Canterbury:

> We are a deeply divided Communion. As leaders of the Communion we have all spent enormous amounts of time, traveled huge distances—sometimes at great risk, and expended much needed financial resources in endless meetings, communiqués and reports—Lambeth Palace 2003, Dromantine 2005, Nottingham 2006 and Dar es Salaam 2007. We have developed numerous proposals, established various task forces and yet the division has only deepened. The decisions, actions, defiance and continuing intransigence of The Episcopal Church are at the heart of our crisis.
>
> As you well know the Church of Nigeria established CANA as a way for Nigerian congregations and other alienated Anglicans in North America to stay in the Communion. This is not something that brings any advantage to us—neither

> financial nor political. We have actually found it to be a very costly initiative and yet we believe that we have no other choice if we are to remain faithful to the gospel mandate . . . . although CANA is an initiative of the Church of Nigeria—and therefore a bonafide branch of the Communion—we have no desire to cling to it. CANA is for the Communion and we are more than happy to surrender it to the Communion once the conditions that prompted our division have been overturned.

(Pls.' Ex. 14, "Letter from the Most Rev. Peter J. Akinola to Archbishop Rowan Williams, 5/6/07," at 1.)

II.) Procedural History of this Case

In December of 2006 through January of 2007, eight of the CANA Congregations filed a "Petition for Approval of Report of Congregational Determination Pursuant to Va. Code section 57-9" with various circuit courts in Virginia. These were Truro Church, Church of the Apostles, and Church of the Epiphany, which filed their petitions in the Fairfax County Circuit Court; The Church at the Falls—the Falls Church, which filed its petition in the Circuit Court of Arlington County; St. Paul's Church and St. Margaret's Church, which filed their petitions in the Circuit Court of Prince William County; St. Stephen's Church, which filed its petition in the Circuit Court of Northumberland County; and The Church of Our Saviour at Oatlands, which filed its petition in the Circuit Court of Loudoun County.

Beginning on January 31, 2007, the Diocese filed complaints against each of the eight CANA Congregations that had filed 57-9 petitions, as well as complaints against three other members of the CANA Congregations: Potomac Falls Church, Christ the Redeemer Church, and Church of the Word. The complaint alleged that "[t]he continued occupancy, possession and use of the properties of [the individual CANA Congregation churches] by [their Rectors] and the Vestry defendants have resulted in a trespass, conversion and illegal alienation of such properties in violation of the Constitution and Canons of The Episcopal Church and the Diocese, the deeds to such real property, and applicable Virginia law." Then, on February 9, 2007, ECUSA filed its own separate complaint against the eleven CANA Congregations and their rectors, vestry members, and other leaders.

On April 10, 2007, a three judge panel appointed by the Supreme Court of Virginia pursuant to Va. Code § 8.01-267.4 issued an order transferring to, and consolidating all of the above proceedings, in the Circuit Court of Fairfax County.

On November 13th through November 20th, 2007, a five-day trial was held regarding the issue of the application of 57-9(A) to the instant case. The final post-trial briefs were submitted to this Court on January 17, 2008.

III.) Parties' Positions

A.) CANA Congregations

Plaintiff CANA Congregations argue that the evidence at trial proved that the definition of "division" within 57-9(A) is "a split, schism, or rupture in a religious denomination that involved the separation of a group of congregations, clergy, or members from the church and the formation of an alternative polity that disaffiliating members could join." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 7.) Plaintiffs further argue that "divisions . . . often result from internal strife, but the divisions themselves entail[] disaffiliating congregations or clergy and the formation of a new entity." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 9.) They also argue that the departure of a single congregation does not fit the definition of "division" under the statute, but that beyond this, the statute does not impose a specific size requirement. (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 9.)

In response to ECUSA/Diocese's argument that a "division" under 57-9(A) must be one that is approved by the proper hierarchical authorities, Plaintiffs argue that, because the statute employs the words "occurred," and "occur," to describe the divisions, "the sense of the statute is that divisions 'happen,' often in unplanned ways, contrary to the TEC[31]-Diocese position that the statute is limited to divisions that result from a consensual, deliberative process by denominational authorities." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 14.) Plaintiffs argue that none of the adjectives that ECUSA/Diocese assert must characterize a division—e.g., that it be "authorized," "structural," "major, "great," "historic," "large," "true," "formal," "recognized," "confirmed," "approved," "significant"—actually appear in the text of § 57-9. (Pls.' Post-Trial Reply Mem. 4.) Further, the CANA Congregations argue that the express text of the statute does not mandate that this Court "defer to denominational authorities in determining whether there has been a division," since "[t]he meaning of legislative enactments does not generally vary from dispute to dispute, and private parties rarely get to decide how a statute applies to them . . . ." (Pls.' Corrected Mem. in Opp'n to the Post-Trial Opening Br. of the Episcopal Church and the Diocese 18-19.)

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[31] The CANA Congregations employed the abbreviation "TEC,"—standing for the Episcopal Church—rather than "ECUSA" in their post-trial briefs.

Plaintiffs also argue that the record demonstrates that between 1867 and 1869,[32] "at least 25 Methodist congregations and four Presbyterian congregations invoked [57-9]," and that "[n]otwithstanding the absence of any evidence of denominational approval . . . the courts without exception ruled for the majority of the congregation." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 26.)

The CANA Congregations further argue that ECUSA/Diocese's definition of division, which is "a denominationally approved administrative or structural subdivision of an entity, such as a diocese, into two new entities," is unworkable, since "if 'division' were limited to administrative redistricting, the statute would never apply to TEC," in that "when TEC 'divides' up a diocese, it does not permit congregations to vote to determine which diocese to join and the resulting dioceses are not considered 'branches.' Thus, the statute would never have any application to Episcopal churches under such a definition of 'division.'" (Pls.' Corrected Mem. in Opp'n to the Post-Trial Opening Br. of the Episcopal Church and the Diocese 14.)

The CANA Congregations' argument that there has been a "division" within the ECUSA and Diocese sufficient to satisfy 57-9(A) is summarized as follows:

> [M]uch of the evidence is undisputed. Numerous congregations and clergy have disaffiliated from [ECUSA] and formed new branches thereof. CANA is one such branch, and since its formation in 2005 CANA has quickly grown into a religious denomination that provides ecclesiastical oversight for some 60 congregations and 12,000 members, the vast majority of whom are former members of [the ECUSA]. Since intervening in this litigation, [the ECUSA] has studiously avoided referring to any "division," but its use of that term outside of this Court . . . confirm[s] that [the ECUSA] has experienced such a division.

(Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 2-3.)

Plaintiffs also argue that there is a division under 57-9(A) within the Anglican Communion, as "evidenced by 2005 amendments to the Church of Nigeria's constitution, which ended that church's legal and structural

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[32] The original statute that was the pre-cursor to today's 57-9 was passed on February 18th, 1867. Hoskinson v. Pusey, 73 Va. 428, 439 (1879) ("That action . . . is claimed to have been had under an act of the general assembly, passed February 18th, 1867 (acts of 1866-7, ch. 210, pp. 649, 650; Code of 1873, ch. 76, §9), which had the effect, as contended, to transfer the control and use of the property . . . .").

relationship with TEC," as well as "by official statements of 'broken' and 'impaired' communion promulgated by multiple Anglican Provinces; and by a number of other official pronouncements from various organs of the Anglican Communion, all recognizing the existence of this international division." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 49.)

In regard to the question as to the proper interpretation of "branch," the CANA Congregations argue that the term "branch," as it is used in 57-9(A), "was most commonly understood in mid-19th century America to refer to an offshoot of a denomination created as a result of a division, or to the group left behind—not to an administrative subunit of a denomination or to a new diocese created by consensual administrative redistricting." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 30-31.) In addition, although this "new polity would vary from denomination to denomination, the 'essential definition' that applied 'across the board' was simply a new polity that had a historic affiliation with the prior denomination, a connection reflected in the fact that its members were 'people who belong[ed] to the original group.'" (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 31.) The CANA Congregations point out that the Reformed Episcopal Church, which "began with only seven ministers and 19 laypersons, and with only a few congregations [at] its first convention" was referred to as a "branch" of ECUSA by the Bishop of Minnesota during an address he made in 1874. (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 32-33.) The CANA Congregations also argue that "the undisputed testimony showed that the Cumberland branch of the Presbyterian Church started with three ministers who formed a presbytery." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 33.) Thus, Plaintiffs argue that CANA and the American Arm of the Church of Uganda are "branches" of ECUSA, that ADV is a "branch" of the Diocese, and that the American Arm of the Church of Uganda, the Church of Nigeria, ADV, ECUSA, and the Diocese are all "branches" of the Anglican Communion.

In regard to the issue as to the nature of the Anglican Communion, Plaintiffs argue that the Anglican Communion is in fact a "church" or "religious society" as that term is used in 57-9(A), and that, in addition, the CANA Congregations were formerly "attached" to the Anglican Communion, for purposes of 57-9, through their affiliation with the ECUSA and the Diocese.[33]

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[33] In addition to these arguments, which were made by all of the CANA Congregations collectively, the Church of Our Saviour at Oatlands [hereinafter "COSO"] submitted its own supplemental brief, arguing that "section 57-9 unambiguously provides that the CANA Congregations may retain their own property upon majority vote in the event of a 'division.'" (Individual Opp'n Br. of the Church of Our Saviour at Oatlands' Supplementing the CANA Congregations' Collective Opp'n Br. 2.) COSO argues that, were this Court to interpret 57-9(A) so that "only the Diocese and TEC could determine when a

B.) ECUSA/Diocese

Defendants ECUSA/Diocese, in contrast, argue that "a 'division' within the meaning [of 57-9(A)] must be an institutional division in a 'church or religious society,' accomplished pursuant to that church or society's rules and polity," which results in "the creation of two or more entities which might properly be viewed as legal successors to the formerly undivided church." (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected Per Errata Filed 01/07/08) at 5.) They argue that, "[c]ontrary to the Congregations' characterization of this definition, it does not require an 'amicable' separation; it does, however, require appropriate action of the regularly constituted body empowered to effect or recognize a structural division under the church's polity." (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected per Errata Filed 01/07/08) at 5.) Essentially, the ECUSA/Diocese argue that unless a church's hierarchy formally declares or admits to a division, the statute does not apply. Because the governing authorities of the ECUSA and the Diocese have not acknowledged the occurrence of a division, the ECUSA/Diocese argue that there is no division here under 57-9(A).

Further, the ECUSA/Diocese suggest that the CANA Congregations' definition of "division" would allow a hierarchical church to be "divest[ed] of its interest in local congregational property . . . by the acts of a few disgruntled individuals." (Post-Trial Reply Br. for the Episcopal Church and the Diocese 5 n.3.) They state that "Virginia certainly has no interest in encouraging divisions and property disputes by making the statute so easily applicable through the acts of a few individuals." (Post-Trial Reply Br. for the Episcopal Church and the Diocese 5-6 n.3.) Defendants argue that the "great 19th Century divisions" in the Methodist, Presbyterian, and Baptist denominations were the "impetus for 57-9." They argue that the current split which resulted in the formation of CANA and ADV is not such a great division, and thus 57-9(A) should not be applied. (Opp'n Br. for the Episcopal Church and the Diocese 15-16.)

In regard to what constitutes a "branch," the ECUSA/Diocese argue that CANA and ADV are in no way "branches" of the ECUSA or the Diocese, because

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'division' cognizable under Section 57-9 could occur," this would violate the CANA Congregations' own First Amendment rights, in that "[i]t is difficult to imagine a heavier burden upon the CANA Congregations than the seizure of their property and the use of that property to support religious practices with which the Congregations strongly disagree." (Individual Opp'n Br. of the Church of Our Saviour at Oatlands' Supplementing the CANA Congregations' Collective Opp'n Br. 2-3.) As stated above, these and all other constitutional arguments will be addressed at a later date.

they no longer are connected in any way with ECUSA or the Diocese. Defendants set forth the following example to support their position: They argue that, in the past, "[t]he Episcopal Church in fact created a new missionary diocese to minister to Mexican Catholics who had become disaffected from, and were departing, the Catholic Church. Yet, not surprisingly, no one referred to or considered that Episcopal Diocese as a "branch" of the Catholic Church—it was a branch of the Episcopal Church, just as CANA is a 'branch" of the Church of Nigeria." (Opp'n Br. for the Episcopal Church and the Diocese 22 (citations omitted).)

As to the nature of the Anglican Communion, the ECUSA/Diocese argue that it is not a "church or religious society" under 57-9(A), but is only " 'a family of [38] churches . . . . regional and national churches that share a common history of their understanding of the church catholic through the See of Canterbury." (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected per Errata Filed 01/07/08) at 34.) For example, they cite the criteria relied upon by the IRS to determine what constitutes a church, arguing that the Anglican Communion does not satisfy most of these characteristics. (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected per Errata Filed 01/07/08) at 35 (citing Spiritual Outreach Soc'y v. Commissioner, 927 F.2d 335, 338 (8th Cir. 1991)).) And since neither the Anglican Communion, nor any other "association of independent churches like the Anglican Communion," existed in 1867, Defendants argue that the legislature could not have had these in mind when it used the words "church" and "religious society" within 57-9(A). (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected per Errata Filed 01/07/08) at 36.)

Finally, ECUSA/Diocese argue that the CANA Congregations were not "attached" to the Anglican Communion, because the element of "control" is missing.[34] (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected per Errata Filed 01/07/08) at 37.)

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[34] The Court notes that the ECUSA/Diocese also makes a "legislative history" argument in their post-trial briefs in regard to S.B. 1305. See, e.g., (Post-Trial Reply Br. for the Episcopal Church and the Diocese 10-11.) According to the ECUSA/Diocese, SB 1305 (2005) "would have expanded [57-9(A)] to apply to congregational votes determining '(i) to which branch of the church or society such congregation shall thereafter belong; *(ii) to belong to a different church, diocese, or society; or (iii) to be independent of any church, diocese, or society.*" (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected per Errata Filed 01/07/08) at 28-29.) ECUSA/Diocese's argument appears to be that the fact that a bill was proposed to broaden 57-9(A)'s reach suggests that 57-9(A), in its current incarnation, is not broad enough to encompass the instant situation. While this Court recognizes the value of legislative history on issues of statutory interpretation, "[a] bill can be proposed for any number of

IV.) Discussion of Expert Testimony and Analysis

A.) Applicable Law

In order to interpret § 57-9(A), this Court looks to the text of the statute itself, the historical context in which it was enacted, and applicable caselaw. The Court begins, as it must, with the text of the statute.

1. Statute

§ 57-9, in its entirety, states:

> If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth.
>
> B. If a division has heretofore occurred or shall hereafter occur in a congregation whose property is held by trustees which, in its organization and government, is a church or society entirely independent of any other church or general society, a majority of the members of such congregation, entitled to vote by its constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom, may decide the right, title, and control of all property held in trust for such congregation. Their decision shall be reported to such court, and if approved by it, shall be so entered as aforesaid, and shall be final as to such right of property so held.

Va. Code Ann. § 57-9 (2007).

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reasons, and it can be rejected for just as many others." Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs., 531 U.S. 159, 170 (2001).

This Court is first required to consider the "plain meaning" of the words as they are used in the statute."[35] As the Virginia Supreme Court states:

> Under basic principles of statutory construction, we consider all relevant provisions of a statute and do not isolate particular words or phrases. When the language of a statute is plain and unambiguous, we are bound by the plain meaning of that statutory language. Thus, when the General Assembly has used words that have a plain meaning, courts cannot give those words a construction that amounts to holding that the General Assembly meant something other than that which it actually expressed.

Lee County v. Town of St. Charles, 264 Va. 344, 348 (2002) (citations omitted).[36]

Further, this Court must also look to the definition of words used in a statute "[a]t the time of [its] enactment . . . Courts cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret." Lewis v. Commonwealth, 184 Va. 69, 73 (1945) (citations and internal quotation marks omitted).

And finally, "it is a well-established rule of statutory construction that when the same word is used in different parts of the same statute, the presumption is that it is used in the same sense throughout the statute, unless a contrary intention clearly appears." Bridgewater Mfg. Co. v. Funkhouser, 115 Va. 476, 480 (1913).

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[35] This is one of the most basic principles of statutory construction within our legal system. See, e.g., United States v. Gonzales, 520 U.S. 1, 5 (1997) (using Webster's Third New International Dictionary to determine the "natural" meaning of a particular word as used in a statute, where "Congress did not add any language limiting the breadth of that word . . . ."); see also Hackney v. Commonwealth, 186 Va. 888, 891-92 (1947) (citing Webster's International Dictionary, 2d Ed. and Bouvier's Law Dictionary, to discern the definitions of words as used in the statute).

[36] See also, Vaughn v. Beck, 262 Va. 673, 677 (2001) ("Under basic rules of statutory construction, we examine the language of [the statute] in its entirety and determine the intent of the General Assembly from the words contained in the statute, unless a literal construction of the statute would yield an absurd result. . . . Thus, when the General Assembly has used words of a plain and definite import, courts cannot place on them a construction that amounts to holding that the General Assembly meant something other than that which it actually expressed.") (citations omitted).

a. Plain Meaning of the Text

Applying the foregoing principles, this Court first looks to the plain meaning of individual words in the statute, also taking into consideration the structure of sentences used, as well as the overall grammatical context of the various sentences and phrases within the statute.

The Court notes that both §§ 57-9 (A) and (B) begin by using the same phrase:

"If a division has heretofore occurred or shall hereafter occur in a . . . ."

At this point, then, the two sections begin to differ, as part A continues:

"church or religious society, to which any such congregation whose property is held by trustees is attached . . . ."

while part B continues:

"congregation whose property is held by trustees which, in its organization and government, is a church or society entirely independent of any other church or general society . . . ."

Thus, the plain text of the statute makes clear that part B applies only to churches that are "entirely independent of any other church or general society."

However, the two sections then merge once again, as each states that, in the event of a "division," the individual congregation, by majority vote, may determine the destiny of its property. Thus, both section A and section B of 57-9 provide that a congregational majority may determine the future of its property. There is, however, a significant distinction between § 57-9 (A) and (B) regarding the procedure for a majority vote. In the case of an independent church, such as the one described in (B), those who may participate in the vote are those "*entitled to vote by [the congregation's] constitution as existing at the time of the division, or where it has no written constitution, entitled to vote by its ordinary practice or custom . . . .*" In contrast, in (A), those entitled to vote are "*the members of such congregation over 18 years of age . . . .*" Thus, in (B), the legislature defers completely to the independent church's constitution, ordinary practice, or custom, whereas in (A), the legislature shows no such deference. Instead, 57-9(A) appears to mandate a neutral rule that the members of the congregation over 18 years of age may participate in the vote. More importantly, (A) appears to reflect a determination by the Virginia legislature to protect the voting rights of any local congregation which is subject to a hierarchical church's constitution or canons. This lends support to the notion

that 57-9(A) was not enacted in contemplation that "divisions" would always be consensual, authorized, or approved.

b. Expert Testimony

1. Dr. Mark Valeri

This Court also must consider the historical context in which the statute was codified.[37] Dr. Mark Valeri,[38] an expert witness for the CANA Congregations, testified during the trial that, based upon a search of newspapers, religious journals/serials, religious pamphlets/tracts, and denominational histories that are widely available in Virginia, the most commonly understood definition of "division," as understood in the mid-19th century, both nationally and specifically in Virginia, is the "separation out of [a] group of members of a religious . . .denomination in sufficient numbers to begin to form an alternative polity[,] and the renunciation of the authority of the original group in that process."[39] (Trial Tr. 52:18-55:20.) Further, Dr. Valeri stated that typically when a group left the particular denomination, it was not an amicable split, nor was it "with the approval or consent of the higher ecclesiastical authorities." (Trial Tr. 56:1-14.)

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[37] Although it has undergone minor non-substantive changes since its enactment in 1867, both sides concede that the statute remains substantively the same today as it did in 1867.

[38] Dr. Valeri is a specialist in American religious history, which "encompasses the history of religious thought, religious life, religious congregations and its interaction with society from the colonial period through the present." (Trial Tr. 45:8-16.) Dr. Valeri presently works at Union Theological Seminary in Richmond, Virginia. He obtained a master's of divinity from Yale University, and a doctorate in philosophy from Princeton University. The topic of his doctorate was American religious history. He has published numerous books and articles, including one book that, at the time of trial, was soon to be published, that focuses upon American religious history during the period from 1750 through 1910. He is also an ordained Presbyterian minister. He gives frequent lectures regarding American religious history, many of which relate specifically to Virginia religious history. (Trial Tr. 45:17-50:8.)

[39] Dr. Valeri also stated that there was a second common definition of "division," which "refers to internal strife or division as in our church is having a quarrel or division over a particular issue." (Trial Tr. 54:12-14.) Further, this "internal strife" frequently leads to a separation, according to Valeri, so that the second definition of "division" often merges into the first. See Trial Tr. 54:4-18.

Dr. Valeri testified at length regarding the various splits among the Presbyterians throughout the 19th century. First, in 1837, due to a debate over "revivalism," and "ordination procedures," there was a split that resulted in the formation of a "new branch" of Presbyterianism, termed the "New school." (Trial Tr. at 57:21-58:15.) This was not a geographical split, since "[e]very state . . . had a mixture [of both Old School and New School groups]." (Trial Tr. 59:2-7.) The General Assembly, which was the "highest ecclesiastical authority in the Presbyterian Church in the mid-1800s," did not "approve" of this "division." (Trial Tr. 60:3-11.) In Dr. Valeri's words, "They [the Old School and New School] recognize each other exists, but they don't recognize the legitimacy of the other," (Trial Tr. 68:1-3) which is evidenced by the fact that "the old school begins deposing some of the new school ministers."[40] (Trial Tr. 61:11-12.) This split between the Old School and New School was far from amicable, as evidenced by the fact that the Old School apparently charged the New School with being "corrupt in doctrine, fanatical in practice, and guilty of the sin of schism."[41] (Trial Tr. 65:2-10.) Eventually, "all of the ordinations which took place under this new school were considered invalid and not acceptable by the old school." (Trial Tr. 67:7-9.)

Following this Old School-New School split, the New School proceeded to itself divide, as, according to Dr. Valeri, "the southern synods or at least some Virginia synods split off from the general conference," to form the "United Synod." (Trial Tr. 73:1-21.) The United Synod then "engage[d] in activities that were condemned by the [N]ew school," including "sen[ding] unauthorized missionaries throughout into new school territories." (Trial Tr. 73:22-74:9.) As Dr. Valeri remarked, "when you send a [missionary] into the parish, into the parish of an existing church, it is a de facto statement of the illegitimacy of the current ministry in that location." (Trial Tr. 74:17-20.)

After discussing the above two major splits among the Presbyterians, Dr. Valeri also described a separate and smaller "division" which occurred with the departure of only three ministers from the Presbyterian Church, who left to form their own polity. (Trial Tr. 77:10-78:11.) "Entire congregations" proceeded to join these three ministers, and thus the Cumberland church continued to grow into its own denomination, the Cumberland Presbyterian Church. See Trial Tr. 77:10-78:19.

Dr. Valeri further described "division" as a "process" which

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[40] Another word for "depose" is "defrock," which was considered a "vulgar kind of diction," at the time of the New School-Old School split. (Trial Tr. 61:17-22.)

[41] Dr. Valeri testified that this use of the word "schism" indicated that the religious body accused of "schism" was thought to be heretical, deviant, and "contemptuous of authorities." (Trial Tr. 65:6-16.)

> begins with disaffection or controversy and then a few members separate out. They are then joined by other members. They form a group and begin to actually talk of themselves as a separate group, and they are later joined by other groups over the period of weeks, months, sometimes years . . . the division is a process that begins small and then grows and that line of crossing between predivision to division is not a hard and fast line.

(Trial Tr. at 78: 20-79:16.)

Finally, Dr. Valeri discussed a split in the Old School itself, which resulted, according to Dr. Valeri, in the formation of the Presbyterian Church in the United States ("PCUSA"--the preexisting denomination) and the Presbyterian Church in the Confederate States of America ("PCCSA"--the new denomination). Dr. Valeri read excerpts from the "Christian Observer," a newspaper founded in Louisville, Kentucky around the year 1840, in which citizens are quoted as publicly describing this split in the Old School as a "division." (Trial Tr. 87:2-88:3.) This Old School split was in fact described by Dr. Valeri as being particularly acrimonious, as the PCUSA "actually had statutes in its own constitution which would have made the ordination of ministers in this new PCCSA invalid." (Trial Tr. 88:8-13.) Further, the PCCSA was "completely organized separately and independently from the Presbyterian Church," in that the breakaway PCCSA group had "parallel General Assembly, parallel Synods, parallel presbyteries, parallel ordination—parallel and different ordination processes, different qualifications for ordination." (Trial Tr. 88:22-89:6.) Also according to Dr. Valeri, another act taken by the PCUSA to reflect its anger over the creation of the PCCSA included the passage of the "Gardiner Spring Resolutions," which "demanded that any Presbyterian minister profess fealty . . . to the federal union and disavow slave holding as a sin against God, and ministers who did [not do] that could not be ordained." (Trial Tr. at 89:11-90:1.)

Thus, the condition of the Presbyterian denomination as a whole in 1867 (the year in which the statute currently codified as section 57-9 was originally passed) was that there was still an Old School/New School division, as well as a division between the northern and southern Presbyterian churches. (Trial Tr. 91:1-4.)

Further, Dr. Valeri testified that all the above splits would have been characterized as "divisions," and that the "operating principle seems to be that groups of three feel themselves qualified to form themselves into new units." (Trial Tr. at 82:10-15, 92:6-9.) His definition of division "carries across" all denominations. (Trial Tr. 94:8-9; 56:15-17.) In contrast, he stated that if a group of individuals from the Lutheran Church left the Lutheran Church and became Baptists, that this would be merely a "departure or transfer," rather than a "division." (Trial Tr. 92:16-93:2.)

Further, Dr. Valeri defined "branch" as "the new organization or polity[42] that results from the division." (Trial Tr. 94:17-18.) Dr. Valeri testified that a "branch" "contains more than one group, and it claims some affiliation[43] with the genetic origin of the original group and consists of people who belong to the original group." (Trial Tr. 94:19-21.) He testified that this definition of "branch" remains the same among denominations, "although the branch itself looks different[] . . . from denomination to denomination," in that "the shape, the coloration, the specifics look different . . . [f]or example, Episcopalians have Dioceses and Bishops. Presbyterians have presbyteries." (Trial Tr. 95:7-18.) It was not Dr. Valeri's view that "the new group [must] be acknowledged by the entity from which it divided in order to be viewed in common parlance as a branch." (Trial Tr. 95:19-21.) For example, the Cumberland Presbyterian Church, although it later reunited with the original Presbyterian entity from which it had previously divided, was on its own for 90 years, during which period of time it was neither formally nor informally connected with the PCUSA, yet a 1904 New York Times' article referred to Cumberland as a "branch" of the original Presbyterian entity from which it had divided. See Trial Tr. 96:1-98:1.

Dr. Valeri testified that the word "branch" is often used within the Christian Church to describe "the large deeply historical divisions in Christianity," including the three main branches: Roman Catholic, Eastern Orthodox, and Protestant, but that "branch" is also used to describe more narrow, particularized branches, so that Dr. Valeri would consider the Cumberland Presbyterian Church to be a "branch" of the original Presbyterian Church, and would also consider the Presbyterian Church's Old School and New School to be "branches" of each other. See Trial Tr. 97:21-100:7.

Dr. Valeri also testified that the three largest denominations in both the United States and Virginia in 1867 were the Methodists, the Baptists, and then the Presbyterians (in descending order of size). (Trial Tr. 103:9-104:1.) All of these denominations experienced divisions on multiple occasions, which were "a subject of frequent public commentary in the 19th century in Virginia," in "newspapers, religious tracts and pamphlets, denominational stories and histories." (Trial Tr. 104:15-105:5.)

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[42] Dr. Valeri defines "polity" as "that structure which adjudicates not only what happens within an individual congregation [such as] how worship shall be conducted[,] but how congregations shall relate to each other and ordained people shall relate to each other . . . you must have more than one congregation to have a polity." (Trial Tr. 93:17-22.)

[43] Valeri defined "affiliation" for these purposes as "claim[ing], for example, to revere the same sacred texts or organize themselves in the basic similar polities . . . ." (Trial Tr. 95:3-5.)

Finally, Dr. Valeri testified that the Episcopal Church itself experienced a "division" during 1873-74,[44] the cause being "[d]ebate over liturgical practices and then the suspension of a pastor around whom a group of supporters of [the] pastor gather[ed] and beg[an] to have meetings." (Trial Tr. 105:19-22.) These supporters, numbering seven clergy and nineteen lay people, left the Episcopal Church to form the "Reformed Episcopal Church." (Trial Tr. 106:11-107:20.) The Reformed Episcopal Church continued to grow, as more congregations later followed the original seven clergy and nineteen lay people. The Episcopal Church reacted by "denounc[ing] the movement as a schism[45] and . . . depos[ing] its chief leader . . . which meant all of the subsequent ordinations he conducted were invalid." (Trial Tr. 107:10-108:1.) The Episcopal Church today still refers to this particular split as a "schism." Pl.'s Ex. 5, "The Episcopal Dictionary definition of 'Schism,'" ("The earliest significant schism from the Episcopal Church was that of the Reformed Episcopal Church, which began in 1873. There were also some smaller schisms from it in the later twentieth century over Prayer Book revision and the ordination of women.") Today the Reformed Episcopal Church has grown to almost 6,000 members. (Trial Tr. 111:7-12.)

In sum, Dr. Valeri testified that the "average, ordinary Virginian in 1867" would have understood "division" to mean "the separation out of a group in rejection of the authority," and that "it is that act of division which creates a branch." This understanding would "encompass situations in which the church or religious society" did not "approve" of the division," as well as situations in which the "new entity, the new polity, was not formally affiliated with the church and religious society from which it divided." (Trial Tr. 115:15-116:15.)

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[44] There was also considerable discussion during the trial regarding the alleged "division" of the ECUSA during the Civil War. The disagreement between the parties centered on whether this alleged "division" was acrimonious and caused by doctrinal or theological differences, or whether it was simply a "geographical" type of split mandated by the political realities on the ground caused by the war. This Court need not and does not resolve the disagreement.

[45] Valeri testified regarding the difference between "schism" and "division" as follows: "Structurally and procedurally they look very much alike, but the word 'schism' is often used of the word [sic] of the parent or originating denomination as a pejorative for what has gone on and implying that it is—has bad theology and a contemptuous order and ecclesiastical authority." (Trial Tr. 109:18-110:1.)

ii. Dr. Charles Irons

CANA Congregations' expert witness Dr. Charles Irons,[46] testified that in preparation for this case he reviewed "congregational records, denominational records, denominational newspapers, secular newspapers from the period, some private papers," and "county court records." (Trial Tr. 175:9-19.) Dr. Irons stated that, in his opinion, "the most common definition of division would be the fragmentation of one religious jurisdiction to create two or more jurisdictions."[47] (Trial Tr. 178:7-9.)

Dr. Irons further stated that the definition of "branch," if "division" and "branch" are used in the same sentence, would mandate that "branch" is being used to describe one of the "resulting jurisdictions" of the "division." (Trial Tr. 180:1-16.) Dr. Irons corroborated Dr. Valeri's testimony that across all denominations, "[m]ost divisions [were] simply not consensual," and Dr. Irons stated that "Virginians would not have summarily construed [that a division was approved by the ecclesiastical authorities] at all." (Trial Tr. 181:17-19.)

Dr. Irons testified at length regarding the various national splits that occurred in the Methodist Church during the 19th century, which was the largest denomination in Virginia in 1867. (Trial Tr. 183:2-9.) Virginians would have known about all of these splits, and about nine out of the almost dozen Methodist splits that occurred during the 19th century impacted Virginia directly. (Trial Tr. 183:10-184:12.) Dr. Irons testified about the creation of the Methodist Episcopal Church South, which was one of the major splits that would have specifically impacted Virginia. In 1844, at the Methodist General Conference, the northern and southern factions within the Methodist church developed a "provisional plan of separation."[48] (Trial Tr. 189:1-16.) Then in

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[46] Dr. Irons received his bachelor's degree, master's degree, and Ph.D. from the University of Virginia. The topic of his dissertation was the "conflict over slavery within Virginia churches," which covered the time period from 1740 through about 1870. He currently works at Elon University in North Carolina, where he is an assistant professor of history. He has also been a guest lecturer at the University of Virginia and Duke University. He has written numerous articles on the topic of Virginia history, and the topic of his forthcoming book is "on conflicts over slavery within Virginia churches, particularly between black and white evangelicals within Virginia churches." (Trial Tr. 170:6-174:3.)

[47] "Division" could also mean, according to Dr. Irons, "internal conflict or discord within a religious body. Most often when it's used in that sense, it's the threat of division or talk of division." (Trial Tr. 178:12-16.)

[48] Dr. Irons stated that this so-called "plan of separation" was never ratified, since the three-quarters (3/4) vote of all Methodists within the annual conferences that was required to ratify certain "points" of the plan never took

1845, these southern Methodist churches called for the organization of an independent jurisdiction of the Methodist Church in the south, which met in its first General Conference in 1846. This new southern entity was called the "Methodist Episcopal Church South," but was not recognized or acknowledged as valid by the Methodist Episcopal Church. (Trial Tr. 194:9-195:1.) This caused some upheaval within the Methodist Church in Virginia, since not all of the Methodist congregations in Virginia automatically joined the southern branch of the church. Dr. Irons testified that

> [t]here were two primary groupings of Virginia Methodists who did not affiliate with the Methodist Episcopal Church South. One involved Methodists in the trans-Allegheny regions, but the other involved Methodists in the Baltimore Conference, a unique conference[49] that included parts of Pennsylvania, Delaware, Maryland, and Virginia.

(Trial Tr. 195:7-13.)

Yet another major split among the Methodists followed soon after when, in 1861, the Baltimore Conference renounced the authority of the General Conference of the Methodist Episcopal Church. This was due to the fact that the Baltimore Conference was angered over a resolution passed by the Methodist Episcopal Church during its 1860 General Conference. (Trial Tr. 196:1-199:6.) In that resolution, the Methodist Episcopal Church strongly condemned slavery. Because the Baltimore Conference had taken a different position on slavery,[50] the Baltimore Conference felt that this Methodist Episcopal Church resolution threatened the Baltimore Conference's neutrality. (Trial Tr. 198:20-199:6.) The Baltimore Conference thus "physically separat[ed] themselves from the Methodist Episcopal Church." (Trial Tr. at 200:8-10.) The Methodist Episcopal Church tried to "recoup their lost members and their lost churches by targeting individual congregations," one of its tactics being the

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place. See Trial Tr. 193:9-15. ECUSA/Diocese expert Dr. Mullen took issue with this (Trial Tr. 1049:19-1050:5), but acknowledged that, in any event, this plan of separation "broke down" soon after its enactment. (Trial Tr. 1158:12-15.)

[49] A "conference" is to the Methodist Church what the "Diocese" is to the Episcopal Church—it is a type of "governing body" within the Methodist Church. See Trial Tr. 195:14-22.

[50] That position was described by Dr. Irons as follows: "[t]he Baltimore Conference on the one hand prohibited slave owning among their ministers. On the other hand, the Baltimore Conference forbid identifying slavery as a sin or disciplining slave-holding members." (Trial Tr. 196:12-20.)

formation of its own competing Baltimore Conference. There were then two different competing Baltimore Conferences in existence for about five years. (Trial Tr. 200:14-201:21.) This resulted in "[v]ery significant ecclesiastical disorder and competition" within the Methodist Church in Virginia in the 1860s. (Trial Tr. 202:6-10.) Dr. Irons testified that all these splits and infighting would have been characterized as "divisions" within the Methodist Church. See Trial Tr. 202:11-203:20. Dr. Irons rejected the idea that this particular Baltimore Conference division resulted from any formal "plan." (Trial Tr. 204:8-11.)[51]

Next, Dr. Irons testified to the history surrounding the enactment of the statutory provision that is codified today as 57-9. It was initially enacted in 1867, and its sponsor was John Baldwin, who at that time was the speaker of the house in the General Assembly. Mr. Baldwin came from Augusta County. (Trial Tr. 220:20-221:21.) Dr. Irons read from a newspaper article[52] that described a particular Methodist congregation that had invoked 57-9. The congregation was, in fact, represented in court by John Baldwin himself. (Trial Tr. 222:18-223:16.) One of the arguments that this Methodist congregation cited as being in its favor was that "the object of the law [which today is codified as 57-9] of the last legislature was to protect local religious congregations who when their church divided were compelled to make choice between the different branches of it, and to allow them in some such cases to take their property with them, and that it was the purpose of this congregation to claim the benefit of that protection." (Trial Tr. 224:1-8.) Dr. Irons confirmed that the article did not state that the "ecclesiastical authorities ha[d] to approve the division." (Trial Tr. 224:9-12.)

The Court ultimately accepted the congregation's petition, and accordingly entered the following order:

> A Religious Congregation of Methodists in the town of Staunton this day presented to the Court certain papers in which it is recited & claimed that "the Baltimore Conference of the Methodist Episcopal Church severed its connection with the General Conference of said Church, by resolution adopted during its [illegible] in Staunton, Va, in March, 1861 & in February, 1866 by

[51] Dr. Irons also testified regarding various Baptist divisions within Virginia, which this Court does not find relevant, due to the fact that the Baptist form of congregational government is very different than the hierarchical form of government in the Episcopal Church. See Trial Tr. 205:3-206:8.

[52] The article was identified as Pls.' Ex. 48, "Article detailing Circuit Court case involving the local Methodist congregation, published in the Staunton Spectator, 6/25/1867," but was only read into the record by the witness, not admitted into evidence.

> a unanimous vote, formed a union with the Methodist Episcopal Church South"—which the said Congregation is one of the congregations of the said Baltimore Conference, known as Staunton Station, in Rockingham District, and which the said Congregation of Staunton Station having assembled at their Church on the [illegible] day of April, 1867, to determine to which division of the Church they should thereafter belong; and the question having been submitted to the communicants & pew holders & pew-owners of said congregation over twenty-one years of age—it was determined by vote of the majority of the whole number, that said congregation should thereafter belong to the Methodist Episcopal Church South; and it appearing to the Court from an inspection of the said papers that the vote of the said Congregation has been fairly taken, according to the provisions of the Act of Assembly in such cases made and provided, and that of 118 members of the said Congregation, entitled to vote [illegible] voted in accordance with the determination of the Congregation, and the remaining 17 either failed or refused to vote-the Court doth approve the proceedings of the said Congregation and their said determination, as having been taken and ascertained according to law, and doth order that such approval be entered of record; and that the said papers be filed and preserved by the Clerk among the records of the Court.

(Pls.' Ex. 96, "August County CL Order Book 6/28/1867.")

Dr. Irons also located other similar orders in various other Virginia counties, totaling twenty-nine. Of these twenty-nine orders, 25 were from Methodist congregations,[53] and four were Presbyterian. (Trial Tr. 245:1-8.) Dr. Irons testified that none of the congregations filing these petitions alleged that the division had been approved by "higher ecclesiastical authorities," nor did they allege that the petitions themselves "had been approved by higher ecclesiastical authorities." (Trial Tr. 245:9-246:2.) These petitions were all "uniformly accepted by the court." (Trial Tr. 230:10-11.)

iii. Dr. Ian Douglas

ECUSA/Diocese expert Dr. Ian Douglas[54] testified that neither ECUSA nor a diocese within ECUSA can divide "without the action of [the] General

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[53] Dr. Irons confirmed that, among the Methodist petitions he located, not all chose to affiliate with the Methodist Episcopal Church South—one congregation chose to go with the Methodist Episcopal Church, which was the northern branch of the church. (Trial Tr. 242:11-22.)

[54] See supra note 8.

Convention." (Trial Tr. 842:19-843:2.)[55] He further stated that "a congregation or a people c[ould] choose to leave a parish or leave [ECUSA], but that such action would "not fundamentally constitute a division or a departure of a parish . . . from the wider Episcopal Church" (Tr. 843:10-14), nor would this have a "structural impact" on ECUSA (Tr. 844:4-6). When asked whether it is possible for the Anglican Communion to divide, Dr. Douglas responded as follows:

> Q: Okay. Dr. Douglas, in your opinion, has the Anglican Communion divided?
>
> A: In my opinion it has not divided.
>
> Q: Could you explain that?
>
> A: Yeah. The Anglican Communion is a family of churches, and we all share a kind of historical relationship, one with another, as brothers and sisters in Christ, understanding and seeing our common ancestry in the Church of England through the See of Canterbury. And as such as a family of churches coming together to serve what God has called us to be about in the world, we as an Anglican Communion, I would argue, are in the process of becoming rather than dividing.
>
> I mean, this is a way by which families are learning to work together and live together in a new and deeper interdependent and mutually responsible manner.
>
> Q: Dr. Douglas, in your view, would it be possible for the Anglican Communion to divide?
>
> A: It really wouldn't be possible for the Anglican Communion to divide because that presupposes some kind of intact whole that somehow will be broken by some action.
>
> Once again, it's a family of churches.

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[55] Dr. Douglas testified that "there can be no division without formal approval of the division by the highest adjudicators of the religious body involved," (Trial Tr. 895:3-7) and that "the only way the [ECUSA] can effect a division is to carve up a diocese geographically." (Trial Tr. 898:8-11). On cross-examination, however, Dr. Douglas also testified that he did not perform any historical research, nor did he consult any historical reference books in order to formulate his definition of division. (Trial Tr. 892:2-15.)

(Trial Tr. 862:6-863:8.)[56]

In regard to the definition of "church or religious society," Dr. Douglas testified that he had never heard the Anglican Communion referred to as such.[57] (Trial Tr. 845:21-846:1.) Dr. Douglas defined "religious society" as "generally speaking . . . a voluntary grouping of people who have come together to effect some goal or achieve some end." (Trial Tr. 926:18-21.)[58] In addition, Dr. Douglas stated that, in his opinion, individual congregations within ECUSA

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[56] Dr. Douglas acknowledged that if the Church of Nigeria made a declaration of "broken communion" with the Episcopal Church (Trial Tr. 950:10-12), this would "alter[] the relationship between the Church of Nigeria and the Episcopal Church" (Trial Tr. 950:21-951:8). Dr. Douglas also acknowledged that "the amendments to the Church of Nigeria Constitution create a different way of defining one's self as being Anglican as compared to what . . . [has] historically [been] done, namely in relationship with the See of Canterbury" (Trial Tr. 955:20-956:2), since what the Church of Nigeria was trying to do by the amendments was to "elevate the 39 articles of religion and the ordinal of the 1662 Prayer Book as normative for Anglican identity as compared to that historic relationship with the See of Canterbury" (Tr. 956:3-8). Cross-examination also indicated that in a previous deposition, Dr. Douglas, when asked "What concrete steps, if any, would you view as being necessary to evidence a division of the Anglican Communion?" answered: "If one church or the other functioned as if they had no relationship with another church in the Anglican Communion." (Trial Tr. 959:15-960:10.) Finally, when asked by the Court whether "a province declaring that it was out of communion with another province [would] be the most severe action one province could take to disassociate itself from another province," Dr. Douglas responded in the affirmative. (Trial Tr. 993:18-994:2.)

[57] Significantly, Dr. Douglas also stated: "I do not think it's fair to describe the Anglican Communion as a Fellowship of churches because that implies a much looser kind of federation or voluntary association that doesn't get at the historic DNA and relationship as a family of churches." (Tr. 912:17-21). Dr. Douglas further stated that he prefers the "metaphor of a family of churches" to describe the Anglican Communion, (Tr. 913:10-13), in that it is "[a] family of churches with a shared history and a common DNA with a focus of unity in the Archbishop of Canterbury." (Tr. 917:21-918:1).

[58] Dr. Douglas stated: "I would say society—if that's what they're using to describe the Anglican Communion—I would want to say to them, say you know, honestly, it's more of a family of churches that shares a common history and commitment to continue to work together and not necessarily some voluntary association . . . ." (Trial Tr. 929:16-21.)

are not "attached"[59] to the Anglican Communion, because "the Anglican Communion . . . is not some kind of intact whole . . . . an individual cannot be attached to the Anglican Communion because . . . fundamentally the Communion doesn't exist in that kind of reality." (Trial Tr. 871:4-871:22).[60]

Dr. Douglas understood the term "branch" to mean, "something that's attached to a common trunk which has been nurtured from a common seed." (Trial Tr. 873:3-5.)[61] He testified that CANA and ADV are not "branches" of the Diocese, or ECUSA, (Trial Tr. 875:7-15) nor are CANA or ADV "branches" of the Anglican Communion.[62] (Trial Tr. 879:2-5.) Dr. Douglas presented the following example of a situation in which one religious entity would not be a "branch" of the other: Dr. Douglas stated that ECUSA at one time had a missionary diocese in Mexico, which ECUSA began in order to serve "Roman Catholics who were alienated from the Roman Catholic Church in Mexico [and who] sought a relationship with [ECUSA]." (Trial Tr. 877:3-11.) Dr. Douglas stated that no one would have considered this Episcopal Missionary Diocese to be a "branch" of the Roman Catholic Church. (Trial Tr. 878:12-18.)

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[59] On cross-examination, Dr. Douglas testified that he does not base his definition of "attach" on any dictionary, historical source, or statute, but on his "perspective as an [sic] missiologist . . . and as a scholar of the church." (Trial Tr. 968:20-972:1.)

[60] However, it was Dr. Douglas' opinion that individual congregations are attached to both ECUSA and the Diocese, pursuant to his definition of attachment, which is "[b]elonging to, under the authority of a set of Constitution and Canons that are [the] agreed-upon polity of a church." (Trial Tr. 872:1-14.)

[61] Dr. Douglas stated that his definition of "branch" was not based upon any statute, historical use of the term, or dictionary. (Trial Tr. 901:1-11.)

[62] Dr. Douglas did not consider CANA or ADV to be a branch of the Anglican Communion, because "[w]hile they might be considered by the Nigerian church [to be] an ecclesial initiative of the Nigerian church, the presence of an Anglican incursion into another already established Anglican church is frowned upon by the Anglican Communion." (Trial Tr. 879:7-12.)

iv. Dr. Robert Bruce Mullen

Dr. Robert Bruce Mullen,[63] provided expert testimony for ECUSA/Diocese related to American religious history, specifically Anglican history and the Anglican Communion. (Trial Tr. 1028:8-10.) Dr. Mullen testified that, in his opinion, the Anglican Communion is not a church or religious society "in any organizational sense." (Trial Tr. 1029:9-11.) In Dr. Mullen's opinion, the word "religious society" was used in the 19th century as a synonym for the word "church." See Trial Tr. 1031:13-1032:17. He stated that the word "religious society" would have also been used to describe a voluntary society, which means "persons coming together as individuals for a common purpose." (Trial Tr. 1032:19-1033:4.) The Anglican Communion would not fit this second definition, Dr. Mullen stated, because the Anglican Communion "is a communion of churches, not of individuals. (Trial Tr. 1033:14-17.) Dr. Mullen also stated that, prior to 1867, the term "religious society" would never have been used to describe "national or international associations of autonomous churches," since prior to 1867, "there were no such groups." (Trial Tr. 1033:18-22.) Dr. Mullen additionally testified that he had never heard of the Anglican Communion being referred to as a religious society. (Trial Tr. 1034:19-21.)

In regard to the definition of "attach," Dr. Mullen testified that individual congregations within ECUSA are attached to their Diocese, and also "in certain key ways" are attached to ECUSA, but that "[individual congregations] are not attached to the Anglican Communion." (Trial Tr. 1035:17-1036:1.) Dr. Mullen defined attachment as having certain "indicia" that include "rules of worship, or order, and of ministry" which "bind [an] individual congregation," (Trial Tr. 1036:2-14), but that "[t]here are no parallel situations in the Anglican Communion (Trial Tr. 1036:21-22.)

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[63] Dr. Mullen is employed at the General Theological Seminary Episcopal Church in New York, New York, where he is the Society for Promotion of Religion and Learning Professor of History in World Mission and Professor of Modern Anglican Studies. (Trial Tr. 1024:3-11.) His degrees include an MAR, *magna cum laude* from Yale Divinity School, and a Ph.D. in the history of Christianity from Yale University, where the subject of his dissertation was "the high church movement in the Episcopal Church in the 19th [c]entury, particularly how it related to the broader Evangelical culture." (Trial Tr. 1025:5-14.) Dr. Mullen has taught at various educational institutions, including Yale University, Wesleyan University, and North Carolina State University, as well as Duke Divinity School, (Tr. 1025:18-1026: 3) and courses taught include the history of Christianity, with a specialty in American Religious History, focused upon Episcopal and Anglican studies. (Trial Tr. 1026:4-10.) He is the author of numerous books and articles regarding the history of Christianity, as well as the history of the Episcopal Church in particular. (Trial Tr. 1026:13-1027:18.)

In regard to the definition of "branch," Dr. Mullen stated that CANA and ADV cannot be considered a branch of ECUSA, but that CANA and ADV can in fact be viewed as branches of the Church of Nigeria. (Trial Tr. 1037:17-1038:11.) Dr. Mullen testified that the word "branch" means to him, "[a]s a historian . . . an extension that grows out of an earlier body or another body of a Christian communion . . . it does not necessarily have to be legally connected." (Trial Tr. 1038:12-1039:6.) He also does not consider CANA or ADV to be branches of the Anglican Communion, or of the Diocese. (Trial Tr. 1039:7-1040:12.)

Dr. Mullen further testified that, in his opinion as a historian, the term "division" as defined in the context of a religious denomination is the following:[64] "a formal separation of a larger religious body such that it looks markedly different after this has been done . . . it [is] much more formal . . . than just simply an informal separation." (Trial Tr. 1041:2-11.) He testified that in the 19th century, there would have been a distinction made "between a division and a denomination as a whole and a mere departure of [sic] separation from that denomination." (Trial Tr. 1046:20-1047:1.) So, "[t]he language of division tended to be specifically directed to some of the major things regarding the large Evangelical denominations." (Trial Tr. 1047:8-10.) Dr. Mullen testified that the "prominent division[s] in religious denominations" in the mid-19th century included the following: 1.) the "splitting of the Presbyterian Church in 1838 between an Old School and a New School primarily on questions of polity and theology"; 2.) the 1844 division of the Methodists in regard to the question of slavery; 3.) the 1845 Baptist division; 4.) the 1857-59 separation of the Presbyterian new School into northern and southern branches; and 5.) the 1861 division of the Old School Presbyterians between the Northern and Southern branch. (Trial Tr. 1047:16-1048:15.) Specifically in regard to the various splits among the Presbyterians, Dr. Mullen testified that these various splits were taken in accordance with official action by the church's governing authority.[65] See Trial Tr. 1054:16-1059:1. It was Dr. Mullen's opinion that all of these "divisions in religious denominations" were the ones that "prompted the Virginia Legislature to adopt Section 57-9." (Trial Tr. 1061:21-1062:3.)

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[64] On cross-examination, Dr. Mullen testified that he "d[id] not know what the public usage" of the term division would have been in the 19th century. (Trial Tr. 1100:6-22.)

[65] On cross-examination, however, Dr. Mullen acknowledged that the formal "Plan of Separation" was never ratified; nevertheless, by the 1850s, it had become a "fait accompli." See Trial Tr. 1154:9-1155:14.

Finally, Dr. Mullen testified regarding the formation of the Reformed Episcopal Church in the 1870s, stating that this was not considered a "division" within ECUSA. (Trial Tr. 1071:9-1073:7.) Dr. Mullen further testified that the Reformed Episcopal Church and ECUSA have never been "in communion with each other," and that the Reformed Episcopal Church has never been a part of the Anglican Communion. (Trial Tr. 1075:18-1076:2.)

v. A Comment Regarding the Expert Testimony

This Court views each of the four experts who testified as sincere professionals, each bringing a wealth of expertise to their task, and each attempting in good faith to assist the Court in its obligation to interpret 57-9. Having said that, the Court finds the testimony of the two CANA congregation experts—Dr. Valeri and Dr. Irons—to be more persuasive and convincing. The Court found the opinions of the CANA experts to be tied directly to the particular and pertinent historical record relevant to the instant case. Some of the significant opinions offered by ECUSA/Diocese experts did not appear to be so tethered; rather, they appeared to be expressions of opinion based on the experts' general knowledge. Moreover, this Court found the testimony of CANA's expert, Dr. Irons, to be especially helpful to the Court in understanding the early history of 57-9.

2. Caselaw

At the outset, the Court must emphasize that there is no controlling Virginia caselaw on point with the issues confronting this Court. Indeed, there is almost no caselaw that can even be characterized as bearing on the issues before this Court. Nevertheless, there are a few cases that provide this Court some guidance.

a. Brooke v. Shacklett

Brooke v. Shacklett, 54 Va. 301 (1856) addressed the issue as to which Methodist Church—the Methodist Episcopal Church, or the Methodist Episcopal Church South—was the correct beneficiary of the trust in question. Brooke pre-dates the enactment of what is today section 57-9 by eleven years, and involved a dispute among factions of the members of the congregations worshipping at two church-houses in Faquier county, Virginia—one faction supported the Methodist Episcopal Church, while the other supported the Methodist Episcopal Church South. On appeal, the Virginia Supreme Court sets forth the language of the deed in question:[66]

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[66] Brooke begins by setting forth a brief history of Virginia law relating to the validity of "devises and bequests to religious societies or congregations." Id. at 309. Significantly, the Brooke Court implies that, in Virginia, there is a distinct policy preference for the rights of local congregations: "No dedication of

> the trustees are to hold the property conveyed to them, and their successors forever, in trust that they shall build or cause to be built thereon a house or place of worship for the use of the members of the Methodist Episcopal church in the United States of America, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of the said church, at their general conferences in the United States of America; and in further trust and confidence that they shall at all times forever hereafter permit such ministers and preachers belonging to said church, as shall from time to time be duly authorized by the general conferences of the ministers and preachers of the said Methodist Episcopal church, or by the annual conferences authorized by the said general conference, to preach and expound God's holy word therein.

Id. at 314. The Brooke Court found that the Methodist Episcopal Church had undergone a "division," after the date of the deed in question, but prior to the date on which Brooke was decided, "which was effected under certain resolutions adopted by the general conference in 1844." Id. at 321. The Brooke Court then goes on to describe various of these "resolutions,"[67] which made up a "provisional plan of separation." Id. at 323.

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property to religious uses, which does not respect these rights of the local society or religious congregation. . . [and] which does not design such enjoyment of the uses of the property . . . by the local religious society or congregation, can be placed within the . . . statutes. Id. at 313 (emphasis added).

[67] Brooke describes these resolutions as follows:

> The first resolution declares, that should the delegates from the annual conferences in the slaveholding states find it necessary to unite in a distinct ecclesiastical connection, the following rule shall be observed with regard to the northern boundary of such connection: All the societies, stations and conferences adhering to the church in the south by a vote of a majority of the members of said societies, stations and conferences, shall remain under the unmolested pastoral care of the southern church (and the ministers of the Methodist Episcopal church shall in no case attempt to organize churches or societies within the limits of the church south; nor shall they attempt to exercise any pastoral oversight therein, it being understood that the ministry of the south reciprocally observe the same rule in relation to stations, societies and conferences adhering by vote of a majority to the Methodist Episcopal church); provided also that this rule shall

The Brooke Court acted upon the presumption that the 1844 plan of separation had been properly adopted by the Methodist general conference and was thus valid, and that therefore the provision of that plan which allowed border societies to vote "to choose to which jurisdictional division of the church they w[ould] belong [either to the Methodist Episcopal Church, or Methodist Episcopal Church South]," Id. at 326, was also valid. The Brooke Court found that this particular church was in fact a "border society," and that it had taken a valid vote to adhere to the Methodist Episcopal Church South. Therefore, Brooke held that the members of the Methodist Episcopal Church South were entitled to the church property under the language of the deed. Id. at 327-28.

Brooke also states the following:

> If at any time before the division of the church a controversy had arisen among the members of the society at Salem church-house, in respect to the occupancy of the house -- each party under the lead of a preacher claiming its exclusive use for purposes of worship -- the dispute must have been determined by enquiring, not which of the two parties constituted a majority, or represented the wishes of a majority, of the members of the society, but which of the two preachers had been appointed and assigned to the society in accordance to the laws of the church; which of the two parties was acting in conformity with the discipline of the church, and submitting to its lawful government.

> apply only to societies, stations and conferences bordering on the line of division, and not to interior charges, which shall in all cases be left to the care of that church within whose territory they are situated.
>
> By the second resolution it is declared that ministers, local and traveling, of every grade and office in the Methodist Episcopal church may, as they prefer, remain in that church, or, without blame, attach themselves to the church south.
>
> And by the ninth it is declared that all the property of the Methodist Episcopal church, in meeting-houses, parsonages, colleges, schools, conference funds, cemeteries, and of every kind, within the limits of the southern organization, shall be forever free from any claim set up on the part of the Methodist Episcopal church, so far as this resolution can be of force in the premises.

Id. at 321-22.

Id. at 321 (emphasis added). The ECUSA/Diocese cite this passage as proof that Brooke supports its position. However, the Brooke decision was premised on a "division" whose existence was not in serious dispute. In other words, that "division"—unlike the circumstances giving rise to the instant litigation—was formally recognized at the highest level of the hierarchy of the church, as manifested by the plan of separation. Brooke recognized—pre 57-9—that in such a situation, a particular congregation's vote to associate with a particular branch of the Methodist church was a bonafide exercise of that congregation's prerogative pursuant to the plan. That Brooke also states that a dispute within a congregation that occurs prior to a division should be resolved based on "which of the two parties were acting in accordance with the discipline of the church" is not helpful precedent to either party in this case because it does not address the question at the heart of this litigation: *Has a division occurred?*

b. Hoskinson v. Pusey

In Hoskinson v. Pusey, 73 Va. 428 (1879), the first-known Virginia Supreme Court case in which the Court mentions the pre-cursor to today's 57-9, the Virginia Supreme Court considered another church property dispute, once again pitting the Methodist Episcopal Church against the Methodist Episcopal Church South. This time the property in dispute involved a "house of public worship," which the Hoskinson Court refers to as "Harmony church," as well as a parsonage in Loudoun County. The deeds in question contained the exact same language as did the deed in Brooke. Id. at 430-31.

On appeal, the Hoskinson Court first summarized the history of the north-south split of the Methodist Church, according to the record developed by the lower court, which included the history of the Baltimore conference. The Baltimore conference chose, in 1846, to join the Methodist Episcopal Church. Id. at 432-33. But then, in 1861, at its annual conference at Staunton, a majority of the Baltimore Conference voted to become independent. This lasted until 1866, when the independent Baltimore Conference then voted at a conference in Alexandria, VA, to join the Methodist Episcopal Church South. Meanwhile, the minority at the Staunton conference who had disagreed with the majority vote had continued to hold their own Baltimore conference, which remained associated with the Methodist Episcopal Church. Thus, the Hoskinson Court noted there were two competing Baltimore conferences. Id. at 433-34.

After the 1866 Alexandria conference, the members of the Harmony Church voted to join the Methodist Episcopal Church South, but when the vote was taken, "none of the members who adhered to the Methodist Episcopal Church were present . . . or, if any were present, they did not vote." Id. at 434. The Hoskinson Court then embarks upon an analysis as to whether or not the Baltimore conference's actions in 1846 and the years thereafter were taken in accordance with the 1844 plan of separation. While this analysis is not

germane to the instant litigation, it is noteworthy that the Supreme Court does address, at least tangentially, the division statute now known as 57-9:

> It is also insisted that the action of the congregation of "Harmony" church, after the conference at Alexandria held in 1866, operated to transfer the title and control of the property to that portion of the congregation which adhered to the Methodist Episcopal Church South. That action has already been adverted to, and is claimed to have been had under an act of the general assembly, passed February 18th, 1867 (acts of 1866-7, ch. 210, pp. 649, 650; Code of 1873, ch. 76, § 9), which had the effect, as contended, to transfer the control and use of the property as aforesaid. It is not clear, from the evidence, whether this action of the congregation was had before or after the passage of the act referred to. I should rather infer that it was in 1866, before the act was passed. If that were so, of course there would be nothing in the point made by the appellants on the operation of the act. But suppose it was after the passage of the act. It is a sufficient answer to the claim of the appellants based on this statute, that it does not appear by the record that the provisions of the statute have been fully complied with. The portion bearing on this case reads as follows: "And whereas divisions have occurred in some churches or religious societies to which such religious congregations have been attached, and such divisions may hereafter occur, it shall, in any such case, be lawful for the communicants and pewholders over twenty-one years of age, by a vote of a majority of the whole number, as soon as practicable after the passage of this act, or whenever such division shall occur, to determine to which branch of the church or society such congregation shall thereafter belong; and which determination shall be reported to the said court, and, if approved, shall be so entered on the minutes, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and shall be respected and enforced accordingly in all the courts of this commonwealth.

Id. at 439-40. The Hoskinson Court concludes that the statute was not complied with, because "there is no evidence that the determination of the congregation manifested by the vote was reported to the circuit court of Loudoun county, approved by that court, and so entered on its minutes." Id. at 440. The Hoskinson Court also emphasizes that "[c]ompliance with these requirements is essential to the effect given by the statutes."[68] Id. Ultimately,

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[68] The Court further states that if the statute had in fact been complied with,

> the question would have been presented, whether the act does not encroach upon vested rights in putting it in the power of a majority

the Hoskinson Court ruled in favor of those members of the congregation adhering to the Methodist Episcopal Church. Id. at 444.

The CANA Congregations argue that Hoskinson can and should be read as implicitly recognizing that the division statute does not require that a division be authorized or approved by a denomination.[69] That may be the case, but it is equally possible the Hoskinson Court simply did not reach this issue.

c. Finley v. Brent

In Finley v. Brent, 87 Va. 103 (1890), the plaintiffs, members of the Methodist Protestant Church, alleged that they had been shut out of their church building by members of the Methodist Episcopal Church South. Id. at 104. As in Brooke and Hoskinson, the Finley Court was required to construe the language of the deed, which was

> a grant in trust to trustees, by the said William Harding and wife, of a lot or parcel of land described therein, "on which the new Methodist Protestant Church, in Heathsville, was erected, in the

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> of the members of the congregation to shift the title and use of the property without the consent and against the will of the minority; and the further question, how the operation of the statute is affected, if at all, by the provision of the state constitution on "church property," art. II.
>
> These are questions of interest and great practical importance. It is not necessary, however, to decide them in this case, as it is presented by the record, and I express no opinion upon them.

Id. at 440.

[69] See Pls.' Corrected Mem. in Opp'n to the Post-Trial Opening Br. of the Episcopal Church and the Diocese 8-9) (stating that "the Court in Hoskinson provided a lengthy explanation of the Baltimore Conference division, concluding that MEC's 1844 Plan of Separation did not authorize congregations in that Conference to separate from MEC. Were the Church correct that § 57-9 applies only to denominationally authorized division, there is every reason to think that the [Hoskinson] Court would have relied on this fact as a basis for disqualifying the congregation from invoking § 57-9. The fact that the Court did not do so confirms that it did not view denominational approval of the division as a requirement for invoking the statute.") (citations omitted).

> said county of Northumberland, for the use and benefit of the religious congregation of the Methodist Protestant Church at Heathsville, which will assemble there for the purpose of worship," to have and to hold the same "in trust for the sole and exclusive use and benefit of religious congregation of regular orthodox Methodist Protestants which may thereafter assemble there to worship, when the said house is completed, or at any church which may hereafter be built at or near the present site or situation, for the purpose of religious worship of the Methodist Protestants, and for no other use or purpose whatever.

Id. at 104. The members of the Methodist Episcopal Church South argued that they had taken a vote in accordance with the precursor of 57-9, and that therefore this vote should "conclude questions as to the property held in trust for such congregation." Id. at 108. The lower court held in favor of the defendants, but on appeal, the Virginia Supreme Court declared that to allow the members of the Methodist Episcopal Church South to keep the church property would violate the Contracts Clause of both the United States and Virginia Constitutions. Id. at 108. The Finley Court thus reversed the holding of the lower court.

Nowhere does the Finley Court directly address any of the issues which are the subject of this opinion, as Finley does not concern the meaning of "division," "branch," "attach," or "religious society." However, Finley does provide this Court with a measure of guidance. First, Finley illustrates that this division involving the Methodist Church was far from amicable, in that members of the competing churches were actually "locking out" other members. Id. at 105. Second, it is important to note that the warring parties in Finley were considered to be two separate denominations.[70] Yet Finley nowhere states that, because these were two separate denominations, the one denomination could not be a "branch" of the other, and that therefore the

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[70] Finley states that

> They [the members of the Methodist Episcopal Church South] profess to adhere to a different denomination, and deny the government and discipline of the Methodist Protestant Church, and disbanded their church society, so far as they could do so, rather than submit to it; and, at the least, abandoned that church and adhered elsewhere.

Id. at 107-08.

precursor to today's 57-9 could not be invoked. Rather, Finley decides the case on other grounds.[71]

d. Baber v. Caldwell

Baber v. Caldwell, 207 Va. 694 (1967),[72] involved the Level Green Christian Church, which had experienced "[i]ntra-congregational strife," followed by a division into two competing factions. The majority invoked 57-9, and sued to "establish their right to control the activities of the Church and the use of its property." Id. at 695. The trial court held that the Level Green Christian Church was not an independent church, and held that the majority "had 'breached the trust' on which the Church property was held 'by diverting the property of the Church to their own use . . . .'" Id. at 696. The division in Baber resulted from "dissension" that "erupted" within the church over the appointment of a controversial pastor, whom a vocal minority of the congregation apparently resented.[73] Id. at 696.

On appeal, the Virginia Supreme Court held that the Level Green Christian Church was in fact independent, and thus that 57-9(B) applied, rather than 57-9(A):

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[71] Those other grounds may, of course, be entirely relevant to the resolution of the constitutional contentions remaining before the Court, in particular, those contentions relating to the Contracts Clause.

[72] This Court is aware of only one additional Virginia Supreme Court decision regarding 57-9 (or the predecessor statutes to 57-9) between 1890 and 1967, which is Cheshire v. Giles, 144 Va. 253 (1926). Cheshire addressed that portion of a predecessor statute to 57-9 that dealt with an independent church or religious society, so Cheshire is of little relevance to the instant case before this Court. Neither party referenced Cheshire in their respective post-trial briefs.

[73] The bill of complaint, filed by the majority of the congregation,

> prayed that the defendants (the minority group) be enjoined "from further interfering with or disrupting the orderly and proper conduct and operation of said Level Green Christian Church, or interfering with its duly appointed minister in the performance of his duties, and from holding or attempting to hold any religious services in said Church contrary to the wishes and direction of the majority of the congregation of said Church and its Board of Elders and Deacons . . . ."

Id. at 697.

> We hold that the Level Green Christian Church is entirely independent of any other church or general society within the meaning of Code § 57-9. The first sentence of the section relates to churches, such as Episcopal and Presbyterian churches, that are subject to control by super-congregational bodies. The Level Green Christian Church is excluded from this category because it is autonomous. The third sentence of the section relates to the other category, autonomous or entirely independent churches. The Level Green Christian Church falls in that category . . . .

Id. at 698 (internal citations omitted). Thus, the Court remanded the case for further proceedings in accordance with its holding that the Level Green Christian Church was completely independent. Id. at 700.

While Baber clearly does not address the applicability of 57-9(A), it does illuminate the meaning of "division" under the statute. Baber characterizes division in terms of "intra-congregational strife," "dissension," leading to a vote by the majority to "establish [its] right to control the activities of the Church and the use of its property," and to extinguish the minority's right in such property. This decision, therefore, provides further support for the notion that a division need not be consensual or amicable.

e. Norfolk Presbytery v. Bollinger

Norfolk Presbytery v. Bollinger, 214 Va. 500 (1974), involved the application of Va. Code § 57-15, rather than 57-9. In Norfolk, the Grace Covenant Presbyterian Church voted to end its relationship with the Norfolk Presbytery and the Presbyterian Church in the United States, and to "become an independent and autonomous church."[74] Id. at 501. Following this, the trustees of Grace Covenant "filed their petition in the trial court praying that they be permitted to convey the real estate which they held for the church, comprising the property used for a church and elementary school and parsonage property . . . ." Id. at 501. The same day the petition was filed, the trial court "[b]y order entered . . . in the *ex parte* proceeding," approved this property transfer. Norfolk Presbytery immediately filed a motion to "set aside the order as contrary to the law and the evidence," and in the alternative, "moved for leave to file its petition as an intervenor and to stay the order pending decision on this motion." The trial court denied both the Presbytery's motion to set aside, as well as its motion for leave to intervene, holding that its

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[74] The congregation apparently did not invoke 57-9 upon its decision to sever its relationship with the Norfolk Presbytery and the Presbyterian Church in the United States.

order granting the property transfer complied with Va. Code § 57-15.[75] Id. at 501-02.

On appeal, the Virginia Supreme Court interpreted § 57-15:

> We construe Code § 57-15 to require that a church property transfer may be ordered only upon a showing that this is the wish of the duly constituted church authorities having jurisdiction in the premises. Under predecessor statutes only the congregation's wishes were to be considered in a proceeding to authorize a church property conveyance, but Code § 57-15 now contemplates that the general church, or a division thereof, or certain ecclesiastical officials may be the proper parties to approve such a property transfer. In determining the proper party to approve the property transfer, the trial court must look to the organizational structure of the church. See Code § 57-9, which recognizes a distinction between an autonomous congregation and one which is part of a super-congregational or hierarchical denomination in providing for the determination of property rights upon a division of a church or

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[75] The text of § 57-15 as quoted by the Norfolk Presbytery Court reads as follows:

> The trustees of such church diocese, congregation, or church or religious denomination, or society or branch or division thereof, in whom is vested the legal title to such land held for any of the purpose mentioned in § 57-7, may file their petition in the circuit court of the county or the circuit or corporation court of the city wherein the land, or the greater part thereof held by them as trustees, lies, or before the judge of such court in vacation, asking leave to sell, encumber, extend encumbrances, improve, or exchange the land, or a part thereof; and upon evidence being produced before the court, or the judge thereof in vacation, that it is the wish of the congregation, or church or religious denomination or society, or branch or division thereof, or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese, to sell, exchange, encumber, extend encumbrances, or improve the property, the court, or the judge thereof in vacation, shall make such order as may be proper, providing for the sale of such land, or a part thereof, or that the same may be exchanged, encumbered, improved, or that encumbrances thereon be extended, and in case of sale for the proper investment of the proceeds. . . .

Id. at 502 n.1. The Court notes that § 57-15 has undergone minor non-substantive changes since the time of the Norfolk Presbytery decision.

> congregation. In the case of a super-congregational church, we hold that Code § 57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church.

Id. at 502-03 (internal citations omitted).

Norfolk Presbytery, in a footnote, cites the legislative history of 57-15:

> The predecessor statute, Code of 1887 (Annotated) § 1406, required only congregational approval as a prerequisite to court sanction of a church property conveyance. The statute, Code of 1904 (Annotated) § 1406, incorporated the amendment by Acts 1904, c. 209, to require evidence that the proposed conveyance is "the wish of said congregation, or church or religious denomination or society, or branch or division thereof," to which the words "or the constituted authorities thereof having jurisdiction in the premises" were added by Acts 1924, c. 372. Subsequently, by Acts 1962, c. 516, the language relating to a church diocese was added to this section, to § 57-7 and to other related sections.

Id. at 503 n.2.[76]

The Court thus holds that, "in view of [its] construction of Code 57-15 . . . the trial court erred in denying the Presbytery's motion to intervene." Id. In the Court's view, the Presbytery was "entitled to present whatever evidence it had tending to establish its interest in the [church property sought to be transferred]." Id. The Court further states that "[i]f, upon remand, the Presbytery does establish such a proprietary interest, it will be entitled to a permanent injunction against the conveyance . . . If, however, the Presbytery is unable to establish a proprietary interest in the property, it will have no standing to object to the property transfer." Id.

In response to the assertion that the Court was violating the First Amendment by enmeshing itself in a controversy involving church property, the Norfolk Court responded that it was doing no such thing, since "[t]he First Amendment requires only that such disputes be adjudicated according to 'neutral principles of law, developed for use in all property disputes,' and which do not involve inquiry into religious faith or doctrine." Id. at 504 (citing United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969)). The Norfolk Court further held that, specifically in Virginia,

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[76] A later Virginia Supreme Court case, Green v. Lewis, 221 Va. 547 (1980), confirmed that §57-15 "require[s] that a church property transfer may be ordered only upon a showing that this is the wish of the duly constituted church authorities having jurisdiction in the premises. . . ." Id. at 553.

"it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church." Id. at 505.

Thus, Norfolk concludes with the Court ordering the trial court to allow the Norfolk Presbytery to intervene, since the Presbytery had "made sufficient allegations to be entitled to file its petition as an intervenor in order to have a determination made whether it had a proprietary interest in the property of Grace Covenant which could not be eliminated by unilateral action of the congregation." Id. at 507. The Supreme Court further ordered that the trial court on remand must consider "the language of the deeds and the constitution of the general church . . . in the application of neutral principles of law," with the Presbytery having the burden "of proving that the Trustees of Grace Covenant have violated either the express language of the deeds or a contractual obligation to the general church." Id.

Norfolk demonstrates a key difference between 57-9 and 57-15: just as 57-9 requires only a majority approval of the congregation in order for the court to determine ownership of property upon a division, 57-15 also originally required only congregational approval for a conveyance of property. However, 57-15 was affirmatively amended to include the specific words: "constituted authorities," and "governing body of any church diocese." In contrast, 57-9 contains absolutely no reference to the governing authorities of a church.[77]

f. Reid v. Gholson

Reid v. Gholson, 229 Va. 179 (1985), deals with a dispute within a congregational church, as opposed to a hierarchical one. Nevertheless, Reid is significant for the way it defines "division" under section 57-9(B): "to separate from the body of [the] church . . . to rend it into groups, each of which seeks to take over all the property and characterize the other as apostate, excommunicated, and outcast . . . such a division [must be created] as a prerequisite to relief under § 57-9." Id. at 192.

V.) Findings and Conclusions

A.) As used in 57-9(A), the term "church" or "religious society" does apply to the Diocese, the ECUSA, and the Anglican Communion.

[77] The Court also notes that there is a 1977 Virginia Circuit Court case, Diocese of Southwestern Va. of the Protestant Episcopal Church in the U.S. v. Buhrman, 5 Va. Cir. 497 (1977), which involved a single congregation that broke away from the Episcopal Church in the Diocese of Southwestern Virginia to become independent. Buhrman, however, did not involve the application of 57-9.

Because the statute itself does not define "church or religious society," nor does any of the caselaw, this Court must resort to dictionary definitions of the terms. The relevant definition of "church" as found in Merriam-Webster's online dictionary is:

> *a body or organization of religious believers: as a: the whole body of Christians b:* DENOMINATION *<the Presbyterian* church> ***c:*** ***CONGREGATION****.*

Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/church (last visited March 31, 2008).

This Court did not locate a similar definition of "religious society" in any modern dictionaries, but relevant definitions of "society" as defined in Merriam-Webster's online dictionary include:

> *a: an enduring and cooperating social group whose members have developed organized patterns of relationships through interaction with one another b.: a community, nation, or broad grouping of people having common traditions, institutions, and collective activities and interests.*

Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/society (last visited March 31, 2008).

Around the time period during which the predecessor statute to 57-9 was enacted, "society" was, similar to its definition today, defined as:

> *a number of persons associated for any temporary or permanent objects.*

(Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 56 (quoting Noah Webster, A Dictionary of the English Language 682 (1872) (preface dated 1867)).)

The parties do not dispute that the Diocese and ECUSA are "churches" or "religious societies" under 57-9(A). In addition, the Court need not reach the question as to whether the Anglican Communion is in fact a "church" under 57-9(A), because there is abundant evidence in the record to allow this Court to find that the Anglican Communion is, at the very least, a "religious society" under all of the above definitions, and therefore is a religious society under 57-9(A).

For example, Professor Douglas, one of ECUSA/Diocese's experts, acknowledged at trial that the Anglican Communion is an enduring group whose members have developed organized patterns of relationships through their shared history. See Trial Tr. 908:21-911:15. Indeed, Professor Douglas testified that words like "association," "fellowship, and "society" "impl[y] a much looser kind of federation or voluntary association that doesn't get at the historic DNA and relationship [that the Anglican Communion possesses]." (Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 57.) Although ECUSA/Diocese experts refrained from using the exact words "religious society," to describe the Anglican Communion, the record reflects that the Anglican Communion has been referred to in pronouncements by its various leaders, as an "international society of churches," with the Archbishop of Canterbury described as its "chief pastor," or "President." See supra pp. 8-9, 11.

Further, in defining "religious society," this Court must look to the context in which that phrase is used within the statute. The Court notes that the only instance in which the exact phrase "religious society" appears in the statute's text is toward the beginning of the first sentence. The word "society" is then used a second time within the first sentence, but at this point, the word "religious" is dropped completely. Then, in subdivision "B" of the statute, the phrase "religious society" is not used at all; rather, the phrase "general society" is used. Thus, subdivision "B" applies only to "a church or society entirely independent of any other church or general society . . . ." (emphasis added). In considering the structure and content of this statute as a whole, it appears that "religious society" and "general society" are used interchangeably, almost as synonyms. Thus, the manner in which these words and phrases are used throughout the statute suggests to this Court that the legislature intended a broader, more "general" definition of "religious society" than that which the ECUSA/Diocese would have this Court attribute to the phrase.

For all these reasons, this Court finds that the Anglican Communion is a "religious society," under 57-9(A).

B.) As used in 57-9(A), the term "attached" applies to the CANA Congregations, in that they are "attached" to the Diocese, the ECUSA, and the Anglican Communion.

As with the phrase "church or religious society," 57-9(A) does not define "attach," nor does any caselaw. Thus, this Court resorts once again to the dictionary, in which the first three definitions of "attach" are as follows:

> *1: to take by legal authority especially under a writ <attached the property>2 a: to bring (oneself) into an association <attached herself to*

their cause> b: to assign (an individual or unit in the military) temporarily
3: to bind by personal ties (as of affection or sympathy). . . .

Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/attach (last visited March 31, 2008).

Likewise, near the time of enactment of the predecessor statute to 57-9, the definition of "attach" was, similar to its present-day definition:

to connect, in a figurative sense.

(Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 58 (citing Noah Webster, A Dictionary of the English Language 44 (1872) (preface dated 1867)).)

The second two definitions of "attachment" in the modern dictionary are most applicable in the present context. The parties concede that the CANA Congregations were attached to the Diocese and ECUSA for purposes of 57-9(A). And, certainly, the CANA Congregations were in an association with the Anglican Communion through their former affiliation with ECUSA, as there is abundant evidence in the record, as set forth by this Court previously in the "Background" section of this letter opinion, that the individual congregations viewed themselves both as Episcopalians and members of the Anglican Communion. As they grew increasingly disillusioned with ECUSA and the Diocese, it is clear that the CANA Congregations sought a way to preserve their ties with the Anglican Communion, while avoiding what they considered to be the misguided policies of the leadership of ECUSA and the Diocese. When the CANA Congregations voted to depart, they did not affiliate with the Roman Catholic Church, the Presbyterian Church, or the Methodist Church. Rather, they affiliated with a religious body to which they viewed themselves as already "attached" and "in communion" with, through their common affiliation as Anglicans, specifically, the Church of Nigeria, the largest province within the Anglican Communion.[78]

Likewise, the record reflects that the CANA Congregations were bound by personal ties of "affection or sympathy" with the Anglican Communion as members of ECUSA prior to disaffiliation, and are still bound by personal ties of "affection or sympathy" with the Anglican Communion as members of the Church of Nigeria.

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[78] That makes this case entirely distinguishable from a situation in which, for example, a group of disillusioned Roman Catholics leave to join the Episcopal Church, or vice versa.

Thus, this Court finds that the CANA Congregations are "attached" to the Anglican Communion for purposes of § 57-9.

C.) As used in 57-9(A), CANA, the American Arm of the Church of Uganda, the Church of Nigeria, ADV, ECUSA, and the Diocese are all "branches" of the Anglican Communion, and CANA and ADV are "branches" of ECUSA and the Diocese.

Once again, this Court looks to a commonly-used and readily-accessible secular dictionary for guidance. The most relevant dictionary definition of "branch" is as follows:

> *a part of a complex body: as* ***a:*** *a division of a family descending from a particular ancestor . . . .*

Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/branch (last visited March 31, 2008).

Likewise, around 1867, the definition of "branch" was

> *[a]ny arm or part shooting or extended from the main body of a thing.*

(Pls.' Opening Post-Trial Mem. Concerning Application of Va. Code § 57-9 at 31 n.17 (citing Noah Webster, A Dictionary of the English Language 81 (1872) (preface dated 1867)).)

As the evidence at trial and the exhibits demonstrate, various Christian Protestant denominations have split apart from their parent denomination, as, for example, the Cumberland Presbyterian Church, the Methodist Episcopal Church South, and the Reformed Episcopal Church, and yet are still considered "branches" of their "mother" church. The definition of "branch" proposed by the CANA Congregations, "an offshoot of a denomination created as a result of a division, or to the group left behind," is consistent with this historical evidence.

This Court need not reach the question of whether the CANA Congregations' proposed definition is correct for purposes of 57-9(A), however. This is because it is clear that, under the simple dictionary definitions of branch described above, all of the various entities before this Court, including CANA, ADV, ECUSA, the Diocese, the Church of Nigeria, and the Church of Uganda, are "branches" of the Anglican Communion. Further, CANA and ADV are branches of both the ECUSA and the Diocese.

The Court would also note that all the various religious entities before it appear to be even more closely related to each other than were the Presbyterian

Church in the United States of America, and the Presbyterian Church in the United States, or the Methodist Episcopal Church and Methodist Episcopal Church South, which were the religious bodies involved in the various 57-9 petitions filed between 1867 and 1869 that are part of the record in this litigation.[79] This is because—unlike the Presbyterian Church in the United States of America, and the Presbyterian Church in the United States, or the Methodist Episcopal Church and Methodist Episcopal Church South—CANA, the American Arm of the Church of Uganda, the Church of Nigeria, ADV, ECUSA, and the Diocese, all continue to be, both directly and indirectly, common members of the Anglican Communion.

The Court does wish to address the example that ECUSA/Diocese set forth in support of their position as to the meaning of "branch": They argue that "[t]he Episcopal Church in fact created a new missionary diocese to minister to Mexican Catholics who had become disaffected from, and were departing, the Catholic Church," and that "no one referred to or considered that Episcopal Diocese as a "branch" of the Catholic Church—it was a branch of the Episcopal Church, just as CANA is a 'branch' of the Church of Nigeria." (Opp'n Br. for the Episcopal Church and the Diocese 22.) But this comparison proves too much. While it is certainly true that no one considered the Episcopal Diocese in Mexico to be a "branch" of the Roman Catholic Church, the Roman Catholic Church and the Episcopal Church are not members of a common international religious society with a common "chief pastor,"[80] or "focus of unity." In contrast, ECUSA, the Diocese, CANA, ADV, the Church of Nigeria, and the Church of Uganda, are all joined together by their common membership in the Anglican Communion, by their adherence to that historical strand of Christianity known as Anglicanism, and by their shared desire to be a part of that particular branch of Christianity whose adherents call themselves Anglicans.

D. As used in 57-9(A), a "division" has occurred in a church or religious society to which the CANA Congregations were attached, at all three levels of the Diocese, the ECUSA, and the Anglican Communion.

The Court finds that the evidence presented at trial establishes that the definition of "division" as that term is used in 57-9(A) is in fact that assigned to it by the CANA Congregations, which is "[a] split . . . or rupture in a religious

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[79] See, e.g., (Pls.' Exs. 96, 97, 98, 118 and 119), which are copies of various orders entered by courts in Augusta and Rockbridge counties approving petitions of congregational majorities pursuant to the predecessor statute to 57-9.

[80] See supra p. 9.

denomination that involve[s] the separation of a group of congregations, clergy, or members from the church, and the formation of an alternative polity that disaffiliating members could join."[81] (CANA Congregations Opening Post-Trial Mem. 7.)

In so concluding, the Court first looks to the language of the statute. The word "division" is used in different parts of the same statute—here 57-9—so this Court must presume that the Virginia Legislature intended to use the word in the same sense throughout the statute. See, e.g., Bridgewater Mfg. Co. v. Funkhouser, 115 Va. 476, 480 (1913). In fact, the first sentence of 57-9(A), which speaks of "division" is exactly identical to that of 57-9 (B)—both begin by stating, "If a division has heretofore occurred or shall hereafter occur in a . . . ." The word "division" has no modifiers—the words "formal" or "approved by the hierarchy," or "approved by the constituent authorities of the church . . . ." do not appear in either section 57-9(A) or (B).

In addition, the record demonstrates that ECUSA and Diocese leaders have in the past used the term "division" themselves to describe the very situation before this Court, as when, for example, Bishop Lee of the Diocese stated in his letter of December 6, 2006, "I encourage you when you vote, to vote for the unity and mission of the church, therefore remaining one with your diocese, and reject the tempting calls to division . . . ." See supra p. 34.

The Court notes that ECUSA/Diocese argue that "Virginia law confirms that a legally cognizable 'division' affecting property rights, as described in 57-9(A), must be a structural division of the denomination accomplished in accordance with that denomination's own rules and polity," and therefore "without official action of the General Convention, the evidence demonstrates that no such division has occurred." (Post-Trial Opening Br. for the Episcopal Church and the Diocese (Corrected per Errata Filed 01/07/08) at 1.) But if this Court were to accept the ECUSA/Diocese's definition of "division," 57-9(A) would never apply to the ECUSA/Diocese, since the record shows that, according to ECUSA's canons, the only "divisions" that are allowed are essentially geographic, and an ECUSA congregation is not allowed to decide which diocese to join. Under applicable caselaw and rules of statutory

[81] The CANA Congregations also use the term "schism" in defining division. This Court does not adopt the term "schism" for 57-9 definitional purposes. In defining "division" for 57-9 purposes, a secular Court should not use the language of "schism," a term heavy with religious connotations. Whether or not the current controversy can be characterized as a "schism" is a decision to be made (or not made) by the parties themselves or, for that matter, by other interested entities, but not by a secular court. The other terms used in the definition—split and rupture—are neutral terms without this religious connotation.

construction referred to elsewhere in this letter opinion, this Court cannot apply a statute in such a way as to render it meaningless as applied to a particular private party. Perhaps even more significantly, the definition urged by ECUSA/Diocese would make 57-9(A) a nullity, for if division is defined as requiring the consent of the hierarchy, all the hierarchy need do to defeat the invocation of 57-9(A) is refuse to recognize or approve the division. Moreover, if the history of division within churches or religious societies in the United States informs this Court of anything, it is that division is frequently nonconsensual and contested and takes place without the approval or affirmation of the hierarchy. Indeed, were it otherwise, there would be little need for a division statute, for churches would simply approve divisions and amicably divide up their property without intervention from secular institutions of government.

Finally, ECUSA/Diocese argue that the CANA Congregations' definition of division would permit a division to be "foisted upon [a hierarchical church] by the acts of a few disgruntled individuals." See Post-Trial Reply Br. for the Episcopal Church and the Diocese 5 n.3. The CANA Congregations' definition, argues ECUSA/Diocese, would make the division statute too "easily applicable." The Court finds no merit in this position. The CANA Congregations' definition requires three major and coordinated occurrences: 1.) a "split" or "rupture" in a religious denomination; 2.) "the separation of a group of congregations, clergy, or members from the church;" and 3.) the formation of an "alternative polity that disaffiliating members could join." The ECUSA/Diocese is correct that division, under 57-9(A), ought not be "easy." Under the CANA Congregations' definition, it is not.

1. Division in the Diocese

The Court finds that, under 57-9(A), a division has occurred within the Diocese. Over 7% of the churches in the Diocese, 11% of its baptized membership and 18% of the diocesan average Sunday attendance of 32,000 have left the Diocese in the past two years. (Pls.' Post-Trial Opening Mem. Concerning Application of Va. Code § 57-9 at 43 (citing Pls.' Ex. 132).) Further, about 20 congregations, comprising 7,500 members, have affiliated with ADV since it began in 2006, almost all of which were previous members of [ECUSA] churches. All 20 of the congregations are led by former ECUSA clergy. (Pls.' Post-Trial Opening Mem. Concerning Application of Va. Code § 57-9 at 44.)

As Plaintiffs state, "[i]n the year since its formation, then, ADV alone is already 25 percent larger than the Reformed Episcopal Church is even today," in that "the Reformed Episcopal Church currently has only 6,000 members." (Pls.' Post-Trial Opening Mem. Concerning Application of Va. Code § 57-9 at 44.)This Court does not, and need not, reach the issue as to how "large" a "division" must be for 57-9(A) to apply. Rather, it finds only that the division

which has occurred within the Diocese is of a magnitude large enough to satisfy the statute.

2. Division in the ECUSA

In addition, this Court finds that a division has occurred within the ECUSA. The record demonstrates that numerous congregations, clergy, and members have separated from ECUSA as a result of internal strife within ECUSA, in order to establish a new "polity" for others to join. Since CANA was formed in 2005, about 60 congregations, comprising 12,000 members, affiliated with CANA, and over 10,000 of these members had previously been in ECUSA congregations. These members come from multiple states within the United States, and many of the congregations that joined CANA joined as "entire congregations." In addition, of the 100 clergy who have joined CANA, 80 were formerly clergy within the ECUSA. (Pls.' Post-Trial Opening Mem. Concerning Application of Va. Code § 57-9 at 34.)

Likewise, as Bishop John Guernsey testified during the trial, about 39 congregations, which together constitute over 11,000 members, have joined the American Arm of the Church of Uganda since the 2003 ECUSA General Convention. About 90 percent of these 11,000 were previously members of ECUSA congregations. (Pls.' Post-Trial Opening Mem. Concerning Application of Va. Code § 57-9 at 35.) As Plaintiffs state, "These congregations [just like the CANA Congregations] too come from 'a large number of states' and various TEC dioceses, have an average Sunday attendance of more than 6,200 people, are already larger than the Reformed Episcopal Church, and are rapidly growing." (Pls.' Post-Trial Opening Mem. Concerning Application of Va. Code § 57-9 at 35.)

The evidence thus confirms that a "split or rupture" in ECUSA that involves the separation of a group of congregations, clergy, or members from ECUSA and the formation of an alternative polity that disaffiliating members could and have joined has clearly occurred. And as with the Diocese, the Court finds that the division within ECUSA is of a large enough magnitude to satisfy the statute.

3. Division within the Anglican Communion

Finally, the Court finds that there has been a split within the Anglican Communion that also qualifies as a division under 57-9(A). Numerous leaders within the Anglican Communion have referred to "divisions" within the Anglican Communion in various official documents, as well as the need for reconciliation among its members.[82] This satisfies the first portion of the Court's definition of "division," which is "a split . . . or rupture in a religious

[82] See supra pp. 15-16, 20-21, 37-39.

denomination." The second portion of the definition, which involves separation and the formation of an alternative polity, is satisfied by the Church of Nigeria's historic alteration of its constitution, which allowed for the formation of CANA, and cut all financial and relational ties with ECUSA. This alteration of its constitution also altered the Church of Nigeria's relationship with the rest of the Anglican Communion, stating that the Church of Nigeria considered itself to be affiliated only with those who "adhered to the historic faith, doctrine, and discipline of the Anglican Communion," rather than simply with "all provinces that relate to the See of Canterbury. See supra pp. 27-28.

VI.) Conclusion:

ECUSA/Diocese argue that the historical evidence demonstrates that it is only the "major" or "great" divisions within 19th-century churches that prompted the passage of 57-9, such as those within the Presbyterian and Methodist Churches. ECUSA/Diocese argue that the current "dispute" before this Court is not such a "great" division, and, therefore, this is yet another reason why 57-9(A) should not apply. The Court agrees that it was major divisions such as those within the Methodist and Presbyterian churches that prompted the passage of 57-9. However, it blinks at reality to characterize the ongoing division within the Diocese, ECUSA, and the Anglican Communion as anything but a division of the first magnitude, especially given the involvement of numerous churches in states across the country, the participation of hundreds of church leaders, both lay and pastoral, who have found themselves "taking sides" against their brethren, the determination by thousands of church members in Virginia and elsewhere to "walk apart" in the language of the Church, the creation of new and substantial religious entities, such as CANA, with their own structures and disciplines, the rapidity with which the ECUSA's problems became that of the Anglican Communion, and the consequent impact—in some cases the extraordinary impact—on its provinces around the world, and, perhaps most importantly, the creation of a level of distress among many church members so profound and wrenching as to lead them to cast votes in an attempt to disaffiliate from a church which has been their home and heritage throughout their lives, and often back for generations. Whatever may be the precise threshold for a dispute to constitute a division under 57-9(A), what occurred here qualifies.

For the foregoing reasons, this Court finds that the CANA Congregations have properly invoked 57-9(A). Further proceedings will take place in accordance with the Order issued today.

Sincerely,

RANDY I. BELLOWS,
CIRCUIT COURT JUDGE

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:	
Multi-Circuit Episcopal Church Litigation	) **Civil Case Numbers:**) CL 2007-248724,) CL 2006-15792,) CL 2006-15793,) CL 2007-556,) CL 2007-1235,) CL 2007-1236,) CL 2007-1237,) CL 2007-1238,) CL 2007-1625,) CL 2007-5249,) CL 2007-5250,) CL 2007-5362,) CL 2007-5363,) CL 2007-5364,) CL 2007-5682,) CL 2007-5683,) CL 2007-5684,) CL 2007-5685,) CL 2007-5686,) CL 2007-5902,) CL 2007-5903, and) CL 2007-11514

ORDER

For the reasons stated in the Letter Opinion issued today, hereby incorporated by reference, the Court finds that the Plaintiff Congregations in the above-entitled matters have properly invoked Va. Code § 57-9(A). The Court further **ORDERS** and schedules the following:

The Court hereby schedules oral argument for 10am on Wednesday, May 28, 2008, on the following three issues:

1.) Whether 57-9(A), as interpreted by this Court, violates the Free Exercise Clause of the First Amendment to the United States Constitution;

2.) Whether 57-9(A), as interpreted by this Court, violates the Establishment Clause of the First Amendment to the United States Constitution.

3.) Whether 57-9(A), as interpreted by this Court, violates the religious freedom provisions of the Virginia Constitution.

On May 28th, 2008, the Court will hear from the Diocese, ECUSA, the CANA Congregations, and the Office of the Attorney General of the Commonwealth of Virginia (amicus).

In addition, if either party believes that today's letter opinion raises constitutional issues in addition to those that have already been briefed, that party must submit the appropriate supplemental brief by noon on Wednesday, April 23rd, 2008. The opposing party may then submit its opposition brief by noon on Friday, May 2nd, 2008. The Court will then determine whether to hear argument on additional issues at the May 28th hearing.

If either party wishes to submit a supplemental brief on either the Establishment Clause, Free Exercise Clause, or related Virginia constitutional issues in light of today's letter opinion, it should do so pursuant to the same schedule outlined above, with the supplemental brief due by noon on Wednesday, April 23rd and opposition brief due by noon on Friday, May 2nd.

The Court will note that this order does not schedule briefing or argument on the constitutional Contracts Clause issue because it has been asserted that the Contracts Clause issue will require an evidentiary hearing and because it has been asserted that this evidentiary hearing will involve factual matters similar or identical to those factual matters at issue in the Declaratory Judgment actions and therefore, should be heard with the Declaratory Judgment actions in October, 2008. If either party wishes to address this issue, it may do so in the April 23rd and May 2nd filings.

Finally, the Court will determine the schedule for taking evidence and argument on the validity of the vote taken pursuant to 57-9(A) at a later date.

THIS IS NOT A FINAL ORDER.

SO ENTERED, THIS 3 DAY of APRIL, 2008.

RANDY I. BELLOWS
CIRCUIT COURT JUDGE