

The Anglican Church of Canada
Governance Working Group
June 2011

**Legal and Constitutional Issues
Presented to the Canadian Church
by the Proposed Anglican Covenant**

For discussion

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**Legal and Constitutional Issues
Presented to the Canadian Church
by the Proposed Anglican Covenant**

General Synod 2010 asked the Governance Working Group to provide advice on the legal and constitutional implications and consequences of a decision to adopt or not to adopt the proposed Covenant.¹

This Memorandum considers the following aspects of the proposed Covenant which have legal and constitutional implications for the Canadian Church:

- A. Definitional concerns
- B. Procedural concerns
- C. Constitutional concerns for the Canadian Church
- D. Consequences of not adopting the Covenant.

A. DEFINITIONAL CONCERNS

The Covenant is more than a statement of belief or intention; it is a legal document. If adopted, it would bind the Canadian Church to act or not act in certain ways. In order to understand the nature and extent of the obligations which would arise if the Covenant is adopted, it is important for there to be clarity and certainty about the concepts and terms used in the Covenant.

The following terms used in the Covenant are not defined, or have more than one meaning, or are used in different contexts in different places in the Covenant.

1. Act 73.

- **“communion”** Sometimes “communion” refers to God’s relationship with Jesus,² or our relationship with God and Jesus.³ Other times, “communion” refers to the relationship that a particular Church has to the one, holy, catholic and apostolic Church.⁴ At other times, “communion” refers to the relationship which one *Anglican* entity has with respect to other *Anglican*⁵ entities. The Covenant does not specify the incidents of one Church being in communion with another Church. Traditionally, full communion between Churches includes the recognition of one baptism, the validity of the ordination of their respective bishops/priests/deacons, the transferability of bishops/priests/deacons from one entity to another, the ability of members of one entity to partake in the Lord’s Supper and other sacraments offered by the other entity, uniformity of (at least core) doctrine, respect for their respective territorial and organizational authority, etc. Not all of these attributes are present currently with respect to the entities which are members of the Anglican Communion,⁶ and the Covenant contemplates that there may be differing degrees of “communion”.⁷ The Covenant sometimes capitalizes “Communion”, other times it does not.⁸
- **“The Anglican Communion”** is not defined. The Covenant does not specify how an entity becomes or ceases to be part of “the Anglican Communion”.⁹

2. See section 1 of the Introduction, which is not technically part of the Covenant but is always to be printed with it.

3. See section 2 of the Introduction.

4. See section 1.1.

5. Anglican entities may be in full communion with other entities which are not *Anglican*: the Anglican Church of Canada is in full communion with the Evangelical Lutheran Church in Canada.

6. For example, women bishops from the Anglican Church of Canada cannot exercise episcopal functions in the Church of England. Nor strictly speaking can Canadian priests ordained by a woman bishop exercise priestly functions in the Church of England.

7. Section 3.2.7.

8. See section 4.2.1 for examples of both spellings.

9. Section 4.1.4 implies that the member Churches of the Anglican Communion are those
(continued...)

- “**Church**” is not defined. Sometimes “Church” means “the one, holy, catholic, and apostolic Church worshipping the one true God, Father, Son and Holy Spirit”.¹⁰ Sometimes “Church” means a particular organization in a particular geographic area which is adhering to the Covenant¹¹—a “Province” in the Anglican Communion, such as the Church of England,¹² or the Scottish Episcopal Church, or the Anglican Church of Canada. However, this latter usage assumes that the “Church” has a top-down unitary structure in which the entity which is constitutionally capable of adopting the Covenant is also capable of ensuring that other constituent units abide by the commitments contained in the Covenant (which may not be the case in Canada¹³ or other countries where there is a federal church structure). It is not clear whether “Church” includes an internal Ecclesiastical Province or a Diocese or a Parish, or what would happen if actions by any of these levels might not be in compliance with the Covenant. What is the “Church” to which the Covenant applies?
- “**faith**” is used many times in sections 1, 2 and 3, but is not defined. It is not clear whether “faith” is the same as “doctrine”.

9. (...continued)

entities which are recognized in accordance with the Constitution of the Anglican Consultative Council. Section 4.1.5 states that the Instruments of Communion may invite *other* Churches to adopt the Covenant, but adoption of the Covenant does not confer any right of recognition by or membership in the Instruments of Communion.

10. For example, see Sections 1.1.1 and 1.1.2.
11. For example, see section 1.1 of the Covenant. Note the discussion below about the constitutional issues which arise because there may not be such an entity as “The Anglican Church of Canada” as opposed to various entities (such as General Synod, Provincial Synods, Dioceses) which each have their own areas of authority.
12. For example, see sections 1.1, 2.1, 3.1 and the words immediately before 4.1, all of which start: “Each Church affirms...”. All of Section Four contemplates that each “Church” will do or be subject to certain things.
13. See the discussion below in the Part dealing with Constitutional Concerns.

- **“a shared mind”** is not defined, but each signatory Church undertakes to seek a shared mind “about matters of common concern”,¹⁴ and the absence of a shared mind is what enables a matter to be referred to the Standing Committee to determine whether actions of a particular Church are compatible with the Covenant.¹⁵ The Covenant does not limit “matters of common concern” to matters of core doctrine. It also is not clear who has to have the “shared mind” or what are the criteria for determining whether there is “a shared mind”. Does it require unanimity? substantial agreement? agreement as evidenced by official decisions of those Churches of the Anglican Communion who have adopted the Covenant? agreement by other Churches or denominations which are not Members of the Anglican Communion?¹⁶ theologians?
- **“relational consequences”** are not defined, but can be imposed if the actions of a covenanting Church (undefined) are found to be “incompatible with the Covenant”.¹⁷ What are “relational consequences”? Impediments on the recognition of the ordination of bishops/priests/deacons, or on the mobility of bishops/priests/deacons to or from the affected entity, or not permitting members of the affected entity from participating in the sacraments of other parts of the Anglican Communion, or not permitting officials from the affected entity to participate in the Instruments of Communion, or not permitting clergy or lay persons who are canonically resident in the affected entity from participating in ecumenical or other bodies that have some official or semi-official connection with the Anglican Communion? Would a “relational consequence” include the recognition of another organization as the (or an additional) Church in the same geographic area as the affected entity? It is not possible to know what might or might not be considered a “relational consequence”.

14. See section 3.2.4.

15. See section 4.2.4.

16. Section 3.2.4 speaks about “a shared mind with other Churches”, which implies that the “shared mind” might need to be broader than just among Members of the Anglican Communion.

17. See section 4.2.6.

- **“incompatible with the Covenant”** There is no definition of what actions or decisions would be “incompatible with the Covenant”—this would only be determined *ex post facto*.
- **“controversy” or “issues which are perceived as controversial or new” or “a controversial action”** There are no criteria for determining what constitutes a “controversy” or a “controversial action”. Who and how many people (official Churches or Primates or Bishops or clergy or laity?) need to perceive an issue or an action as being “controversial” (or “new”)?¹⁸ A “controversial action” or “controversial issue” may not be the same as “a matter of common concern”.¹⁹
- **“Commissions of the Communion” and “the Communion’s councils”**. Not defined, but apparently are something other than the Instruments of Communion.²⁰

The lack of clarity in terms and concepts used in the Covenant raises the possibility that different people will understand those terms and concepts in different ways. This makes it difficult to give a precise meaning to all of the draft document. This lack of definition and clarity makes it difficult to know the full nature and extent of the obligations which would be undertaken by adopting the Covenant.

B. PROCEDURAL CONCERNS

The Covenant lays out a process for addressing issues which are (or are perceived as being) “controversial”.

The process contained in the Covenant raises several serious concerns:

1. *The multiple roles of the Standing Committee*

Under section 4.2 of the Covenant, the Standing Committee has the following roles:

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18. See sections 3.2.3 (“issues which are perceived as controversial or new”), 3.2.5 (“any action which may provoke controversy ...”), 4.2.5 (“a controversial action”).
 19. “Matters of common concern” is the phrase used in section 3.2.4 as the trigger.
 20. See section 3.2.4 where “Commission” is used in addition to “Instruments”.

- (a) First the Standing Committee attempts to “facilitate agreement” where a matter has not resulted in a “shared mind” (however that is defined) and to take advice about “the nature of the matter in question” (whatever that means) and the “relational consequences which may result” (the types of which are not defined): s. 4.2.4.
- (b) Then the Standing Committee has the ability to request a “Church”²¹ to defer an action even before there is any determination about whether the action breaches the Covenant: s. 4.2.5.
- (c) Then the Standing Committee has the ability to refer a matter to the Anglican Consultative Council *and* the Primates’ Meeting²² for advice about whether the action or decision is or would be “incompatible with the Covenant”: s. 4.2.6.
- (d) And then, on the basis of that advice,²³ the Standing Committee has the ability to make recommendations to those very bodies [the Anglican Consultative Council and the Primates’ Meeting], other Instruments of Communion, and other Churches

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- 21. It is not entirely clear what is a “Church”—whether this term means a Province which is a member of the Anglican Consultative Council, or it could also refer to a constituent entity therein such as an internal ecclesiastical province or diocese. This issue has constitutional consequences for the Canadian Church which are discussed below.
 - 22. As worded, section 4.2.6 requires the Standing Committee to refer the matter to *both* bodies, not just one of them.
 - 23. Because section 4.2.7 follows section 4.2.6, it might be presumed that the reference to “advice received” means the advice requested from the Anglican Consultative Council and the Primates’ Meeting pursuant to section 4.2.6. However, under section 4.2.4 the Standing Committee may “take advice from *such bodies as it deems appropriate* to determine a view on the nature of the matter at question and those relational consequences which may result”. Section 4.2.7 deals with relational consequences and uses the phrase “on the basis of the advice received” without specifying from whom that advice has been received, so it is possible to interpret section 4.2.7 as permitting the Standing Committee to act on advice from unspecified others besides the Anglican Consultative Committee and the Primates’ Meeting.

of the Anglican Communion²⁴ about the relational consequences which should flow from the incompatible action [or decision?]:²⁵ s. 4.2.7.

2. *No details about process*

The Covenant does not contain any detail about the process to be used in any of the above steps.

For example, Section 4 of the Covenant does not address the process which the Standing Committee will use to determine whether an action or decision is “controversial”, or whether there is a “shared mind”²⁶ about an issue, from whom it will decide to seek advice (either about whether the proposed action or decision is incompatible with the Covenant, or about the relational consequences which may or should flow from an incompatible action or decision).

Similarly, the Covenant does not specify how either the Anglican Consultative Council or the Primates’ Meeting is to approach a request for advice, what material they will have, whom they may consult, whether their proceedings will be in public, whether their advice will be made public and in a timely manner.

It is also not clear to what extent the Standing Committee could depart from or ignore the advice it receives from the Anglican Consultative Council and the Primates’ Meeting. Nor is it clear what the Standing Committee should (or legally could) do if the advice from these two bodies is not identical.

24. Not just covenanted Churches.

25. Sometimes section 4.2 speaks about an “action” (4.2.3), other times about an “action or decision” (4.2.6), sometimes both in different parts of the same provision (4.2.7). Section 4.2.4 refers to a “matter”. It is not clear why different terminology is used, but the legal presumption is that different phrases mean different things.

26. As noted above, the Covenant does not contain any criteria for determining whether there is a “shared mind” about a particular issue. How many Member Churches of the Anglican Communion have to dissent in order for there not to be a “shared mind”? One? Two? An indeterminate number? Does it matter which ones? Does the question encompass concerns by Churches which are not Members of the Anglican Communion (such as other denominations, or groups which have broken away from the Anglican Communion—note that section 3.2.4 speaks about “Churches”)? Would it include individual members of an Anglican Church who are dissatisfied with a decision or action taken by the official decision-making bodies of their Church?

3. *Lack of due process and procedural fairness*

Importantly, section 4 of the Covenant does not contain any provisions to ensure due process and procedural fairness²⁷ which the Canadian legal system generally requires decision-makers to observe.

For example:

- The Covenant does not comply with the legal principle of *Audi Alteram Partem* (“The Right to be Heard” or “Hear the Other Side”).

There is no provision that a potentially affected “Church” will be heard prior to the invocation of any of the steps set out in section 4.2. “Being heard” includes receiving timely and full disclosure of all materials which are provided to the Standing Committee, the right to be present when others are addressing the Standing Committee, the right to make submissions at each step of the decision-making process, and the right to know and to make submissions about the contents of any communications between the Standing Committee and anyone from whom it seeks advice (such as the Anglican Consultative Council and the Primates’ Meeting), and the right to full participation in the process used by those advisers in forming their advice.

- The Covenant does not comply with the legal principle of *Nemo iudex in sua causa debet esse* (“No Man should be a judge in his own cause” or the “Rule against Bias”).

The multiple functions of the Standing Committee do not comply with the legal expectation that there will be separation of functions between the investigator, the prosecutor, and the adjudicator.

In addition, while section 4.2.8 specifies that participation in decision-making under section 4.2 is limited to those members of the Instruments of Communion who are representatives of those Churches who have adopted the Covenant (or who are still in the process of adoption), section 4.2 does not exclude participation of members on either the Standing Committee, the

27. In Law these procedural requirements are known as the “Principles of Natural Justice”. The Principles of Natural Justice must be complied with in disciplinary proceedings in the Canadian Church: Canon XVIII, section 14. These procedural concepts are not the same as “Natural Law”.

Anglican Consultative Council, Primates' Meeting, or in the other Instruments of Communion who are representatives of those Churches who have raised the question about whether there is a controversy.

4. *No time limit for moratoriums, and no ability to raise the matter from that state*

There is no time limit to any moratorium requested by the Standing Committee pursuant to Section 4.2.5. It could last forever.

There is also no ability for a Church which has initially agreed to a moratorium to move along the consideration of the controversial action.

As a result, the affected Church would be left in the position of either (a) waiting for an indeterminate length of time for the matter to be considered by the appropriate Instrument(s) of Communion and the Standing Committee, or (b) making the decision to end the moratorium by taking the controversial action, and thereby risking the Standing Committee recommending “relational consequences” against it.

5. *No criteria for determining the preconditions for various steps*

The Covenant does not contain any criteria for determining whether an action or decision is “controversial”, or whether there is a “shared mind” about a matter.

6. *No appeal*

The Covenant does not provide any rights of appeal.

7. *Not clear what happens if a Church declines to implement the recommended “relational consequence”*

The Covenant does not specify what will happen if one or more Churches of the Anglican Communion²⁸ decline to implement the “relational consequences” recommended by the Standing Committee to the Instruments of Communion.

28. Not just “covenanted Churches”.

Will such a decision by a covenanted Church²⁹ in and of itself constitute an action that breaches the Covenant?

C. CONSTITUTIONAL CONCERNS FOR THE CANADIAN CHURCH

The Covenant raises the following constitutional concerns for the Canadian Church:

- (a) What is the “Church” in Canada?
- (b) Which level of the Canadian Church has authority to adopt the Covenant?
- (c) Voting procedure in General Synod for different types of resolutions
- (d) Is the Covenant “doctrine”? If so, this would affect the process required to be used to adopt it.
- (e) What is the status of the Covenant? Is the Covenant to be part of the Declaration of Principles or the Constitution?
- (f) Can General Synod fulfill the requirements of section 4.2.9 of the Covenant to see that all parts of the Canadian Church maintain in their lives the affirmations and commitments contained in the Covenant?
- (g) If the actions of one of the Anglican entities in Canada are not in compliance with the Covenant, and relational consequences are recommended, would those consequences apply only to the entity in question, or would the consequences apply to all of the Anglican entities in Canada (even those which are in compliance)?
- (h) Will the Canadian Church automatically be bound by future amendments to the Covenant?
- (i) Is the Covenant compatible with the role of the laity in synodical government in the Canadian Church?

29. Only a “covenanted Church” can breach the Covenant.

Relevant Provisions in the Covenant

The Covenant contains the following provisions:

- 4.1.2 In adopting the Covenant for itself, each Church recognizes in the preceding sections a statement of faith, mission and interdependence of life which is consistent with its own life and with the doctrine and practice of the Christian faith as it has received them. It recognises these elements as foundational for the life of the Anglican Communion and therefore for the relationships among the covenanting Churches.
- 4.1.3 Such mutual commitment does not represent submission to any external ecclesiastical jurisdiction. Nothing in this Covenant of itself shall be deemed to alter any provision of the Constitution and Canons of any Church in the Communion, or to limit its autonomy of governance. The Covenant does not grant to any one Church or any agency of the Communion control or direction over any Church of the Anglican Communion.
- 4.1.4 Every Church of the Anglican Communion, as recognized in accordance with the Constitution of the Anglican Consultative Council, is invited to enter into this Covenant according to its own constitutional procedures.
- 4.1.6 This Covenant becomes active for a Church when that Church adopts the Covenant through the procedures of its own Constitution and Canons.
- 4.2.1 The Covenant operates to express the common commitments and mutual accountability which hold each Church in the relationship of communion one with another. Recognition of, and fidelity to, this Covenant, enable mutual recognition and communion. Participation in the Covenant implies a recognition by each Church of those elements which must be maintained in its own life and for which it is accountable to the Churches with which it is in Communion in order to sustain the relationship expressed in this Covenant.
- 4.2.9 Each Church undertakes to put in place such mechanisms, agencies or institutions, consistent with its own Constitution and Canons, as can undertake to oversee the maintenance of the affirmations and commitments of the Covenant in the life of that Church, and to relate to the instruments of Communion on matters pertinent to the Covenant.

[Emphasis added.]

(a) What is the “Church” in Canada?

The Covenant assumes that a “Church” which adopts the Covenant is a unitary structure. In other words, the Covenant assumes that there is a decision-making entity which has the authority not only to make the decision about adopting the Covenant, but also has the authority to ensure that all of its constituent units comply with the Covenant.

This structural assumption in the Covenant is not accurate in Canada.

The Canadian Church is not a unitary organization and does not have an entity which can make top-down decisions about any or all matters which will automatically be binding on all of its constituent parts.

Rather, the Canadian Church is a federation consisting of the General Synod (with defined legislative powers) and the four internal Ecclesiastical Provinces (with other defined legislative powers). Both of these in turn are comprised of 30 dioceses (with some legislative powers), each with their own diocesan bishop (with some episcopal powers which in certain circumstances might be legislative or prescriptive in nature).

The non-unitary structure of the Canadian Church raises the following issues when considering whether to adopt the Covenant.

(b) Which entity in the Canadian Church has the authority to make the decision about whether to adopt the Covenant?

Under section 6 of the Declaration of Principles, General Synod has “authority and jurisdiction in all matters affecting in any way the general interest and well-being of the whole Church”.³⁰

In addition to this general grant of authority, General Synod has the following particular heads of authority and jurisdiction which would (or might) be relevant to the adoption of the Covenant:

... d) the relations of the Church to other Churches of the Anglican Communion;

30. Although it has been suggested that a diocese might be able to adopt the Covenant (even if the Province to which it belongs did not), such an action would not accord with the constitutional framework of the Canadian Church.

- ... i) the definition of the doctrines of the Church in harmony with the Solemn Declaration adopted by this synod;
- ... j) the revision, adaptation and publication of a Book of Common Prayer and a Hymnal for the Church.

(c) *Voting procedure in General Synod for different types of resolutions*

Under the Declaration of Principles, some types of resolutions can be passed by a simple majority³¹ at one session of General Synod, while others must be passed at two successive sessions and require a two-thirds majority. Of the latter group, some types of resolutions must be referred to the four internal Provincial Synods and the 30 Diocesan Synods, and others must also receive the consent of the four Provincial Synods.

Regardless of the number of sessions of General Synod required to pass a resolution, the Declaration of Principles and the Rules of Order and Procedure specify that voting will occur as follows:

- The initial procedure for a resolution to be passed requires a majority of the Bishops voting as one Order, and a simple majority of the Orders of Clergy and Laity voting together.³²
- However, any six members of General Synod can require a vote by the three Orders voting separately.³³ Effectively, therefore, a successful resolution could require the approval by each Order.

31. Sections 18 b), 19 and 20 of the Rules of Order and Procedure.

32. Section 5 b) of the Declaration of Principles and Section 18 a) of the Rules of Order and Procedure. However, some types of resolutions must be passed by specified majority *in each Order*, so this initial step would not occur for these types of resolutions (for example, a resolution to change the Declaration of Principles or the Constitution, or to enact or amend a Canon dealing with doctrine, worship or discipline).

33. Section 19 of the Rules of Order and Procedure.

- If a vote by separate Orders passes, six members of General Synod (two from each of three different dioceses) can require a vote by dioceses.³⁴ The vote of each diocese is determined by the majority of the members of all Orders in that diocese.³⁵ The resolution will be passed if there is an equal or greater number of dioceses voting in favour than opposed.³⁶ While votes by dioceses have been rare, the possibility means that a resolution could be lost if more than half of the members of half of the dioceses are opposed, even though the majority of each Order in General Synod is in favour.

In addition, while resolutions generally only require a simple majority of the relevant group to pass, some types of resolutions require a two-thirds majority of the relevant group. Examples include resolutions to amend the Declaration of Principles or the Constitution or to enact or amend any Canon.³⁷

Further, some types of resolutions must be passed at two successive sessions of General Synod by two-thirds majorities in the relevant groups. Examples include resolutions to amend the Declaration of Principles or the Constitution or to enact or amend any Canon.³⁸ All of these must be referred for consideration to all diocesan and provincial synods.³⁹ The consent of the Provincial Synods is required for any resolutions involving

34. Section 20 of the Rules of Order and Procedure.

35. Section 20 b) of the Rules of Order and Procedure provides that in the case of equality in the votes of members from any diocese, that diocese shall not be counted.

36. Section 20 d) of the Rules of Order and Procedure.

37. Canons dealing with doctrine, worship, or discipline must be enacted or amended by a two-thirds majority of each Order (voting at two successive sessions of General Synod), all other Canons must be enacted or amended by a two-thirds majority of the Order of Bishops on the one hand and a two-thirds majority of the Orders of Clergy and Laity voting together on the other hand (the usual method, which could be followed by a vote by Orders): see Section 11 c) of the Declaration of Principles. After an affirmative vote by Orders, any six members of General Synod (two from each of three different dioceses) may require that a vote on the question be taken by dioceses: section 20 of the Rules of Order and Procedure.

38. Sections 11 a) ii) and iii), and c) of the Declaration of Principles.

39. Section 11 a) ii) and c) of the Declaration of Principles.

a change in sections 6 (powers of General Synod), 7 (powers of Provincial Synods) and 8 (Ecclesiastical Offences and Disciplinary Proceedings) of the Declaration of Principles.⁴⁰

The Rules of Order and Procedure can be amended by a two-thirds majority of the members of General Synod voting in the ordinary manner (for example, to provide a greater threshold for approval of any particular resolution).⁴¹ However, an amendment to the Rules of Order and Procedure cannot amend any provision of the Declaration of Principles or Constitution.⁴²

Careful consideration will need to be given by all levels of the Canadian Church about the process and type of voting which will need to be used when making a decision about whether to adopt the Covenant.

(d) *Is the Covenant “doctrine”?*

Clarity is required about whether the Covenant constitutes “doctrine”.

Pursuant to section 6 i) of the Declaration of Principles, General Synod has legislative authority and jurisdiction with respect to “the definition of the Doctrines of the Church in harmony with the Solemn Declaration”.

If the Covenant is properly characterized as doctrine, then there are at least two consequences:

- First, section 11 c) i) of the Declaration of Principles requires all canons dealing with doctrine to be passed by a two-thirds majority in each Order voting at two successive sessions of the General Synod, having been referred for consideration to diocesan and provincial synods following the first approval by General Synod. Although it may be suggested that the Covenant could be adopted by a simple resolution at one session of General Synod,⁴³ the contrary

40. Section 11 a) iii) of the Declaration of Principles.

41. Section 11 d) of the Declaration of Principles.

42. Without following the procedure contained in section 11 of the Declaration of Principles for amending the provision in question.

43. The amending formula in section 11 c) i) of the Declaration of Principles applies to “all Canons dealing with doctrine, worship and discipline”. There are numerous
(continued...)

view is that such a process would circumvent section 11 c) i) of the Declaration of Principles, and therefore would be invalid. Simply not calling the resolution a “canon” would not necessarily avoid the requirement to follow the procedure specified by section 11 c) i) of the Declaration of Principles. What matters in law is the substance, not the format.

- Secondly, if the Covenant is properly characterized as “doctrine”, then a decision by General Synod to adopt the Covenant (following the appropriate procedure) would be binding on all parts of the Canadian Church and a breach of the Covenant would be grounds for discipline.

If the Covenant is determined to constitute “doctrine”, then it will be necessary to be satisfied that all parts of the Covenant are consistent with our existing doctrine, or be satisfied that any changes are acceptable.

On the other hand, if the Covenant is not considered to be doctrine, it might be possible for General Synod to adopt the Covenant by a simple majority voting in the normal manner in one session of General Synod.⁴⁴ If General Synod decides to proceed this way, it would be strongly advisable to include a clear and unambiguous statement to that effect that nothing in the Covenant constitutes doctrine. The absence of such a clear and unambiguous statement would leave open the possibility that at some later time (a) there might be a question about whether adopting the Covenant was a definition of or dealt with doctrine, and therefore could not be done by simple resolution; and (b) something in the Covenant could be used as a basis for challenging or invalidating some action or decision taken by General Synod, a Provincial Synod, a Diocesan Synod, or a bishop.

43. (...continued)

examples of General Synod passing resolutions at only one session authorizing various forms of services for use, experimentally or otherwise (such as the Book of Alternative Services)—that is, not in the form of a Canon and not following the procedure contained in section 11 c) i).

44. Members of General Synod might decide that more than a simple majority (voting as described above) should be required for the decision about whether to adopt the Covenant. In such a case, it would be necessary to amend the Rules of Order and Procedure, and such a motion would need to be passed by a two-thirds majority of the members voting in the normal manner: section 11 d) of the Declaration of Principles.

(e) What is the status of the Covenant? Is the Covenant to be part of the Declaration of Principles or the Constitution?

There also needs to be clarity about the status of the Covenant. Would the Covenant become part of (or have the same status as, or be superior to) the Declaration of Principles or the Constitution of General Synod (or the constitutions of the internal Ecclesiastical Provinces or the 30 dioceses)?⁴⁵

The status of the Covenant has at least two important consequences for the Canadian Church.

First, the characterization of the status of the Covenant will determine the procedure that must be used by General Synod to consider adopting the Covenant. Amendments to the Declaration of Principles or to the Constitution of General Synod require a two-thirds majority in each Order voting at two successive sessions of the General Synod, after having been referred to all of the internal provincial and diocesan synods.⁴⁶ The internal Provincial Synods must consent if the resolution involves an amendment to provisions in the Declaration of Principles relating to the legislative powers of General Synod (section 6) or the internal Provincial Synods (section 7) or ecclesiastical offences and disciplinary proceedings (section 8).⁴⁷

By contrast, resolutions which are not constitutional in nature can be passed at only one General Synod.

Secondly, if the Covenant has constitutional or quasi-constitutional status *within* the Canadian Church, could someone *within* the Canadian Church⁴⁸ at some point in the

45. See the discussion below about the federal nature of the Canadian Church.

46. Section 11 a) ii) and 11 b) of the Declaration of Principles. See the discussion below about the different methods of voting prescribed by the Rules of Order and Procedure.

47. Section 11 a) iii) of the Declaration of Principles (and the corresponding provisions in the constitutions of the four internal Ecclesiastical Provinces). There is no provision for enacting such an amendment over the objection of one or more of the internal Provincial Synods.

48. This issue involves the use of the Covenant once it becomes an *internal* document of the Canadian Church, by someone *within* the Canadian Church to challenge an action
(continued...)

future argue that a future action by General Synod (or an internal Provincial or Diocesan Synod) is inconsistent with the Covenant, and therefore invalid?

An analogous situation arose in the recent property litigation where some parties suggested that actions or decisions taken by diocesan authorities were invalid because they were inconsistent with the Solemn Declaration (which is *internal* to the constitution of all parts of the Canadian Church).

The relationship of the Covenant to the constitutional and foundational documents of a Church is a live issue in other parts of the Communion. The Church in South-East Asia has “acceded” to the Covenant, and issued a long preamble to its Letter of Accession which makes it clear that it contemplates that the Covenant will be superior to the internal constitutions of signing Churches and will be used to prevent or reverse actions taken by a Church which are perceived as being contrary to the Covenant—a sort of “super Constitution” that will take precedence over the internal constitution and autonomy of a Church.⁴⁹ By contrast, the Church of Ireland has “subscribed” to the Covenant, and issued covering documentation which makes it clear that it contemplates that the Covenant will have no effect on its sovereignty or existing constitutional provisions, which will be superior to the Covenant.⁵⁰ Obviously, these contradictory

48. (...continued)
by some part of the Canadian Church.

This is not the same as the issue addressed in section 4.1.3 of the Covenant, which states:

- 4.1.3 Such mutual commitment [in adopting the Covenant] does not represent submission to any external ecclesiastical jurisdiction. Nothing in this Covenant of itself shall be deemed to alter any provision of the Constitution and Canons of any Church of the Communion, or to limit its autonomy of governance. The Covenant does not grant to any one Church or any agency of the Communion control or direction over any Church of the Anglican Communion.

[Emphasis added.]

49. http://www.anglican.org.sg/index.php/blog/comments/preamble_to_the_letter_of_accession_province_of_southeast_asia.

50. <http://www.ireland.anglican.org/index.php?do=news&newsid=3615>.

views of the Covenant’s constitutional function and relationship cannot both be correct.⁵¹

In order to avoid the possible use of the Covenant as a fulcrum providing leverage to attack the validity of other internal decisions by any level of the Canadian Church, it would be important for any resolution to adopt the Covenant to state explicitly General Synod’s view about the status of the Covenant as having—or not having—constitutional status.

(f) *Can General Synod fulfill the requirements of section 4.2.9 of the Covenant to see that all parts of the Canadian Church maintain in their lives the affirmations and commitments contained in the Covenant?*

Section 4.2.9 of the Covenant provides as follows:

4.2.9 Each Church undertakes to put in place such mechanisms, agencies or institutions, consistent with its own Constitution and Canons, as can undertake to oversee the maintenance of the affirmations and commitments of the Covenant in the life of that Church, and to relate to the instruments of Communion on matters pertinent to the Covenant.

[Emphasis added.]

Unless the Covenant constitutes “doctrine”,⁵² General Synod does not presently have the authority to require an internal Ecclesiastical Province or a Diocese or any Bishop to comply with the affirmations and commitments contained in the Covenant.

An example is provided by the blessing of committed same sex relationships. General Synod has determined that blessing of same sex relationships is not a matter of core or credal doctrine, and has not passed any resolution prohibiting such blessings. Several bishops have authorized (or have contemplated authorizing) such blessings, relying on the principle of *ius liturgicum*.⁵³ Without more, General Synod does not have power to

51. The Covenant contemplates that Churches will “adopt” the Covenant, not “accede” or “subscribe” to it.

52. If the Covenant is determined to constitute “doctrine”, a breach of the Covenant would constitute a disciplinable offence.

53. Section 8 a) of the Declaration of Principles provides that the powers, jurisdiction and
(continued...)

prohibit these diocesan decisions or actions, or to require the body in question to defer such decisions or actions as might be requested by the Standing Committee.

Given the vagueness of what might constitute a “controversial decision” which might engage section 4 of the Covenant, it is not possible to provide an exhaustive list of the circumstances in which one of the component entities in the Canadian Church (apart from General Synod itself) might make a decision or take an action which would not comply with the Covenant—but which General Synod could not prevent.

In addition, the Covenant does not limit a “controversial decision” to something which happens in the future—it might also relate to something which occurred prior to the Covenant (such as the ordination of women priests or women bishops, or the re-marriage of divorced persons in the Church).

In order for General Synod to be in a position to be able to comply with section 4.2.9 of the Covenant, it would be necessary to do one of the following:

- There could be an amendment to section 6 of the Declaration of Principles to give General Synod the authority and jurisdiction to require the internal Ecclesiastical Provinces and dioceses to comply with the Covenant, and to take whatever action is required to achieve that compliance.⁵⁴ Such an amendment would have to be passed by two-thirds majorities in each Order at two successive General Synods, having been referred for consideration to all of the

53. (...continued)

authority inherent in the office of bishop are not affected by the division of legislative powers under sections 6 and 7 of Declaration of Principles, or the disciplinary provisions under section 8. In addition, section 7 b) of the Declaration of Principles gives authority and jurisdiction to Provincial Synods to authorize special forms of prayers, services, and ceremonies for which no provisions have been made under the authority of General Synod or the national House of Bishops (which implies that General Synod does not have exclusive authority in this area).

54. An analogy from the civil context would be an amendment to the Canadian Constitution which would permit the federal Parliament to overrule anything done by a Provincial Legislature within the latter’s specified and exclusive areas of jurisdiction.

internal provincial and diocesan synods, and having been consented to by all four of the internal provincial synods.⁵⁵

- The internal Provincial and diocesan synods could all enact internal legislation (probably constitutional in nature) requiring them to comply with the Covenant.⁵⁶

Under either process, it is not clear what would happen if one or more of the internal Ecclesiastical Provinces or Dioceses did not agree.

In the absence of an effective “mechanism, agency or institution” to ensure compliance with the Covenant by all levels of the Canadian Church, General Synod will need to consider whether it can in conscience make the commitment contained in section 4.2.9 of the Covenant.

(g) If the actions of one of the Anglican entities in Canada are not in compliance with the Covenant, and relational consequences are recommended by the Standing Committee, would those consequences apply only to the entity in question, or would the consequences apply to all of the Anglican entities in Canada (even those which are in compliance)?

As noted above, the Covenant assumes that a “Church” is a unitary structure, and that a “Church” which adopts the Covenant can ensure that all of its constituent parts comply with the Covenant, failing which “relational consequences” may be applied.

Because the Canadian Church is not unitary in structure, there is the possibility that some level of the Canadian Church (besides General Synod, such as an internal Ecclesiastical Province or a diocese or a bishop) might be in breach of the Covenant. It

55. Sections 11 a) ii) and iii) of the Declaration of Principles and the parallel provisions in the constitutions of the internal Ecclesiastical Provinces. There is no provision for enacting such an amendment over the objection of one or more of the internal Provincial Synods.

56. This would be an internal commitment by the Provincial or Diocesan Synod to comply with the Covenant. That is not the same as saying that the Provincial or Diocesan Synod *adopts* the Covenant—that authority and jurisdiction lies with General Synod.

is not clear whether the relational consequences contemplated by section 4.2.5⁵⁷ or 4.2.7⁵⁸ would only apply to the entity (such as a diocese or internal Ecclesiastical Province) which took the controversial decision or action, or would apply to all parts of the Canadian Church (whether or not they had made the same decision or action).

It is not possible to anticipate what the Standing Committee would do in such circumstances.

(h) *Will the Canadian Church automatically be bound by future amendments to the Covenant?*

Section 4.4.2 contemplates the possibility that the Covenant could be amended in the future:

- 4.42 Any covenanting Church or Instrument of Communion may submit a proposal to amend the Covenant to the Instruments of Communion through the Standing Committee. The Standing Committee shall send the proposal to the Anglican Consultative Council, the primates' Meeting, the covenanting Churches and any other body as it may consider appropriate for advice. The Standing Committee shall make a recommendation on the proposal in light of the advice offered, and submit the proposal with any revisions to the covenanting Churches. The amendment is operative when ratified by three-quarters of such Churches. The Standing Committee shall adopt a procedure for promulgation of the amendment.

It is, of course, impossible to foresee what types of amendments might be proposed to the Covenant.

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57. Section 4.2.5 permits the Standing Committee to request a "Church" to defer a controversial action, and if such request is declined to recommend to any Instrument of Communion "relational consequences" which may specify a provisional limitation of participation in, or suspension from, that Instrument until completion of the process provided in the following sections of the Covenant.
58. Section 4.2.7 permits the Standing Committee to recommend relational consequences which flow from an action incompatible with the Covenant, which may address the extent to which the decision of any covenanting "Church" impairs or limits the communion between that "Church" and the other Churches of the Communion, and the practical consequences of such impairment or limitation.

It is also possible that such an amendment could be proposed and ratified when only a small number of Churches have adopted the Covenant.⁵⁹

Section 4.4.2 does not contemplate that a covenanted Church which does not agree with the proposed amendment would have the ability to opt out of that amendment. It would appear that the only course available would be for the affected Church to withdraw from the entire Covenant pursuant to section 4.3.1:

- 4.3.1 Any covenanting Church may decide to withdraw from the Covenant. Although such withdrawal does not imply an automatic withdrawal from the Instruments of Communion or a repudiation of its Anglican character, it may raise a question relating to the meaning of the Covenant, and of compatibility of the principles incorporated within it, and trigger the provisions set out in section 4.2 above.

If a Church had never adopted the Covenant, the provisions set out in section 4.2 would never have had any effect (because the Church would never have been a “covenanting Church”).

On the other hand, once a Church has adopted the Covenant, the provisions set out in section 4.2 will continue to apply (at least with respect to any question arising from the withdrawal).

(i) *Is the Covenant compatible with the role of the laity in synodical government in the Canadian Church?*

For more than a century, the laity have had an integral role in the synodical government of the Canadian Church at all levels. All decisions of the 30 diocesan synods, the four internal Provincial Synods, and General Synod itself must include approval by their

59. Section 4.1.6 provides that the Covenant “becomes active for a Church when that Church adopts the Covenant”—so the Covenant is “active” the moment one Church has adopted it. When even a small number of Churches have adopted it, they could propose an amendment which would become operational when ratified by three-quarters of them after being referred by the Standing Committee for advice to the Anglican Consultative Council, the Primates’ Meeting, the covenanted Churches (as many or few as there might be at that point) and other appropriate bodies.

respective Houses of Laity.⁶⁰ This system is sometimes described as “the Bishop leads, the Synod governs”.

By contrast, the Covenant does not contemplate any specific role for the laity. Of the four Instruments of Communion, only the Anglican Consultative Council has any representation from the laity—and the lay members do not form a majority of that Council, nor is their concurrence required for any decision by that Council.⁶¹ Nor is there any guarantee that there will be any lay members on the Standing Committee of the Anglican Communion which controls the process under section 4 of the Covenant.⁶²

The question therefore arises about whether the overwhelmingly episcopal nature of the decision-making process under the Covenant is compatible with the long-accepted constitutional role of the laity in decision-making in the Canadian Church.

D. CONSEQUENCES OF NOT ADOPTING THE COVENANT

The only provision in the Covenant which directly addresses the consequence of a Church not adopting the Covenant appears to be section 4.2.8, which provides as follows:

- 4.2.8 Participation in the decision-making of the Standing Committee or of the Instruments of Communion in respect to section 4.2 shall be limited to those members of the Instruments of Communion who are representatives of those Churches who have adopted the Covenant, or who are still in the process of adoption.

[Emphasis added.]

This provision does not apply so long as a Church is “still in the process of adoption”; it only applies to a Church which has made a definite decision not to adopt the Covenant.

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60. As well as the House of Clergy and the House of Bishops. Although the Houses may vote together much of the time, all decisions are potentially subject to a vote by Orders, thereby giving each Order a veto.
61. The constitution of the Anglican Consultative Council can be found at: <http://www.anglicancommunion.org/communion/acc/resources>.
62. Nor is there any requirement that any lay members must concur in any decision by the Standing Committee.

If applicable, section 4.2.8 only prevents members of a Church which has made a decision not to adopt the Covenant⁶³ from participating in *decision-making* by these bodies *with respect to section 4.2*. This provision does not exclude members of a non-covenanted Church from being members of these bodies, or from participating in any *non-decision-making* function of these bodies, or from participating in any other *decision-making* function of these bodies that is not related to section 4.2.⁶⁴

Thus, if the Canadian Church made the decision not to adopt the Covenant, section 4.2.8 would not prevent representatives from the Canadian Church from participating in the Lambeth Conference or the Primates' Meeting (neither of which may be "decision-making" in any event) or the Anglican Consultative Council.

1. ***The distinction between a "covenanting Church" and a "non-covenanting Church"***

In considering how a decision not to adopt the Covenant might affect the Canadian Church, it is also important to note that various provisions in the Covenant only apply to a "covenanting Church", whereas other provisions apply to "a Church" (whether covenanting or not).

For example, under section 4.2.3, only a "covenanting Church"⁶⁵ can raise a question about the meaning of the Covenant, or raise a question about the compatibility with the Covenant of an action by a "covenanting Church". A non-covenanting Church cannot engage the process. And the process cannot be engaged against a non-covenanting Church.

Similarly, because of the structure of section 4.2, it would appear that none of the provisions subsequent to section 4.2.3 would be available against a non-covenanting

63. Section 4.2.8 does not exclude Churches "who are in the process of adoption". This phrase is not defined. Short of a resolution by a Church clearly rejecting the Covenant, how long could a Church be said to be "in the process of adoption"?

64. It is important to note what *decisions* can actually be made by either the Standing Committee or an Instrument of Communion under section 4.2. For example, would the provision of "advice" to the Standing Committee by the Anglican Consultative Council or the Primates' Meeting constitute "decision-making"? Does "decision-making" include "making recommendations"?

65. Or an Instrument of Communion.

Church. In particular, the Standing Committee does not have power to impose relational consequences on a non-covenanting Church, because section 4.2.7 only permits the Standing Committee to make recommendations about the extent to which an action taken by a “covenanting Church” impairs or limits the communion between that “covenanting Church” and other Churches of the Communion.

2. *Not adopting the Covenant does not affect membership in the Anglican Communion*

A decision by the Canadian Church not to adopt the Covenant would not affect the membership of the Canadian Church in the Anglican Communion. Membership in the Anglican Communion is not determined by the Covenant, and the Covenant does not directly address the issue of membership in the Anglican Communion.

However, the Covenant does refer to the Constitution of the Anglican Consultative Council for the purpose of determining (a) which Churches of the Anglican Communion are being invited to enter into the Covenant, and (b) which other Churches might be invited to adopt the Covenant:

4.1.4 Every Church of the Anglican Communion, as recognized in accordance with the Constitution of the Anglican Consultative Council, is invited to enter into this Covenant according to its own constitutional procedures.

4.1.5 The Instruments of Communion may invite other Churches to adopt the Covenant using the same procedures as set out by the Anglican Consultative Council for the amendment of its schedule of membership. Adoption of this Covenant does not confer any right of recognition by, or membership of, the Instruments of Communion, which shall be decided by those Instruments themselves.

[Emphasis added.]

These provisions do not state that the Anglican Consultative Council determines the membership of the Anglican Communion.

On the one hand, the Constitution of the Anglican Consultative Council does not give it the authority to determine which entities are in communion with the See of Canterbury or are members of the Anglican Communion. The purpose of the Schedule to the Council’s Constitution is to identify how many members of the Council will be drawn from each group of the specified Churches (all of whom are members of the Anglican Communion). Indeed, there are entities which are not listed in the Schedule (and

therefore do not have representation on the Council) even though they are undoubtedly part of the Anglican Communion.⁶⁶

On the other hand, section 4.1.5 of the Covenant merely identifies the *procedures* to be used for determining which other Churches (not being members of the Anglican Communion) might be invited to adopt the Covenant. This is a cross-reference to the procedures contained in section 7.2 of the Council's Constitution.⁶⁷ However, it does not follow that using the same procedures for this purpose under the Covenant automatically means that (a) the Schedule to the Council's Constitution is amended, (b) the Church in question becomes a member of the Council, or (c) the Church in question becomes a member of the Anglican Communion. If section 4.1.5 had been intended automatically to have these consequences, section 4.1.5 would have been unnecessary, because then section 4.1.4 would apply. Further, the last sentence in section 4.1.5 of the Covenant makes it clear that these are separate questions:

. . . Adoption of this Covenant does not confer any right of recognition by, or membership of, [any of] the Instruments of Communion [including the Council], which shall be decided by those Instruments themselves.

The test for membership in the Anglican Communion was stated by the Lambeth Conference of 1930 (which pre-dates the creation of the Anglican Consultative Council after the Lambeth Conference of 1968) as follows:⁶⁸

The Anglican Communion is 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.

66. Such as the extra-provincial dioceses of Cuba, Bermuda, Ceylon, Spain, Falkland Islands as well as the Lusitanian Church. See www.anglicancommunion.org/tour/index.cfm. Given the language of section 4.1.4 of the Covenant, it is not clear that they are being invited to enter into the Covenant.

67. Section 7.2 of the Council's Constitution provides that with the assent of two-thirds of the Primates' Standing Committee, the Council may alter or add to the Schedule. If being included in the Schedule were the test for membership in the Anglican Communion, one would have expected section 7.2 of the Council's Constitution to have required the two-thirds of the Primates to include the Archbishop of Canterbury.

68. See Norman Doe, *Canon Law in the Anglican Communion: A World Wide Perspective*, Clarendon Press, Oxford, 1998, at p. 340.

A decision by a Church to adopt or not to adopt the Covenant has no effect on that Church's status as a member of the Anglican Communion (or with respect to its membership in any of the Instruments of Communion).

3. Summary on the effect of not adopting the Covenant

Accordingly, it is not apparent that there would be any consequence to the Canadian Church if it makes a definitive decision not to adopt the Covenant, apart from the restriction contained in section 4.2.

E. CONCLUSION

The purpose of this memorandum has been to address the legal and constitutional implications and consequences which adoption or non-adoption of the proposed Covenant present to the Canadian Church.

The Canadian Church will need to take these—and other—considerations into account when making the decision about whether to adopt the proposed Covenant.

Invitation for comments

The Governance Working Group invites comments about any aspect of this Memorandum.

In particular, comment is invited about the questions which are set out on the next page.

Comments should be received by September 30, 2011, and should be addressed to the Governance Working Group and sent either by email to gwg@national.anglican.ca or by regular mail to Church House, 80 Hayden Street, Toronto ON M4Y 3G2.

Members of the Governance Working Group

Canon David Jones, Q.C., Chair (Province of Rupert's Land)
Canon Dr. Randall Fairey (Province of British Columbia and Yukon)
Cynthia Haines Turner (Province of Canada)
The Ven. Dr. Harry Huskins (House of Clergy)
Rt. Rev. Sue Moxley (House of Bishops)
Monica Patten (Province of Ontario)

June 2011

COMMENTS ARE INVITED ABOUT THE FOLLOWING QUESTIONS

1. Should the imprecision in the definitions of a number of terms used in the Covenant concern General Synod when it considers whether or not to adopt the Covenant?
2. Should the lack of natural justice and procedural fairness in section 4 concern General Synod when it considers whether or not to adopt the Covenant?
3. If the Covenant were adopted by General Synod, what wording should be included in the resolution by General Synod to ensure clarity about General Synod's intention about whether the Covenant does or does not affect the doctrine of the Anglican Church of Canada?
4. If the Covenant were adopted by General Synod, what should be the relationship between the Covenant and the Declaration of Principles and the Constitution of the Anglican Church of Canada? What wording should be included in the resolution by General Synod to achieve this?
5. What consultation with (or approval by) the Provincial and Diocesan Synods before General Synod considers a resolution to adopt the Covenant? Beyond any legal requirements, what consultation (or approval) should take place?
6. If General Synod were to adopt the Covenant, what steps would have to be taken to be able to fulfill the obligation under section 4.2.9 for there to be adequate mechanisms within the Canadian Church to ensure that all parts of the Canadian Church comply with the Covenant? What steps would need to be taken by General Synod, the Provincial Synods and the Diocesan Synods to put in place such a mechanism?
7. Is the strong synodical place of the laity in the Canadian Church sufficiently upheld in the decision-making processes in the Covenant?
8. Would there be a difference between General Synod's passing a resolution to "adopt" the Covenant (the term used in the Covenant), "accede" to the Covenant (the term used by the Church in South-East Asia), or "subscribe" to the Covenant (the term used by the Church of Ireland)?
9. What would be the effect of a decision by General Synod not to adopt the Covenant?

10. Are there any other legal or constitutional implications or consequences which have not been identified by the GWG which would be raised by adopting the Covenant?

Comments should be received by September 30, 2011, and should be addressed to the Governance Working Group and sent either by email to gwg@national.anglican.ca or by regular mail to Church House, 80 Hayden Street, Toronto ON M4Y 3G2.