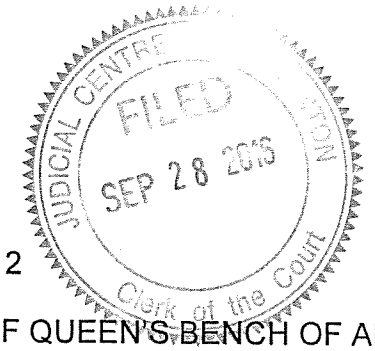

Clerk's Stamp

COURT FILE NO.:	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, as am. IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19 ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANT	MAURICE STONEY ON HIS OWN BEHALF AND THAT OF HIS LIVING SISTERS AND BROTHERS
DOCUMENT:	WRITTEN ARGUMENT ON THE APPLICATION TO BE ADDED as a Party or Intervener by Maurice Felix Stoney and his brothers and sisters VOLUME TWO

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	DLA Piper (Canada) LPP 1201 Scotia 2 Tower 10060 Jasper Avenue NW Edmonton, AB, T5J 4E5 Attn: Priscilla Kennedy Tel: 780.429.6830 Fax: 780.702.4383 Email: priscilla.kennedy@dlapiper.com File: 84021-00001
CONTACT INFORMATION OF ALL OTHER PARTIES: Sawridge Trustees	Reynolds Mirth Richards & Farmer LLP 3200 10180 - 101 Street NW Edmonton, AB, T5J 3W8 Attn: Marco Poretti Tel: 780.425.9510 Fax: 780.425.9510
And	Dentons Canada LLP 2900 10180 - 101 Street NW Edmonton, AB, T5J 3W8 Attn: Doris Bonora

Fax: 780.423.7276

And Catherine Twinn, Trustee

McLennan, Ross LLP
600 12220 Stony Plain Road
Edmonton, AB, T5N 3Y4
Attn: Karen Platten, Q.C.
Tel: 780.482.9200
Fax: 780.482.9100

Public Trustee

Hutchison Law
#190 Broadway Business Square
130 Broadway Boulevard
Sherwood Park, AB, T8H 2A3
Attn: Janet Hutchison
Tel: 780.417.7871
Fax: 780.417.7872

Supreme Court Advocacy
340 Gilmour Street #100
Ottawa, ON, K2P 0R3
Attn: Eugene Meehan, Q.C.
Tel: 613.695.8855
Fax: 613.695.8580

Justice Canada

Indigenous Affairs and Northern Development
Attn: Linda Maj
300, 10423 - 101 Street NW Epcor Tower
Edmonton, AB, T5H 0E7

Clerk's stamp:

COURT FILE NUMBER

1103 14112

COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE

EDMONTON

IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")

APPLICANTS

ROLAND TWINN,
CATHERINE TWINN,
WALTER FELIX TWIN,
BERTHA L'HIRONDELLE, and
CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

DOCUMENT

Affidavit of Paul Bujold for Procedural Order

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Attention: Doris C.E. Bonora

Reynolds, Mirth, Richards & Farmer LLP

3200 Manulife Place

10180 - 101 Street

Edmonton, AB T5J 3W8
Telephone: (780) 425-9510
Fax: (780) 429-3044
File No: 108511-001-DCEB

AFFIDAVIT OF PAUL BUJOLD

Sworn on August 30, 2011

I, Paul Bujold, of Edmonton, Alberta swear and say that:

1. I am the Chief Executive Officer of the Sawridge Trusts, which trusts consist of the Sawridge Band Intervivos Settlement created in 1985 (hereinafter referred to as the "1985 Trust") and the Sawridge Band Trust created in 1986 (hereinafter referred to as the "1986 Trust"), and as such have personal knowledge of the matters hereinafter deposed to unless stated to be based upon information and belief, in which case I verily believe the same to be true.

2. I make this affidavit in support of an application for setting the procedure for seeking the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust.

3. On April 15, 1982, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "A" to this my affidavit ("1982 Trust").

4. On April 15, 1985, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "B" to this my affidavit ("1985 Trust").

5. On August 15, 1986, Chief Walter Patrick Twinn, who is now deceased, executed a Deed of Settlement a copy of which is attached hereto as Exhibit "C" to this my affidavit ("1986 Trust").

6. The Trustees of the 1985 Trust have been managing substantial assets, some of which were transferred from the 1982 Trust, and wish to make some distributions to the Beneficiaries of the 1985 Trust. However, concerns have been raised by the Trustees of the 1985 Trust with respect to the following:

   a. Determining the definition of "Beneficiaries" contained in the 1985 Sawridge Trust, and if necessary varying the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".

   b. Seeking direction with respect to the transfer of assets to the 1985 Sawridge Trust.

7. In order to determine the beneficiaries of the 1985 Trust, the Trustees of the 1985 Trust directed me to place a series of advertisements in newspapers in Alberta, Saskatchewan, Manitoba and British Columbia to collect the names of those individuals who may be beneficiaries of the 1985 Trust.

8. As a result of these advertisements I have received notification from a number of individuals who may be beneficiaries of the 1985 Trust.

9. I have corresponded with the potential beneficiaries of the 1985 Trust and such correspondence is attached hereto as Exhibit "D".

10. I have compiled a list of the following persons who I believe may have an interest in the application for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Trust:

    a. Sawridge First Nation;

b. All of the registered members of the Sawridge First Nation;

c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the 1986 Sawridge Trust, but who would now qualify to apply to be members of the Sawridge First Nation;

d. All persons known to have been beneficiaries of the Sawridge Band Trust dated April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

e. All of the individuals who have applied for membership in the Sawridge First Nation;

f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries;

(those persons mentioned in Paragraph 10 (a) – (h) are hereinafter collectively referred to as the "Beneficiaries and Potential Beneficiaries"); and

i. Those persons who regained their status as Indians pursuant to the provisions of *Bill C-31* (An Act to amend the *Indian Act,* assented to June 28, 1985) and who have been deemed to be affiliated with the Sawridge First Nation by the Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister").

11. The list of Beneficiaries and Potential Beneficiaries consists of 194 persons. I have been able to determine the mailing address of 190 of those persons. Of the four individuals for whom I have been unable to determine a mailing address, one is a person who applied for membership in the Sawridge First Nation but neglected to provide a mailing address when submitting her application. The other three individuals are persons for whom I have reason to believe are potential beneficiaries of the 1985 Trust and whose mother is a current member of the Sawridge First Nation.

12. With respect to those individuals who regained their status as Indians pursuant to the provisions of *Bill C-31* and who have been deemed to be affiliated with the Sawridge First Nation by the Minister, the Minister will not provide us with the current list of these individuals nor their addresses, citing privacy concerns. These individuals are not members of the Sawridge First Nation but may be potential beneficiaries of the 1985 Trust due to their possible affiliation with the Sawridge First Nation.

13. A website has been created and is located at www.sawridgetrust.ca (hereinafter referred to as the "Website"). The Beneficiaries and Potential Beneficiaries and the Minister have

access to the Website and it can be used to provide notice to the Beneficiaries and Potential Beneficiaries and the Minister and to make information available to them.

14. The Trustees seek this Court's direction in setting the procedure for seeking the opinion, advice and direction of the Court in regard to:

a. Determining the Beneficiaries of the 1985 Trust.

b. Reviewing and providing direction with respect to the transfer of the assets to the 1985 trust.

c. Making any necessary variations to the 1985 Trust or any other Order it deems just in the circumstances.

SWORN OR AFFIRMED BY THE DEPONENT BEFORE A COMMISSIONER FOR OATHS AT EDMONTON, ALBERTA ON AUGUST 30, 2011.

PAUL BUJOLD

Commissioner's Name:
Appointment Expiry Date:
MARCO S. PORETTI
Barrister / Solicitor

810070; August 29, 2011
810070;August 30, 2011

This is Exhibit " A " referred to in the Affidavit of
Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths in and for the Province of Alberta
MARCO S. PORETTI

DECLARATION OF TRUST

SAWRIDGE BAND TRUST

This Declaration of Trust made the 15th day of April, A.D. 1982.

BETWEEN:

CHIEF WALTER PATRICK TWINN
of the Sawridge Indian Band
No. 19, Slave Lake, Alberta

(hereinafter called the "Settlor")

of the First Part

AND:

CHIEF WALTER PATRICK TWINN,
WALTER FELIX TWINN and GEORGE TWINN
Chief and Councillors of the
Sawridge Indian Band No. 150 G S R respectively

(hereinafter collectively called the "Trustees")

of the Second Part

AND WITNESSES THAT:

Whereas the Settlor is Chief of the Sawridge Indian Band No. 19, and in that capacity has taken title to certain properties on trust for the present and future members of the Sawridge Indian Band No. 19 (herein called the "Band"); and,

Whereas it is desirable to provide greater detail for both the terms of the trust and the administration thereof; and,

Whereas it is likely that further assets will be acquired on trust for the present and future members of the Band, and it is desirable that the same trust apply to all such assets;

NOW, therefore, in consideration of the premises and mutual promises contained herein, the Settlor and each of the Trustees do hereby covenant and agree as follows:

1. The Settlor and Trustees hereby establish a Trust Fund, which the Trustees shall administer in accordance with the terms of this Agreement.

2. Wherever the term "Trust Fund" is used in this Agreement, it shall mean: a) the property or sums of money paid, transferred or conveyed to the Trustees or otherwise acquired by the Trustees including properties substituted therefor and b) all income received and capital gains made thereon, less c) all expenses incurred and capital losses sustained thereon and less d) distributions porperly made therefrom by the Trustees.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Agreement. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein.

4. The name of the Trust Fund shall be "The Sawridge Band Trust", and the meetings of the Trustees shall take place at the Sawridge Band Administration office located on the Sawridge Band Reserve.

5. The Trustees of the Trust Fund shall be the Chief and Councillors of the Band, for the time being, as duly elected pursuant to Sections 74

through 80 inclusive of the Indian Act, R.S.C. 1970, c. I-6, as amended from time to time. Upon ceasing to be an elected Chief or Councillor as aforesaid, a Trustee shall ipso facto cease to be a Trustee hereunder; and shall automatically be replaced by the member of the Band who is elected in his stead and place. In the event that an elected Chief or Councillor refuses to accept the terms of this trust and to act as a Trustee hereunder, the remaining Trustees shall appoint a person registered under the Indian Act as a replacement for the said recusant Chief or Councillor, which replacement shall serve for the remainder of the term of the recusant Chief or Councillors. In the event that the number of elected Councillors is increased, the number of Trustees shall also be increased, it being the intention that the Chief and all Councillors should be Trustees. In the event that there are no Trustees able to act, any person interested in the Trust may apply to a Judge of the Court of Queen's Bench of Alberta who is hereby empowered to appoint one or more Trustees, who shall be a member of the Band.

6. The Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band; provided, however, that at the end of twenty one (21) years after the death of the last decendant now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and

their status may not have been protested under Section 12(2) thereunder; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act).

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above; and the Trustees may make such payments at such time, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investment authorized for Trustees' investments by The Trustees' Act, being Chapter 373 of the Revised Statutes of Alberta 1970, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or desirable to give effect to the trust purposes set out above,

and to discharge their obligations thereunder other than acts done or omitted to be done by them in bad faith or in gross negligence, including, without limiting the generality of the foregoing, the power

a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefore; and

c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by Federal, Provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them

by this Agreement provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take with notice of and subject to this clause.

12. A majority of the Trustees shall be required for any action taken on behalf of the Trust. In the event that there is a tie vote of the Trustees voting, the Chief shall have a second and casting vote.

Each of the Trustees, by joining in the execution of this Trust Agreement, signifies his acceptance of the Trust herein. Any Chief or Councillor or any other person who becomes a Trustee under paragraph 5 above shall signify his acceptance of the Trust herein by executing this Trust Agreement or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Trust Agreement.

IN WITNESS WHEREOF the parties hereto have executed this Trust Agreement.

SIGNED, SEALED AND DELIVERED
In the Presence of:

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

A. Settlor: Walter P. Twin

Heather Lyle
NAME
1100 One Thornton Court
ADDRESS

B. Trustees: 1. Walter P. T

NAME Heather Ayers

ADDRESS 1100 One Thornton Court

NAME Heather Ayers

ADDRESS 1100 One Thornton Court

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

NAME _____

ADDRESS _____

2. 

3. Walter F Ayers 

4. _____

5. _____

6. _____

7. _____

8. _____

This is Exhibit " B " referred to in the Affidavit of Paul Bujold

Sworn before me this 30 day of August A.D., 20 11

A Notary Public, A Commissioner for Oaths In and for the Province of Alberta

MARCO S. PORETTI

SAWRIDGE BAND INTER VIVOS SETTLEMENT

DECLARATION OF TRUST

THIS DEED OF SETTLEMENT is made in duplicate the 15th day of April, 1985

B E T W E E N :

CHIEF WALTER PATRICK TWINN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter called the "Settlor"),

OF THE FIRST PART,

- and -

CHIEF WALTER PATRICK TWINN,
GEORGE V. TWIN and SAMUEL G. TWIN,
of the Sawridge Indian Band,
No. 19, Slave Lake, Alberta,
(hereinafter collectively called
the "Trustees"),

OF THE SECOND PART.

WHEREAS the Settlor desires to create an inter vivos settlement for the benefit of the individuals who at the date of the execution of this Deed are members of the Sawridge Indian Band No. 19 within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, as such provisions existed on the 15th day of April, 1982, and the future members of such band within the meaning of the said provisions as such provisions existed on the 15th day

of April, 1952 and for that purpose has transferred to the Trustees the property described in the Schedule hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Settlement, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time

would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band

No 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement; and

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule hereto and any accumulated income thereon;

(B) any further, substituted or additional property and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Settlement; and

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Settlement.

4. The name of the Trust Fund shall be "The Sawridge Band Inter Vivos Settlement", and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. Any Trustee may at any time resign from the office of Trustee of this Settlement on giving not less than thirty (30) days notice addressed to the other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee shall be vested in the continuing Trustees or Trustee of this Settlement and such

power shall be exercised so that at all times (except for the period pending any such appointment, including the period pending the appointment of two (2) additional Trustees after the execution of this Deed) there shall be at least five (5) Trustees of this Settlement and so that no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there is more than one (1) Trustee who is not then a Beneficiary.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the end of twenty-one (21) years after the death of the last survivor of all persons who were alive on the 15th day of April, 1982 and who, being at that time registered Indians, were descendants of the original signators of Treaty Number 8, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then living.

Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under section 12(2) thereunder.

The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for Trustees' investments by the Trustees' Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment nor to accumulate the income of the Trust Fund, and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Savings Bank Act applies.

8. The Trustees are authorized and empowered to do all acts necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Settlement for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner to any extent detracting from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with the Trust shall be paid from the Trust Fund,

including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of the Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provisions of this Settlement may be amended from time to time by a resolution of the Trustees that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years provided that no such amendment shall be valid or effective to the extent that it changes or alters in any manner, or to any extent, the definition of "Beneficiaries" under subparagraph 2(a) of this Settlement or changes or alters in any manner, or to any extent, the beneficial ownership of the Trust Fund, or any part of the Trust Fund, by the Beneficiaries as so defined.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such

act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and subject to this clause.

13. Subject to paragraph 11 of this Deed, a majority of fifty percent (50%) of the Trustees shall be required for any decision or action taken on behalf of the Trust.

Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Settlement shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

14. This Settlement shall be governed by, and shall be construed in accordance with the laws of the Province of

Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

A. Settlor

B. Trustees:

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

1.

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

2.

Bruce G Thom
NAME

Box 326, Slave Lake, Alta
ADDRESS

3.

Schedule

One Hundred Dollars ($100.00) in Canadian Currency.

This is Exhibit " C " referred to in the Affidavit of Paul Bujold

Sworn before me this 30 day of August A.D., 20 11

A Notary Public, A Commissioner for Oaths in and for the Province of Alberta

MARCO S. PORETTI

THE SAWRIDGE TRUST

DECLARATION OF TRUST

THIS TRUST DEED made in duplicate as of the 15th day of August, A.D. 1986.

BETWEEN:

CHIEF WALTER P. TWINN,
of the Sawridge Indian Band, No. 19, Slave Lake, Alberta
(hereinafter called the "Settlor")

OF THE FIRST PART,

- and -

CHIEF WALTER P. TWINN, CATHERINE TWINN and GEORGE TWIN,
(hereinafter collectively called the "Trustees")

OF THE SECOND PART,

WHEREAS the Settlor desires to create an inter vivos trust for the benefit of the members of the Sawridge Indian Band, a band within the meaning of the provisions of the Indian Act R.S.C. 1970, Chapter I-6, and for that purpose has transferred to the Trustees the property described in the Schedule attached hereto;

AND WHEREAS the parties desire to declare the trusts, terms and provisions on which the Trustees have agreed to hold and administer the said property and all other properties that may be acquired by the Trustees hereafter for the purposes of the settlement;

NOW THEREFORE THIS DEED WITNESSETH THAT in consideration of the respective covenants and agreements herein contained, it is hereby covenanted and agreed by and between the parties as follows:

1. The Settlor and Trustees hereby establish a trust fund, which the Trustees shall administer in accordance with the terms of this Deed.

2. In this Deed, the following terms shall be interpreted in accordance with the following rules:

(a) "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;

(b) "Trust Fund" shall mean:

(A) the property described in the Schedule attached hereto and any accumulated income thereon;

(B) any further, substituted or additional property, including any property, beneficial interests or rights referred to in paragraph 3 of this Deed and any accumulated income thereon which the Settlor or any other person or persons may donate, sell or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed;

(C) any other property acquired by the Trustees pursuant to, and in accordance with, the provisions of this Deed;

(D) the property and accumulated income thereon (if any) for the time being and from time to time into which any of the aforesaid properties and accumulated income thereon may be converted; and

(E) "Trust" means the trust relationship established between the Trustees and the Beneficiaries pursuant to the provisions of this Deed.

3. The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this Deed. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein. The Trustees may accept and hold as part of the Trust Fund any property of any kind or nature whatsoever that the Settlor or any other person or persons may donate, sell, lease or otherwise transfer or cause to be transferred to, or vest or cause to be vested in, or otherwise acquired by, the Trustees for the purposes of this Deed.

4. The name of the Trust Fund shall be "The Sawridge Trust" and the meetings of the Trustees shall take place at the Sawridge Band Administration Office located on the Sawridge Band Reserve.

5. The Trustees who are the original signatories hereto, shall in their discretion and at such time as they determine, appoint additional Trustees to act hereunder. Any Trustee may at any time resign from the office of Trustee of this Trust on giving not less than thirty (30) days notice addressed to the

other Trustees. Any Trustee or Trustees may be removed from office by a resolution that receives the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years. The power of appointing Trustees to fill any vacancy caused by the death, resignation or removal of a Trustee and the power of appointing additional Trustees to increase the number of Trustees to any number allowed by law shall be vested in the continuing Trustees or Trustee of this Trust and such power shall be exercised so that at all times (except for the period pending any such appointment) there shall be a minimum of Three (3) Trustees of this Trust and a maximum of Seven (7) Trustees of this Trust and no person who is not then a Beneficiary shall be appointed as a Trustee if immediately before such appointment there are more than Two (2) Trustees who are not then Beneficiaries.

6. The Trustees shall hold the Trust Fund for the benefit of the Beneficiaries; provided, however, that at the expiration of twenty-one (21) years after the death of the last survivor of the beneficiaries alive at the date of the execution of this Deed, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among the Beneficiaries then alive.

During the existence of this Trust, the Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the Trustees may make such payments at such time, and from time to time, and in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate.

7. The Trustees may invest and reinvest all or any part of the Trust Fund in any investments authorized for trustees' investments by the Trustee's Act, being Chapter T-10 of the Revised Statutes of Alberta, 1980, as amended from time to time, but the Trustees are not restricted to such Trustee Investments but may invest in any investment which they in their uncontrolled discretion think fit, and are further not bound to make any investment and may instead, if they in their uncontrolled discretion from time to time deem it appropriate, and for such period or periods of time as they see fit, keep the Trust Fund or any part of it deposited in a bank to which the Bank Act (Canada) or the Quebec Saving Bank Act applies.

8. The Trustees are authorized and empowered to do all acts that are not prohibited under any applicable laws of Canada or of any other jurisdiction and that are necessary or, in the opinion of the Trustees, desirable for the purpose of administering this Trust for the benefit of the Beneficiaries including any act that any of the Trustees might lawfully do when dealing with his own property, other than any such act committed in bad faith or in gross negligence, and including, without in any manner or to any extent detracted from the generality of the foregoing, the power

(a) to exercise all voting and other rights in respect of any stocks, bonds, property or other investments of the Trust Fund;

(b) to sell or otherwise dispose of any property held by them in the Trust Fund and to acquire other property in substitution therefor; and

(c) to employ professional advisors and agents and to retain and act upon the advice given by such professionals and to pay such professionals such fees or other remuneration as the Trustees in their uncontrolled discretion from time to time deem appropriate (and this provision shall apply to the payment of professional fees to any Trustee who renders professional services to the Trustees).

9. Administration costs and expenses of or in connection with this Trust shall be paid from the Trust Fund, including, without limiting the generality of the foregoing, reasonable reimbursement to the Trustees or any of them for costs (and reasonable fees for their services as Trustees) incurred in the administration of this Trust and for taxes of any nature whatsoever which may be levied or assessed by federal, provincial or other governmental authority upon or in respect of the income or capital of the Trust Fund.

10. The Trustees shall keep accounts in an acceptable manner of all receipts, disbursements, investments, and other transactions in the administration of the Trust.

11. The provision of this Deed may be amended from time to time by a resolution of the Trustees that received the approval in writing of at least eighty percent (80%) of the Beneficiaries who are then alive and over the age of twenty-one (21) years and, for greater certainty, any such amendment may provide for a commingling of the assets, and a consolidation of the administration, of this Trust with the assets and administration of any other trust established for the benefit of all or any of the Beneficiaries.

12. The Trustees shall not be liable for any act or omission done or made in the exercise of any power, authority or discretion given to them by this Deed provided such act or omission is done or made in good faith; nor shall they be liable to make good any loss or diminution in value of the Trust Fund not caused by their gross negligence or bad faith; and all persons claiming any beneficial interest in the Trust Fund shall be deemed to take notice of and shall be subject to this clause.

13. Any decision of the Trustees may be made by a majority of the Trustees holding office as such at the time of such decision and no dissenting or abstaining Trustee who acts in good faith shall be personally liable for any loss or claim whatsoever arising out of any acts or omissions which result from the exercise of any such discretion or power, regardless whether such Trustee assists in the implementation of the decision.

14. All documents and papers of every kind whatsoever, including without restricting the generality of the foregoing, cheques, notes, drafts, bills of exchange, assignments, stock transfer powers and other transfers, notices, declarations, directions, receipts, contracts, agreements, deeds, legal papers, forms and authorities required for the purpose of opening or operating any account with any bank, or other financial institution, stock broker or investment dealer and other instruments made or purported to be made by or on behalf of this Trust shall be signed and executed by any two (2) Trustees or by any person (including any of the Trustees) or persons designated for such purpose by a decision of the Trustees.

15. Each of the Trustees, by joining in the execution of this Deed, signifies his acceptance of the Trusts herein. Any other person who becomes a Trustee under paragraph 5 of this Trust shall signify his acceptance of the Trust herein by executing this Deed or a true copy hereof, and shall be bound by it in the same manner as if he or she had executed the original Deed.

16. This Deed and the Trust created hereunder shall be governed by, and shall be construed in accordance with, the laws of the Province of Alberta.

IN WITNESS WHEREOF the parties hereto have executed this Deed.

SIGNED, SEALED AND DELIVERED
in the presence of:

NAME

#[illegible], 12220 Stony Plain Road, T5N

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

NAME

ADDRESS

A. Settlor

CHIEF WALTER P. TWINN

B. Trustees:

1.

CHIEF WALTER P. TWINN

2. Catherine M Twinn

CATHERINE TWINN

3.

GEORGE TWIN

SCHEDULE

One Hundred Dollars ($100.00) in Canadian Currency.

This is Exhibit "D" referred to in the Affidavit of Paul Bujold
Sworn before me this 30 day of August A.D., 20 11
A Notary Public, A Commissioner for Oaths In and for the Province of Alberta
MARCO S. PORETTI

SAWRIDGE TRUSTS

24 November 2009

Dear Sawridge Trusts Potential Beneficiary,

During the consultations carried out by Four World Centre for Development Learning (Four Worlds), some of those consulted raised some questions regarding either the Sawridge Band Inter-Vivos Settlement (1985 Trust) or the Sawridge Trust (1986 Trust) or both (Trusts). The Trustees of the Trusts are pleased to try to answer your questions to the best of our ability based on information available at this time. The questions asked were:

- *Who are the trustees and how are they appointed?*
- *Are the children of individuals who became eligible under Bill C-31 also eligible as beneficiaries?*
- *What about the children of those individuals who are now deceased?*
- *What is the process whereby decisions are made about who is or is not a beneficiary?*
- *How do we get to the place where we can operate the Trusts without being forced into boxes originated with the Indian Act and that continue to cause disunity?*
- *If I am a beneficiary under a Trust and I receive benefits, am I taking something from someone else's table?*
- *Do "new" beneficiaries get the same benefits as those who have been eligible for their whole lives?*
- *Can benefits to seniors be structured to avoid tax consequences and not impact old age benefits?*
- *How can we ensure equity for all beneficiaries when the Band only serves those individuals who live on the Reserve?*
- *What happens to the Trust programs if the trustees change and new trustees have a different set of ideas?*

Attached to this letter is a copy of each of the deeds setting out the terms of each of the Trusts. These are the basic governing documents which, along with generally applicable principles and the rules of trust law, determine how the Trusts are operated.

Currently, the trustees of the two Trusts are the same, namely, Bertha L'Hirondelle, Clara Midbo, Catherine Twinn, Roland (Guy) Twinn and Walter Felix Twin. The trustees can be reached through the Trusts' office located in Edmonton, Alberta. The address, telephone number, fax number and email address for the Trusts is listed below on the letterhead. According to the trust deeds, the existing trustees select new trustees as trustees leave. The number of possible trustees for each trust is slightly different but the trustees have chosen to appoint five trustees for both trusts and have appointed the same trustees to each trust so that the two trusts can operate together.

Paragraph 6 of the deeds applying to each of the Trusts provides that the trustees have power to distribute income or capital of the Trusts "as they in their unfettered discretion from time to time deem appropriate for any one or more of the Beneficiaries; and the trustees may make such payment at such time and from time to time, in such manner and in such proportions as the Trustees in their uncontrolled discretion deem appropriate."

Although this provision refers to the Trustees' discretion as "unfettered", it is in fact controlled by the requirements of trust law. These requirements, which have been laid down in case law and are expressed in fairly general terms, can be summarized as follows:

- Trustees must give their active consideration to the exercise of their discretionary powers.
- Trustees must act in good faith, in the sense that they must take account of relevant factors and must not take account of irrelevant factors.

Whatever is relevant for these purposes depends on the circumstances of each particular case. However, the basic idea is that trustees should take account of factors relevant to the purposes of the Trusts.

The trustees have recently hired a Trust Administrator and Program Manager, Paul Bujold, to administer the benefits, develop the programs and run the office of the Trusts. Paul can be reached at the address and telephone/fax numbers below, by email at paul@sawridgetrusts.ca or on his cell at (780) 270-4209.

Sawridge Trusts are developing a web site that will be accessible to all beneficiaries. Certain parts of the site will contain documents that are of interest to all beneficiaries while other parts will only be accessible to the particular beneficiary as it will contain private information about that person. The Web site will also list the programs currently available through the Trusts and how to access them and will provide useful links to other sites that can provide information or support programs to the beneficiaries.

Each of the Trusts owns all the shares in a separate holding company. In the case of the 1985 Trust, that company is Sawridge Holdings Ltd. and in the case of the 1986 Trust it is 352736 Alberta Ltd. Through these companies, the Trusts have invested in a number of businesses. The assets of Sawridge Holdings Ltd. and 352736 Alberta Ltd. are listed on the attached flow chart. The Directors of the holding companies and their subsidiaries, called the Sawridge Group of Companies, are independent individuals who have been chosen for their skills and experience in overseeing business enterprises such as those owned by the companies.

The Trusts were established to provide on-going benefits to the beneficiaries from the revenue generated by the Trusts' investments. This revenue fluctuates with the economic climate. The success of the businesses vary, accordingly. The resources of each Trust are limited and any system of programs has to be based on views about equitable and appropriate use of the resources available.

It is for the trustees to consider the weight to be given to particular factors. They may consider the length of time a person has been a beneficiary as one relevant factor if this is appropriate to the nature of the particular program or benefit being provided.

Another factor the trustees may consider is the impact of taxation, both generally and in the circumstances of particular beneficiaries. The trustees may be able to attempt to structure distributions in a way that will be as tax-efficient as reasonably possible. It is possible, however, that a particular distribution from the Trusts may have an impact on a person's entitlement to other programs such as Old Age Security. In considering the appropriate programs, the trustees may consider it relevant that certain programs and other benefits are only available to beneficiaries who live on the Reserve and other programs may only be available to beneficiaries living off the Reserve.

As trustees of discretionary trusts, the trustees have a broad discretion to develop those benefits through the Trusts that they feel would, from time to time, assist the individual beneficiaries and the Sawridge Band community grow and develop to better meet their own needs, the costs of which are consistent with the revenues available to the Trusts. Following the Four Worlds report, the trustees adopted a list of potential benefits suggested by the beneficiaries and Four Worlds. These benefits will be put in place gradually as more work is done on planning the financial impact of the programs on the Trusts and as the programs are matched with other programs already existing through the Regional Council, the Alberta Government, the Canadian Government or other agencies.

The trustees are responsible for exercising their discretion in respect of the programs while they are trustees. They will be responsible for evaluating the success of the programs on an on-going basis and therefore would be expected to make changes when they determine that changes are required. They also have the power to make changes based on their having, as phrased in the question asked by a beneficiary, "a different set of ideas". However, in order to make any such change they would need to consider whether replacing an already existing program would be reasonable in all the circumstances. The trustees may also, from time to time, have to take into consideration the cost of a program in relation to the amount of revenue available to the Trusts.

The rules for eligibility as a beneficiary are presently being worked out for each of the trusts. According to the trust deeds, the persons who qualify as beneficiaries are to some extent different for the 1985 Trust and for the 1986 Trust. In the 1985 Trust (paragraph 2(a) of the Deed), 'beneficiaries' are defined as persons who are also qualified to be Band members in accordance with the criteria provided in the Indian Act as at 15 April 1982. In the 1986 Trust (paragraph 2(a) of the Deed), 'beneficiaries' are defined as "all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada.".

The trustees are presently in the process of having some research carried out by experts in Canadian law and First Nations and Cree traditional law to develop a clear list of criteria. This

will help in the process of determining who is an eligible beneficiary, especially under the 1985 Trust where the rules are more complex.

As part of this process, the trustees will post a notice in newspapers in British Columbia, Alberta and Saskatchewan asking anyone who thinks that they may be a beneficiary under either trust to provide the Trusts with information about why they feel they are eligible. Based on the facts determined and the legal advice received, the Trusts will then develop a list of qualified beneficiaries. Where it is still not clear after this process whether someone is or is not a beneficiary, the Trusts will apply to the Alberta Court for its advice on the matter.

We hope that this information answers most people's questions. As more information becomes available we will keep the beneficiaries informed, either by newsletter or through the web site. If you have any questions, please do not hesitate to contact our office and the Trusts Administrator will try to assist you.

Cordially

Paul Bujold,

Interim Chair

Sawridge Trusts Board of Trustees

Attachments

12

Federal Court | Cour fédérale

Date: 20130515

Docket: T-923-12
Docket: T-922-12

Citation: 2013 FC 509

Ottawa, Ontario, May 15, 2013

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-923-12

BETWEEN:

MAURICE FELIX STONEY

Applicant

and

SAWRIDGE FIRST NATION

Respondent

Docket: T-922-12

BETWEEN:

ALINE ELIZABETH (MCGILLIVRAY) HUZAR AND JUNE MARTHA (MCGILLIVRAY) KOLOSKY

Applicants

and

SAWRIDGE FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

[2] The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

[3] The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was

not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

[4] In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 – 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

[5] Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

[6] After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their

character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

[7] In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

[8] The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

[9] I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge v Canada*, 2004 FCA 16 at para 26, [2004] FCJ no 77.

[10] Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge v Canada*, 2003 FCT 347, [2003] 4 FC 748, and *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77 in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

[11] A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge v Canada*, 2003 FCT 347 at paras 27 to 30, 4 FC 748, [2003] 4 FC 748:

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic

entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

> ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...
>
> [Emphasis added]

This decision was upheld on appeal in *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77.

[12] The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

[13] While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

[14] This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

[15] I also cannot identify anything in Bill C-31 that would extend an automatic right of membership in the Sawridge First Nation to William Stoney. He lost his right to membership when his father sought and obtained enfranchisement for the family. The legislative amendments in Bill C-31 do not apply to that situation.

[16] Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v Canada*, [2000] FCJ no 873, 258 NR 246.

[17] It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460.

[18] The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

[19] The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

[20] In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

[21] Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v Favel*, 2007 FC 271 at para 19, [2007] FCJ no 347, and *Lavalee v Louison*, [1999] FCJ no 1350 at paras 34-35, 91 ACWS (3d) 337.

[22] The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

[23] For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-923-12 T-922-12
STYLE OF CAUSE:	STONEY v SAWRIDGE FIRST NATION and HUZAR ET AL v SAWRIDGE FIRST NATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 5, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	May 15, 2013

APPEARANCES:

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Canada Trust Co., trustee for the Leonard Foundation v. Ontario Human Rights Commission; Royal Ontario Museum, Class of Persons Eligible to Receive Scholarships from the Leonard Foundation and Public Trustee

Indexed as: Canada Trust Co. v. Ontario Human Rights Commission
(C.A.)

74 O.R. (2d) 481
[1990] O.J. No. 615
Action Nos. 586/87 and 622/87

ONTARIO
Court of Appeal
Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)
April 24, 1990.

Courts -- Jurisdiction -- Charitable trust established to provide scholarships on allegedly discriminatory basis -- Complaint filed under Ontario Human Rights Code -- Court having jurisdiction to make declaration as to validity of trust -- Declaration prior to investigation by Human Rights Commission not premature.

Trusts and trustees -- Charitable trusts -- Public policy -- Discrimination -- Charitable trust established to provide scholarships exclusively to white, Protestant, British subjects -- Trust instrument also providing that amount of income spent on providing scholarships for female students not to exceed one quarter of total money available for all students -- Provisions discriminatory and invalid as infringing public policy.

Trusts and trustees -- Charitable trusts -- Cy-pres -- Charitable trust established to provide scholarships on discriminatory basis -- Discriminatory provisions invalid --

Cy-pres doctrine applied and trust brought into accord with public policy by removing restrictions with respect to race, colour, creed, ethnic origin and sex.

An educational trust was established in 1923. The terms of the trust excluded from benefit "all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual". The power to select recipients of the scholarships was given to a committee, the members of which had to possess the same qualifications. The trust instrument also provided that the amount of income spent on providing scholarships for female students in any one year should not exceed one quarter of the total money available for all students for that year.

A complaint was filed under the Ontario Human Rights Code, 1981.

The trustee applied for the advice, opinion and direction of the court upon certain questions arising from the administration of the trust, including whether the provisions of the trust were void or illegal by reason of contravention of public policy as declared in the Human Rights Code, 1981, contravention of other public policy or uncertainty.

The trial judge found that the court had jurisdiction to rule on the question of discrimination contrary to the Human Rights Code, 1981 and that such a ruling before the Human Rights Commission had investigated and considered the complaint would not be premature. He also found that the trust provisions were not invalid on the ground of contravention of the Code or public policy or on the ground of uncertainty.

The Human Rights Commission and a residuary legatee of the settlor appealed.

Held, the appeal should be allowed.

Per Robins J.A. (Osler J. (ad hoc) concurring): The trial

judge was correct in finding that the court had jurisdiction to make a determination as to the validity of the trust and that such a determination was not premature.

The trust violated public policy. It was premised on notions of racism and religious superiority that contravened contemporary public policy. However, the trust should not fail. The cy-pres doctrine should be applied and the trust should be brought into accord with public policy so as to permit the general charitable intent to advance education to be implemented. The recitals should be struck out and all restrictions with respect to race, colour, creed or religion, ethnic origin and sex should be struck out.

Per Tarnopolsky J.A. (concurring in result): Generally, a charitable trust should not fail for uncertainty. The definition of the persons eligible to be recipients of scholarships constituted a condition precedent. Such a condition will not fail for uncertainty if some person or persons can be established as satisfying the condition. The definition was, accordingly, sufficiently certain.

The trust was void on the ground of public policy to the extent that it discriminated on grounds of race, religion and sex.

A charitable trust which fails can be applied cy-pres if the settlor had a general charitable intention. In this case, the settlor's paramount intention was charitable and the discriminatory scheme he chose as merely the machinery for carrying out his general charitable intention. Accordingly, the provisions of the trust which confined management, judicial advice and benefit on discriminatory grounds should be deleted from the trust instrument.

Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.); Re Lysaght; Hill v. Royal College of Surgeons of England, [1966] Ch. 191, [1965] 2 All E.R. 888, 109 Sol. Jo. 577 (Ch. D.); National Anti-Vivisection Society v.

A. Can the recitals be considered in deciding this issue?

In holding that the provisions of the trust did not violate either the Human Rights Code, 1981 or public policy, McKeown J. took into account only the operative clauses of the trust document and the second sentence of the fourth recital. In his view, the balance of the recitals were merely expressions of the settlor's motive and, hence, irrelevant to a determination of the issues before him. While he found the motives offensive to today's general community, he concluded that these recitals could play no part in interpreting the trust document or in resolving the question of whether the trust contravened public policy.

In my opinion, the recitals cannot be isolated from the balance of the trust document and disregarded by the court in giving the advice and direction sought by the trustee in this case. The document must be read as a whole. While the operative provisions of an instrument of this nature will ordinarily prevail over its recitals, where the recitals are not clearly severable from the rest of the instrument and themselves contain operative words or words intended to give meaning and definition to the operative provisions, the instrument should be viewed in its entirety. That, in my opinion, is the situation in the case of this trust document.

The recitals here in no way contradict or conflict with the operative provisions. The settlor made constant reference to them throughout the operative part of the document. He restricted the class of persons entitled to the benefits of the trust by reference to the recitals; he set the qualification for those who might administer the trust and give judicial advice thereon by reference to the recitals; and he stipulated the universities and colleges which might be attended by scholarship winners by reference to the recitals.

Moreover, the recitals were intended to give guidance and direction to the General Committee in awarding scholarships. They go beyond the restriction in the second sentence of the fourth recital excluding "all who are not Christians of the

White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual" from benefits in the Foundation. They indicate that not all white Protestants of British parentage should be eligible for the benefits of the trust but, rather, only those "whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire" and "who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire". Those statements were intended as standards which, if not binding, were meant to be taken into account in the making of awards. I would not regard them as irrelevant. Nor would I regard any other of the recitals as irrelevant. The operative provisions were intended to be administered in accordance with the concepts articulated in the recitals. As this document is framed, its two parts are so linked as to be inextricably interwoven. In my opinion, one part cannot be divorced from the other.

Furthermore, and perhaps more fundamentally, even if the recitals are properly treated as going only to the matter of motive, I would not think they can be ignored on an application of this nature in which a trustee seeks advice with respect to public policy issues. While the Foundation may have been privately created, there is a clear public aspect to its purpose and administration. In awarding scholarships to study at publicly supported educational institutions to students whose application is solicited from a broad segment of the public, the Foundation is effectively acting in the public sphere. Operating in perpetuity as a charitable trust for educational purposes, as it has now for over half a century since the settlor's death, the Foundation has, in realistic terms, acquired a public or, at the least, a quasi-public character. When challenged on public policy grounds, the reasons, explicitly stated, which motivated the Foundation's establishment and give meaning to its restrictive criteria, are highly germane. To consider public policy issues of the kind in question by sterilizing the document and treating the recitals

as though they did not exist, is to proceed on an artificial basis. In my opinion, the court cannot close its eyes to any of this trust document's provisions.

B. Does the trust violate public policy?

Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds": Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 [per Crocket J., quoting Lord Aitkin in Fender v. Mildmay, [1937] 3 All E.R. 402, at p. 13 S.C.R.]. I have regard also to the observation of Professor D.W.M. Waters in his text on the Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), at p. 240 to the effect that:

> The courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.

Nonetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. This, in my opinion, is manifestly such a case.

The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law: Blathwayt v. Lord Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684, 119 Sol. Jo. 795 (H.L.). That interest must, however, be limited in the case

of this trust by public policy considerations. In my opinion, the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.

According to the document establishing the Leonard Foundation, the Foundation must be taken to stand for two propositions: first, that the white race is best qualified by nature to be entrusted with the preservation, development and progress of civilization along the best lines, and, second, that the attainment of the peace of the world and the advancement of civilization are best promoted by the education of students of the white race, of British nationality and of the Christian religion in its Protestant form.

To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.

To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

Given this conclusion, it becomes unnecessary to decide

whether the trust is invalid by reason of uncertainty or to consider the questions raised in this regard in para. 23 of Mr. McLeod's affidavit which I reproduced earlier. Nor is it necessary to make any determination as to whether other educational scholarships may contravene public policy.

On the material before the court, it appears that many scholarships are currently available to students at colleges and universities in Ontario and elsewhere in Canada which restrict eligibility or grant preference on the basis of such factors as an applicant's religion, ethnic origin, sex, or language. None, however, so far as the material reveals, is rooted in concepts in any way akin to those articulated here which proclaim, in effect, some students, because of their colour or their religion, less worthy of education or less qualified for leadership than others. I think it inappropriate and indeed unwise to decide in the context of the present case and in the absence of any proper factual basis whether these other scholarships are contrary to public policy or what approach is to be adopted in determining their validity should the issue arise. The court's intervention on public policy grounds in this case is mandated by the, hopefully, unique provisions in the trust document establishing the Leonard Foundation.

THE CY-PRES ISSUE

On this issue, I agree with the learned weekly court judge that the trust established by the indenture is a charitable trust. I am persuaded that the settlor intended the trust property to be wholly devoted to the furtherance of a charitable object whose general purpose is the advancement of education or the advancement of leadership through education.

It must not be forgotten that when the trust property initially vested in 1923 the terms of the indenture would have been held to be certain, valid and not contrary to any public policy which rendered the trust void or illegal or which detracted from the settlor's general intention to devote the property to charitable purposes. However, with changing social attitudes, public policy has changed. The public policy of the

1920s is not the public policy of the 1990s. As a result, it is no longer in the interest of the community to continue the trust on the basis predicated by the settlor. Put another way, while the trust was practicable when it was created, changing times have rendered the ideas promoted by it contrary to public policy and, hence, it has become impracticable to carry it on in the manner originally planned by the settlor.

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

The observations of Lord Simonds in National Anti-Vivisection Society v. Inland Revenue Commissioners, [1948] A.C. 31, [1947] 2 All E.R. 217, 177 L.T. 226 (H.L.), are apposite to this case. At p. 74 A.C. he said:

> A purpose regarded in one age as charitable may in another be regarded differently. I need not repeat what was said by Jessel M.R. in In re Campden Charities, 18 Ch. D. 310. A bequest in the will of a testator dying in 1700 might be held valid on the evidence then before the court but on different evidence held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. But this is not to say that a charitable trust, when it has once been established can ever fail. If by a change in social habits and needs or, it may be, by a change in the law the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases to the charity commissioners or in educational charities to the Minister of Education and ask that a cy-pres scheme may be established. ... A charity once established does not die, though its nature may be changed.

Reference might also be made to A.W. Scott and W.F. Fratcher, eds., The Law of Trusts, 4th ed. (Boston: Little, Brown & Co., 1989), where, at vol. IVA, pp. 535-36, the following comment appears:

> The result of a too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and to render it useless is to defeat his intention (Dunbar v. Board of Trustees of George W. Clayton College, 170 Colo. 327, 461 P.2d 28 (1969) (quoting the text)). Said John Stuart Mill,
>
> "Under the guise of fulfilling a bequest, this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow. ... No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found."
>
> Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. He is permitted to devote his property in perpetuity to charitable purposes only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity that by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity that shall be forever exempt from modification.

(Emphasis added)

See generally, Waters, Law of Trusts, at pp. 611-32 (a section entitled "Cy-pres: the Scheme-Making Power"); Power v. Nova Scotia (Attorney General) (1903), 35 S.C.R. 182; Re Fitzpatrick (1984), 6 D.L.R. (4th) 644, 16 E.T.R. 221, 27 Man. R. (2d) 284 (Q.B.); Re Tacon; Public Trustee v. Tacon, [1958] Ch. 447,

[1958] 1 All E.R. 163, 102 Sol. Jo. 53 (C.A.); and Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.).

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DISPOSITION

To give effect to these reasons, I would strike out the recitals and remove all restrictions with respect to race, colour, creed or religion, ethnic origin and sex as they relate to those entitled to the benefits of the trust and as they relate to the qualifications of those who may be members of the General Committee or give judicial advice and, as well, as they relate to the schools, universities or colleges in which scholarships may be enjoyed. (The provision according preferences to sons and daughters of members of the classes of persons specified in the trust document remains unaffected by this decision.) I would answer the questions posed as follows:

Q. 1(ii). Yes, the provisions of the trust which confine management, judicial advice, schools, universities and colleges and benefits on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

Q. 1(i), (iii) and (iv). It is not necessary to answer these questions.

Q. 2. No.

Q. 3. Yes.

Q. 4. As before, but with the deletion of the discriminatory restrictions mentioned in the answer to Q. 1(ii).

QQ. 5 and 6. The application form should be changed in accordance with this decision.

In the result, I would allow the appeal, set aside the order of McKeown J., and issue judgment as aforesaid. The costs of the appeal and of the application before McKeown J. shall be paid to the parties on a solicitor-and-client basis out of the

corpus of the trust.

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TARNOPOLSKY J.A. (concurring in result):--

THE JUDICIAL HISTORY AND THE ISSUES

This case concerns appeals from the judgment of McKeown J., dated August 10, 1987 [reported 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193] upon an application, under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee under an indenture made on December 28, 1923, between one Reuben Wells Leonard, the settlor, and the Toronto General Trusts Corporation, the trustee, for advice and direction upon the following questions arising out of the administration of the trust created by the indenture:

1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of

(i) public policy as declared in the Human Rights Code, 1981 (the "Code");

(ii) other public policy, if any;

(iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or

(iv) uncertainty?

2. If the answer to any of the questions propounded above

is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?

3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?

4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/or the General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite the infringement of rights under Part 1 of the Code?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

The answers given by McKeown J. were as follows:

Question 1 (i): No; (ii): No; (iii): No; (iv): No.

Questions 2, 3 and 4: The answers given to the previous

Inland Revenue Commissioners, [1948] A.C. 31, [1947] 2 All E.R. 217, 177 L.T. 226 (H.L.); Re Wren, [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.J.), apld

Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65; Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 2 C.H.R.R. D/468, 81 C.L.L.C. Paragraph14,117, 22 C.P.C. 130, 124 D.L.R. (3d) 193, 37 N.R. 455, revg (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. Paragraph14,003, 105 D.L.R. (3d) 707 (C.A.), consd

Blainey v. Ontario Hockey Assn. (1986), 54 O.R. (2d) 513, 21 C.R.R. 44, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 26 D.L.R. (4th) 728, 14 O.A.C. 194 (C.A.) [leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274n, 21 C.R.R. 44n, 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 72 N.R. 76n, 17 O.A.C. 399n], distd

Other cases referred to

Re Allen; Faith v. Allen, [1953] Ch. 810, [1953] 2 All E.R. 898, 97 Sol. Jo. 606 (C.A.) [subsequent proceedings at [1954] Ch. 259, [1954] 1 All E.R. 526, 98 Sol. Jo. 146]; Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 36 C.R.R. 193, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 10 C.H.R.R. D/5719, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289; Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, 18 D.L.R. (3d) 1; Blathwayt v. Lord Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684, 119 Sol. Jo. 795 (H.L.); Clayton v. Ramsden, [1943] A.C. 320, [1943] 1 All E.R. 16, 86 Sol. Jo. 384 (H.L.); Christie v. York Corp., [1940] S.C.R. 139, [1940] 1 D.L.R. 81; Re Fitzpatrick (1984), 6 D.L.R. (4th) 644, 16 E.T.R. 221, 27 Man. R. (2d) 284 (Q.B.); Gilmour v. Coats, [1949] A.C. 426, [1949] 1 All E.R. 848, 93 Sol. Jo. 355 (H.L.); Re Gott; Glazebrook v. Leeds University, [1944] Ch. 193, [1944] 1 All E.R. 293, 88 Sol. Jo. 103 (Ch. D.); Income Tax Special Purposes Commissioners v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28, 65 L.T. 621 (H.L.); Jones v. T. Eaton Co., [1973] S.C.R. 635, 35 D.L.R. (3d) 97; Re Levy Estate (1989), 68 O.R. (2d) 385, 58 D.L.R. (4th) 375, 33 E.T.R. 1,

33 O.A.C. 99 (C.A.); McGovern v. Attorney General, [1982] Ch. 321, [1981] 3 All E.R. 493, [1982] 2 W.L.R. 222 (Ch. D.); McPhail v. Doulton, [1971] A.C. 424, [1970] 2 All E.R. 228, 114 Sol. Jo. 375 (H.L.); Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137, 94 Sol. Jo. 777 (H.L.); Re Moon; Ex parte Dawes (1886), 17 Q.B.D. 275, 55 L.T. 114, 34 W.R. 753 (C.A.); Noble v. Alley, [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.) [revd [1951] S.C.R. 64, [1951] 1 D.L.R. 321]; Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, 3 C.H.R.R. D/781, 82 C.L.L.C. Paragraph17,005, 132 D.L.R. (3d) 14, 40 N.R. 159; Ontario Human Rights Commission v. Simpson-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. Paragraph17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241; Oppenheim v. Tobacco Securities Trust Co., [1951] A.C. 297, [1951] 1 All E.R. 31, [1951] 1 T.L.R. 118 (H.L.); Power v. Nova Scotia (Attorney General) (1903), 35 S.C.R. 182; R. v. Tottenham & District Rent Tribunal; Ex parte Northfield (Highgate) Ltd., [1957] 1 Q.B. 103, [1956] 2 All E.R. 863, 100 Sol. Jo. 552 (Q.B.); Re Selby's Will Trusts; Donn v. Selby, [1965] 3 All E.R. 386, [1966] 1 W.L.R. 43, 110 Sol. Jo. 74 (Ch. D.); Re Tacon; Public Trustee v. Tacon, [1958] Ch. 447, [1958] 1 All E.R. 163, 102 Sol. Jo. 53 (C.A.); Re Tarnpolsk; Barclays Bank Ltd. v. Hyer, [1958] 3 All E.R. 479, [1958] 1 W.L.R. 1157, 102 Sol. Jo. 857 (Ch. D.); Re Wilson; Twentyman v. Simpson, [1913] 1 Ch. 314, [1911-3] All E.R. Rep. 1101, 57 Sol. Jo. 245 (Ch. D.)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 15(1), (2), 27, 28
Charities Accounting Act, R.S.O. 1980, c. 65
Conveyancing and Law of Property Act, R.S.O. 1980, c. 90, ss. 13, 22
Human Rights Code, 1981, S.O. 1981, c. 53, ss. 1 [am. 1986, c. 64, s. 18(1)], 13, 31(2), 40 [am. 1986, c. 64, s. 18(16)], 40(1)
Insurance Act, R.S.O. 1980, c. 218, s. 117
Labour Relations Act, R.S.O. 1980, c. 228, s. 13
Ministry of Citizenship and Culture Act, 1982, S.O. 1982, c. 6, s. 4

Ontario Human Rights Code, R.S.O. 1970, c. 318
Ontario Human Rights Code, R.S.O. 1980, c. 340
Race Relations Act, 1968 (U.K.), c. 71 [now Race Relations Act, 1976 (U.K.), c. 74]
Trustee Act, R.S.O. 1980, c. 512, s. 60

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 14.05(2) [am. O. Reg. 711/89, s. 14], 14.05(3) [am. O. Reg. 711/89, s. 15]

Authorities referred to

Halsbury's Laws of England, 4th ed. (London: Butterworths, 1974), vol. 5 "Charities", p. 309, para. 505, pp. 430-31, para. 696
Hansard, 33rd Parliament, 2nd Session, May 28, 1986, pp. 937-41
Scott, A.W. and W.F. Fratcher, eds., The Law of Trusts, 4th ed. (Boston: Little, Brown & Co., 1989), vol. IVA, pp. 535-36
Waters, D.W.M., Law of Trusts in Canada (Toronto: Carswell, 1974), c. 14 "Charitable Trusts", pp. 460-504, 502, 601-03, 626
Waters, D.W.M., Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), pp. 240, 611-32 (section entitled "Cy-près: the Scheme-Making Power")

Treaties, covenants and conventions referred to

International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), Articles 2, 3, 25, 26
International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180
International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX)

APPEAL from the judgment of the High Court of Justice (1987), 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193, which upheld the validity of certain trust provisions.

Janet E. Minor, for Ontario Human Rights Commission, appellant.

Alan P. Shanoff and Francy B. Kussner, for Royal Ontario Museum, intervener.

H. Donald Guthrie, Q.C., and John W.R. Day, for Canada Trust Company, respondent.

William L.N. Somerville, Q.C., and Lindsay A. Histrop, for Class of Persons Eligible to Receive Scholarships from the Leonard Foundation, intervener.

Stan J. Sokol, for Public Trustee, intervener.

ROBINS J.A. (OSLER J. (ad hoc) concurring):-- The principal question in this appeal is whether the terms of a scholarship trust established in 1923 by the late Reuben Wells Leonard are now contrary to public policy. If they are, the question then is whether the cy-pres doctrine can be applied to preserve the trust.

The appeal is from the order of McKeown J. [reported (1987), 61 O.R. (2d) 75, 42 D.L.R. (4th) 263, 27 E.T.R. 193 (H.C.J.)] on an application under s. 60 of the Trustee Act, R.S.O. 1980, c. 512 and rules 14.05(2) [am. O. Reg. 711/89, s. 14] and (3) [am. O. Reg. 711/89, s. 15] of the Rules of Civil Procedure, O. Reg. 560/84, by the Canada Trust Company, as the successor trustee of a scholarship trust known as the Leonard Foundation, for the advice, opinion and direction of the court upon certain questions arising in the administration of the trust. The questions put before the court are as follows:

1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the "Indenture") set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee

thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of

(i) public policy as declared in the Human Rights Code, 1981 (the "Code");

(ii) other public policy, if any;

(iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or

(iv) uncertainty?

2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?

3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-pres?

4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/or the General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite

the infringement of rights under Part 1 of the Code?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

McKeown J. found that the trust provisions were not invalid for any of the reasons set out in Question 1, which made it unnecessary for him to answer Questions 2, 3 and 4. He answered Question 5 in the negative, which made it unnecessary to answer Question 6.

The order has been appealed by two of the parties to the proceedings. The first appellant, the Ontario Human Rights Commission, takes the position that the learned weekly court judge should have declined to answer Questions 1(i), 1(iii) and 5 on the ground that these questions concern the applicability of the Human Rights Code, 1981, S.O. 1981, c. 53, and relate to matters within the exclusive primary jurisdiction of the Commission and, therefore, are not properly before the court.

The appellant, the Royal Ontario Museum (the ROM), has status in these proceedings as one of the charitable institutions named in the last will of Reuben Wells Leonard. Under this will, any amount that falls to be administered in the residuary estate is to be divided among certain individuals and charitable institutions as set out by the testator. The ROM's position on this appeal is that the scholarship trust violates public policy and fails completely. In its submission, the judge erred in not holding that the trust fund falls into the Leonard estate and must be distributed to the residual beneficiaries, including the ROM, in accordance with the provisions of the will.

The Public Trustee and the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation are interveners in the case. They both support the judgment below

and ask that the appeal be dismissed. However, should the court find that the terms of the scholarship trust violate public policy, the Public Trustee submits that the trust nonetheless has a valid charitable purpose and should not fail but should be applied cy-pres without the offending conditions. On the other hand, counsel for the Class of Persons Eligible to Receive Scholarships takes the position that if the trust violates public policy, it fails completely and is incapable of being applied cy-pres.

The respondent, Canada Trust Company (the trustee), takes no position other than to suggest that: (1) the court below had jurisdiction to hear the application, and (2) that the indenture in 1923 created a valid charitable trust and, should this court determine by reason of the Human Rights Code, 1981 or other grounds of public policy that the conditions are now void, then either (a) such conditions are merely malum prohibitum and the court should strike them out and leave the charitable trust to operate freed therefrom, or (b) a reference should be directed to apply the fund cy-pres.

THE ISSUES

The preliminary issue as to jurisdiction raised by the Ontario Human Rights Commission, can be disposed of very briefly. In my opinion, this application is properly before the court. I agree with McKeown J. and Tarnopolsky J.A. in this regard and have nothing to add to their reasons. On the remaining issues, while I agree with Tarnopolsky J.A. that the appeal must be allowed, my reasons for reaching that conclusion differ from those of my learned colleague.

The remaining issues, in my view, reduce themselves to these questions:

1. Do the provisions of the trust contravene public policy or are they void for uncertainty?

2. If the answer to that question is in the affirmative, can the doctrine of cy-pres be applied to save the trust?

Before considering these issues, I think it important to examine the trust and review the circumstances that compelled the trustee to launch this application for advice and direction.

THE FACTS

A. The trust document

By indenture dated December 28, 1923 (the indenture or trust document), Reuben Wells Leonard (the settlor) created a trust to be known as the Leonard Foundation (the trust or the scholarship trust or the Foundation). He directed that the income from the property transferred and assigned by him to the trust (the trust property or trust fund) be used for the purpose of educational scholarships to be called the Leonard Scholarships. The Canada Trust Company has been appointed successor trustee of the Foundation.

The indenture opens with four recitals which relate to the race, religion, citizenship, ancestry, ethnic origin and colour of the class of persons eligible to receive scholarships. These recitals read as follows:

> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into

leading citizens of the Empire:

AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.

The schools, colleges and universities in which the scholarships may be granted are described in the body of the Indenture in these terms:

2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the Settlor intends shall be excluded from the management of or benefits in the said Foundation ...

. . . . .

PROVIDED further and as an addition to the class or type of schools above designated or in the Schedule "A" hereto attached, the term ''School" may for the purposes of Scholarships hereunder, include Public Schools and Public

Collegiate Institutes and High Schools in Canada of the class or type commonly known as such in the Province of Ontario as distinguished from Public Schools and Collegiate Institutes and High Schools (if any) under the control and domination of the class or classes of persons hereinbefore referred to as intended to be excluded from the management of or benefits in said Foundation, and shall also include a Protestant Separate School, Protestant Collegiate Institute or Protestant High School in the Province of Quebec.

PROVIDED further that in the selection of Schools, Colleges and Universities, as herein mentioned, preference must always be given by the Committee to the School, College or University, which, being otherwise in the opinion of the Committee eligible, prescribes physical training for female students and physical and military or naval training for male students.

(Emphasis added)

The management and administration of the Foundation is vested in a permanent committee known as the General Committee. The Committee consists of 25 members, all of whom must be possessed of the qualifications set out in the indenture's recitals:

The administration and management of the said Foundation is hereby vested in a permanent Committee to be known as the General Committee, consisting of twenty-five members, men and women possessed of the qualifications hereinbefore in recital set out.

(Emphasis added)

The General Committee is given, inter alia, the following power:

(c) Power to select students or pupils of the classes or types hereinbefore and hereinafter described as recipients of the said Scholarships or for the enjoyment of same, as the Committee in its discretion may decide.

(Emphasis added)

The class of students eligible to receive scholarships is described as follows:

SUBJECT to the provisions and qualifications hereinbefore and hereinafter contained, a student or pupil to be eligible for a Scholarship shall be a British Subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the following classes or descriptions of persons who are nct of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said Foundation as in the preamble or recital more particularly referred to, but regardless of the order of priority in which they are designated herein, namely:

(a) Clergymen,

(b) School Teachers,

(c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,

(d) Graduates of the Royal Military College cf Canada,

(e) Members of the Engineering Institute of Canada,

(f) Members of the Mining & Metalurgical (sic) Institute of Canada.

PROVIDED further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for

Scholarships under the terms hereof, shall not exceed one-fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

(Emphasis added)

The settlor expressed the wish that:

... the students or pupils who have enjoyed the benefits of a scholarship ... will form a Club or association for the purpose of

. . . . .

(b) Encouraging each other when the occasion arises and circumstances will permit, to personally afford financial assistance to pupils and students of similar classes as in recital hereinbefore described to obtain the blessings and benefits of education ...

(Emphasis added)

The trustee is empowered at the expense of the trust to apply to a judge of the Supreme Court of Ontario possessing the qualifications set out in the recitals for the opinion, advice and direction of the court:

9. The Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared.

(Emphasis added)

I should perhaps note that no challenge was put forth on this basis in either this court or the court below.

The Leonard Scholarships have been available for more than 65 years to eligible students across Canada and elsewhere, and are tenable at eligible schools, colleges and universities in Canada and Great Britain. Application forms are available upon request from members of the General Committee. An applicant submits the application through a member of the General Committee who conducts a personal interview of the applicant, completes the nomination and recommendation and forwards the application to the General Committee.

The Committee on Scholarships meets in April or May of each year to consider all of the applications and to make recommendations to the General Committee. Finally, the General Committee meets and, after consideration of the recommendation of the Committee on Scholarships, approves the awards for the following academic year.

B. The circumstances leading up to the application

The circumstances leading up to this application are described in the affidavit of Jack Cummings McLeod, a trust officer with Canada Trust Company who has been the secretary of the General Committee since 1975. In light of the public policy aspects of the application, the circumstances described by Mr. McLeod become significant.

Mr. McLeod deposes that since 1975 he, as secretary, and various members of the General Committee have received correspondence from students, parents and academics expressing concerns and complaints with regard to the terms of eligibility for scholarships under the trust. Since 1956, numerous press articles, news reports and letters to the editor have appeared in the daily and university press of Canada commenting on, or reporting on comments about, the eligibility conditions. Mr. McLeod is aware of approximately 30 such articles, all generally critical of the eligibility requirements. The tenor of these articles is evident from their headings, which include "A Sorry Anachronism", "Act Now on Racist Funding" and "Whites Only Scholarship is Labelled 'Repugnant' ".

Since 1971, the Human Rights Commissions of Alberta and

Ontario and the Human Rights Branch of the Department of Labour of British Columbia have complained to the trustee and officials of the General Committee about the conditions of eligibility. Other bodies such as the Saskatoon Legal Assistance Clinic and units of the Anglican Church of Canada have made similar complaints.

Over the years 1975 to 1982, various schools and universities, including the University of Toronto, the University of Western Ontario and the University of British Columbia, have also complained, without success, to the Foundation about the eligibility requirements. In 1982, the University of Toronto discontinued publication of the Leonard Scholarship and refused to continue processing award payments because of the University's policy with respect to awards containing discriminatory or irrelevant criteria. The University of Alberta has taken similar action.

In January 1986, the chairman of the Ontario Human Rights Commission advised the Foundation that the terms of the scholarships appear to "run contrary to the public policy of the Province of Ontario" and requested "appropriate action to have the terms of the trust changed". In response, the Foundation took the position that it was administering a private trust whose provisions did not offend the Human Rights Code, 1981.

At various times over the past 25 years, members of the General Committee and officials of the trustee have themselves expressed concern about the eligibility criteria. The matter has been considered internally and, it appears, has been the subject of "divisive" debate at meetings of the General Committee.

In April 1986, the Most Reverend Edward W. Scott, then Primate of the Anglican Church of Canada, the church of which the late Colonel Leonard was a prominent member, wrote to the Foundation expressing his "deep concerns" about the trust. He recorded, in strong terms, his view that the eligibility criteria are discriminatory and against public policy and not "in keeping with the spirit and intent of the Canadian

Charter of Rights". He urged the Committee to apply to the courts to have the offensive terms "read out of the trust deed ... with the ultimate result that effect will continue to be given to the trust deed and gift as a whole". He concluded his letter stating:

> I have every confidence that if the kind benefactor of this Trust were living in 1986, rather than those many years ago, there would be agreement that the scope of possible recipients be widened bringing the document in line with standards of public acceptance of today. There is every reason why the good works of the generous benefactor of the Foundation should live on in perpetuity but, in my view, they must be in keeping with the society of today just as what was written those many years ago was, no doubt, although regretfully, in keeping with the society of that day.

In August 1986, the Ontario Human Rights Commission, not satisfied with the response to its earlier letter, filed a formal complaint against the Leonard Foundation alleging that the trust contravened the Human Rights Code, 1981. This prompted the trustee to seek the advice and direction of the court. In his affidavit, Mr. McLeod explains the Trustee's position in bringing the application as follows:

> 21. ... the Trustee has been advised that it is, and has hitherto seen it to be its duty to support, maintain and administer the trusts which were accepted by the original Trustee until such time as a Court of competent jurisdiction determines that the trust is illegal or void. This the Trustee and its predecessor corporations have done for upwards of 63 years since the inception of the trust, without serious difficulty or opposition until the more recent of the events described in paragraphs 14 to 20 hereof.
>
> 22. The inquiries from the press, complaints of universities, schools, Human Rights Commissions and similar agencies, academics, members of the public and certain members of the General Committee, as well as the Complaint referred to in paragraph 17 hereof, the press articles and reports referred to in paragraphs 14 and 18 hereof, the

divisive effect of the motion and vote referred to in paragraph 20 hereof, and other similar recent events have, in my view, had an unsettling effect and have interfered with the due administration of the trusts declared by the Indenture and the ability of the Trustee to carry on such administration effectively. They have also impacted and can be expected to continue to impact unfavourably on the efficient administration of the scholarship programme by the General Committee, its Committee on Scholarships and its officials.

23. Although there has not to date been any serious difficulty experienced by the General Committee in identifying and making awards to students who fulfil the eligibility requirements of the Indenture, there have obviously been great changes in Canadian society and in the British Empire that have occurred in the 63 years since the inception of the Foundation. It may become more difficult than in the past to interpret and apply such eligibility terms as "British Nationality", "British Parentage", "allegiance to any Foreign Government, Prince, Pope or Potentate", "Christians of the White Race", "British Subject" and "of the Christian Religion in its Protestant Form". The Trustee has received an opinion of its counsel that a charitable trust is exempt from the requirement of certainty of objects and cannot fail for uncertainty so long as there are some eligible persons who are with certainty within the ambit of the qualifications. Nevertheless, in the context of modern Canadian life and society, the increasingly multi-cultural makeup of Canada and the attention which has now been focused on the eligibility requirements of the Indenture, these difficulties may be expected to increase.

24. The Trustee accordingly believes that it requires the opinion, advice and direction of this Honourable Court as to the essential validity of the Indenture under which it operates, pursuant to the provisions of section 60 of the Trustee Act and the Court's inherent jurisdiction to supervise charitable trusts.

THE PUBLIC POLICY ISSUE

question make it unnecessary to answer Questions 2, 3 and 4.

Question 5: No.

Question 6: The answer given to the previous question makes it unnecessary to answer this one.

One appellant is the Royal Ontario Museum (ROM), which was one of several charitable institutions which were, by order of the Associate Chief Justice of Ontario dated December 3, 1986, required to be served, as residuary legatees of the settlor, with notice of the application of the trustee. This appellant asks that the appeal be allowed in part and that positive answers be given to Questions 1(ii), 1(iii), 1(iv); and to Question 2, with the added declaration that the residual beneficiaries are entitled to the trust fund; and also that the answer to Question 3 be in the negative.

The other appellant is the Ontario Human Rights Commission which had, pursuant to s. 31(2) of the Human Rights Code, 1981, S.O. 1981, c. 53 (hereafter Human Rights Code, 1981), initiated a formal complaint with itself against the trustee on August 12, 1986, alleging discrimination in the provision of services and facilities and in contracting, on grounds of race, creed, colour, citizenship, ancestry, place of origin and ethnic origin. Subsequent to being informed of this complaint the trustee applied to the High Court for directions and the Commission was added as the respondent. The Commission appeals that part of the decision of McKeown J. in which he provides answers to Questions 1(i), 1(iii) and 5, on the ground that they concerned the applicability of the Human Rights Code, 1981 and so are matters within the exclusive primary jurisdiction of the Commission and any board of inquiry appointed under the Code.

There are two interveners in this appeal. The first is the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation, added by the order of the Associate Chief Justice of the High Court referred to earlier. On behalf of this class it was argued that the appeal should be dismissed, but that, if the answer to Question 1 is answered in the

affirmative, then the answers to Questions 2, 3 and 4 should be that the trust fails, is incapable of being applied cy-pres, and the trust fund results to the settlor's estate to be distributed according to his will.

In his order of December 3, 1986 mentioned above, the Associate Chief Justice of the High Court also ordered that notice of the application be served on the Public Trustee, rather than upon the Official Guardian as set out in clause 9 of the indenture. The Public Trustee also argued that the appeal should be dismissed. However, in the alternative it was submitted that if it should be found that certain terms or clauses breach public policy or are uncertain, such terms or clauses should be treated as conditions subsequent or unessential, which could be expressed so as not to detract from a valid charitable purpose of creating a scholarship fund for students in need of financial assistance to pursue their studies in selected schools, colleges or universities.

All these submissions can be summarized into three main issues:

1. Did McKeown J. have jurisdiction to determine this matter or should he have deferred to the jurisdiction of the Ontario Human Rights Commission?

2. Is the trust void in whole or in part either for uncertainty or because it violates public policy?

3. If the trust is void on grounds of public policy or uncertainty, is there a general charitable intention so that the court can apply the trust cy-pres?

Questions 5 and 6 of the original application, which are subsidiary questions, could need to be addressed depending upon the answers to the three main issues.

II. THE FACTS

These are set out in sufficient detail in the judgment of McKeown J. at pp. 82-87 O.R. It is sufficient for our purposes

to summarize therefrom.

By indenture dated December 28, 1923, the trustee accepted the burden of certain trusts thereby created with respect to the trust property transferred and assigned to it. The trust was directed to be known as the Leonard Foundation (the Foundation), the scholarships from which were directed to be known as the Leonard Scholarships. There was provision for the settlor to revoke the indenture during his lifetime, but he did not do so before his death on December 17, 1930.

The most pertinent parts of the indenture are:

The Recitals

WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:

AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian Religion:

AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:

AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by any allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seal of which government, power or authority is outside of the British

Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

. . . . .

2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the Settlor intends shall be excluded from the management of or benefits in the said Foundation ...

. . . . .

If a vacancy in the General Committee is not filled for two years after it occurs, pursuant to the above provisions, the Trustee may apply to any Judge of the Supreme Court of Ontario, possessed of the qualifications herein required of a member of the said General Committee ...

. . . . .

The General Committee shall have the following powers ...

. . . . .

(c) Power to select students or pupils of the classes or types hereinbefore and hereinafter described as recipients of the said Scholarships or for the enjoyment of same, as the

Committee in its discretion may decide.

. . . . .

SUBJECT to the provisions and qualifications hereinbefore and hereinafter contained, a student or pupil to be eligible for a Scholarship shall be a British subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the following classes or descriptions of persons who are not of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said Foundation as in the preamble or recital more particularly referred to, but regardless of the order of priority in which they are designated herein, namely:

(a) Clergymen,

(b) School Teachers,

(c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,

(d) Graduates of the Royal Military College of Canada,

(e) Members of the Engineering Institute of Canada,

(f) Members of the Mining & Metalurgical (sic) Institute of Canada.

PROVIDED further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for Scholarships under the terms hereof, shall not exceed one-

fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

. . . . .

8. THE Trustee shall disburse the whole or such part of the net annual income derived from the Trust Estate among the persons, Schools, Colleges and Universities in such amounts, at such times, upon such terms and in such manner as the General Committee shall in its discretion consistent with the intention of the Settlor as hereinbefore set out, decide, and the money payable in respect of such Scholarships shall, except as hereinafter provided, be paid to the respective Schools, Colleges or Universities in which the respective student or students, pupil or pupils, are in attendance ...

9. THE Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared ...

The indenture indicates that the administration and management of the Foundation, as distinct from the powers and duties of the applicant with respect to the trust estate, are vested in a General Committee and a sub-committee thereof known as the Committee on Scholarships.

Application forms for scholarships are made available during the months of January, February and March to members of the General Committee and, upon request, to schools, colleges, universities and individuals. An applicant submits an application through a member of the General Committee, who conducts a personal interview of the applicant, completes the nomination and recommendation, and forwards the application to the General Committee before March 31.

The Committee on Scholarships meets in April or May in each

year to consider the applications and to prepare recommendations to the General Committee for the award of scholarships. The General Committee then meets and, inter alia, receives the report and recommendations of the Committee on Scholarships and approves the awards to be made for the ensuing scholastic year. In making awards, the General Committee bases its decision in each individual case upon, inter alia, the requirements set out in the indenture. To be eligible for a scholarship, a person must be one who, without financial assistance, would be unable to pursue a course of study and meets the other criteria in the indenture.

Since 1971, the Ontario Human Rights Commission and its equivalents in the Provinces of Alberta and British Columbia, together with other bodies, have expressed concerns over conditions of eligibility to officials of the trustee. There are universities which, in the last ten years, have also complained or expressed concern to officers of the Foundation regarding eligibility requirements. Notwithstanding instances of this kind, the Foundation receives approximately 230 new and renewal applications annually.

Evidence was submitted to McKeown J. to show that there exist in Ontario and elsewhere in Canada numerous educational scholarships which contain eligibility restrictions based on race, ancestry, place of origin, ethnic origin, citizenship, creed, sex, age, marital status, family status and handicap.

III. THE JURISPRUDENCE

(1) Jurisdiction -- Human Rights Commission or court?

The Ontario Human Rights Commission submitted that McKeown J. should have deferred to the Commission to exercise its jurisdiction under the Human Rights Code, 1981 with respect to the complaint against the trustee that the Leonard Trust contravenes the Code. In considering this submission one must start with the following fundamental proposition offered by Dubin A.C.J.O. in Blainey v. Ontario Hockey Assn. (1986), 54 O.R. (2d) 513, 21 C.R.R. 44, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 26 D.L.R. (4th) 728, 14 O.A.C. 194 (C.A.) [leave to appeal

to S.C.C. refused (1986), 58 O.R. (2d) 274n, 21 C.R.R. 44n, 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 72 N.R. 76n, 17 O.A.C. 399n], at pp. 532-33 O.R., p. 64 C.R.R.:

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... the Human Rights Code provides a comprehensive scheme for the investigation and adjudication of complaints of discrimination. There is a very broad right of appeal to the Court from the ultimate determination of a board of inquiry constituted under the Human Rights Code. The procedure provided for in the Human Rights Code must first be pursued before resort can be made to the Court. This was so held in Board of Governors of Seneca College v. Bhadauria, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 ... Chief Justice Laskin, speaking for the Court, stated at p. 183 S.C.R., pp. 194-5 D.L.R.:

"In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of The Ontario Human Rights Code cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law."

And at pp. 194-5 S.C.R., p. 203 D.L.R.:

"The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.

For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use."

Nevertheless, although this may be taken as a starting proposition, I agree with McKeown J. that in this case several factors militate towards the High Court, as the superior court of inherent jurisdiction in this province, assuming jurisdiction despite a complaint being filed with the Human Rights Commission with respect to the same subject-matter.

In the first place, the state of the law dealt with by this court and the Supreme Court of Canada in Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 2 C.H.R.R. D/468, 81 C.L.L.C. Paragraph14,117, 22 C.P.C. 130, 124 D.L.R. (3d) 193, 37 N.R. 455, revg (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. Paragraph14,003, 105 D.L.R. (3d) 707 (C.A.) is in contrast with the situation in this case. In Bhadauria this court had attempted "to advance the common law" in filling a void by creating a new tort of discrimination. The Supreme Court held that not to be necessary because of the comprehensive scheme of the Ontario Human Rights Code, R.S.O. 1970, c. 318 [later R.S.O. 1980, c. 340]. Here, however, we are concerned with the administration of a trust, over which superior courts have had inherent jurisdiction for centuries and, in particular, with respect to charitable or public trusts. As noted at the beginning of this judgment, the trustee in this case applied to the High Court for advice and direction pursuant to the trust instrument itself as well as s. 60 of the Trustee Act.

Second, we are not concerned here with a typical proceeding under the Human Rights Code, 1981 in which an allegation of discrimination is brought against a respondent. The Commission's first mandate is to effect a settlement. However, the trustee has no authority, absent authorization of the trust deed or legislation or a court order, to enter into a settlement which would be contrary to the terms of the trust. Even if no settlement could be effected and a board of inquiry were to be appointed, there is serious question as to whether the board could grant an adequate remedy. Its remedial authority is governed by s. 40(1) of the Code. If a Code infringement is found, the board may, by order,

(a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

These remedial powers do not appear to give the board of inquiry the power to alter the terms of the trust or declare it void. In any case, resort to a court would have to be made to determine authoritatively whether such power exists.

Finally, I agree with McKeown J. that this is not a case where the fact-finding role of the Commission and a board of inquiry would be required. Even in Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, where some further fact-finding and, particularly, fact-verification might have been useful, Martland J., on behalf of the majority on the Supreme Court of Canada, quoted Lord Goddard in R. v. Tottenham and District Rent Tribunal; Ex parte Northfield (Highgate) Ltd., [1957] 1 Q.B. 103, [1956] 2 All E.R. 863, 100 Sol. Jo. 552 (Q.B.) at p. 108 Q.B., to the effect that:

... where there is a clear question of law not depending upon particular facts -- because there is no fact in dispute in this case -- there is no reason why the applicants should not come direct to this court for prohibition ...

Similarly, here, I agree with McKeown J. that we are concerned with a question of law; there are no facts in dispute. The trustee is entitled to come to the superior court pursuant to s. 60 of the Trustee Act to seek advice and direction.

(2) Is the trust Void in whole or in part either for uncertainty or because it violates public policy?

We are concerned here with a charitable trust. In order to be considered charitable, a trust must have been established for one of the following four purposes: relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community as a whole as enunciated by the courts. (For the original summary and categorization of these see Income Tax Special Purposes Commissioners v. Pemsel, [1891] A.C. 531, [1891-4] All E.R. Rep. 28, 65 L.T. 621 (H.L.). For their Ontario application see the Charities Accounting Act, R.S.O. 1980, c. 65 and Re Levy Estate (1989), 68 O.R. (2d) 385, 58 D.L.R. (4th) 375, 33 E.T.R. 1, 33 O.A.C. 99 (C.A.). Also see, generally, D.W.M. Waters, Law of Trusts in Canada (Toronto: Carswell, 1974), c. 14 "Charitable Trusts".)

The general rule is that in order to achieve charitable status, a trust must satisfy three conditions. It must have as its object one of the four purposes stated above; its purpose must be wholly and exclusively charitable; and it must promote a public benefit (Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137, 94 Sol. Jo. 777 (H.L.); McGovern v. Attorney General, [1982] Ch. 321, [1981] 3 All E.R. 493, [1982] 2 W.L.R. 222 (Ch. D.), at p. 331 Ch., and Re Levy Estate, supra). To satisfy the public benefit requirement, the trust must be beneficial and not harmful to the public and its benefits must be available to a sufficient cross-section of the public (Halsbury's Laws of England, 4th ed. (London: Butterworths, 1974), vol. 5 "Charities", p. 309, para. 505; Gilmour v. Coats, [1949] A.C. 426, [1949] 1 All E.R. 848, 93 Sol. Jo. 355 (H.L.), at p. 855 All E.R., and Waters, Law of Trusts, c. 14, pp. 460-504). If there is a personal nexus between each of the beneficiaries and the settlor, the trust will fail for lack of public benefit (Oppenheim v. Tobacco Securities Trust Co., [1951] A.C. 297, [1951] 1 All E.R. 31, [1951] 1 T.L.R. 118 (H.L.), at p. 309 A.C.

In the case at bar, all of these tests are met. The trust is dedicated to the advancement of education and it is wholly charitable. Education is clearly a benefit to the public. Because the class was not ascertainable by the settlor, there was no personal nexus between him and the beneficiaries. The benefit, although not available to everyone, is available to a

sufficiently wide cross-section of the public.

Next, it is necessary to consider whether the trust could be invalid because of uncertainty. It is important to note that in analyzing the validity of the trust on this basis, the court may refer only to the operative words, unless they are ambiguous, in which case it can refer to the recitals. Regular rules of statutory construction apply (Re Moon; Ex parte Dawes (1886), 17 Q.B.D. 275, 55 L.T. 114, 34 W.R. 753 (C.A.)). Since recitals are descriptions of motive and are normally irrelevant to determining validity, McKeown J. held that they were irrelevant and inoperative. However, it could be argued that many sections of the indenture refer to the recitals and thereby incorporate them. In fact, McKeown J. noted eight references, after the recitals, to the definition of the class of beneficiaries, but then went on to state [p. 89 O.R.]: "At no time throughout the operative clauses does Colonel Leonard refer back to the three opening recitals; thus his beliefs as stated therein are not incorporated into the operative words and play no part in the interpretation of this instrument".

Without deciding whether the recitals are incorporated in the trust instrument by subsequent references to them, I would agree that Colonel Leonard's beliefs as stated in the opening recitals are evidence of motive and are irrelevant. However, that part of the trust instrument which matters for the purpose of assessing certainty is the second sentence in the first full paragraph on p. 2 of the instrument, which reads as follows:

> For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

This definition of the class of beneficiaries is a condition precedent. A condition precedent is one in which no gift is intended until the condition is fulfilled. A condition subsequent differs in that non-compliance with the condition

will put an end to an already existing gift. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class (Jones v. T. Eaton Co. Ltd., [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at pp. 650-51 S.C.R., and McPhail v. Doulton, [1971] A.C. 424, [1970] 2 All E.R. 228, 114 Sol. Jo. 375 (H.L.) at p. 456 A.C.). It is enough that some claimants can satisfy the condition (Re Selby's Will Trusts; Donn v. Selby, [1965] 3 All E.R. 386, [1966] 1 W.L.R. 43, 110 Sol. Jo. 74 (Ch. D.)). The condition will not fail for uncertainty unless it is clearly impossible for anyone to qualify (Re Allen; Faith v. Allen, [1953] Ch. 810, [1953] 2 All E.R. 898, 97 Sol. Jo. 606 (C.A.) [subsequent proceedings at [1954] Ch. 259, [1954] 1 All E.R. 526, 98 Sol. Jo. 146]. It is well established that a charitable trust should not fail for uncertainty (see Re Gott; Glazebrook v. Leeds University, [1944] Ch. 193, [1944] 1 All E.R. 293, 88 Sol. Jo. 103 (Ch. D.)). Historically, courts have been reluctant to strike down such gifts if it can be avoided. If a condition is uncertain, the court can consider it inoperative, but rarely will a trust fail because of uncertainty if the condition is a condition precedent.

In this case there has been no difficulty over some six decades in ascertaining whether students qualify. The clause referred to above is sufficiently certain, except possibly for the "allegiance'' exclusion. In my view, however, the clause as a whole meets the requirements established for a condition precedent and the provisions containing the conditions are sufficiently certain. If I am wrong, however, I would find only the clause referring to "allegiance" to be uncertain and I would hold that it is severable from the other restrictions as to class.

Turning now to the public policy issue, it must first be acknowledged that there has been no finding by a Canadian or a British court that at common law a charitable trust established to offer scholarships or other benefits to a restricted class is void as against public policy because it is discriminatory. In some cases, British courts have chosen to delete offensive clauses as "uncertain", as in Re Lysaght; Hill v. Royal College

of Surgeons of England, [1966] Ch. 191, [1965] 2 All E.R. 888, 109 Sol. Jo. 577 (Ch. D.); Clayton v. Ramsden, [1943] A.C. 320, [1943] 1 All E.R. 16, 86 Sol. Jo. 384 (H.L.), and Re Tarnpolsk; Barclays Bank Ltd. v. Hyer, [1958] 3 All E.R. 479, [1958] 1 W.L.R. 1157, 102 Sol. Jo. 857 (Ch. D.), or "impracticable" as Re Dominion Students' Hall Trust; Dominion Students' Hall Trust v. Attorney General, [1947] Ch. 183, 176 L.T. 224, 91 Sol. Jo. 100 (Ch. D.). In the latter case the court found a general charitable intention and then applied the trust property cy-pres. The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in Re Lysaght, supra, at p. 206 Ch., quoted by McKeown J. at p. 93 O.R.:

> I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects and I am aware that there is a Bill dealing with racial relations at present under consideration by Parliament, but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or are to exclude adherents to a particular faith, is contrary to public policy. The testatrix's desire to exclude persons of the Jewish faith or of the Roman Catholic faith from those eligible for the studentship in the present case appears to me to be unamiable, and I would accept Mr. Clauson's suggestion that it is undesirable, but it is not, I think, contrary to public policy.

However, in considering these observations of Buckley L.J., it is necessary to keep in mind two points. First, the observations themselves indicate that they were made before the enactment of the first comprehensive statute in the United Kingdom to prohibit discrimination on racial grounds -- the Race Relations Act of 1968, c. 71 [now Race Relations Act, 1976 (U.K.), c. 74]. Second, religion as a prohibited ground of discrimination is conspicuously left out of the anti-discrimination laws of the United Kingdom. I do not, therefore, find the English cases on point to be of any help or guidance.

In Canada the leading case on public policy and

discrimination at the commencement of World War II was Christie v. York Corp., [1940] S.C.R. 139, [1940] 1 D.L.R. 81, wherein the majority of the Supreme Court of Canada found that denial of service on grounds of race and colour was not contrary to good morals or public order.

After the war this court, in Noble v. Alley, [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.) [revd [1951] S.C.R. 64, [1951] 1 D.L.R. 321] upheld a racially restrictive covenant in the course of deciding that there was insufficient evidence to conclude that racial discrimination was contrary to public policy in Ontario. In this the court specifically overruled Mackay J., in Re Wren, [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.J.), who had found such covenants void as against public policy. The Supreme Court of Canada struck down the covenant in Noble on technical grounds, but did not refer to the public policy argument.

Subsequently, in Bhadauria (C.A.), at pp. 149-50 O.R., p. 715 D.L.R., in concluding that the common law had evolved to the point of recognizing a new tort of discrimination, Wilson J.A. referred to the preamble to the Ontario Human Rights Code, R.S.O. 1970, c. 318 [later R.S.O. 1980, c. 340], the first two paragraphs of which then provided:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin ...

She then observed:

> I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human

rights.

That the Human Rights Code, 1981 recognizes public policy in Ontario, was acknowledged a few years later by the Supreme Court of Canada in Ontario Human Rights Commission v. Etobicoke, [1982] 1 S.C.R. 202, 3 C.H.R.R. D/781, 82 C.L.L.C. Paragraph17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at pp. 213-14 S.C.R., pp. 23-24 D.L.R.

Therefore, even though McKeown J. referred to the caution of Duff C.J.C. in Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, at pp. 7-8 S.C.R., to the effect that public policy is a doctrine to be invoked only in clear cases where the harm to the public is substantially incontestable and does not depend upon the "idiosyncratic inferences of a few judicial minds", the promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern-day Ontario. I can think of no better way to respond to the caution of Duff C.J.C. than to quote the assertion of Mackay J. of nearly 45 years ago in Re Wren, supra, at p. 783 O.R.:

> Ontario and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

Further evidence of the public policy against discrimination

can be found in several statutes in addition to the preamble and content of the Human Rights Code, 1981: s. 13 of the Conveyancing and Law of Property Act, R.S.O. 1980, c. 90; s. 4 of the Ministry of Citizenship and Culture Act, 1982, S.O. 1982, c. 6; s. 117 of the Insurance Act, R.S.O. 1980, c. 218; and s. 13 of the Labour Relations Act, R.S.O. 1980, c. 228. All of these indicate that this particular public policy is not circumscribed by the exact words of the Human Rights Code, 1981 alone. Such a circumscription would make it necessary to alter what the courts would regard as public policy every time an amendment were made to the Human Rights Code, 1981. This can be seen just by comparing the wording of the second paragraph of today's preamble with that considered by Wilson J.A. in 1979 and quoted above. Currently this paragraph reads:

> AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province ...

It is relevant in this case to refer as well to the Ontario Policy on Race Relations (Race Relations Directorate, Ministry of Citizenship) as well as the Premier's statement in the Legislature concerning that policy (Hansard Official Report of Debates of Legislative Assembly of Ontario, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-41). The Policy on Race Relations states:

> The government is committed to equality of treatment and opportunity for all Ontario residents and recognizes that a harmonious racial climate is essential to the future prosperity and social well-being of this province. ... The government will take an active role in the elimination of all racial discrimination, including those policies and practices which, while not intentionally discriminatory, have a discriminatory effect. ... The government will also continue to attack the overt manifestations of racism and to this end

declares that: (a) Racism in any form is not tolerated in Ontario.

In introducing it in the Legislature, Premier David Peterson said (Hansard, supra, at p. 937):

> This policy recognizes that Ontario's commitment to equality has grown from benign approval to active support. It leaves no doubt that the path we will follow to full racial harmony and equal opportunity is paved, not just with good wishes and best intentions but with concrete plans and active measures.

Public policy is not determined by reference to only one statute or even one province, but is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti-discrimination laws of every jurisdiction in Canada. These have been given a special status by the Supreme Court of Canada in Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. Paragraph17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241, at p. 547 S.C.R., p. 329 D.L.R.:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at pp. 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect.

In addition, equality rights "without discrimination" are now enshrined in the Canadian Charter of Rights and Freedoms in s. 15; the equal rights of men and women are reinforced in s. 28; and the protection and enhancement of our multicultural heritage is provided for in s. 27.

Finally, the world community has made anti-discrimination a matter of public policy in specific conventions like the International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX), and the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180, as well as Articles 2, 3, 25 and 26 of the International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), all three of which international instruments have been ratified by Canada with the unanimous consent of all the provinces. It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public policy invalidity is restricted to any particular activity or service or facility.

Clearly this is a charitable trust which is void on the ground of public policy to the extent that it discriminates on grounds of race (colour, nationality, ethnic origin), religion and sex.

Some concern was expressed to us that a finding of invalidity in this case would mean that any charitable trust which restricts the class of beneficiaries would also be void as against public policy. The respondents argued that this would have adverse effects on many educational scholarships currently available in Ontario and other parts of Canada. Many of these provide support for qualified students who could not attend university without financial assistance. Some are restricted to visible minorities, women or other disadvantaged groups. In my view, these trusts will have to be evaluated on a case by case basis, should their validity be challenged. This case should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy.

It will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss. 1 [am. 1986, c. 64, s. 18(1)] and 13 of the Human Rights Code, 1981 and that adopted by the courts when approaching s. 15(2) of the Charter. Those charitable trusts

aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the Human Rights Code, 1981 or s. 15(2) of the Charter would not likely be found void because they promote, rather than impede, the public policy of equality. In such an analysis, attention will have to be paid to the social and historical context of the group concerned (see Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 36 C.R.R. 193, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 10 C.H.R.R. D/5719, 56 D.L.R. (4th) 1, 91 N.R. 255, [1989] 2 W.W.R. 289, at pp. 152-53 S.C.R., pp. 201-02 C.R.R., per Wilson J. and p. 175 S.C.R., p. 228-29 C.R.R., per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the Charter (Andrews, supra, pp. 168-69 S.C.R., p. 223 C.R.R., per McIntyre J.). In the indenture in this case, for example, there is nothing contrary to public policy as expressed in the preferences for children of "clergymen", "school teachers", etc. It would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women, aboriginal peoples, the physically or mentally handicapped, or other historically disadvantaged groups would be void as against public policy. Clearly, public trusts restricted to those in financial need would be permissible. Given the history and importance of bilingualism and multiculturalism in this country, restrictions on the basis of language would probably not be void as against public policy subject, of course, to an analysis of the context, purpose and effect of the restriction.

In this case the court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions on freedom of both contract and testamentary disposition. Under the Conveyancing and Law of Property Act, s. 22, for instance, covenants that purport to restrict the sale, ownership, occupation or use of land because of, inter alia,

race, creed or colour are void. Under the Human Rights Code, 1981 discriminatory contracts relating to leasing of accommodation are prohibited. With respect to testamentary dispositions, as mentioned earlier, one cannot establish a charitable trust unless it is for an exclusively charitable purpose (see Waters, Law of Trusts, at pp. 601-03 and 626; and Ministry of Health v. Simpson, supra). Similarly, public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void.

A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection: (1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property cy-pres providing they can discern a general charitable intention. This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community (Waters, Law of Trusts, p. 502). It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.

(3) Is there a general charitable intention so that the court can apply the trust cy-pres?

One of the great advantages of a charitable trust is that if it fails for some reason, it can be applied cy-pres. However, in order to apply the trust property cy-pres, the court must find that the settlor had a general charitable intention. If the mode of application is such an essential part of the gift that the court cannot distinguish any general purpose of

charity, but is obliged to say that the prescribed mode of doing the charitable act is the only one the testator intended, it cannot apply the trust cy-pres (see Re Wilson; Twentyman v. Simpson, [1913] 1 Ch. 314, [1911-3] All E.R. Rep. 1101, 57 Sol. Jo. 245 (Ch. D.); Re Lysaght, supra, at p. 203 Ch., and Halsbury's Laws of England, supra, pp. 430-31, para. 696). Cy-pres should never depart from the testator's true intention. This must be discerned from reading the trust instrument as a whole. The court may have regard to the recitals in order to determine the "substantial, overriding, true or paramount intention".

If the court must decide that the settlor would not have established the trust if it could not be carried out in the specific way set out, then there is no general charitable intention and the trust fails. If, on the other hand, the discriminatory provisions can be said to be the "machinery" of the trust, separable from the general intention to educate, then the court may apply the money cy-pres. The distinction between a general and a specific charitable intent was expressed by Buckley L.J. in Re Lysaght, supra, at p. 202 Ch.:

> A general charitable intention, then, may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention -- not, that is to say, part of his paramount intention.
>
> In contrast, a particular charitable intention exists where the donor means his charitable disposition to take effect if, but only if, it can be carried into effect in a particular specified way.

The question in this case is, then, whether the testator's paramount intention was to provide scholarships for education or whether he intended to provide it for specific kinds of students and would not have created it otherwise. To preserve the trust, this court must find that the settlor's general intention was to educate young people for the benefit of the

Empire (now the Commonwealth and this country) and that the discriminatory provisions are merely the machinery designed to effect that intention. Was it his intention to educate particular kinds of people because only they could be entrusted with the future of the country? Was it his overriding purpose to select students of the right breeding and prepare them for leadership? If so, then his intention was specific and the trust must fail.

It seems to me, however, that his intention must be viewed as one to promote leadership through education. The scheme he chose was the one he thought best because of the time in which he lived. Although today discrimination is considered to have been an ugly feature of our society in the past (and is still too prevalent), we judge attitudes of the past with hindsight. It is easy, with the benefit of such hindsight, to feel contempt for the views expressed in the recitals of the trust instrument and to find the racial and religious restrictions contained in its text to be repugnant. In his day, however, Colonel Leonard was a philanthropist. He obviously believed that education was the key to a strong and prosperous country and a peaceful world. In that, he was no doubt right. The fact that he chose to implement his desire to promote education through a discriminatory scheme cannot displace his general charitable intention. In my view, the tests for finding a general charitable intention are met. This conclusion finds support in para. 13 of the trust instrument which provides that the testator could alter the trust or change its objects and purposes and that any income that became available "shall thereupon become applicable for such other objects or purposes, being an object or purpose conducive to the promotion or encouragement of education, as the settlor may from time to time think proper".

I find support for this conclusion in the case of Re Dominion Students' Hall Trust, supra, where Evershed J. granted a petition by the charity to remove a restriction which confined a student hostel to members of the Empire of European origin. He said, at p. 186 Ch.:

It is not necessary to go to the length of saying that the

original scheme is absolutely impracticable. Were that so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire.

I have, however, to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the hall to members of the Empire of European origin. But times have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain.

This observation, made in 1946, is particularly apt today.

IV. THE DISPOSITION

In the result I would allow the appeal and substitute the following answers for those given by McKeown J.:

Q. 1 (i) - Yes, but not just as confined by the Human Rights Code, 1981.

(ii) - Yes, the provisions of the trust which confine management, judicial advice and benefit on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

(iii) - It is not necessary to answer this question.

(iv) - No.

Q. 2 - No.

Q. 3 - Yes.

Q. 4 - As before, but with a deletion of the discriminatory restrictions mentioned in answer to Q. 1.(ii).

Q. 5 - This question should not be answered in this decision. After the application form is changed in accordance with this decision the question will become moot and, if not, it should be considered under the procedures in the Human Rights Code, 1981.

Q. 6 - The answer to this question is provided in the answer to Q. 5.

As far as costs are concerned, the order made by McKeown J. should stand and the same disposition should apply with respect to costs on this appeal.

Appeal allowed.

Fox v. Fox Estate et al. *

[Indexed as: Fox v. Fox Estate]

28 O.R. (3d) 496
[1996] O.J. No. 375
No. C20011

Court of Appeal for Ontario,
McKinlay, Catzman and Galligan JJ.A.
February 7, 1996

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs December 12, 1996 (La Forest, Cory and Major JJ.). S.C.C. File No. 25314. S.C.C. Bulletin, 1996, p. 2157.

Trusts and trustees -- Powers of trustees -- Encroachment -- By his will testator giving wife and son life interest in residue of estate -- Wife as executrix given wide power to encroach on capital for benefit of son and son's children -- Wife using power by giving all of residue to son's children -- Motive for exercise of discretion being wife's disapproval of son's second marriage outside Jewish faith -- Extraneous consideration demonstrating mala fides -- Power to encroach conferred by will not entitling wife to encroach as she did -- Exercise of discretion unlawful.

By his will, the testator appointed his wife M as his sole executrix and gave her a life interest in 75 per cent of the residue. His son W was given a life interest in the remaining 25 per cent. If W survived M, upon her death he was to receive the residue. The will gave M a wide power to encroach on capital for the benefit of W's children. M exercised that power by giving all of the residue to W's children, with the result that W was deprived of any interest in the residue and of any

income from it. In proceedings brought by W, the trial judge found that M used her power to encroach in order to deprive the applicant of his interest in the residue because she disapproved of his marriage to a gentile. She found that this motive was "perhaps coupled" with M's concern for the welfare of her grandchildren, but that her dislike of W's marriage was her prime motivation. The trial judge concluded that because she did not find mala fides on M's part, the exercise of her discretion had been a proper one. W appealed.

Held, the appeal should be allowed.

Per Galligan J.A.: So long as there is no mala fides on the part of a trustee, the exercise of an absolute discretion is to be without any check or control by the courts. Conduct which does not amount to fraud may be categorized as mala fides so as to bring it within the scope of judicial supervision. The courts may interfere if a trustee's decision is influenced by extraneous matters. The fact that W intended to marry a gentile was completely extraneous to the duty which the will imposed on M. This extraneous consideration demonstrated sufficient mala fides to bring her conduct within any reasonable interpretation of that term. Moreover, it is abhorrent to contemporary community standards that disapproval of a marriage outside one's religious faith could justify the exercise of a trustee's discretion. It is against public policy to discriminate on grounds of race or religion. If a settlor cannot dispose of property in a fashion which discriminates upon religious or racial grounds, it follows that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons. In this case, it would be contrary to public policy to permit a trustee effectively to disinherit the residual beneficiary because he married outside the religious faith of his mother. M's exercise of discretion to the prejudice of W was unlawful and should be set aside. As a result of her improper dealing with the assets of the estate, M should be removed as executrix.

Per McKinlay J.A.: If M's discretion was exercised because of her religious bias, then the decision of Galligan J.A. is decisive. If she had reasons in addition to the religion of W's

proposed spouse, then the meaning of the will, and the nature of her exercise of discretion should be considered. It was not clear that marriage outside the Jewish faith was the sole reason for the transfer of estate assets to M's grandchildren.

It was obvious that M in no way considered the terms of the will when she made the encroachments she did. She had no understanding of her duties as an executrix, and acted in the firm belief that she was dealing with her own property. Accordingly, she did not exercise her discretion as executrix at all.

It was the obvious intent of the testator that W have a life income from his estate, and the remainder outright following the death of M. The power to encroach had to be viewed in the light of that intent. The encroachments by M constituted breaches of trust. M should be removed as executrix and funds improperly removed from the estate should be repaid.

Per Catzman J.A.: The conclusions that M did not exercise her discretion as executrix at all, but rather dealt with the estate assets as if they were her own, and that the power to encroach conferred by the will did not entitle her to encroach in the manner she did, are agreed with. However, M's disapproval of W's marriage was not the sole reason for the exercise of her discretion. The trial judge found that M's actions were motivated, at least in part, by her concern for the financial welfare and security of her grandchildren. That was a legitimate foundation for the exercise of her discretion under the will. Given the disposition of this appeal, it was not necessary to decide whether the inappropriate motive fatally infected M's decision to encroach, notwithstanding the appropriate motive.

However, the preferable view was that, if an executrix exercises her discretion to encroach for a "good" reason, clearly within the contemplation of the power conferred upon her by the will, the court should be reluctant to interfere on the ground that she was, additionally, motivated by a "bad" reason that the court is unprepared on public policy grounds to support.

Cases referred to

Canada Trust Co. v. Ontario Human Rights Commission (1990), 74 O.R. (2d) 481, 69 D.L.R. (4th) 321, 38 E.T.R. 1, 37 O.A.C. 191 (C.A.); Gisborne v. Gisborne (1877), 2 App. Cas. 300 (H.L.); Hunter Estate v. Holton (1992), 7 O.R. (3d) 372, 46 E.T.R. 178 (Gen. Div.); Klug v. Klug, [1918] 2 Ch. 67

Statutes referred to

Family Law Act, R.S.O. 1980, c. 152
Family Law Act, 1986, S.O. 1986, c. 4 -- now R.S.O. 1990, c. F.3

Authorities referred to

Cullity, Maurice, "Judicial Control of Trustees' Discretions" (1975), 25 U.T.L.J. 99, at pp. 115, 117, 119

APPEAL from a judgment of Haley J. (1994), 5 E.T.R. (2d) 174, holding exercise of discretion to encroach by an executrix was proper.

Bernard L. Eastman, Q.C., and Cindy Cohen, for appellant.
Rodney Hull, Q.C., and Ian M. Hull, for respondent, Miriam Fox.
Sandra A. Forbes, for respondents, Ralph James Fox and Shayne Melissa Fox.

GALLIGAN J.A.: -- Walter Fox is a lawyer. He is the only child of Miriam Fox and the late Ralph Fox. Ralph made his will in 1961 when Walter was 20 years of age and still a student. Ralph died in 1969, two years after Walter was called to the bar. Walter married a few months before his father's death. He has two children from this marriage, a son and a daughter. Both were born after Ralph died. By his will Ralph appointed Miriam as his sole

executrix.

In its essential parts the will gives Miriam a life interest in 75 per cent of the residue and it gives Walter a life interest in the remaining 25 per cent. It provides that, if Walter survives his mother, upon her death he is to receive the residue.

The will gives Miriam a very wide power to encroach "for the benefit of" Walter's children. Miriam has exercised that power. She has given all of the residue to Walter's children with the result that Walter has been deprived of any interest in the residue and of any income from it. The issue in this appeal is whether Miriam was lawfully entitled to exercise her power to encroach in that fashion. The value of the residue is not insubstantial. It appears from information given to the court during argument that the value of the assets which make up the residue is upwards of $750,000.

For the purposes of my decision an extensive review of the evidence is not necessary. However, some reference to the circumstances surrounding the encroachments is required to see the issue in its factual context. Walter's son is age 25 and his daughter is 22. His marriage to their mother was an unhappy one which ended by separation in 1984 and divorce in 1986. Following the separation Walter's son lived with him for a few years. His daughter lived with her mother. Both children are close to Miriam, their grandmother, particularly the son. The breakdown of the marriage was bitter. It involved much litigation mainly about support payments.

Some time after the divorce Walter became romantically involved with his long-time secretary. In the spring of 1989 they decided to marry. This was a source of some tension for the Fox family. This is because the members of the Fox family are Jewish; Walter's secretary is a gentile. In late April 1989 Walter told his mother about his plans to marry. She was upset and immediately made a new will disinheriting Walter. She also made the first of a series of encroachments in favour of her two grandchildren. With these encroachments she transferred all of the assets forming the residue of the estate to the

grandchildren.

The trial was long and bitter (now reported at (1994), 5 E.T.R. (2d) 174). It pitted a mother and her grandchildren against her son. The trial judge described the trial as the vehicle for exposing bitterness, general animosity and a desire to retaliate among the parties. No one came out of it looking very noble. The real issues, however, were narrow. The principal question concerned Miriam's reason for exercising her power to encroach. A second concomitant question was whether the exercise of the power was a proper one. The first issue was factual; the second was legal.

The trial judge's finding on the factual issue is clear. She found [at p. 191] that Miriam used her power to encroach in order "to deprive the applicant of his interest in the bulk of the residue of the estate because he had married a gentile" (emphasis added). There was overwhelming evidence to support that finding even though Miriam denied that this was her motive. The trial judge found that Miriam's motive was "perhaps coupled" with her concern for the welfare of her grandchildren but that her dislike of Walter's marriage was throughout "her prime motivation in encroaching as she did".

Unquestionably, concern for the welfare of her grandchildren would be a proper motive to encroach on their behalf. Initially, I was of the view that because Miriam's primary motive was "perhaps coupled" with a concern for her grandchildren's welfare, that the latter concern might support the exercise of the power of encroachment. However, upon reading the trial judge's reasons for judgment together with the reasons which she gave for her disposition of costs, I think I would be doing a disservice to the clear and unambiguous finding of fact made after a long, difficult and emotional trial if I relied on the possible concern of Miriam for her grandchildren's welfare to dispose of this case. I have concluded that I must examine the legal issue in the light of an unassailable finding of fact that Miriam's disapproval of Walter's proposed marriage to a gentile was her motivation for exercising her power to encroach.

The grant of the power to encroach is found in the following clause in the will:

> Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

The discretion conferred upon the trustee is absolute.

After a review of a number of leading cases, the trial judge concluded that because she did not find mala fides on Miriam's part, the exercise of her discretion had been a proper one.

The entire question of the degree of control which the courts can and should exercise over a trustee who holds an absolute discretion is filled with difficulty. The leading case, or at least the case to which reference is almost always made, is Gisborne v. Gisborne (1877), 2 App. Cas. 300 (H.L.). It stands for the proposition that so long as there is no mala fides on the part of a trustee the exercise of an absolute discretion is to be without any check or control by the courts.

The courts, however, have not always equated mala fides with fraud. I am spared an extensive review of authority by a very learned paper written by Professor Maurice Cullity, "Judicial Control of Trustees' Discretions" (1975), 25 U.T.L.J. 99. I think it can safely be said in the light of Professor Cullity's analysis of the authorities that some conduct which does not amount to fraud will be categorized as mala fides so as to bring it within the scope of judicial supervision. I am in respectful agreement with Professor Cullity when he expresses the opinion, at p. 119, that the term mala fides is sufficiently broad "to make the use of the term undesirable". Nevertheless, the term is still used. While I am not bold enough to attempt to define its outside limits, I think the cases do support Professor Cullity's conclusion at p. 117 that the courts may interfere if a trustee's decision is influenced by extraneous matters. I make particular reference to the judgment of Steele J. in Hunter Estate v. Holton (1992), 7 O.R.

(3d) 372 at p. 379, 46 E.T.R. 178 (Gen. Div.):

Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in Re Hastings-Bass . . . at p. 41 Ch., p. 203 All E.R., as being applicable to the court's review of the exercise of such power:

> To sum up the preceding observations, in our judgment, where by the terms of a trust . . . a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

(Emphasis added)

In this case, in my view, the fact that her son intended to marry a gentile was completely extraneous to the duty which the will obviously imposed upon Miriam, namely, to be concerned about the welfare of her grandchildren. This extraneous consideration demonstrated sufficient mala fides to bring her conduct within any reasonable interpretation of that term.

The circumstances bear some similarity to those in Klug v. Klug, [1918] 2 Ch. 67. In that case a trustee refused to exercise a discretion allowing her to pay money for the advancement or benefit of her daughter because her daughter had married without her consent. In those circumstances Neville J. held at p. 71:

. . . it is the duty of the Court to interfere and, in the

exercise of its control over the discretion given to the trustees, to direct a sum to be raised out of the capital sufficient to pay . . .

The duty which rested with the trustee was to pay moneys for the advancement or benefit of the children if the trustee saw fit to do so. While Neville J. did not specifically state that the mother's displeasure at her daughter's marriage was an extraneous circumstance, it seems to me that the situation was analogous to this one. In the context of all the facts, disapproval of the marriage was extraneous to the child's advancement or benefit. The court interfered with the trustee's discretion in that case and I think this court ought to do the same.

There is another reason why the discretion which Miriam exercised in this case was improper and must be set aside. It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion. This is made clear in the reasons delivered by Robins J.A. in Canada Trust Co. v. Ontario Human Rights Commission (1990), 74 O.R. (2d) 481 at pp. 495-96, 69 D.L.R. (4th) 321 (C.A.):

> To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.

To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

In that case, Robins J.A. was discussing the restraint which public policy puts upon the freedom of the settlor to dispose of his property as he saw fit. If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons.

I am of the view that in this case it would be contrary to public policy to permit a trustee effectively to disinherit the residual beneficiary because he dared to marry outside the religious faith of his mother. While there were decisions in the past which have upheld discriminatory conditions in wills, in response to a query from the bench, counsel in this case were not prepared to argue that any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a particular religious faith. I find compelling Mr. Eastman's argument that if a testator could not do so then his trustee could not do it for him.

Counsel for the grandchildren argued that if Ralph were still alive there would have been nothing to prevent him from revoking his will and making a new one in which he left nothing to Walter. She argued, therefore, that in the exercise of her absolute power to encroach Miriam should be able to do that for him. Even if it were accepted that Ralph, if alive, would have disinherited Walter because of his intention to marry out of Ralph's religious faith, that argument cannot succeed.

It is of course a given, assuming testamentary capacity, that a person is entitled to dispose of property by will in any fashion that he or she may wish. The exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control. Admittedly, because he would not be subject to judicial supervision, Ralph, if alive, could have disinherited Walter for reasons which would have contravened public policy. However, Ralph is not alive and is not preparing a new will. Miriam, while acting as a trustee, on the other hand is subject to judicial control and that control can and must prevent her from exercising her discretion in a fashion which offends public policy.

With great deference to the experienced trial judge who held a different view, it is my opinion that Miriam's exercise of discretion to the prejudice of Walter because he married outside of Miriam's and his own religious faith was unlawful and must be set aside. It follows that as a result of her improper dealing with the assets of the estate Miriam can no longer remain the executrix.

For these reasons it is my opinion that this appeal should succeed. I have read the reasons for judgment prepared by McKinlay J.A. and I agree that the appeal should also be allowed for the reasons which she has given. I would dispose of the appeal in the fashion which she proposes.

MCKINLAY J.A.: -- I agree with the result reached by Galligan J.A. in this appeal. I am not satisfied, however, that marriage outside the Jewish faith was the sole reason for the transfer of estate assets by the trustee to her grandchildren. Thus, I consider that it is necessary to consider some of the evidence and the specific terms of the will itself.

Cottage Property

I will first discuss the question of the proceeds of the cottage property, because it is clear from the reasons of Haley J. that Mrs. Fox intended to dispose of those proceeds to her grandchildren because of the possible marriage of Walter

outside the faith. I see no reason to question that finding. The cottage property was sold, and the proceeds turned over by the executrix to her grandson before other estate property was transferred to her grandson and granddaughter. Mrs. Fox was of the view that all of the proceeds of the cottage property were hers personally to dispose of as she wished. Haley J. agreed with that position, in error, in my view.

There can be no doubt that the apartment building and the matrimonial home were intended to be held by the parties as tenants in common; indeed, that was never in issue in this case. However, there was no evidence, other than evidence of the testatrix, that there was ever an intent that the cottage be held by the parties in any form of joint tenancy. It was registered in the sole name of the testator, there was no declaration of trust in favour of Mrs. Fox, and he made a clear disposition of the cottage property in paragraph 3 of his will, which reads as follows:

> 3. To permit my said wife to use, as long as she may desire, my summer cottage at Lake Simcoe.

Mrs. Fox had the right to use the physical cottage property during her lifetime, and a general power in the will to sell estate assets. On a sale of those assets, of course, the proceeds became part of the residue of the estate. In her reasons, Haley J. stated [at pp. 179-80]:

> There is no explanation why the cottage property was not included in the statutory declaration of 1961 [which dealt with the apartment building, the matrimonial home, and a mortgage receivable] nor why it was treated specifically in Ralph's will as his separate property. . . . If the property was Ralph's alone there is also no reason why Mr. Day who acted as estate solicitor and who also drew the statutory declarations of 1961, would have included it in the succession duty affidavit with the specific note to the contrary. I am satisfied that Miriam accepted the one-half sharing of all the real estate at the time of Ralph's death.

With respect, the fact that Mrs. Fox accepted a one-half

sharing of the cottage property does not create any right for her to do so. The asset was registered in the sole name of the deceased, and when he signed his will he dealt with it specifically. In any event, Mrs. Fox disposed of the total proceeds to her grandson when even her own position would have entitled her to only one-half of those proceeds. (There can be no suggestion that she was entitled to any interest in the cottage under any prevailing family law, since the Family Law Reform Act, R.S.O. 1980, c. 152, the predecessor of the Family Law Act, 1986, S.O. 1986, c. 4, had not yet been enacted in 1961.)

Mrs. Fox executed a "Memorandum of Decision of the Trustee of the Estate of Ralph Fox" expressing her purported reasons for her exercise of discretion in paying the cottage proceeds over to her grandson. However, that declaration was not drafted by her, but by her counsel two full years after the fact.

In my view, on the sale of the cottage, the total net proceeds fell into the residue of the estate to be dealt with accordingly, and the disposition of those proceeds by Mrs. Fox as if they were her own constituted a breach of trust.

Other Estate Property

The appellant signed a release in favour of Mrs. Fox as executrix of the estate with respect to his income entitlement out of the estate up to December 31, 1991. Although that release purports to release Mrs. Fox with respect to all matters pertaining to the estate to that date, the application which is the subject of this appeal alleges surreptitious and intentional misuse of the entire corpus of the estate.

On October 17, 1992, the grandson of the executrix, who was living with her, wrote to the solicitor of the executrix stating:

> . . . included in this letter is a statement from my Grandmother which sets out her reasons for exercising an encroachment of the proceeds from the sale of the cottage.

Late last week my father contacted Jonathon Suttner asking him to provide an income statement for 1992. It is the opinion of both myself and my Grandmother that the estate of Ralph Fox must formally be dissolved as soon as possible. We look forward to hearing from you in the near future so that we may begin to take further action in that direction.

(Emphasis added)

Of course, Mrs. Fox's grandson had no right to participate in a decision to "dissolve" the estate of his grandfather, who died before he was born.

The statement included with that letter was drafted by the grandson, and included many expressions of love of the grandmother for her grandchildren, and also references to the appellant's dereliction of duty toward his children. It states, among other things, the following:

. . . Walter's estrangement from his own family can be attributed to his ambition of remarrying and starting up a new family. In essence his plans were to begin a new family while simply discarding his old one.

It was only several months ago upon the receipt of a legal document from my son asking for a financial statement of Ralph Fox's estate did I first become aware of the terms that my husband's will had prescribed for the estate. I had naively assumed that because I was an equal partner in building the Estate, and since I have exclusively attended to all matters concerning the Estate, that I had complete discretion over the assets of the Estate and the distribution of its income.

In her viva voce evidence, Mrs. Fox made it quite clear that she had no understanding whatever of her duty as executrix of her husband's estate. She, in effect, said that she was of the view that all of the assets were hers to dispose of as she pleased because she had worked with her husband to acquire them. The following are but a few relevant examples of that evidence.

[p. 585] I had to send him to school [her grandson] and I had to see that he should get somewhere in this world and whatever I have, I want to give to those two children [her grandson and granddaughter].

[p. 587] Well, I don't worry about him now [the appellant].. . I used to, but not now, now he's married and he's got a wife, let her worry about him.

[p. 598-9] Q. . . . When you got this order [a court order freezing estate assets], did you, at that point, understand the difference between your half of the apartment building and the estate's half?

A. No.

Q. Did you at that point --

A. No, I didn't separate it, no.

Q. Did you at that point think that the whole apartment building was yours?

A. Yes.

Q. And that all the money was yours?

A. That's right.

. . . . .

Q. Did you do anything different --

A. No nothing.

Q. -- as a result of this order?

A. No, I didn't do nothing.

Q. And so you kept paying the money out --

A. The same --

Q. -- the same way that you did before?

A. Yes, I did.

Q. And treating all the money from the apartment building as if it was your own?

A. That's right . . .

[pp. 609-10] Q. Now Mrs. Fox, you said, concerning the cottage property, I believe, that you thought it was yours from day one?

A. Yes.

Q. And in 1989 when it was sold, you received the proceeds and you put them in your account; correct?

A. Mm-hm.

Q. Now, what was your understanding at that point of who owned those proceeds?

A. Me.

Q. You personally?

A. Yeah.

Q. And was it your understanding at that time that if you wanted to, you could go out and spend that money --

A. Exactly.

Q. -- on anything you wanted?

A. Yes, that's what I thought it was.

Q. And did that apply -- in 1989, is that the same way you thought about the apartment building?

A. Yes.

Q. That all the income was yours?

A. Right.

Q. So then anything you gave from the apartment, or from the cottage to anybody was something that you didn't have to do, you felt that this was something that was completely up to you?

A. Yes.

Q. And it was as if you were dealing with your own property?

A. Right.

[pp. 630-1] Q. Mrs. Fox, you indicated that you had no concern about giving all the money and property to Ralph and Shayne, right?

A. No.

Q. And did you feel, when you were doing that, that it was necessary to have some kind of an agreement so that you could still be in charge of things?

A. No. I'm in charge of things even if I gave it to them.

Q. So really, Mrs. Fox, as far as you're concerned, everything is continuing as before?

A. I hope so.

Q. With you being able to --

A. As long as I'm able to --

Q. With you being able to deal with all the property as if it's your own during your lifetime?

A. That's right.

Q. And the only difference is now you're sure that Walter can't get anything and that it will go to your grandchildren?

A. Well, to my knowledge, that's the way I see it.

Q. And otherwise everything is the same as before?

A. Everything is the same as before.

It is obvious that Mrs. Fox in no way considered the terms of the will when she made the encroachments she did. What she did, she did in the firm belief that she was dealing with her own property. In addition, she had no intention of giving up her own interest in the estate income. As she said, "I'm in charge even if I gave it to them." To this end, she had her solicitor draft an agreement between her and her grandchildren which required her signature to deal in any way with funds in the Canadian Imperial Bank of Commerce totalling $53,500 and with the income from and ownership of the Palmerston Boulevard apartment building.

The property of the estate, as sworn for succession duty purposes, included the matrimonial home at 16 Lilywood Road, North York, where it appears Mrs. Fox was still living with her grandson at the time of the trial; the apartment building at 532-534 Palmerston Blvd., Toronto; the cottage property in Innisfil Township; $18,674.99 in cash or deposits; and $1,556 in other assets. Nonetheless, a "Memorandum of Encroachment with Respect to the Estate of Ralph Fox", dated December 30, 1992, and signed by Mrs. Fox, and obviously drafted with legal advice,

states in para. 6:

> The estate initially consisted of two assets: cottage property on Lake Simcoe and a 50% interest in real property in the City of Toronto, municipally known as 532-534 Palmerston Boulevard (the "property"). The cottage property on Lake Simcoe was sold in June 1989.

It is interesting to note that this memorandum indicates that the whole cottage property, and not merely a 50 per cent interest in it, was an asset of the estate. Obviously missing from the list of original assets are the matrimonial home, the cash and other assets.

At the time of his father's death, the appellant was 29 years of age. After Mrs. Fox's grandson went to live with her, some 20 years after her husband's death, there was a breakdown in communications between the appellant and his mother. There is no evidence that before that time the appellant took issue with his mother's handling of estate assets. He seemed content to have her live in the matrimonial home and to give to him a share of income of the estate as determined by her. However, there was no contact with him, and obviously no consideration of the terms of the will when Mrs. Fox dealt with capital assets of the estate as if they were her own personal property.

It appears from the evidence that the appellant was not aware of capital encroachments until he received a letter from Mrs. Fox's solicitor on May 26, 1993, informing him as follows:

> The executrix has asked me to advise you that she has exercised her right of encroachment and transferred the entire estate to Ralph Fox and Shayne Fox pursuant to the provisions of the will.
>
> In fact the proceeds with respect to the summer cottage were transferred on December 31, 1991. The 50% in 532-534 Palmerston Boulevard was effectively transferred on December 30, 1992.
>
> I have asked Mr. Jonathan Suttner to prepare estate accounts from the closing date of the last accounts sent to you to the

wind up of the estate on December 30, 1992. I will provide you with a copy of those accounts as soon as they are received.

This letter makes no mention of the matrimonial home, cash, and other original estate assets.

Whether or not these encroachments were appropriate depends on whether they were made within the terms of the will. As stated earlier, I agree with Galligan J.A. that a capital encroachment made because of the appellant's involvement with a person not of the Jewish faith does not constitute a bona fide exercise of discretion. However, I wish also to look at the terms of the will for the purpose of determining whether there was a proper exercise of discretion within the terms of the will apart from religious considerations.

The relevant provisions of the will state:

4. During the lifetime of my said wife, if she shall survive me, to hold the residue of my estate upon the following trusts:

(a) To pay to my said wife, for her own use and benefit absolutely, 75% of the net income derived therefrom, and to pay the remaining 25% thereof as follows:

(i) For so long as my said son shall be living, to my said son,

(ii) After the death of my said son, to or for my said son's issue, or some one or more of them, in such proportions as my Trustee may, in its absolute discretion, consider advisable from time to time.

(iii) After the death of the last survivor of my said son and his issue, to my said wife, for her own use and benefit absolutely.

(b) Out of the capital thereof, to pay such amount or amounts as my Trustee may in its absolute discretion, consider advisable to or for my said son.

(c) Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

5. After the death of the survivor of me and my said wife, subject as hereinafter provided, to hold the residue of my estate upon trust to pay the net income therefrom to my said son until he attains the age of twenty-five years, and at that time or at the death of the survivor of me and my said wife, whichever be later, to pay, transfer and convey unto my said son the residue of my estate; provided that if my said son shall die before attaining the age of twenty-five years, either in my lifetime or after my death, the residue of my estate shall, after the death of the last survivor of me and my said wife and my said son, (hereinafter referred to as "the time of determination") be held in trust, in equal shares per stirpes, for the issue of my said son living at the time of determination, or, if there be no issue of my said son living at the time of determination . . .

With respect to the interpretation of the discretion provisions of the will, the trial judge stated in her reasons, at p. 186:

> Ralph was free at the time of making his will to consider the circumstances in which he wanted the power to be exercised. He elected to place utmost faith in the discretion of the executrix and by the discretion gave her power to re-make his will if she saw fit in the circumstances. Instead of using the will to reach into the future from the grave, Ralph decided to allow his executrix to take the actions framed by the power of encroachment to achieve his goals in events which he could not himself foresee. Therefore, if Walter made a marriage which his executrix considered unfortunate, in giving the power to his executrix that he did, it should be taken that Ralph approved her actions based on her disapproval.

If the discretion of the executrix was exercised in this case because of her religious bias, then the decision of Galligan J.A., in my view, is decisive. If she had reasons in addition to

the religion of her son's proposed spouse, then the meaning of the will, and the nature of her exercise of discretion should be considered.

The law is clear that if there is any ambiguity in the terms of a will, the court should attempt to ascertain the intention of the testator at the time it was executed. The son of the testator was born on March 8, 1941. At the time of the execution of the will, on July 12, 1961, he was an only son, 20 years of age, and unmarried. With respect to income from the estate, it is clear that the appellant has a right to income during his life and that his issue take benefits under the will only on his death (see cl. 4(a)(ii)). The first provision for encroachment on capital is in sub-para. 4(b). It is in favour of the appellant, and permits encroachment to the extent of paying "such amount or amounts" as the trustee "may in its absolute discretion consider advisable". I think it is fair to say that all of the cases cited to us indicate that such a discretion, standing alone, permits the trustee to exercise discretion without the fear of intervention of the court other than in cases such as those referred to by Galligan J.A. However, there are a number of provisions in this will which would be defeated if sub-para. 4(c) were interpreted to permit a total capital encroachment.

The discretion to encroach on capital in favour of the issue of the appellant is found in sub-para. 4(c). It permits payment of "such amount or amounts" as the trustee "may, in its absolute discretion consider advisable from time to time". That wording is slightly different from that in sub-para. 4(b) which permits capital encroachment in favour of the appellant. The only apparent difference between the two provisions is that sub-para. 4(b) seems to permit a total encroachment in favour of the appellant at one time, whereas sub-para. 4(c) permits only periodic encroachments in favour of his issue.

Without reference to other provisions in the will, that difference might not seem significant. However, no cases were cited to us where there is a discretion provided in a will which, upon its exercise, would wipe out the possibility of an encroachment in favour of another beneficiary in whose favour there is a life interest in income and a remainder interest in

capital. If the encroachment made in this case is permitted by the terms of the will, it raises startling possibilities. For instance, had Mrs. Fox been unable, perhaps because of infirmity, to act as trustee, another trustee could have transferred the entire estate (excepting only the cottage before its sale) to the appellant, and wiped out Mrs. Fox's life interest in income and her remainder interest without any consideration of her rights or the rights of other beneficiaries. Surely the court would have interfered in such a case, because it was clearly the intention of the testator that his widow should have a life interest in his estate. This intention was also clear with respect to his son. Grandchildren who, it should be remembered, were not born when the will was executed, were only to have an interest in income following the death of the appellant. Their interest in the remainder of the estate was also to fall in only after the death of their father.

In my view, it was the obvious intent of the testator that his son have a life income from his estate, and the remainder outright following the death of his mother. The power to encroach must be viewed in the light of that intent.

In addition, although the encroachment to the extent of the cottage proceeds was of an "amount" within the terms of sub-para. 4(c), the encroachment to the extent of the transfer of the estate interest in the apartment building was not the payment of an "amount", but was the transfer of an interest in real property, which was the major source of estate income. Were it necessary to do so, I should hold that at least the transfer of the estate interest in the apartment building was not an encroachment within the terms of the will. However, I do not consider it necessary to do so.

It is clear that the testatrix, in transferring all of the property she did to her grandchildren, did not consider the provisions of the will at all. She arbitrarily decided to treat the estate assets as her own property and, even after an order of the court freezing estate assets, continued to do so. After the appellant properly requested an accounting of disbursements from the estate, Mrs. Fox obtained legal advice and her counsel drafted a memorandum of encroachment using all of the appropriate

words to support the encroachment. However, her own clear viva voce evidence indicates that she always considered the estate assets to be hers to deal with as she pleased, and that she wished to disinherit her son. She can do that with her own estate, but not with that of her deceased husband. It is my view that all of the encroachments made by Mrs. Fox constitute breaches of trust.

In result, I would allow the appeal, set aside the judgment in appeal and replace it with judgment in favour of the appellant in the following terms:

1. Declaring that Miriam Fox is in breach of the trust provisions of the last will and testament of her deceased husband Ralph Fox.

2. Removing Miriam Fox as executrix of the estate of Ralph Fox, and replacing her by an executor or executrix, other than any of the other parties to this action, to be agreed upon by the parties. In the event that the parties cannot agree upon a new executor or executrix, one may be appointed upon application to the Ontario Court of Justice (General Division).

3. Ordering an accounting of all original estate assets, including the estate interest in the matrimonial home, the cash, and other original assets.

4. Ordering repayment of any funds improperly removed from the estate, plus appropriate interest thereon, including 100 per cent of the net proceeds of the sale of the cottage property, from funds into which they can be traced, or from Miriam Fox personally where tracing is not possible.

5. Ordering a retransfer into the name of the estate of a one-half interest in the Palmerston Avenue apartment building.

6. Ordering costs in favour of the appellant to be paid by Miriam Fox personally.

CATZMAN J.A.: --

Introduction

I have read, in draft form, the reasons for judgment of my colleagues. They
would allow the appeal on the grounds that:

(1) Miriam had no right to dispose of the cottage property in any capacity;

(2) Miriam did not exercise her discretion as executrix at all, but rather dealt with the estate assets as if they were her own;

(3) if Miriam did purport to act as executrix,

(a) the exercise of her discretion to encroach cannot be sustained because it was motivated by her disapproval of Walter's marriage outside the Jewish faith; and

(b) the power to encroach conferred by the will did not entitle her to encroach in the manner she did.

I agree with the conclusions identified above as items (1), (2) and (3)(b). If, however, those conclusions are wrong, and if this appeal falls to be determined on the basis of the nature of the motivation underlying the exercise of Miriam's discretion to encroach, I respectfully disagree with the views of my colleagues. I consider it advisable, in the event that this litigation proceeds further, to record the basis of my disagreement.

Miriam's Motivation

Galligan J.A. has concluded that Haley J. found as a fact that "Miriam's disapproval of Walter's proposed marriage to a gentile was her motivation for exercising her power to encroach". I agree with Galligan J.A. that, if Miriam's exercise of her discretion to encroach was actuated solely by her displeasure with her son's choice of spouse, her exercise of discretion should not be

permitted to stand. However, I have a different assessment of Miriam's motivation.

I begin by looking at what Haley J. said on the subject. Her reasons for judgment following the trial are reported at (1994), 5 E.T.R. (2d) 174. At pp. 184-85, she says:

> I am satisfied that the first encroachment, being of the cottage proceeds, was motivated by Miriam's concern about the marriage and that this motive continued and was perhaps coupled with her concern for the welfare of Walter's children as stated in the Memorandum of Encroachment of December 1992. However, the conversation with Percy Freedman took place as late as August 1992 and I am satisfied that Miriam's dislike of Walter's marriage continued as her prime motivation in encroaching as she did.

(Emphasis added)

Her reasons for judgment respecting costs, delivered some two months later, are reported at (1994), 5 E.T.R. (2d) 188. At p. 191, she says:

> The central issue of this trial was whether the executrix had properly exercised the broad power of encroachment the testator had given her under the will when she had used it to deprive the applicant of his interest in the bulk of the residue of the estate because he had married a gentile.

Galligan J.A.'s view is that these passages reflect a clear and unambiguous finding of fact that Miriam's motivation for exercising her power to encroach was exclusively her disapproval of Walter's marriage. His reasons proceed on that premise, and I have no quarrel with the conclusion he reaches if that premise is correct. With deference, however, I read Haley J.'s reasons for judgment somewhat differently. On my reading, while Haley J. does clearly indicate that Miriam's displeasure with Walter's choice of spouse was the primary reason for her exercise of the power to encroach, she also indicates that Miriam's actions were motivated, at least in part, by her concern for the financial welfare and security of her grandchildren.

In fairness, Miriam's motivation for encroaching as she did was not the focus of Haley J.'s reasons for judgment. Her focus, rather, was on the broad and uncontrolled nature of the power to encroach conferred by the will. Although, unlike Galligan J.A., I do not find Haley J.'s finding of fact to be clear and unambiguous, I think it fair to say that the imprecision arises because she did not consider it necessary to be precise on the subject. On her analysis, the question whether Miriam was entitled to encroach as she did was far more important than the question why Miriam encroached as she did.

As Galligan J.A. has pointed out, there was evidence at the trial to support the finding that Miriam, despite her denials, exercised the power to encroach because Walter chose to marry out of the Jewish faith. But there was also evidence, none of which Haley J. purported to reject, that Miriam was moved as well by her concern for the financial welfare and security of her grandchildren. Indeed, it should be borne in mind that, in encroaching as she did, Miriam was acting against her own interest, for she thereby forfeited the portion of the income on the residue that would have otherwise accrued to her under her husband's will.

Walter's son, Ralph, testified that Miriam had expressed concern that Walter's new wife was after money, both Walter's and Miriam's. This concern was reflected in a memorandum prepared by Miriam's lawyer in May 1989, in which he wrote:

> Miriam's major concern is related to Walter's present folly. He appears to be deeply involved with his secretary -- about whom his mother has very strong feelings and historial [sic] grounds for objection. She has made up her mind to "disinherit" Walter so as to prevent this woman from getting her hands on any of her money.

(Emphasis added)

In Walter's own evidence, he acknowledged that, since 1989, he had no contact with Ralph and provided no financial support to him. Walter also acknowledged that his daughter, Shayne, was

aware of the continuing court battles between him and his former wife on the issue of child support. The memorandum of encroachment signed by Miriam in December 1992 (to which Haley J. referred in the first of the two passages quoted above) recited, in part:

> Among my many reasons for giving positive consideration to exercising my discretion to transfer a major portion or all of the assets of the estate to my grandchildren are the following:
>
> (a) My son, Walter, went through an extremely acrimonious divorce with his wife (the mother of Ralph and Shayne) in or about 1984. Through his actions, Walter has alienated both of his children, has not acted as a responsible parent to them either financially or emotionally and I have concerns that if any portion of the estate eventually passed to Walter on my death (as is provided under the will) he would not make proper provision for Ralph and Shayne, as was the hope of my late husband.
>
> (b) I am aware that at various times Walter's financial circumstances have been very insecure. Therefore, I am concerned that a major portion of any part of the estate which is left to him would only go to satisfy his indebtedness.
>
> (c) Both Ralph and Shayne attend school and Ralph particularly may be in university for many years. Walter has not been providing the financial support to Shayne that he was required to pursuant to Court Order and despite the fact that Shayne's mother has gone to the court on a number of occasions to attempt to have Walter meet his obligations. As a consequence, I have been personally paying for my grandson's, Ralph, university education.
>
> (d) I have a very close relationship with my grandchildren, Ralph and Shayne, and I know them to be mature well beyond their years. As a result of the actions of their father, they have experienced a great deal of uncertainty in their lives and I believe that they would maturely benefit from a degree of financial security that would be provided by transferring the estate to them.

(e) Although I would lose my entitlement to income from the estate if I transferred the remaining assets to Ralph and Shayne, I have reviewed my own financial situation with my accountant and have concluded that my lifestyle and security will not be affected.

(f) I understand that at this particular time an incidental benefit of making the encroachment as regards the property is the fact that the estate would avoid the deemed capital disposition that would occur pursuant to the Income Tax Act on January 2, 1993 and would avoid the necessity of relying upon the proposed new legislation to attempt to defer the deemed capital disposition.

(g) Walter is fifty years old, has remarried, is a lawyer, and has been in his own private practice for over twenty-five years. He suffers no disability and is certainly able to fully support himself and his wife and maintain his lifestyle.

These were legitimate factors for Miriam to take into account in exercising the discretion conferred upon her by her husband's will.

As I read the evidence, therefore, having regard to the history of the estranged and unhappy relationship between Walter and his children and to Miriam's historically justified apprehension regarding Walter's sense of responsibility to provide for them, their financial welfare was a real and operating concern influencing Miriam to exercise her discretion as she did. I therefore conclude, as I understand Haley J. to have concluded, that there were two bases, both supported by credible evidence, on which Miriam exercised her discretion to encroach:

(1) the first, and inappropriate, basis, her displeasure with Walter's choice of spouse; and

(2) the second, and appropriate, basis, her concern for the financial welfare and security of her grandchildren.

While the first basis was undoubtedly primary and would, if

standing alone, warrant intervention by the court, the second basis is a legitimate foundation for the exercise of discretion by the executrix under the will.

The Significance of Miriam's Motivation

If I am right that there were two bases on which Miriam exercised her discretion to encroach, one appropriate (her concern for his grandchildren's financial welfare and security) and one inappropriate (her displeasure with Walter's choice of spouse), what is the significance of her duplex motivation? Does the inappropriate motive fatally infect Miriam's decision to encroach, notwithstanding the appropriate motive? Or does the appropriate motive save her decision to encroach, notwithstanding the inappropriate motive?

The point was not argued before us, and my research has failed to find any clear answer. There is some slender support for the former view -- that the inappropriate motive is fatal -- in the article, "Judicial Control of Trustees' Discretions" (1975), 25 U.T.L.J. 99, in which Professor Cullity writes, at p. 115:

> Extraneous benefits, motives, or desires will vitiate an attempt to exercise a discretion only if they actuate or form part of the basis upon which the trustee's decision was reached.

(Emphasis added)

No authority is cited for that proposition and, in the absence of authority, I have difficulty in accepting that the exercise of discretion by an executrix on an appropriate basis must necessarily fail because of a concomitant inappropriate basis. In light of our proposed disposition of this appeal on other grounds, I need not resolve this question. I incline to the view, however, that if an executrix exercises her discretion to encroach for a "good" reason, clearly within the contemplation of the power conferred upon her by the will, we should be reluctant to interfere on the ground that she was, additionally, motivated by a "bad" reason that the court is unprepared on public policy grounds to support.

Disposition

Having regard to my agreement with those aspects of the reasons of my colleagues set out in the introduction to these reasons, I would dispose of this appeal in the manner proposed by McKinlay J.A.

Appeal allowed.

ESTT FAM

S/M/49/13

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

Citation: McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkili (aka McCorkell), Deceased – 2014 NBQB 148
Date : 2014 06 05

BETWEEN: **ISABELLE ROSE MCCORKILL**

Applicant

- and -

FRED GENE STREED, EXECUTOR OF THE ESTATE OF HARRY ROBERT MCCORKILL (AKA MCCORKELL), DECEASED

Respondent

-and-

THE PROVINCE OF NEW BRUNSWICK as represented by THE ATTORNEY GENERAL, THE CENTER FOR ISRAEL AND JEWISH AFFAIRS, LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA, and THE CANADIAN ASSOCIATION FOR FREE EXPRESSION

Interveners

BEFORE:	Justice William T. Grant
HEARING HELD:	Saint John
DATES OF HEARING:	January 27-28, 2014
DATE OF DECISION:	June 5, 2014

COUNSEL:

Marc-Antoine Chiasson for the Applicant

John D. Hughes for the Respondent

Richard A. Williams for the Intervener, Province of New Brunswick as represented by the Attorney-General

Danys R.X. Delaquis for the Intervener, The Centre for Israel and Jewish Affairs

Catherine A. Fawcett for the Intervener, League for Human Rights of B'Nai Brith Canada

Andy Lodge for the Intervener, The Canadian Association for Free Expression

DECISION

GRANT, J

[1] Harry Robert McCorkill died on February 20, 2004 having first made his last will and testament dated April 19, 2000. He named William Luther Pierce of Post Office Box 70, Hillsboro, West Virginia as his sole executor and the respondent, Fred Gene Streed ("Streed"), of the same address as his alternate executor. Mr. Pierce predeceased Mr. McCorkill so Streed became the executor and trustee.

[2] In the dispositive clause of his will he transferred all of his property to his trustee in trust to pay all his debts and taxes and to "...pay or transfer the residue of my estate... to the NATIONAL ALLIANCE, a Virginia corporation, with principal offices at Post Office Box 70, Hillsboro, West Virginia 24946, United States of America", the same address he used for both his executor and his alternate executor.

[3] On November 30, 2010, Streed applied for Letters Probate of the McCorkill Will showing a probate value of approximately $128,500 Canadian and $90,000 US, all of which was personal property. On May 6, 2013, Letters Probate were issued to Streed.

[4] Mr. McCorkill was never married and had no children. He had two siblings, a brother and a sister, both of whom survived him though he was not close to them.

[5] On July 18, 2013 his sister, Isabelle Rose McCorkill, filed an application with this court which was amended on August 29, 2013. In her amended application, Ms. McCorkill requests, *inter alia*, an order:

a. Declaring that the bequest provided at paragraph 3(b) of the Last Will and Testament of Harry Robert McCorkill (a.k.a. McCorkell) void as it is a bequest that is illegal and/or contrary to public policy;

[6] On July 22, 2013, Ms. McCorkill was granted an *ex parte* injunction enjoining Streed as executor of the estate from paying, transferring or dispersing any portion of the estate and ordering that all the assets of the estate remain in the province of New Brunswick until further order of the Court.

[7] On July 31, 2013, after a hearing with notice to the respondent, that order was continued pending the disposition of this application on its merits.

[8] On August 19, 2013, the Province of New Brunswick ("the Province"), The Centre for Israel and Jewish Affairs ("the CIJA") and The League for Human Rights of B'Nai Brith Canada ("B'Nai Brith") were given leave to intervene in this application.

[9] On September 3, 2013, the Canadian Association for Free Expression ("CAFE") was also added as an intervenor.

APPLICANT'S GROUNDS

[10] In her amended Notice of Application, Ms. McCorkill sets out the following as the grounds of her application:

g. The payment or transfer of the residue of the estate to the National Alliance is against public policy and in contradiction with Canada's own laws, undertakings and commitments in that:

i. The National Alliance is a long-standing neo-Nazi group in the United States that has also been active in Canada. Through its hate propaganda, the National Alliance promotes a

political program parallel to that of the original World War II-era National Socialist Party of Germany (the Nazis) including genocide, ethnic cleansing, and the use of hate motivated violence and terror to achieve its aims.

ii. The National Alliance has a long history of inspiring and carrying out hate motivated violence and terror through its members and supporters in order to achieve its stated political aims;

iii. The *Criminal Code* of Canada specifically prohibits hate propaganda in Canada and make criminal offences of advocating genocide and publicly inciting hatred;

iv. Canada has been a signatory and party to the *International Convention on the Elimination of All Forms of Racial Discrimination* ("Convention") since 1970. Parties to the Convention shall condemn all hate propaganda and declare as offences hate propaganda, membership in racial supremacist groups and the provision of any assistance to racist activities, including the financing thereof;

v. Canada has also signed on, and committed to, other international declarations and covenants which specifically protect individuals against any discrimination, advocacy of national, racial or religious hatred and incitement to discrimination and violence; ...

ISSUES

[11] This application raises the following issues:

A) Are the writings and other communications of the residual beneficiary of the estate, The National Alliance, (hereinafter sometimes referred to as "the NA") illegal and/or in violation of public policy?

B) If so, should the court declare the bequest invalid, given that it is made to a beneficiary whose activities are contrary to public policy but not made for specific purposes?

A. THE NA'S COMMUNICATIONS AND ACTIVITIES

[12] There is an extensive body of evidence dealing with both the communications and the activities of the National Alliance which has been filed by the parties and the interveners in this application which I will summarize in the following paragraphs.

Isobel McCorkill - Applicant

[13] In support of her application, Ms. McCorkill has sworn two affidavits and filed three sworn by Mark Potok, a senior fellow at the Southern Poverty Law Center ("the SPLC"), which is a non-profit civil rights organization in the United States. Portions of two of Mr. Potok's affidavits were ruled inadmissible. Ms. McCorkill makes no allegations in her affidavits about the National Alliance.

[14] In his third affidavit sworn November 20, 2013, Mr. Potok, states:

> **I have performed extensive research and have published several articles and chapters on right-wing extremist hate groups, including the National Alliance (NA). As I also explained, the SPLC has gathered numerous documents concerning the National Alliance through publicly available sources or subscriptions to NA publications.**

[15] Mr. Potok also attaches four exhibits to his affidavit concerning the NA. The first is a document entitled "What is the National Alliance?" which is prepared by the NA and sets out its ideology and program. Under the heading "Summary of Statement of Belief" is found the following:

> **We may summarize in the following statement the ideology outlined above:**

> We see ourselves as a part of Nature, subject to Nature's law. We recognize the inequalities which arise as natural consequences of the evolutionary process and which are essential to progress in every sphere of life. We accept our responsibilities as Aryan men and women to strive for the advancement of our race in the service of Life, and to be the fittest instruments for that purpose that we can be.

[16] Under the heading "White Living Space" the document states:

> ... After the sickness of "multiculturalism," which is destroying America, Britain, and every other Aryan nation in which it is being promoted, has been swept away, we must again have a racially clean area of the earth for the further development of our people. We must have White schools, White residential neighborhoods and recreational areas, White workplaces, White farms and countryside. We must have no non-Whites in our living space, and we must have open space around us for expansion.
>
> We will do whatever is necessary to achieve this White living space and to keep it White. We will not be deterred by the difficulty or temporary unpleasantness involved, because we realize that it is absolutely necessary for our racial survival. ...

...

[17] Under the heading "An Aryan Society" it states:

> We must have new societies throughout the White world which are based on Aryan values and are compatible with the Aryan nature. We do not need to homogenize the White world: there will be room for Germanic societies, Celtic societies, Slavic societies, Baltic societies, and so on, each with its own roots, traditions, and language. What we must have, however, is a thorough rooting out of Semitic and other non-Aryan values and customs everywhere. ...
>
> In specific terms, this means a society in which young men and women gather to revel with polkas or waltzes, reels or jigs or any other White dances, but never to undulate or jerk to negroid jazz or rock rhythms. ...

[18] On the topic of "A Responsible Government" the document states:

> **... The fact is that we need a strong, centralized government spanning several continents to coordinate many important tasks during the first few decades of a White world: the racial cleansing of the land, the rooting out of racially destructive institutions, and the reorganization of society on a new basis.**
>
> **The central task of a new government will be to reverse the racially devolutionary course of the last few millennia and keep it reversed: a long-term eugenics program involving at least the entire populations of Europe and America. Such a task is necessarily intrusive, and it will require large-scale organization.**

[19] The Merriam-Webster online dictionary defines the term "eugenics" as " a science that tries to improve the human race by controlling which people become parents". It continues:

> **The first thorough exposition of eugenics was made by FRANCIS GALTON, who in *Hereditary Genius* (1869) proposed that a system of arranged marriages between men of distinction and women of wealth would eventually produce a gifted race. The American Eugenics Society, founded in 1926, supported Galton's theories. U.S. eugenicists also supported restriction on immigration from nations with "inferior" stock, such as Italy, Greece, and countries of eastern Europe, and argued for the sterilization of insane, retarded, and epileptic citizens. Sterilization laws were passed in more than half the states, and isolated instances of involuntary sterilization continued into the 1970's. The assumptions of eugenicists came under sharp criticism beginning in the 1930's and were discredited after the German Nazis used eugenics to support the extermination of Jews, blacks, and homosexuals. ...**

[20] Under the heading "Program of the National Alliance" the document discusses one of its goals as "the attainment of governmental power". In explaining this, it states:

> **By governmental power we mean, of course, the power to make and execute all governmental policy. This implies a massive replacement of the existing power structures: legislatures, courts, military and police command cadres, and the mass media.**
>
> **No mere election of a head of state can give us this power; no president or prime minister, even if he is installed by a military coup and has the backing of the top military leaders, can stand alone against the other elements of the power structure in a modern White state – especially not against the power of the mass media. In order for any power we acquire to be meaningful it must be total: that is, it must include all the major elements of the power structure.**

[21] Later, in explaining why it is not necessary to build a larger power structure than the one it seeks to replace the document states:

> **The second reason why we don't have to build a power structure as large as the one opposed to us is that all the elements in the population we want to reach with our message are becoming increasingly responsive to that message. At the same time the opposed power structure is losing its own partisans. The government and the Jewish media will continue to have their hard core of support – Jews, feminists, some homosexuals, some Christians, the radical-liberal New World Order enthusiasts, most of the state and Federal bureaucrats, and others on government or media payrolls – but outside these special constituencies our enemies have very few real friends left, even among their beneficiaries. Blacks and mestizos as a whole, for example, can hardly be considered a staunch bulwark of the government, despite the favoritism it has shown them.**

[22] Under the heading "Requirements for Membership" the document states:

> **Eligibility: Any White person (a non-Jewish person of wholly European ancestry) of good character and at least 18 years of age who accepts as his own the goals of the National Alliance and who is willing to support the program described herein may apply for membership.**
>
> **Ineligible persons: No homosexual or bisexual person, no person actively addicted to alcohol or to an illegal drug, no person with a non-White spouse or a non-White dependent, (sic) and, except in extraordinary circumstances, no person currently confined in a penal institution may be a member. (The National Alliance does not advocate any illegal activity and expects its members to conduct themselves accordingly.)**

[23] The second document attached to Mr. Potok's affidavit is the National Alliance Bulletin of April/May 1990. It contains a commentary by W.L.P. which are the initials of the National Alliance founder and primary executor under the McCorkill will, William Luther Pierce, entitled "On Being a Front-Line Soldier." He recounts a recent conversation with a skinhead who accused the National Alliance of not being front-line soldiers. The commentary continues in part:

> **I said, well, that depends upon how you define a soldier, but our conversation was over for all practical purposes. It was clear that his conception of a "front-line soldier" is someone who cracks the enemy's skull in the street with a baseball bat, rips his face open with a bicycle chain, or breaks his legs across a curbstone. And that's fine. It's a healthy, red-blooded response to the current situation in America's cities. Any decent White person – certainly, any White male – who can walk six blocks in a major American city without feeling rage rising in himself and a growing desire to engage in such activity needs to have his hormone level checked. It is clear that if *most* White males would respond to their rage in a direct, physical way, as skinheads do, then we would have no race problem, no Jewish problem, no homosexual problem, and no problem with White race traitors in America. Our cities would be clean, decent, safe, and White once again, after a relatively brief period of bloodletting.**

> **The fact is, of course, that most White males will not take direct, physical action against their racial enemies. In fact, the minds of most White males are so addled by love-thy-nigger Christianity and Jewish TV that they don't even know who their enemies are. Still, it is good that a few do, and that they act accordingly. ...**
>
> **...**
>
> **Ultimately, we will win the war only by killing our enemies, not by any clever, indirect schemes which involve no personal risk. We should never forget that, and even if the skinheads served no other purpose than to remind us of it, we should be grateful for their activity. Our only regret in that regard should be that their activity is not better organized and better disciplined.** (Underlining by Grant J.)
>
> **...**

[24] Exhibit 3 to Mr. Potok's affidavit is the National Alliance Bulletin of January, 1994 which contains a commentary by Mr. Pierce entitled "Reorienting ourselves for Success" in which he states:

> **All the homosexuals, racemixers, and hard-case collaborators in the country who are too far gone to be re-educated can be rounded up, packed into 10,000 or so railroad cattle cars, and eventually double-timed into an abandoned coal mine in a few days time.**
>
> **...**
>
> **Those who speak against us now should be looked at as dead men – as men marching in lockstep toward their own graves - ...**

[25] Pierce also wrote novels, one of which, "The Turner Diaries", he dedicated to John Paul Franklin, a serial killer. In an interview on CNN which aired on November 18, 2013 (see Exhibit 4 to Mr. Potok's affidavit), Mr. Franklin

estimates that he killed 22 people. The interviewer writes about the interview and Franklin as follows:

> **"I felt like I was at war. The survival of the white race was at stake," he says. Franklin compares himself to a U.S. soldier in Vietnam, trained to be a sniper in the war. The enemy, he explains, were Jews, blacks and especially interracial couples. "I consider it my mission, my three-year mission. ...**
>
> **...**
>
> ***What was your mission? "To get a race war started."***
>
> **...**
>
> **Franklin's birth name was James Clayton Vaughn and he was born in Mobile, Alabama. He grew up in poverty and lived a childhood of abuse, he says.**
>
> **...**
>
> **He found a family and comfort in the white supremacy groups of the American South in the 1960's. Hitler's autobiographical manifesto, "Mein Kampf," moved him from hate to action. "I had this real strange feeling in my mind," he says. "I've never felt that way about any other book that I read. It was something weird about that book."**
>
> **At 26, he changed his name to Joseph Paul Franklin. Joseph Paul in honor of Paul Joseph Goebbels, the Nazi minister of propaganda, and Franklin after Benjamin Franklin.**

Province of New Brunswick - Intervener

[26] The Intervener, the Province of New Brunswick, filed two affidavits sworn by Kevin Fornshill who is the Chief Executive Officer and Director of Fringe Link Inc., a private company that provides research and training for law enforcement agencies. Mr. Fornshill worked for 24 years for the United States Park Police,

the last two of which he was assigned to work for the Joint Terrorism Task Force of the FBI in Washington, D.C. During that period of time he was involved with research of white extremist groups.

[27] In his affidavit sworn November 26, 2013, Mr. Fornshill attaches a number of exhibits most of which are taken from the National Alliance website or other National Alliance publications. They oppose immigration, promote racism and extol the white race. One posting from September 9, 2010 recounts an incident that occurred at Xavier University concerning the posting by the NA of an inflammatory flyer which referred to a robbery of three students at gunpoint. The flyer, entitled "Just in case they didn't bring this up in your orientation", alleged that "an urban hell surrounds the campus" and urged students to "stop fearing the smears."

[28] The National Alliance became involved in this matter after an article appeared in the Cincinnati Enquirer quoting one of the victims as saying, "We were trying to be nice" to the robbers. Robert Ransdell, the NA's Northern Kentucky Unit coordinator, commented,

> **This is an example of not being prejudiced or worrying about being prejudiced as resulting in somebody being robbed. I think that blacks have become accustomed to the realities of whites these days, and that is that whites are willing to submit – not willing to fight back. They are easy targets... because they have been indoctrinated from the cradle with this white guilt stuff.**

[29] The website also quotes Mr. Ransdell, who approved the flyer, as saying:

> **Some of the stuff was kind of inflammatory in there. But honestly I don't know – and the person that wrote the flyer made a good point. Should we really be sensitive to what we call people who are going to go up and put a gun**

to the head of people just for a few bucks? I'd have to say I'd call them savages.

[30] Mr. Fornshill also attaches to his affidavit a transcript of a July 30, 2011 radio broadcast by Erich Gliebe who has sworn two affidavits in support of the National Alliance in this application. In that broadcast, entitled "Exposing the Holocaust Story", Mr. Gliebe says that the story of the Holocaust has played a big role in the western world for many decades and that it affects the behaviour of people who, because of their blind belief in it, refuse to join and contribute to an organization like the National Alliance that is trying to "remedy the situation." He says, "These fearful Whites can't bear to be perceived as sharing a similar ideology to those people – namely, the German National Socialists – who supposedly killed millions of people... deliberately." He continues,

According to the Jews and their allies, the Holocaust was the attempt on the part of the German National Socialists, to exterminate the race of the Jews. The Germans conceived the plan and tried to carry it out by rounding up Jews from all over Europe, shipping them off to "death camps" and then killing them, usually using the delousing agent Zyklon-B. Masses of Jews were herded into more or less sealed rooms, and then gaseous Zyklon-B was forced into the rooms, killing the unfortunate victims. Most of the victims were then cremated. This extermination process resulted in the deaths of six million Jews and millions of others, including Gypsies, homosexuals and political criminals.

That is, in essence, the "official" version of the Holocaust, and all of the "official" sources pretty much agree on the above mentioned generalities. But if one tries to sift through the glut of so-called "information" on the subject in search of specifics, he is in for a long, discouraging, and wearisome struggle. His labors will most likely turn up only a jumble of contradicting claims and obvious exaggerations. The "specifics" are not specific at all, and in fact, are rather fuzzy. Although essentially all of the "approved" Holocaust literature toes the line when it comes to the 6-million-Jews figure, there are many gross and impossible-to-discount discrepancies in the details, especially

> **when one sees how the "official" version has changed through the years.**
>
> ...

[31] Mr. Gliebe then purports to poke holes in the "official" version and expose it as an "enormous Jewish extortion racket." He concludes:

> **So the official version of the Holocaust is not only a money-making scheme, it is also a weapon of restraint. It chains the minds of people and tends to prevent them from trying to fix what is wrong with society, even when they don't LIKE what's going on and, deep down, WANT to do something.**
>
> ...
>
> **But, from the white racialist perspective, Jews lie a lot – almost habitually, it seems – or at least they bend the truth, turn it into half-lies, and leave out crucial information much of the time. And there is no getting around that sometimes Jews just plain lie about things, and they do so knowingly. So the realization that the Jews have lied for decades about the Holocaust doesn't really strike us as being much different from the way they usually behave.**
>
> **However, as I mentioned earlier in this broadcast, the way that the Holocaust lie is used to browbeat our people into submission and to make a large portion of them fearful to do what they know they SHOULD do to remedy our race's plight... THAT is why the lie that we call the Holocaust must be destroyed. Once that lie is sufficiently exposed and weakened, then the programs and policies of the National Alliance will help to organize our people into a force that will set our race back on the path to a destiny of greatness.**

[32] Mr. Fornshill also references a flyer discussed on the National Alliance website on August 12, 2011 concerning a murder/suicide involving a white girl

and a black boy. The flyer, which was addressed to "white parents" warns "Don't let your daughter date blacks, it might be a matter of life and death."

[33] Mr. Fornshill also includes in his affidavit an excerpt from the National Alliance website of July 6, 2012 which states in part:

> **... People are beginning to see that the survival of our Race is much more important than the survival of the United States as a country. If the country cannot stand for the Race then the Race needs to found a new country. That is the ultimate goal of the National Alliance and the public can see that with the quality people who are members and the understanding of the quality of people we want to recruit that indeed we are a very serious organization and we can be and will be the Vanguard of hope for the racially conscious of our beleaguered people.**

[34] Mr. Fornshill also attaches an excerpt from the National Alliance website of July 7, 2013 following the trial concerning the shooting in Florida of Trayvon Martin by George Zimmerman. The website posting reads as follows:

> **As predicted, riots have begun as a result of the Zimmerman verdict. An interesting note regarding this latest Media Circus is just how obviously they distorted the facts in order to achieve their desired result.**
>
> **On cue from their Jewish masters, professional Race-baiters, Al Sharpton and Jessie Jackson, riled up their followers against Whitey like Voodoo practitioners in a bad horror movie.**
>
> **Never mind the fact that Zimmerman was only half white. Never mind the fact that in the 513 Days Between the Trayvon shooting and the Zimmerman verdict, 11,106 Blacks were murdered by other Blacks.**
>
> **For the first time in decades average White people are seeing past Mainstream Media's lies, thanks to the blatant contradictions regarding this particular case.**

[35] In his affidavit of August 31, 2013, Mr. Fornshill deposes that three members of the National Alliance, including its chief executive officer, were convicted in 2006 of threatening and intimidating a Mexican and Native Americans at a bar in Utah. He also deposes that another member was convicted of attempting to bomb a January, 2011 Martin Luther King, Jr. Day parade in Spokane, Washington.

[36] Finally, Mr. Fornshill deposes that a financial supporter of the National Alliance, whom he describes as a racist skinhead, was responsible for a shooting at an Oak Creek, Wisconsin Sikh Temple in August 2012 though he does not indicate that that individual was convicted of anything.

B'nai Brith - Intervener

[37] Anita Bromberg, who is the national director of legal affairs for the Intervener, The League of Human Rights of B'nai Brith Canada, also filed an affidavit in support of B'nai Brith's position which she swore on September 4, 2013. In that affidavit, she deposes as follows:

> **2. B'nai Brith Canada has been at the forefront of the battle against antisemitism, racism and bigotry since its formation in Canada in 1875. Through the League, B'nai Brith Canada monitors the activities of hate groups in Canada and documents all reported incidents of antisemitism.**
>
> **3. I have been involved in the anti-hate activities of the organization since I began working with the League in 2002 and have co-authored its annual report, *The Audit of Antisemitic Incidents* (herein after referred to as the "Audit"). This report, published annually since 1982 by the League, is a major vehicle for reporting findings of antisemitism to the public.**

4. **As documented in the Audit, incidents of antisemitism have shown an increasing trend. Antisemitism of far right groups and individuals have consistently featured in the Audit's findings.**

5. **Far right groups identified as such in the Audit promote white supremacist, racist viewpoints similar to those held by the National Alliance. While the white supremacist groups in Canada are distinct, they do share ties with American groups often interacting on web forums.**

6. **Attached to this my affidavit as Exhibit "A" is the 2002 *Audit of Antisemitic Incidents* which documents the continued activities of various white supremacist groups in Canada, the recruitment drives as well as the use of the Internet to spread their brand of hatred.**

Centre for Israel and Jewish Affairs - Intervener

[38] Shimon Koffler Fogel is the chief executive officer of the Intervener, The Centre for Israel and Jewish Affairs ("the CIJA"), and has served as the founding national director of community services at the Canadian Jewish Congress. He also served as a consultant to Parliament's standing committee on foreign affairs and is a member of the round table on global security under the Department of National Defence.

[39] In his current position Mr. Fogel spends considerable time studying and researching various organizations that are white nationalist/supremacist and anti-Semitic such as the National Alliance. In an affidavit sworn on November 27, 2013 he deposes that the CIJA's mandate is to represent and protect the Jewish community's interests by maintaining ongoing contact with government and political leadership and with representatives of Canada's diverse cultural communities, with the media and with the general Canadian public.

[40] Mr. Fogel further deposes that the Jewish community has historically been a target of racism, hate and group vilification. He states that one of the objectives of the CIJA is to fight against anti-Semitism in any form in Canada and around the world and that its predecessor organization, The Canadian Jewish Congress, has consistently worked against Nazi, Neo-Nazi, white nationalist and white supremacist organizations.

[41] He recites the following information about the NA as found on the websites of the Southern Poverty Law Center and the Anti-Defamation League:

> **29. According to the Southern Poverty Law Center's (SPLC) website (www.splcenter.org), which I have read, NA materials call for the eradication of the Jews and other races. While the NA and associated groups dehumanize all non-whites as threats to Aryan racial and cultural purity, according to the Handbook, Jews are considered a more pressing threat to the NA than other groups. According to ADL's website, on the subject, the NA's founder in his essay "Who Rules America" wrote:**
>
> > **"The Jewish control of the American mass media is the single most important fact of life, not just in America, but in the world today. There is nothing – plague, famine, economic collapse, even nuclear war – more dangerous to the future of our people."**
>
> **30. The SPLC has reported, and I have read the reports and believe, that the NA has produced and influenced more violent criminals in the last three decades than any other neo-Nazi organization. According to the SPLC reports, NA members were connected to at least 14 violent crimes between 1984 and 2005, including bank robberies, shootouts with police and, in Florida, a plan to bomb the main approach to Disney World.**

31. According to the ADL's website, the NA have used billboards, hung organizational banners in prominent locations, rented booths at gun shows, posted their propaganda materials on public property and distributed NA literature in suburban neighborhoods and on college campuses. The ADL specifically mentions one popular item that has been distributed by the NA at secondary schools and colleges – the SAGA of... White Will!! – a racist, anti-Semitic comic book that encourages students to join the fight for "nationalism and racial and ethnic self-determination everywhere".

32. According to the ADL's website, the NA has also had significant influence through its publication and distribution of books authored by William Pierce. One such book, *The Turner Diaries* calls for the violent overthrow of the government and the systematic murder of Jews and non-whites in order to establish an "Aryan" society. This book has been implicated as a motivation for the 1995 Oklahoma City bombing that caused the death of 168 people and injured 680. The book was also the inspiration behind a crime spree that included murder, robbery and the bombing of a synagogue by a white supremacist gang connected to the NA.

33. According to the ADL's website, *The Turner Diaries* was required reading for the Aryan Republican Army, and influenced white supremacists as far away as Britain, where the book inspired the bombing of ethnic neighbourhoods and a gay bar in London, killing three people in April 2000.

34. According to the ADL's website, in addition to the publication and distribution of Pierce's books, the NA has also been active in promoting hatred through Resistance Records, producing and distributing music replete with fierce lyrics directed against Jews and other minorities. Canadian neo-Nazi skinheads originally founded this operation in 1993. According to ADL's website, Erich Gliebe, Pierce's successor in the winter 2000 issue of NA's Resistance magazine, described the utility of white power music as

"awakening and mobilizing the White Youth of today into a revolutionary force to destroy the system.

Fred Gene Streed - Respondent

[42] The respondent, Fred Gene Streed, filed an affidavit in response to this application in which he recites what he has done as executor of the estate to date. He addresses the application in the following paragraphs:

12. The affidavit of Mr. Potok on behalf of the Southern Law Center I believe to be deliberately misleading, because the documentation used is from the early years of the foundation and existence of the National Alliance. Articles written by the founder Mr. Pierce more than a decade before his death in 2002 are being advanced as a basis for invalidating the Testator's Will more than a decade after Pierce's death. A picture of Adolf Hitler is clearly submitted for inflammatory, not probative, value. To the extent that the testator sympathized with the purposes of the National Alliance I believe he was simply exercising his political freedom.

13. It is also my belief that the political writings of the founder of the National Alliance, William L. Pierce, were legal and in compliance with the laws of the United States of America at the time they were written. As the laws and the social mores of the United States have changed with time the message and views expressed by the organization have also changed. These changes were advocated in no small part by the Testator, Harry Robert McCorkill, before his death. It is my belief that this is why Mr. Potok has had to rely on material several decades out of date.

14. The additional mention of specific individuals and their crimes and punishment is a transparent attempt to smear the Testator and Beneficiary with guilt by association, which I believe is not a legitimate method of legal proof. Since I am not affiliated with the National Alliance I prefer to leave the particulars of these matters to the present head

of the National Alliance, Mr. Erich Gliebe, who has better access to the true facts of membership alleged for those individuals in the affidavit of Mr. Potok than I can command from my own recollections.

[43] Erich J. Gliebe has been Chairman of the National Alliance since 2002 when William Luther Pierce died. He deposes, *inter alia*, as follows:

> **2. I became Chairman of the National Alliance (NA) in 2002 by a vote of the members of the Board of Directors, succeeding William Luther Pierce who died in 2002. I was personally acquainted with him and with the Testator named in the present proceeding, Harry Robert McCorkill.**
>
> **3. When I joined the NA in 1990 it was my aim to introduce traditional European culture to its activities. My own heritage and background are German and I had always been interested in history and my heritage. I believed the NA presented current and historical events accurately and that it addressed concerns of people of European descent. At the time I was a member of a German folk dance group which performed at festivals and other functions.**
>
> **4. It was my aim to introduce traditional European culture to the NA, so I organized the Cleveland Local Unit well enough that we were able to promote its first cultural festival in November 1996, and subsequent cultural festivals in Cleveland, St. Louis and Detroit. This endeavour was assisted by the Resistance Records label, purchased by William Pierce in 1999. He felt we should reach young people through their music, and then introduce them to classical and European folk music. The record label did have some success in that aspect, and some new members attended the cultural festivals.**
>
> **...**
>
> **6. Because of the attention given to the NA in the affidavit of Mark Potok, I make this affidavit chiefly**

in rebuttal of the characterizations therein of the NA as a neo-Fascist organization and of alleged concerns with public policy.

7. Throughout my years in the NA, I have been aware of Mr. Potok's writings for the Southern Poverty Law Center (SPLC) and its publications, in particular because it has depicted the NA as a "hate group". From this I believe the SPLC distorts the facts and publishes false reports about the NA and its members.

...

11. With regard to specific accusations in Mr. Potok's affidavit, I believe it is misleading the Court to refer to language from the NA's foundational document, decades old, to stir up concerns that the present-day NA has violent intentions. I am aware of current media reports that decades ago Canadian authorities may have carried out nutritional experiments on aboriginal schoolchildren. I see the Potok affidavit as a similar attempt to inject the past into the present.

12. With regard to specific allegations about individuals, Potok's paragraphs 13 and 14, after consulting or reviewing such records as are available to me, I can say that on that basis I believe McVeigh and Compton were never members of the NA, that no records appeared for Vanbiber, Carlson and Page, that Mathews left the NA in the 1980's to form his own group, and that Hanson was a member for a time. Carrothers was dismissed after being convicted, Harpham was dismissed for non-payment of dues six years before the incident alleged, that McGhee left four years before the incident alleged.

13. In the current edition of the NA Members' Handbook (2005) appears on page 9: "The National Alliance continues to maintain a Zero Tolerance policy towards illegal activity and any member involved,

suggesting or even hinting (at) such activities will be immediately expelled from the organization." ...

14. Under my leadership the NA began requiring applicants for membership to undergo a probationary period of at least one-year before admission (2011); more recently the Board of Directors approved having only supporters rather than members. In my broadcast and other statements on behalf of the NA I speak of the need to get back to real activism and offer viable alternatives to the decadent practices surrounding us. I have not been able to verify Potok's Exhibit 7, but the NA has no programs in Canada.

[44] Mr. Gliebe filed a second affidavit sworn November 12, 2013 in opposition to the application but it does not address the issue of public policy which has been raised by this application.

[45] The respondent also filed an affidavit from Malcolm Ross, which deals with his involvement in preserving the assets of the estate and includes an exhibit critical of the Southern Poverty Law Center. In that exhibit which Mr. Ross describes as "reputable commentary," the author lists several alleged "lies" of the SPLC, in one of which he states:

SLPC (sic) again uses guilt by association logic and tries to portray Chuck Baldwin's Liberty Fellowship Church in Kalispell, MT as a gathering of anti-government white supremacists.

...

SPLC ignores the quality of people who regularly attend and contribute to Liberty Fellowship's services. It also ignores that there are people who attend that are Chinese, African, Spanish, Canadian, Native Indian, among other ethnicities.

The Canadian Association for Free Expression - Intervener

[46] The Intervener, The Canadian Association for Free Expression ("CAFE"), filed an affidavit in opposition to this application sworn by its executive director, Paul Fromm, in which he states *inter alia*:

> **1. I am the Executive Director of the Canadian Association for Free Expression, (CAFE) and as such have personal knowledge of the information sworn to below and am authorized to speak on behalf of the Association.**
>
> **...**
>
> **3. The objectives of CAFE are as follows:**
>
> **(a) To operate exclusively as a charitable corporation for the purposes of education and general benefit to the community;**
>
> **(b) To promote respect for and observance of freedom of speech and expression generally;**
>
> **(c) To engage in and to encourage research into and awareness of freedom of speech and expression generally in light of common law tradition and the Charter of Rights and Freedoms of the Constitution of Canada;**
>
> **(d) To establish and fund educational scholarships and research programs, provided however, that no funds or assets of the Corporation shall be:**
>
> **(i) used for any political purpose;**
>
> **(ii) paid to any political organization.**
>
> **...**
>
> **5. Over the past thirty years, CAFE has developed an enhanced knowledge and expertise in relation to the issue of freedom of speech and expression.**

...

7. CAFE has an interest and mandate in ensuring and protecting the Fundamental Freedoms contained in Section 2 of the Canadian Charter of Rights and Freedoms, specifically, Section 2(a) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication and Section 2(d) freedom of association.

8. CAFE has no financial interest in the disposition of this Estate.

[47] In his affidavit Shimon Koffler Fogel challenges the *bona fides* of both The Canadian Association for Free Expression and Mr. Fromm as follows:

35. In 1981 Paul Fromm founded the Canadian Association for Free Expression (CAFE) and remains its leader.

36. Attached as Exhibit "A" is a copy of the Wikipedia website pertaining to Paul Fromm, which I have read.

37. CAFE presents itself as an organization concerned with the promotion and preservation of Freedom of Speech but its record of activism suggests a different agenda.

38. In 2004 CAFE was a signatory to the New Orleans Protocol, a gathering of white nationalist leaders such as Don Black (Stormfront), Kevin Alfred Strom (former managing director of National Vanguard), Willis Carto (founder of the Holocaust denial organization Institute for Historical Review) and David Duke (former grand Wizard of the Ku Klux Klan).

39. In the early 1990's Mr. Fromm was a speaker at several events hosted by the Heritage Front, including events marking the birthday of Adolf Hitler and honouring the memory of Robert Matthews

(leader of the nationalist group, The Order) at a "Martyr's Day Rally".

40. When his activities became known to his employer, The Peel Board of Education, he was warned that continued participation would result in a recommendation for termination.

41. In 1997 Mr. Fromm was terminated from his position as a teacher by the Peel Board of Education because of his continued involvement in such activities. ...

42. Mr. Fromm has published numerous YouTube videos on the Internet promoting his ideas. I have viewed several of Mr. Fromm's YouTube videos. Mr. Fromm introduces himself in these videos as the "Midnight Man" for Stormfront Radio, with a show every night at midnight eastern time. The videos reference the www.stormfront.org website and promote it. Attached as Exhibit "C" is a copy of a publication on the Stormfront forum website (www.stormfront.org/forum). This document references "the Jewish Problem" and more specifically that:

> "The origin of the problem with the Jews is, once again, in the blood. As a group, as a *race*, they suffer from psychopathy – a mental disorder whose main symptom is the ability to lie like there is no tomorrow."

ANALYSIS AND DECISION

[48] Much of the content of the affidavits filed by the respondent focused on discrediting the SPLC's evidence as being deliberately misleading, containing half truths and implying guilt by association. However, even if I accept every allegation these deponents make against the SPLC, that does not change the writings of the NA from William Luther Pierce 20 years ago to Erich Gliebe and others today, along with their foundational documents, Mr. Pierce's writings, their website, their other publications, and the transcripts of Mr. Gliebe's radio

broadcasts. All of these publications can only be described as racist, white supremacist and hate-inspired. They are disgusting, repugnant and revolting.

[49] While they may be protected by the first amendment under the US Constitution, there is a difference between that Constitution and the ***Canadian Charter of Rights and Freedoms*** which protects freedom of speech under Section 2(b) but also provides under Section 1 thereof:

> **The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.**

[50] Section 319 of the ***Criminal Code of Canada*** makes the public incitement of hatred a criminal offence. Section 319(2) states:

> **(2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of**
>
> > **(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or**
> >
> > **(b) an offence punishable on summary conviction.**

[51] In the case of ***R. v. Andrews***, [1990] 3 S.C.R. 870, the court considered the constitutionality of the predecessor to Section 319. In ***Andrews***, the majority decision written by Dickson, C.J. upheld the constitutionality of Section 319(2) of the ***Criminal Code*** and, in doing so, adopted much of the reasoning of Cory, J.A. then of the Ontario Court of Appeal.

[52] Cory, J.A. found that Section 319(2) of the ***Criminal Code*** violated Section 2(b) of the ***Charter of Rights and Freedoms*** but that it was justified under Section 1 of the ***Charter***. In reviewing his decision, Dickson, C.J. states:

The appellants belonged to the Nationalist Party of Canada, a white nationalist political organization. Mr. Andrews was the party leader and Mr. Smith its secretary. Both were members of the party's central committee, the organization responsible for publishing and distributing the bi-monthly *Nationalist Reporter*. This publication constitutes the primary subject-matter of the prosecution and was subscribed to by 43 individuals and 50 groups, clubs or organizations.

Pursuant to a search warrant, 89 materials were seized from the home of the appellants. Included in these materials were copies of the *Nationalist Reporter*, letters written by subscribers, subscription lists and mimeographed sticker cards containing such messages as "Nigger go home", "Hoax on the Holocaust", "Israel stinks" and "Hitler was right. Communism is Jewish". The ideology expressed by the material was summarized as follows by counsel for the appellants:

> ... the material argues that God bestowed his greatest gifts only on the "White people"; that if it were God's plan to create one "coffee-coloured race of 'humanity' it would have been created from Genesis"; and that therefore all those who urge a homogeneous "race-mixed planet" are, in fact, working against God's will. In forwarding the opinion that members of minority groups are responsible for increases in the violent crime rate, it is said that violent crime is increasing almost in proportion to the increase of minority immigrants coming into Canada. A high proportion of violent crimes are committed by blacks. America is being "swamped by coloureds who do not believe in democracy and harbour a hatred for white people." The best way to end racial strife, an excerpt opines, is by a separation of the races "through a repatriation of non-whites to their own lands where their own race is the majority..." The "Nationalist Reporter" also promulgated the thesis that Zionists had fabricated the "Holocaust Hoax" and that because Zionists dominate financial life and resources, the nation cannot remain in good health

> because the "alien community's interests" are not those of the majority of the citizens either culturally or economically.
>
> Cory J.A. in the Ontario Court of Appeal, referring specifically to the contents of the *Nationalist Reporter* and other publications of the Nationalist Party, characterized this material as "rubbish and offal", and stated that the writings were "malodorous, malicious and evil".

[53] Dickson, C.J. later discussed Cory, J.A.'s conclusion that s. 1 of the *Charter* saved the constitutionality of section 319(2) of the ***Criminal Code.*** He continued:

> ... Instrumental in reaching this conclusion was his rejection of the argument that the dissemination of hate propaganda represents little harm to society. Cory J.A. was unable to discount the danger presented by such expression, noting that s. 319(2) was introduced into the *Criminal Code* only after extensive study by the Special Committee on Hate Propaganda in Canada (hereinafter "the Cohen Committee") and, in a passage which has been much quoted, stating (at pp. 179-80):
>
> > I would have thought it sufficient to look back at the quintessence of evil manifested in the Third Reich and its hate propaganda to realize the destructive effects of the promotion of hatred. That dark history provides overwhelming evidence of the catastrophic results of expressions which promote hatred. The National Socialist Party was in the minority in the Weimar Republic when it attained power. The repetition of the loathsome messages of Nazi propaganda led in cruel and rapid succession from the breaking of the shop windows of Jewish merchants to the dispossession of the Jews from their property and their professions, to the establishment of concentration camps and gas chambers. The genocidal horrors of the Holocaust were made possible by the deliberate incitement of hatred against the Jewish and other minority peoples.

> It would be a mistake to assume that Canada today is necessarily immune to the effects of Nazi and other hate literature.

In light of the above comment, Cory J.A. concluded that the public and willful promotion of hatred against identifiable groups was the very antithesis of all the essential values and principles stressed by this Court in *Oakes, supra*, and that the aim behind s.319(2) clearly constituted a pressing and substantial objective under s.1.

Considering next whether the proportionality of s. 319(2) to Parliament's valid objective met the requirements of *Oakes*, a number of factors led Cory J.A. to conclude that the provision was justifiable under s. 1. He noted, for instance, that the need for communications to promote "hatred" prevented an unduly wide limitation upon the freedom of expression, stating (at p. 179):

> Hatred is not a word of casual connotation. To promote hatred is to instill detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)]. When an expression does instill detestation it does incalculable damage to the Canadian community and lays the foundations for the mistreatment of members of the victimized group.

[54] These eloquent statements are equally applicable to the evidence that is before the court in this application. Mr. Streed asserts that the writings of the NA attached to Mr. Potok's affidavits are dated while Erich Gliebe says it is misleading to rely on the NA's foundational documents to "smear" them. However, there is nothing "dated" about the anti-semitic rantings of Mr. Gliebe, the current Chair of the National Alliance, in his 2011 radio broadcast, the transcript of which is set out in Mr. Fornshill's affidavit. (See paragraph 31, *supra.*).

[55] Neither is there any evidence before the court that the NA has distanced itself from its "dated" foundational documents. Mr. Gliebe says that the NA now has "supporters" rather than "members". In the same paragraph he says that the NA now requires its members/supporters to "undergo a probationary period of at least one year before admission". However, he doesn't elaborate as to how those measures render the organization's vitriol "dated" or any less repugnant.

[56] The respondent also submits that the writings of the NA were not in violation of any laws in the United States when they were published. However, they clearly violate the ***Criminal Code of Canada*** and this court takes judicial notice of the fact that in this age of the internet national boundaries are meaningless for purposes of spreading hate propaganda such as that disseminated by the NA. In that regard I also accept and rely on the evidence of Anita Bromberg that white supremacist groups in Canada share ties with American groups and interact with them on web forums.

[57] This brings me to the first salient question in this application, whether or not the NA disseminates information that is in violation of public policy in Canada.

[58] What constitutes public policy is a question that has been considered in many cases. In the case of ***Re: Wishart Estate (No. 2)*** 1992 CanLii 2679 (NBQB); (1993) 129 NBR (2d) 397 Riordon, J. considered whether or not a direction in a will to destroy four horses violated public policy. He quoted extensively from the Missouri case of ***Eyerman et al v Mercantile Trust Co. N.A. et al*** 524 S.W.2d 210 including the following:

> **The term 'public policy' cannot be comprehensively defined in specific terms but the phrase 'against public policy' has been characterized as that which conflicts with the morals of the time and contravenes any established interest of**

> society. Acts are said to be against public policy 'when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality'. Dille v. St. Luke's Hospital, 355 Mo. 436; 196 S.W. 2d 615, 620 (1946); Brawner v. Brawner, 327 S.W. 2d 808, 812 (Mo. banc 1959).

[59] In ***Canada Trust Co. v. Ontario Human Rights Commission*** [1990] O.J. No. 615 (O.C.A.) the court considered whether a trust document establishing a charitable trust based on white supremacy, religious supremacy, racism and sexism violated public policy. Writing for the majority, Robins, J.A. stated at paragraph 34:

> 34. Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds": Re Millar, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 [per Crocket J., quoting Lord Aitkin in Fender v. Mildmay, [1937] 3 All E.R. 402, at p. 13 S.C.R.]. I have regard also to the observation of Professor D.W.M. Waters in his text on the Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), at p. 240 to the effect that:
>
> > The courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.

> **Nonetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. ...**

[60] In the case of ***Re Estate of Charles Millar, Deceased*** [1938] S.C.R. 1 Duff C.J. stated at p. 4:

> **It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates.**

[61] Public policy, then, embodies the "interests of society" as expressed in the morals of the time, the common law and legislation. In respect to the latter in ***Canada Trust Co.***, *supra.*, Tarnopolsky, J.A. stated at paras. 92-94:

> **92 Public policy is not determined by reference to only one statute or even one province, but is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti-discrimination laws of every jurisdiction in Canada. These have been given a special status by the Supreme Court of Canada in Ontario Human Rights Comission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (note), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. Paragraph17, 002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (note), 64 N.R. 161, 12 O.A.C. 241, at p. 547 S.C.R., p. 329 D.L.R.**
>
> **The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of**

> a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R. 145 at pp. 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect.
>
> 93 In addition, equality rights "without discrimination" are now enshrined in the Canadian Charter of Rights and Freedoms in s. 15; the equal rights of men and women are reinforced in s. 28; and the protection and enhancement of our multicultural heritage is provided for in s. 27.
>
> 94 Finally, the world community has made anti-discrimination a matter of public policy in specific conventions like the International Convention on the Elimination of All Forms of Racial Discrimination (1965), G.A. Res. 2106 A (XX), and the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), G.A. Res. 34/180, as well as Articles 2, 3, 25 and 26 of the International Covenant on Civil and Political Rights (1966), G.A. Res. 2200 A (XXI), all three of which international instruments have been ratified by Canada with the unanimous consent of all the provinces. It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public policy invalidity is restricted to any particular activity or service or facility.

[62] In my view engaging in activity which is prohibited by Parliament through the enactment of the ***Criminal Code of Canada*** falls squarely within the rubric of a public policy violation. In addition, as the applicant has pointed out, the NA's various communications and activities contravene the values set out in the ***Charter of Rights***, provincial human rights legislation as well as the International Conventions which Canada has signed all of which promote equality and the dignity of the person while prohibiting discrimination based on various grounds, including race and ethnic origin.

[63] I find that the information the NA disseminates is hate propaganda which is every bit as "malodorous, malicious and evil" as the material excerpted by Dickson, C.J. in ***R v. Andrews,*** *supra.* and which is of the kind targeted by the ***Criminal Code*** which makes its dissemination illegal. It follows, therefore, and I further find, that the dissemination of it by the NA violates the public policy of Canada.

B. Should the court declare the bequest to be invalid, given that it is made to a beneficiary whose activities are contrary to public policy, but not made for specific purposes?

[64] The respondent and CAFE also submit that cases where the courts have struck wills down as being against public policy are limited and only involve cases where the bequest itself is objectionable such as in the case of ***Re Wishart Estate,*** *supra.* They submit that the jurisprudence deals with repugnant conditions that are attached to bequests, not to the quality of the beneficiary as a person or organization. They submit that even in cases where a person has a criminal record, they are still entitled to receive a bequest, the obvious exception being where the crime, such as murder, was committed in order to obtain the bequest. On that issue see Tarnow, N.M. ***Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates,*** (1980), 58 Can. Bar Rev. 582.

[65] CAFE cites the case of ***Bolianatz Estate v. Simon***, [2006] S.J. No. 64 where the court refused to invalidate a gift to a beneficiary who had been stealing from the testator prior to the testator's death. In that case Richards, J.A., in separate but concurring reasons, stated at paragraphs 58 & 59:

> **... the general orientation of the law is very much against involving the courts in superintending the question of whether particular beneficiaries merit their inheritances. Bequests are not denied because a beneficiary is of bad**

> **character, has behaved immorally or has been involved in criminal activity.**
>
> **In terms of general principle, this recommends itself as a sound approach. It fits with the basic assumption that individuals are entitled to dispose of their property as they see fit. It promotes certainty and efficiency in the handling of wills by avoiding costly and protracted disputes over the proper allocation of testators' assets. And finally, it recognizes and avoids the deep problems involved in attempting to identify the particular kinds of behavior which should deny an inheritance.**

[66] They also rely on ***Jake Estate v. Antleman*** 2006 NBQB 371 where Creaghan, J. refused to void a gift as being against public policy. In that case, he stated at paragraph 22:

> **Although it may be argued that policies of the State of Israel are not in total conformity with policy of Canada as the country where the Will was executed and with whose law the validity of the Will must conform, I cannot find any basis for finding that a testamentary gift to the Government of Israel is contrary to public policy.**

[67] CAFE submits that there is nothing objectionable within the bequest itself. The only objection lies, they submit, within the applicant's perception of the beneficiary and that it should not be interfered with.

[68] They further submit that the gift merely expresses Mr. McCorkill's desire to benefit the National Alliance. There is no evidence, they submit, that the gift contains any conditions or connotation of violence. In that regard, they rely on Section 2 of the ***Charter of Rights*** which guarantees freedom of speech. They further submit that if a testamentary gift is not subject to any conditions which call for a use that is against public policy then the court should not interfere with the testator's right or freedom to dispose of his estate as he sees fit.

[69] They further submit that if the court intervenes it will open the floodgates to frivolous estate litigation. They submit that the certainty which has long been associated with testamentary bequests and which has served the English common law tradition so well will be eroded if courts intervene in cases where the character and/or quality of the beneficiary is challenged because that, they submit, is irrelevant.

[70] They further submit that since Mr. McCorkill would have been entitled to give money to the National Alliance while he was alive, there should be no reason he cannot do so on his death.

[71] Finally, the respondent submits that there is no evidence before the Court that if the will is upheld the National Alliance will use the money against any minority groups. They support CAFE's submissions and, in particular, submit that voiding this bequest would set a dangerous precedent.

ANALYSIS AND DECISION

[72] While the jurisprudence on voiding bequests on the grounds of public policy tends to deal with conditions attached to specific bequests, in my opinion the facts of this case are so strong that they render this case indistinguishable from those.

[73] Unlike most beneficiaries, the National Alliance has foundational documents which state its purposes. Moreover, those purposes have been expanded upon, explained and disseminated in various forms of media by the NA since its inception. They consistently show that the National Alliance stands for principles and policies, as well as the means to implement them, that are both illegal and contrary to public policy in Canada. If the organization has changed in these respects since its inception then it was incumbent upon the respondent, particularly through the evidence of Erich Gliebe, the current

President of the National Alliance, to demonstrate that in this application. It has not done so.

[74] The facts of this case can be distinguished from most other cases because in most cases, a beneficiary of an estate does not "stand for" something identifiable. They don't have foundational documents. A drug dealer does not "stand for" dealing drugs. He or she may have a criminal record of doing that but that does not mean that that is what they stand for. Their crimes are not the purpose for which they exist, their *raison d'être*.

[75] Unlike in the ***Jake Estate*** case, *supra.*, where there was no finding by the court that the State of Israel's *raison d'être* was contrary to public policy in Canada, in this case it is abundantly clear that what the National Alliance stands for and has stood for since its inception, its *raison d'être*, is contrary to public policy in Canada. In fact, as mentioned earlier, what it stands for, anti-semitism, eugenics, discrimination, racism and white supremacy, violates numerous statutes and conventions that have been passed by Parliament and the Legislatures and endorsed by the Government of Canada, including the ***Criminal Code***.

[76] The evidence before the court convinces me that in the case of the NA the purpose for which it exists is to promote white supremacy through the dissemination of propaganda which incites hatred of various identifiable groups which they deem to be non-white and therefore unworthy. Those purposes and the means they advocate to achieve them are criminal in Canada and that is what makes this bequest repugnant.

[77] It is also what makes this situation comparable, in my view, to a gift to a trustee for a purpose that is contrary to public policy. The law of wills is concerned with the intent of the testator and from the very fact that Mr.

McCorkill left his entire estate to the NA I infer that he intended it to be used for their clearly stated, illegal purposes. For me to find that such a gift was valid would require that I ignore an overwhelming body of evidence. The Court of Appeal has made the point on more than one occasion that trial judges must not "check their common sense at the court room door". Allowing this bequest to stand because it doesn't repeat those stated purposes but bestows the bequest on the organization whose very existence is dedicated to achieving them would be doing just that, in my view.

[78] Moreover, while the bequest doesn't advocate violence, it would unavoidably lead to violence because the NA, in its communications, both advocates violence and supports its use by others of like mind such as skinheads. It attempts, in some of its writings, to profess zero tolerance for violence or illegal activity but its writings and publications consistently expose those disclaimers as disingenuous.

[79] In its foundational documents, and more recently in Mr. Gliebe's affidavit opposing this application which he swore on July 26, 2013, the NA attempts to project an image of itself as a cultural organization promoting traditional European culture and heritage to young people through music and festivals. These feeble protestations only call to mind the attempts by the Nazis in Hitler's Germany to mask their true intentions through organizations like the Hitler Youth. History tells us that behind the mask lurked some of the worst evil ever visited on the human race.

[80] Mr. Gliebe also protests that the NA's records show that the Oklahoma bomber, Timothy McVeigh, and others identified by the SPLC as having been inspired by the writings of the NA were never members of the NA. In my view the fact that there is credible evidence before the court of any connection, no matter how small, between the NA and the evil visited on society by people such

as McVeigh and Joseph Paul Franklin only underlines what Cory, J.A. (as he then was) called "... the destructive effects of the promotion of hatred." and "... the catastrophic results of expressions which promote hatred.": see paragraph 53, *supra.*

[81] CAFE further submits that decisions such as this dealing with public policy should be left to Parliament and the Legislatures and that the courts should not interfere. (See also para. 59, *supra.*) That submission ignores the fact that Parliament has spoken loudly and clearly on this very subject in s. 319(2) of the ***Criminal Code*** as well as the fact that the New Brunswick Legislature has enacted the ***Human Rights Act***, R.S.N.B. 1973 c. H-11, the preamble to which states, in part:

> **Whereas recognition of the fundamental principle that all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity is a governing principle sanctioned by the laws of New Brunswick; ...**

[82] That submission also might have carried more weight if, in this case, the Attorney General had not intervened. However, the Attorney General has intervened and clearly stated the position of the government that this bequest is in violation of the public policy of this province and should be voided. It would not be practical for legislatures to pass legislation dealing with individual wills. An intervention such as this by the Attorney General is the only practical way for a government to deal with a particular case in order to ensure that the principles set out in legislation such as the ***Human Rights Act***, *supra.*, are upheld. That intervention sends a strong message about the effect of this bequest on the public policy of this province.

[83] CAFE also submits that since Mr. McCorkill was legally permitted to donate money to the NA during his lifetime there is no compelling legal

argument for prohibiting him from doing so on his death. I don't accept the premise of that submission. He may have been able to donate to the NA during his lifetime but I absolutely reject the submission that it was legal for him to assist an organization in the dissemination of hate propaganda. As mentioned earlier the NA's activities offend section 319(2) of the ***Criminal Code*** and, as a contributor, he would have been a party to that offence.

[84] Moreover, even if the bequest were not illegal but violated public policy for other reasons, the court could still void it. In ***Egerton v Brownlow*** (1853) 10 Eng. Rep. 359 (H.L.C.) the Lord Chief Baron discussed this in the following passage at p. 417:

> **... The owner of an estate may himself do many things which he could not (by a condition) compel his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land (though it be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in and pronounces the condition void, ...**

[85] Thus, in this case if the right of free speech in Canada were unfettered by the ***Criminal Code*** and Mr. McCorkill could have legally donated to the NA while he was living, this court would still have the authority, on making a finding that the bequest violates public policy, to step in and declare it void. See also ***Fox v Fox estate*** 1996 CanLii 779 at p. 11.

[86] Mr. Streed also submits that there is no evidence before the court that the NA will use the bequest for any purposes that violate public policy such as inciting hatred against Jewish people and other identifiable minorities. The answer to that submission is found in the foundational documents of the NA which demonstrate that it is dedicated to precisely that and related purposes as

the means of achieving white supremacy, white living space and its other racist goals. The fact that it may use some of the bequest to pay someone to clean its office premises or to fund a cultural festival does not mean that the bequest is used for other purposes. All of its activities are clearly focused on achieving its core purposes and thus any money it spends, from whatever source or for any activity, contributes, either directly or indirectly, to achieving those purposes.

[87] Finally, CAFE and the respondent submit that if the Court intervenes and voids the bequest because of the nature of the beneficiary then the floodgates will be open and estate litigation will flourish where bequests are left to persons who are not of stellar character. In my view, there is little risk of that. Each case must be dealt with on its own merits and I have little doubt that the expense of litigation will discourage frivolous applications. It is difficult to imagine too many applications that would be based on such a strong factual background as this one. On the contrary, in my view, if the court allowed this bequest to stand it would increase the risk of opening the door to bequests to other criminal organizations.

[88] Moreover, the jurisprudence concerning cases that are contrary to public policy goes back 200 years in the English common law tradition and more than a century in Canada alone. Despite that long history, it can hardly be said that there has been a deluge of cases where the courts have intervened in an estate or trust or even a contract on the grounds of public policy.

[89] I therefore find that while the voiding of a bequest based on the character of the beneficiary is, and will continue to be, an unusual remedy, where, as here, the beneficiary's *raison d'être* is contrary to public policy, it is the appropriate remedy.

DISPOSITION

[90] In summary, I find that the purposes of the National Alliance and the activities and communications which it undertakes to promote its purposes are both illegal in Canada and contrary to the public policy of both Canada and New Brunswick. Consequently, I declare the residual bequest to it in the will of Harry Robert McCorkill to be void.

[91] I further declare that as a result of this finding, there is an intestacy with respect to the residue of the estate of Harry Robert McCorkill and that the residue shall be divided amongst the next of kin of the said Harry Robert McCorkill in accordance with the ***Devolution of Estates Act***, R.S.N.B. 1973 c.D-9, as amended.

[92] With respect to the administration of the estate, Ms. McCorkill requests that I direct Mr. Streed to turn the assets of the estate over to her lawyer in trust and order Mr. Streed to pass his accounts within 30 days. However, I have not, by this decision, removed Mr. Streed as executor or otherwise invalidated the will nor has Ms. McCorkill provided any grounds for removing Mr. Streed as executor. That would require a separate application under the Probate Rules.

[93] With respect to Mr. Streed's accounts, if he wishes to have them passed for whatever reason, including if he wishes to resign as executor, then he can renew the application he previously made for that purpose to the Probate Court.

[94] Ms. McCorkill also requests, and I hereby make, an order permanently enjoining any individual associated with the estate from distributing, paying or transferring the residue of the estate or any part thereof to the National Alliance without further order of either this Court or the Probate Court.

COSTS

[95] Ms. McCorkill is entitled to her costs on a solicitor and client basis from the estate. Mr. Streed is also entitled to his costs from the estate on a solicitor and client basis. While he has not been successful, he did not write the will. Mr. McCorkill did and Mr. Streed had a duty to propound it as the surviving executor.

[96] The province has not requested costs and CAFE has been unsuccessful in its intervention. While the submissions of CIJA and B'nai Brith have both been helpful, their own purposes were also served by intervening so I will award them each a lump sum of $3,000.00 including disbursements to be paid out of the estate.

William T. Grant
Judge of the Court of Queen's Bench
of New Brunswick

CITATION: Royal Trust Corporation of Canada v. The University of Western Ontario et al., 2016 ONSC 1143
COURT FILE NO.: 2017/15 ES
DATE: 20160216

SUPERIOR COURT OF JUSTICE – ONTARIO

In the Estate of Victor Hugh Priebe, Deceased

RE: Royal Trust Corporation of Canada, Applicant

AND:

The University of Western Ontario, University of Windsor, Windsor Public Library, Hotel-Dieu Grace Healthcare, Windsor Regional Hospital and Office of the Public Guardian and Trustee, Respondents

BEFORE: Justice A. K. Mitchell

COUNSEL: B. Duewel, for the Applicant

D. Desante, for the Respondent, Office of the Public Guardian and Trustee

HEARD: February 3, 2016

ENDORSEMENT

Nature of the Application

[1] Pursuant to s. 60 of the *Trustees* Act[1], s. 10 of the *Charities Accounting Act*[2] and Rules 14.05(3)(a),(b) and (d) of the *Rules of Civil Procedure*[3], the applicant, Royal Trust Corporation of Canada, Trustee of the estate of Victor Hugh Priebe (the "Trustee"), seeks the opinion, advice and direction of the court upon the following questions arising out of the last will and testament of Dr. Priebe dated July 20, 1994:

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[1] R.S.O. 1990, c. T.23.
[2] R.S.O. 1990, c. C.10.
[3] R.R.O. 1990, Reg. 194.

(a) does the Will provide the Trustee with a discretion to choose whether or not to disperse funds for the purposes of paragraph 3(d)(ii)(E) of the Will?

(b) Are any of the provisions in paragraph 3(d)(ii)(E) of the Will void or illegal or not capable of being lawfully administered by the trustee because they are contrary to public policy, discriminatory on the basis of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sexual orientation, or otherwise and/or uncertain?

(c) If so, who is entitled to the trust funds under the Will?

(d) Is there a general charitable intention expressed in the Will sufficient to permit the court to exercise its inherent jurisdiction in the matter of charitable trusts and direct that the trust be administered *cy-pres*?

(e) If the court exercises its inherent jurisdiction to direct that the trust be administered *cy-pres*, how should the Trustee administer the trusts?

[2] The respondents, The University of Western Ontario, University of Windsor, Windsor Public Library, Hotel-Dieu Grace Healthcare and Windsor Regional Hospital take no position on the application.

[3] Applicant's counsel advises that, as a courtesy, the Human Rights Commission was served with a copy of the application record. The Commission did not appear on the return of the application and takes no position on the application.

[4] The Office of the Public Guardian and Trustee asks the court that when giving its advice and direction to the Trustee the court declare paragraph 3(d)(ii)(E) of the Will void as being contrary to public policy.

[5] It is important to note that the position taken by The Office of the Public Guardian and Trustee is not opposed by the Trustee. The Trustee's position on the application is neutral in all respects. The Trustee seeks only such advice and direction of the court as will permit the Trustee to fulfil its duties and obligations in administering the estate of Dr. Priebe in accordance with the provisions of the Will.

[6] Immediately following receipt of submissions on the application, I declared paragraph 3(d)(ii)(E) void as being contrary to public policy by virtue of it being discriminatory on the basis of race, gender and sexual orientation and held that this provision of the Will cannot be saved by applying the doctrine of *cy-pres*. I made these findings with written reasons to follow. These are those reasons.

Background

[7] Dr. Priebe died on January 1, 2015. Royal Trust was appointed estate trustee pursuant to a Certificate of Appointment of Estate Trustee with a Will issued August 4, 2015.

[8] The Will contains, *inter alia*, the following provisions in respect of which the Trustee seeks the court's opinion, advice and direction:

> Paragraph 3(d)(ii): My Trustee shall expend the balance of the income of my estate, and all income of my estate following the death of my sister, in the sole discretion of my Trustee, but after consultation with its Windsor Advisory Board, for so long as it exists, and thereafter, with a committee comprised of senior trust administrators of my Trustee and no more than two persons not ordinarily employed by my Trustee, such persons to be chosen from those with a science, industry or medical background, other than academics, administrators and government officials, for such one or more of the following purposes, it being my intention that my Trustee in its sole discretion may in any one year allocate a portion or all of the income to one or more of the following purposes so long as it is following a plan, to be updated from time to time to carry out **all** such purposes at such time and times as it determines:
>
> ...
>
> (E) To provide funds, from time to time and in the discretion of my Trustee for awards or bursaries to **Caucasian (white)** male, **single, heterosexual** students in scientific studies, including medicine, genetics, biology, chemistry, physics and those going into medical pharmacology research. The selection of these students shall be made by my Trustee's Windsor Advisory Board, or with the committee it constitutes pursuant to this paragraph 3(d)(ii). It is my wish hereby

expressed that the committee in determining the terms of such awards or bursaries that they take into consideration academic achievement, but not necessarily the highest marks, but a minimum cumulative average of at least 10.0 (B+) and an honest desire to work and achieve in his or her chosen profession and be of good character. Extracurricular activities (i.e. non-academic) of the applicant shall not be taken into consideration in qualifying a student for purpose of these awards or bursaries. In addition, students with the necessary academic qualifications who through work histories have demonstrated that they are not afraid of hard manual work in their selection of summer employment shall be given special consideration in the selection process. If no paid employment is available, then a full-time voluntary manual labour job may be considered as a substitute. These awards shall be directed to students who are going to attend the University of Western Ontario or those for whom it may be a hardship to go to the University of Western Ontario then they can be awarded to these particular students who wish to attend the University of Windsor. No awards to be given to anyone who plays intercollegiate sports. Further, to similarly provide funds for an award to be known as the Ellen O'Donnel Priebe Memorial Award in the discretion of my trustee, under the same terms as the awards above, except this award is to go to a hard-working, **single, Caucasian white** girl **who is not a feminist or lesbian**, with special consideration, if she is an immigrant, but not necessarily a recent one. This award is for someone going into a field the scientific study (not medicine) on the terms outlined above for the male applicants. The awards, at the discretion of the Trustee may be for some or all of the tuition payable by such applicants in the year of the award applicants must reapply if these are desired in subsequent years and the Trustee will reassess each candidate at that time to evaluate their academic progress and adherence to remaining single. The number of the awards or bursaries available shall be determined at the discretion of the Trustee depending on the amount of award available for this purpose. The awards or bursaries may be paid directly to the University to be attended by an award recipient on account of tuition.

...

> (G) In the event that one or more of the foregoing provisions shall be declared to be of a non-charitable nature, or, if the qualifications set forth for receipt of an award referred to above are adjudged by a court of competent jurisdiction to be void for public policy, **then the provision for such gift shall be deleted without prejudice to the remaining provisions of this paragraph 3(d)(ii).**
>
> (emphasis added)

Analysis

[9] The Trustee and the Office of the Public Guardian and Trustee both agree that pursuant to paragraph 3(d)(ii) set forth above, the Trustee only retains discretion as to which of the charitable purposes described in paragraphs 3(d)(ii)(A) through (F) it will direct income in any given year. This paragraph does *not* grant the Trustee discretion to disregard any one or more of the charitable purposes/trusts described in paragraph 3(d)(ii). For greater clarification, the Trustee cannot simply disregard the charitable trust established by paragraph 3(d)(ii)(E).

[10] As a precondition to the Trustee having recourse to paragraph 3(d)(ii)(G) of the Will, the court must find that paragraph 3(d)(ii)(E) is contrary to public policy and, therefore, void. This is the central issue on this application.

[11] The leading authority is *Canada Trust Co. v. Ontario Human Rights Commission.*[4] In that case, the indenture, under which the *inter vivos* trust was created, contained four recitals relating to race, religion, citizenship, ancestry, ethnic origin and colour with respect to the persons eligible to receive scholarships under the will. One recital stated: "The Settlor believes that the white race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the world along the best lines."

[12] The Ontario Court of Appeal in *Canada Trust Co.* found the charitable trust to be void on the ground of public policy to the extent that it discriminated on the ground of race (colour, nationality, ethnic origin), religion and sex.[5]

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[4] 1990 CanLII 6849 at 22 (Ont. C.A.)

[5] However, the court applied the *cy-pres* doctrine and brought the educational trust into accord with public policy by removing the offending restrictions. In doing so, the charitable trust was maintained.

[13] As a guiding principle, the court in *Canada Trust Co.* stated that each trust must be evaluated on a case-by-case basis should its validity be challenged and cautioned that not all restrictions amount to discrimination and are therefore contrary to public policy.

[14] I have no hesitation in declaring the qualifications relating to race, marital status, and sexual orientation and, in the case of female candidates[6], philosophical ideology, in paragraph 3(d)(ii)(E) of the Will void as being contrary to public policy. Although it is not expressly stated by Dr. Priebe that he subscribed to white supremacist, homophobic and misogynistic views as was the case in the indenture under consideration in *Canada Trust Co.*, the stated qualifications in paragraph 3(d)(ii)(E) leave no doubt as to Dr. Priebe's views and his intention to discriminate on these grounds.

[15] With respect to the application of the doctrine of *cy-pres*, it was envisioned (quite rightly) by Dr. Priebe that the qualifications for receipt of an award or bursary under paragraph 3(d)(ii)(E) might offend public policy. He included in the Will a paragraph permitting the Trustee to seek the court's declaration in this regard which the Trustee has now done. The doctrine of *cy-pres* can have no application in the present case because the Will contains an express provision as to the consequences of a declaration by the court that the qualifications for entitlement of an award or bursary are void as against public policy. In the face of such a declaration, the Will requires that the "provision for such gift *shall be deleted* without prejudice to the remaining provisions of this paragraph 3(d)(ii)". (emphasis added)

[16] Having found that the qualifications for receipt of an award or bursary under paragraph 3(d)(ii)(E) are discriminatory on the basis of marital status, gender, race and sexual orientation and therefore void on the ground of public policy, I am bound to give effect to the intentions of the testator under paragraph 3(d)(ii)(G) and delete the charitable trust established under paragraph 3(d)(ii)(E).

[17] In summary, the court's advice and directions on the questions under the Will posed by the Trustee are as follows:

---

[6] In a derogatory manner female candidates are referred to as "girls".

(a) Does the Will provide the Trustee with a discretion to choose whether or not to disperse funds for the purposes of paragraph 3(d)(ii)(E) of the Will?

No.

(b) Are any of the provisions in paragraph 3(d)(ii)(E) of the Will void or illegal or not capable of being lawfully administered by the trustee because they are contrary to public policy, discriminatory on the basis of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sexual orientation, or otherwise and/or uncertain?

Yes. The qualifications relating to race, gender, marital status and sexual orientation in paragraph 3(d)(ii)(E) are void as being contrary to public policy.

(c) If so, who is entitled to the trust funds under the Will?

The beneficiaries of the other charitable trusts established in paragraphs 3(d)(ii)(A),(B),(C),(D) and (F) of the Will.

(d) Is there a general charitable intention expressed in the Will sufficient to permit the court to exercise its inherent jurisdiction in the matter of charitable trusts and direct that the trust be administered *cy-pres*?

No. The Will requires that upon the court's declaration that the qualifications are void as being contrary to public policy the charitable trust established in paragraph 3(d)(ii)(E) fails in its entirety and is to be deleted.

(e) If the court exercises its inherent jurisdiction to direct that the trust be administered *cy-pres*, how should the Trustee administer the trusts?

Not relevant given the court's decision in (d).

Costs

[18] Both parties acknowledge the other's entitlement to its respective costs of the application.

[19] The Office of Public Guardian and Trustee submitted a Costs Outline to support its claim for partial indemnity costs of responding to the application

in the amount of $5,904.25 inclusive of disbursements and HST. The Trustee does not object to the quantum claimed and, accordingly, the Office of the Public Guardian and Trustee shall be paid its costs of the application in the all-inclusive amount of $5,904.25 from the estate of Victor Hugo Priebe, deceased.

[20] The Trustee submitted a Costs Outline to support its claim for full indemnity costs of the application[7] in the amount of $16,155.49 inclusive of disbursements and HST. The Office of the Public Guardian and Trustee does not object to the quantum claimed or the reasonableness of those costs. I am satisfied that the application was necessary and the time spent by the various timekeepers and rates charged by those timekeepers were reasonable given the importance of the issues to a proper administration of this estate. Accordingly, Royal Trust, as Trustee of the Estate of Dr. Priebe, shall be paid its costs of the application in the all-inclusive amount of $16,155.49 from the estate of Victor Hugo Priebe, deceased.

Justice A.K. Mitchell

Date: February 16, 2016

[7] Trustees are entitled to be fully indemnified for all legal costs reasonably incurred on behalf of the estate. See *Goodman Estate v. Geffen*, [1991] 2 SCR 353 at para. 75.

Manitoba Court of Queen's Bench

Citation: Fitzpatrick (Re)
Date: 1984-02-10

Simonsen J.

Counsel:
Jacob L. Henteleff, for applicants.
D. A. Bedford, for respondents, Sisters of Providence and St. Joseph's Vocational School.
D. A. Young, for Mabel Trainor.

[1] SIMONSEN J.:—By motion, the applicants, being the executors of the will of the late Kathleen Fitzpatrick, seek an order for advice and directions relating to a legacy contained in the last will of the deceased who died November 16, 1969. The Sisters of Providence of Kingston in Manitoba, an incorporated body which operates St. Joseph's Vocational School in the City of Winnipeg, requested the court devise a scheme by which the legacy could be administered *cy-près*, while Mabel Trainor, a sister of the deceased, and the only surviving sibling, contended the legacy lapsed and should be administered as an intestacy.

[2] The disposition under the will was not complicated and read:

> I GIVE, DEVISE AND BEQUEATH unto my said Executors the whole of my said estate, real and personal, of whatsoever kind and wheresoever situate of which I may die possessed, or over which I have any power of appointment, to be held in trust by my said Executor and to be distributed by it as follows:
>
> TO GIVE to my nephew John Michael Trainor one of the pictures which I have painted as he shall choose.
>
> TO GIVE to my sister Mrs. O. C. Trainor one of the remaining pictures which I have painted as she shall choose.
>
> TO GIVE to my sister Anna L. Burke one of the remaining pictures which I have painted as she or her nominee shall choose.
>
> TO GIVE to Walter Trenholm Graham, presently residing at Ana Cortes, U.S.A., one of the remaining pictures which I have painted as he shall choose.
>
> TO GIVE to Mrs. Kathleen Dunlop, wife of William Dunlop, of Winnipeg, any one of my pieces of furniture, pictures, objects of art or furnishings in my home.
>
> TO GIVE to William D. Thompson the French chair covered with needle-point which was done by his mother.
>
> I DIRECT my Executors to call in, sell and convert into money all of the balance of my

estate and I direct that my Executors employ the firm of Johnson-Hutchinson Ltd., or its successors, to dispose of my jewelry.

I DIRECT my Executors to pay to Mrs. Norma McDonnell, presently residing at 361 St. James Street, London, Ontario, the sum of $25.00 each month for as long as she shall live, and to put aside sufficient of the monies in my estate to provide for these payments.

I DIRECT my Executors to hold the balance of the monies in my estate in a fund to be known as "The Kathleen Fitzpatrick Fund", and to invest such monies in such investments as in its sole discretion shall be appropriate and from the principal and interest of such fund to pay for the musical education of any boy or boys who are under the care of St. Joseph's Vocational School of Winnipeg, and resident there, and who shall show musical talent, the selection of such boy or boys to be made by a committee consisting of the Rev. Sister Superior of St. Joseph's Vocational School, the President of the Manitoba Registered Music Teachers Association Incorporated, and the head of the music department of St. Mary's Academy, of Winnipeg.

DATED at the City of Winnipeg, this 27th day of December A.D. 1964.

[3] The problem arose out of the administration of "The Kathleen Fitzpatrick Fund" because St. Joseph's Vocational School ceased its operation as a residential boys' school in January, 1979, about 10 years after the deceased had died.

[4] The factual background was presented in affidavit form and although there were some gaps, sufficient detail was provided to permit resolution of the issues.

[5] The Sisters of Providence came to Winnipeg from Kingston, Ontario in 1923 and established Providence Shelter as a residence for orphaned Roman Catholic children between six months and five years of age. After reaching six years of age the orphans were dispersed to other institutions. The girls were sent to St. Agnes Priory (now Marymount School for Girls) and the boys attended St. Joseph's Orphanage.

[6] In 1938, the Sisters of Providence of Kingston in Manitoba was incorporated and by its letters patent declared the following objects:

To establish, maintain and conduct homes for convalescents, homes for transients, old folks' home, infants' shelter and orphanage and training school for boys and/or girls, affording educational and religious instructions necessary to produce good Canadian citizens; and, further, to conduct an infirmary or hospital in connection therewith for sick children.

[7] Also, in 1938, the Sisters of Providence assumed management of St. Joseph's Orphanage from the Grey Nuns and renamed the institution St. Joseph's Vocational School. The school had two purposes: To provide a residence and class-rooms for orphaned boys between the ages of five and sixteen and also to provide a residential nursery school under age five. In 1943, enrolment stood at 130, of which 100 were residential pupils in the class-room programme and 30 boys in the nursery.

[8] The nature of the school's programme was not static. Over the years the dedication to orphans gave way to a residential, educational and treatment centre for emotionally disturbed boys. While functioning as a school for emotionally disturbed boys, the classroom programme included the usual academic and athletic curricula, but also involved cultural activities, including choral and instrumental music activities. A school choir competed in the annual music festival, soloists sometimes performed outside the school and on one occasion two students, through the assistance of the ladies' auxiliary, studied at St. Michael's Cathedral Choir School in Toronto.

[9] Obviously, the contribution of the school was well recognized in the community. It received assistance from United Way, the Winnipeg Foundation, as well as the provincial government.

[10] The evidence presented did not disclose if the deceased had any direct involvement with the school either as a volunteer or a member of the ladies' auxiliary. There was no suggestion that any relative or next of kin attended the school and thereby benefited from the legacy.

[11] With new and different public needs, the programme and function changed again in 1979. By that time enrolment of emotionally disturbed students had declined to about 35, while the day nursery programme flourished with registrations of approximately 46 boys and girls. In January, 1979, the Sisters of Providence terminated the operation of St. Joseph's Vocational School, demolished the building in 1980, and constructed a new day-care facility, known as St. Joseph's Nursery. Almost concurrently, the Order acquired a residence, at a different location, to accommodate six moderately retarded teen-age boys who lived in a group home situation and who attended various schools in the City of Winnipeg.

[12] The evidence did not indicate the precise number of students enrolled at St. Joseph's Vocational School in 1969, the year the testatrix died. The highest enrolment occurred in the early 1940's with about 100 registered residents in the class-room programme. This number dwindled to near 35 at the time of closing the school in 1979. One could reasonably conclude that the numbers in the school programme in 1969 would be somewhere between 35 and 100.

[13] Counsel for the estate advised the court that St. Joseph's Vocational School was told, a short time after the death of the deceased, to proceed with selection of a candidate or candidates who might receive assistance from the fund. No selection was made and indeed no one had received benefit from the fund at the time of the school's termination in 1979. It is not known if the failure to select arose from absence of suitable candidates or other causes. The fund at present stands at about $160,000.

[14] At this point it would be appropriate to comment further on the contents of the specific legacy which has given rise to this litigation. The legacy contained no provision for a gift over if the devise should fail. It was an out and out gift of the entire balance of the estate, including principal and income. The fund represented the bulk of the estate.

[15] Further, it should be observed that the trustees were not to make the payment to the Sisters of Providence or St. Joseph's Vocational School. It was not a gift bestowed upon the

institution, but rather a gift "to pay for the musical education of any boy or boys ...". Several criteria were to be met before benefits were to be granted to an applicant. The recipient was required to demonstrate musical talent and was also required to be a resident at St. Joseph's Vocational School. The selection was to be made by a committee of three, of whom one was the Reverend Sister Superior of St. Joseph's Vocational School.

[16] Clearly, the testatrix had knowledge of the programme conducted at St. Joseph's. She knew it was a boys' residential school, which included music in its programme. She must also have known that Reverend Sister Superior was the correct description of the school's principal and an appropriate person to serve on the selection committee. The testatrix, in my view, intended to enrich the educational programme offered at the school by providing assistance to students who exhibited talent in the musical field. The deceased included in the selection committee the president of the Manitoba Registered Music Teachers Association Incorporated and, therefore, was aware of at least one other organization interested in the promotion of music. However, she chose to benefit students of musical talent at St. Joseph's in preference to a more general musical purpose. In her mind the objective was to enhance the school and the education of those who needed help and decided to bestow a legacy for musical education available only to students at the school.

[17] The Sisters of Providence have invited the court to administer the legacy *cy-près.* Numerous case and textbook authorities have commented upon the doctrine.

[18] By tradition the courts have had a bias in favour of the continuation of a charitable trust. In furtherance of this bias the *cy-près* doctrine was developed. It had its origin in the jurisdiction exercised by the ecclesiastical courts. The expression was derived from the French term *aussi-pres* (as near as possible) and intended to give the court jurisdiction to adopt an alternate mode of disposition where a charitable legacy had failed or lapsed.

[19] In abbreviated form the principle is stated in 4 Hals., 3rd ed., p. 317, para. 654, as follows:

> 654. *The doctrine.* Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode *cy-près*, that is, as near as possible to the mode specified by the donor.
>
> There can be no question of an application *cy-près* until it is clearly established that the mode specified by the donor cannot be carried into effect and that the donor had a general charitable intention. If, however, the mode specified by the donor is perpetual and has been carried into effect but ceases to be practicable, there will nevertheless be a *cy-près* application independently of any general charitable intention. In order to establish whether the mode specified by the donor is practicable, the Court may direct an inquiry.

[Footnotes omitted.]

[20] Although in slightly different language, the author Pettit, *Equity and the Law of Trust*, 3rd ed. (1974), at p. 215, described the term:

> In the case of a private trust, if the trust fails the beneficial interest results to the settlor or testator. This may be the position also in the case of a charitable trust, though in practice the trust property is commonly saved for charity by the *cy-près* doctrine. Where this doctrine applies, even though the particular charitable trust fails, the trust property is applied for other charitable purposes *cy-près*, that is as near as possible, to the original purposes which cannot be carried out. The procedure is for the establishment of a scheme by the court or the Commissioners.

[21] Before the doctrine can be applied, several questions must be addressed. These questions were outlined by counsel for the Sisters of Providence in four points:

> 1. Is the trust in question charitable?
>
> 2. If the answer to the first question is yes, is the charitable trust impossible or impractical to perform?
>
> 3. If the answer to the second question is also yes, was the charitable purpose designated by the Testatrix impossible to fulfill at the date of her death or has it subsequently become impossible to carry out?
>
> 4. If the charitable trust was impossible or impractical to carry out at the date of death, the Court must find a general charitable intention on the part of the Testatrix before the *Cy-Pres* doctrine can be applied. If the trust became impossible or impractical to carry out sometime after the Testatrix's death, the Court need only find that the trust monies have been given absolutely and perpetually to charity and can then apply the *Cy-Pres* doctrine without finding any general charitable intention in the Testatrix.

[22] Counsel for the parties conceded that the legacy in this instance was charitable and indeed there is ample authority in both texts and cases to support the conclusion that a gift for the advancement of musical education for boys in a particular institution was charitable and one which served a public object.

[23] Counsel further acknowledged that there is no issue that the charitable trust was impossible or impracticable following 1979 when St. Joseph's Vocational School was terminated and the activity disbanded.

[24] The third question involved a consideration of whether there was initial failure as distinct from supervening impossibility, it being generally acknowledged that somewhat different legal consequences arise with the two situations.

[25] The critical date in respect of this inquiry was November 16, 1969, being the date of death, following which funds would have been available to the trustees to meet the objects specified in the legacy.

[26] The governing principle was stated by Kay L.J. in *Re Slevin* (1891), 60 L.J. Ch. 439, in the following terms at p. 442:

> In the case of a legacy to an individual, if he survived the testator it could not be argued that the legacy would fall into the residue. Even if the legatee died intestate and without next-of-kin, still the money was his, and the residuary legatee would have no right whatever against the Crown. So, if the legatee were a corporation which was dissolved after the testator's death, the residuary legatee would have no claim. Obviously it can make no difference that the legatee ceased to exist immediately after the death of the testator. The same law must be applicable whether it was a day, a month, a year, or, as might well happen, ten years after, the legacy not having been paid either from delay occasioned by the administration of the estate or owing to part of the estate not having been got in. The legacy became the property of the legatee upon the death of the testator, though he might not for some reason obtain the receipt of it till long after. When once it became the absolute property of the legatee, that is equivalent to saying that it must be provided for, and the residue is only what remains after making such provision. It does not for all purposes cease to be part of the testator's estate until the executors admit assets, and appropriate or pay it over, but that is merely for their convenience and that of the estate. The rights as between the particular legatee and the residue are fixed at the testator's death.

[27] That authority was followed in *Re Soley* (1900), 17 T.L.R. 118, and also *Re McDougall*, [1939] 1 D.L.R. 783, [1939] O.W.N. 64. If the charity existed at the time of death the legacy became vested in that charity and would be applied *cy-près* if there was a subsequent failure arising from disappearance of the institution. The legacy would not be defeated by supervening impossibility.

[28] The argument has been advanced that different considerations apply when the legacy has been directed for a charitable purpose as contrasted with a devise to a charitable institution. If the devise were for a charitable purpose (not an institution) and that object became impossible, need the court find a general charitable intent before ordering a *cy-près* scheme?

[29] That subject was canvassed and answered by Lord Evershed M.R. in *Re Tacon*, [1958] 1 Ch. 447, who said at pp. 453-4:

> It is well established that in the case of a gift to a charity (that is, to some body of persons or organization admittedly charitable) where no general charitable intention is present, then (1) if the charity has ceased to exist before the will comes into operation the gift lapses; but (2) if the charity is still in existence at the date mentioned, it is effective as a gift to the extent that the interests of the next-of-kin (or of whoever else take in default of the charitable interest taking effect) are for ever excluded, notwithstanding the later dissolution or disappearance of the charity: see *In re Slevin.* In these respects the "charity" is assimilated to an ordinary individual legatee.
>
> The same principles apply to a gift, not to a named charity, but for some (admittedly) charitable purpose where (again) there is no general charitable intention. Such a gift will wholly fail if the purpose is either so vague or uncertain or so impracticable that the court cannot execute it. But the test of vagueness or uncertainty or impracticability is to be applied at the date of the testator's death; if at that date the disposition is shown to be

impracticable (confining myself henceforth to that case)—that is, incapable for any reason of being practically initiated or administered—then the gift fails altogether and the next-of-kin (or whoever else are entitled in default) take. Per contra, if the charitable gift is not then shown to be "impracticable," the next-of-kin or other interests are for ever excluded, even though later supervening events defeat the precise purpose contemplated by the testator. In such case the gift will be administered cy-près, and in my opinion the onus will (prima facie, at any rate) be upon those seeking to invalidate the charitable gift.

[30] The principles were expressed by the author Donovan Waters in an article, 52 Can. Bar Rev. 598 (1974) at pp. 598-9:

> The law in this area is not easy, but it is fairly well laid down. Before the court can approve a cy-près scheme, it must be shown that the testator's charitable purpose was impossible to carry out or impracticable, and that he did not have only that particular charitable purpose in mind, but a general intent to give to charitable work of that kind. It is because the testator had this so-called general charitable intent that the court will assist his intention by seeing that the property is applied to some similar purpose. If he only wanted to further the particular named charitable purpose, but impossibility or impracticability has occurred, the court will not intervene, and the property in question will revert to his estate.
>
> However, these rules only apply when the expressed charitable purpose is impossible or impractical on the instrument of gift taking effect, and in the case of a will, of course, this is the moment of the testator's death. It does not matter whether the charitable gift is to take place immediately or only after the completion of a prior interest. If there is a so-called initial impossibility or impracticability, the rules mentioned apply.
>
> These rules do not apply when impossibility or impracticability occurs *after* the instrument of gift has taken effect. It does not matter whether the purpose is being carried out when the impossibility or impracticability subsequently occurs, or if either of those events occurs during the time of a prior interest, while the purpose or charity is awaiting the end of that interest. When impossibility or impracticability occurs after the instrument has taken effect, a so-called supervening impossibility or impracticability has occurred.
>
> In these circumstances the court now looks to see whether the instrument of gift has given the property in question exclusively to the charitable purpose. That is to say, if there is a gift over any kind, then there is no so-called exclusive dedication to the charitable purpose. However, if there is an exclusive dedication, and the purpose can no longer be carried out because of impossibility or impracticability, the property is regarded as dedicated to charity, and passes to the Crown in right of the province as the ultimate protector of charity and charities. By long custom the Crown will now agree to the drawing up of a cy-près scheme for the approval of the court.
>
> In the circumstances of supervening impossibility of impracticability no general charitable intent is required. This is because the purpose or charity was possible and practicable when the instrument of gift took effect, and whatever the scope of the donor's intent he has dedicated his property to charity. All that is required, as I have said, is an exclusive

dedication.

[31] This statement of law was not adopted in *Re Hunter* (1973), 34 D.L.R. (3d) 602, [1973] 3 W.W.R. 197 (B.C.), nor in *Re Fitzgibbon* (1922), 69 D.L.R. 524, 51 O.L.R. 500 (Ont.), the authorities in which it was concluded that a general charitable intent was a precondition to the application of the *cy-près* doctrine if a supervening failure of a charitable object or purpose had occurred. Both judgments were criticized by Donovan Waters: see 52 Can. Bar. Rev. 598 (1974) at p. 599, and Waters, *Law of Trusts in Canada* (1974), at p. 531.

[32] There is abundant and cogent authority to support the views of Waters. Similar conclusions are found in Picarda, *The Law and Practice Relating to Charities* (1977), p. 237; Kelton and Sheridan, *The Modern Law of Charities* (1962), p. 140; 4 Hals., 3rd ed., p. 320.

[33] Furthermore, the decisions in *Re Hunter* and *Re Fitzgibbon* were not followed in *Re McDougall, supra; Avalon Consolidated School Board v. United Church of Canada et al.* (1983), 42 Nfld. & P.E.I.R. 8; and *Re Lynds* (1978), 20 N.B.R. (2d) 564.

[34] In the present case, St. Joseph's Vocational School was in existence at the time of the testatrix's death and there were potential candidates in existence at that time. In my view, that was the critical date because the objects of the charity were in existence at the time of death. It can therefore be said the charity vested in perpetuity for the stated charitable purpose. This was not a case of initial failure but rather of supervening impossibility. In the circumstances, it is not necessary to find a general charitable intent in the legacy to permit the ordering of a *cy-près* scheme.

[35] The essential thrust of argument in opposition to the application *cy-près* was twofold. First, it was contended that *Re Fitzgibbon, supra*, was clear authority against the imposition of *cy-près* and, secondly, it was argued that the legacy was so specific and precise that it was the clear intention of the testatrix that failure of the gift in its stated form should result in a lapse.

[36] I am not prepared to follow the views expressed in *Re Fitzgibbon* and *Re Hunter.* In my view, the decisions in *Re Fitzgibbon* and *Re Hunter* are not consistent with the text authorities earlier cited and are further inconsistent with the conclusion reached in other Canadian decisions.

[37] As to the second point, I do not see the terms of the legacy as being so specific that an altered mode of implementation of the charitable object would defeat the intent of the testatrix. No gift over was provided in the instrument. It was intended to bestow an educational benefit upon young people who were particularly disadvantaged. The testatrix had no husband. She had no children. She was a Roman Catholic. With all these factors in her background, it would be totally logical to bestow benefit upon students who were attending a school serving a laudable and useful public service and operated by a religious order which she respected. The gift was educational to students attending an institution which itself was charitable. There was no intent, in my view, that the gift should fail if the particular form of education had been disbanded or some other worthwhile activity replaced it.

[38] In turning next to the question of implementation, reference should be made to the exhaustive examination of the *cy-près* doctrine in Sheridan and Delany, *The Cy-Près Doctrine*

(London, 1959). In discussing the nature of a *cy-près* order, the authors stated that it should combine the virtues of proximity, usefulness and practicability, always being mindful of the testatrix's intention. In its current operation of a group home for the mentally retarded, the Sisters of Providence continue to be engaged in the training, care, help and assistance of young disadvantaged boys. Although not functioning as an educational institution, the scope of attention and guidance given to members of the group home could readily be encompassed within the more general expression of the term "education". It has been suggested in the evidence that the mode of application *cy-près* could be to provide assistance to the Sisters of Providence in the operation of the activities in this group home for mentally retarded.

[39] I have no doubt that the fund should be applied *cy-près*, but the material which has been presented does not contain sufficient specific information for me to make an order. Obviously, it would be desirable that the fund be employed for some educational purpose to provide greater opportunity for education and development of the young people in the home, particularly in areas of endeavour which are not adequately or fully provided for in the present educational framework.

[40] It is common knowledge that group homes have been established in many areas of the province, and, therefore, there should be some experience available which could assist the court in formulating an appropriate scheme or mode of application of the fund. A division or branch of the Canadian Association for the Mentally Retarded exists within the province and that organization should be requested to work with the Sisters of Providence to propose an appropriate scheme and to provide sufficient background and information to permit the court to evaluate the proposal.

[41] Because the evidence is not complete on the issue of appropriate application of the fund, I would not preclude consideration of some other alternative scheme which would be consistent with the objects which have been expressed earlier. If in conjunction with its nursery school, the Sisters of Providence were to establish a school to teach children with disabilities or other problems requiring special attention such a programme might be equally consistent with the purposes of the legacy. If such a proposal were advanced, it should be done with the support and guidance of persons experienced in the field.

[42] Within the framework of the views which I have expressed, I would hope and expect a further proposal to be made to the court. If counsel so desire I would be prepared to hear the further application on an appropriate *cy-près* scheme.

[43] Counsel for the executors as well as counsel for the parties will have their costs out of the estate on a solicitor-client basis which I will tax or fix upon application of the parties.

[44] Judgment accordingly.

Forbes Estate, Re 2003 NBQB 430
S/M/38/03 [S/P/18/96]

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

IN THE ESTATE OF LEO ROBERT FORBES, DECEASED

-and-

IN THE MATTER OF AN APPLICATION PURSUANT TO RULE 16.04 OF THE RULES OF COURT.

BETWEEN:

ELIZABETH LECAVALIER
AND THOMAS MADDEN

APPLICANTS

-and-

TOWN OF SUSSEX, SUSSEX AREA COMMUNITY FOUNDATION STEERING COMMITTEE, SUSSEX LIONS CLUB, J.D. O'CONNELL PRESERVE, MR. FORBES' GOD SON, SUSSEX WESLEYAN CHURCH, SUSSEX VALLEY 8213 KNIGHTS OF COLUMBUS, CEMETERY COMMITTEE OF ST. FRANCIS XAVIER PARISH, CIRCLE SQUARE RANCH, CRISIS PREGNANCY CENTRE INC., SUSSEX CHRISTIAN SCHOOL, CALVARY PENTECOSTAL CHURCH, SUSSEX VALE TRANSITION HOUSE INC., SUSSEX YOUTH OUTREACH FOUNDATION, ST. FRANCIS XAVIER ROMAN CATHOLIC CHURCH

RESPONDENTS

BEFORE: Mr. Justice Peter S. Glennie

DATE OF HEARING: August 22, 2003

DATE OF DECISION: December 12, 2003

REPRESENTATION OF PARTIES:

Raymond P. Gorman, Q.C., on behalf of Elizabeth Lecavalier

Deno P. Pappas, Q.C., on behalf of Thomas Madden

D. James Gerrish, on behalf of the Town of Sussex

Donald V. Keenan and Allison T. Gerrish, on behalf of the Sussex Area Community Foundation Steering Committee

R. Andrew Palmer, on behalf of Brian Geldart

Elizabeth S. Cotter,
on behalf of the Cemetery Committee of St. Francis Xavier Parish

Murray Hayes,
on behalf of the St. Francis Xavier Roman Catholic Church and Sussex Valley 8213 Knights of Columbus

DECISION

GLENNIE, J.

[1] This is an application pursuant to Rule 16.04(e) of the ***Rules of Court*** seeking a determination of rights which depend upon the interpretation of the residuary clause contained in the Last Will and Testament of the late Leo Robert Forbes, who was a resident of the Town of Sussex, New Brunswick and who died on January 15, 1996.

[2] Mr. Forbes executed his Last Will and Testament on November 16, 1995 and a codicil thereto on November 29, 1995. He named his lawyer, Lyman F. D. Purnell, Q.C., and his close friend, Thomas J. Madden, as executors of his Will and Letters Probate were granted to them on February 19, 1996. Mr. Purnell died on February 8, 1998, leaving Mr. Madden as the surviving executor.

[3] Through his Will, Mr. Forbes made certain specific monetary bequests totalling $785,000.00, including the sum of $50,000.00 to each of the Applicants, namely, his cousin Elilzabeth Lecavalier, and his friend, Thomas Madden. The specific bequests were made to relatives, friends and other named individuals together with various specific charities, including the Canadian Red Cross Society, the Canadian Cancer Society, the New Brunswick Heart and Stroke Foundation, and the New Brunswick Arthritis Society.

[4] After making the various specific monetary bequests, Mr. Forbes directed his executors on the use of the residue of his estate "*in the event of there being any residue yet remaining in my Estate after the payment of the foregoing bequests.*"

[5] The residuary clause in Mr. Forbes' Will is contained in paragraph 4 and reads as follows:

> *"In the event of there being any residue yet remaining in my Estate after the payment of the foregoing bequests, I further direct my Trustees to use such residue for such purpose or purposes as they may deem to be advisable and appropriate, bearing in mind my family's connection with and involvement in the general community and organizations of the Sussex, New Brunswick area."*

[6] The applicant, Elizabeth Lecavalier, is the only first cousin of Mr. Forbes who survived him and stands to inherit the entire residue of Mr. Forbes' estate should the residuary clause contained in his Will be struck down. The applicant, Thomas J. Madden, is the surviving executor of Mr. Forbes' estate.

[7] It is the position of both of the Applicants that while Mr. Forbes' Will poses a valid trust on Mr. Madden as the surviving executor, the trust fails because of vagueness and indefiniteness of the objects intended. As a consequence, the Applicants jointly submit that the residue of Mr. Forbes' estate devolves by intestacy and that Mr. Madden, as the surviving executor, holds the residue of Mr. Forbes' estate in trust for the next of kin of Mr. Forbes entitled to take on an intestacy and that Elizabeth Lecavalier, as the only first cousin of Mr. Forbes who survived him, is entitled to receive the full amount of the residue of Mr. Forbes' Estate since Mr. Forbes had no relatives in a closer degree of kindred than a first cousin. The Applicants state that Elizabeth Lecavalier is therefore Mr. Forbes' closest next of kin as provided for in the ***Devolution of Estates Act*** , C.D.-9, R.S.N.B. 1973 and is accordingly solely entitled to the entire residue of the estate. The value of the residue of Mr. Forbes' estate is estimated to be approximately $1,500,000.00.

[8] I would note at this juncture that it is unusual for an executor of a will to take an advocacy position in an application of this nature and in this case to argue that the gift contained in the residuary clause of Mr. Forbes' Will is invalid. It is accepted that an executor as a fiduciary administrator may only seek advice and direction. Counsel for the Sussex Area Community Foundation Steering

Committee argues that an executor has a duty to remain neutral as to beneficiaries and not to favour one over the other and that an executor's primary duty is to enforce the wishes of the testator. I agree.

[9] Pursuant to Rule 16.04(e) of ***The Rules of Court***, the Applicants have posed the following questions:

> *(a) does the Will pose a valid trust of the residue on the executor?;*
>
> *(b) does the bequest contained in paragraph 4 of the Will fail for uncertainty and does the executor then hold the residue of the estate in trust for the next of kin entitled to take on intestacy?; and*
>
> *(c) if the answers to (a) and (b) are in the affirmative, who are the next of kin entitled to take on intestacy?*

[10] As mentioned, both the solicitor for Mr. Madden and the solicitor for Mr. Forbes' first cousin, Elizabeth Lecavalier, argue that the surviving executor holds the residue in trust for Elizabeth Lecavalier who would be entitled to receive the full amount of the residue of the Estate on an intestacy in the event that the residuary clause contained in Mr. Forbes' Will is determined to be void.

ANALYSIS

Mr. Forbes' Intention

[11] It is essential to begin with the rule that Mr. Forbes is presumed not to have intended to create an intestacy with respect to his bequest of the residue of his estate. In my opinion, Mr. Forbes' Last Will and Testament should be construed with this presumed intention in mind.

[12] In ***Re Harrison; Turner v. Hellard***, (1885), 30 Ch. D. 390 (C.A.) the Master of the Rolls writes:

> *There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce, -- that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.*

[13] In ***Feeney's Canadian Law of Wills***, Fourth Edition, it is stated at ¶ 10.75:

> *§10.75 As was said in one case, a person making a will does not intend "to make it a solemn farce", and, therefore, he or she should not be taken to have intended to die intestate. The presumption against intestacy is especially strong when the testator has attempted to insert a general residuary clause, and the courts will especially avoid a construction that would result in a total intestacy.*

[14] As to discovery of intent, Lord Denning, M.R. writes in ***Re Smiths Will Trusts***, (1962) 2 All E.R. at 563:

> *This will, like every will, should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will, read in the light of the circumstances existing at the time when the testator made it. One should place oneself, as it was once said, in his arm chair, and consider the circumstances by which he was surrounded when he made his will to assist oneself in arriving at his intention.*

[15] ***Halsbury's Laws of England***, 4th ed., vol. 50, states at ¶ 370:

> *The cardinal rule of English law as to the effect of a will is that the testator's intention, as declared by him and apparent in the words of his will, has effect given to it, so far and as nearly as may be consistent with the law. The application of the rule requires a court of construction to consider two matters: (1) the intention of the testator disclosed by the will, and (2) the manner in which effect can be given to that intention. In ascertaining the testator's intention, it is a settled principle that his intention is to be sought in the words that he has used in his will given, normally, their natural and grammatical meaning, but that that meaning can admit of*

> *modification to accord with a real intention shown by the will as a whole.*

[16] In ***Re Kirk***, [1956] O.W.N. 418, 2 D.L.R. (2d) 527 (H.C.) at p. 528, Kelly J. writes:

> *There are certain rules of construction to which a Judge ought to adhere, viz.: (1) to read the will without paying any attention to legal rules: per Lord Davey in Comiskey v. Bowring-Hanbury, [1905] A.C. 84 at p. 89; (2) to have regard not only to the whole of the clause which is in question, but to the will as a whole, which forms the context to the clause: per Lord Birkenhead L.C. in Lucas-Tooth v. Lucas-Tooth, [1921] 1 A.C. 594 at p. 601; (3) to give effect, if possible, to all parts of the will and so to construe the will that every word shall have effect, if some meaning can be given to it and if such meaning is not contrary to some intention plainly expressed in other parts of the will: see 34 Hals., 2nd ed., 2. 252, pp. 197 et seq.; (4) when the Judge thus determines the intention of the testator he should inquire whether there is any rule of law which prevents effect being given to it: Hodgson v. Ambrose (1780), 1 Doug. K.B. 337 at p. 342, 99 E.R. 216.*

[17] It is a well-established rule that the courts do not favour an intestacy. See ***Re Parnell; Ranks v. Holmes***), [1944] Ch. 107, at 109; ***Williams on Wills***, 3rd ed. vol. 1, c. 52, p. 353 and ***Gray Estate v. Yule***, 1990 CarswellOnt 500.

[18] The courts are even more concerned with preventing an intestacy in the case of a charitable bequest. As stated in ***Re Gott; Glazebrook v. Leeds University***, [1944] 1 All E.R. 293, at p. 197 [Ch.], as cited with approval by Estey C.J.H.C. in ***Re Robinson*** (1976), 15 O.R. (2d) 286, (H.C.) at p. 289:

> *The Court ... has taken strong liberties on the subject of charities. The liberties taken are embodied in definite principles, one of which is that a trust for charitable purposes does not fail for uncertainty and another the assertion of the jurisdiction to give effect to the drift of the ideas embodied in the expression of a gift made on trust for a charitable purpose.*

[19] Thus, the courts will lean in favour of making a charitable bequest effective if it is possible within the limitation of the law.

[20] In ***The Law and Practice Relating to Charities***, Butterworths, the author, Hubert Picarda, comments at page 166 on the general principle of benignant construction in the case of charity:

> *There is a well-established maxim that the court leans in favour of charity when construing charitable gifts. Charity is always favoured by equity: Re Watt, [1932] 2 Ch. 243n, at 246.*
>
> *In the words of Lord Loreburn "there is no better rule than that a benignant construction will be placed upon charitable bequests". Thus where a gift is capable of two constructions, one which would make it void and the other which would render it effectual, the latter must be adopted. It is better to effectuate than to destroy the intention.*
>
> . . . .
>
> *The court is in some cases prepared to infer from very tenuous indications that a testator means to give the whole of his estate to charity.*

[21] In ***Re Rowland***, [1963] Ch. 1 (C.A.), Lord Denning states at p. 10:

> *... in point of principle the whole object of construing a will is to find out the testator's intentions, so as to see that his property is disposed of in the way he wished. True it is that you must discover his intention from the words he used:* but you must put upon his words the meaning which they bore to him. *If his words are capable of more than one meaning, or of a wide meaning and a narrow meaning, as they often are, then you must put upon them the meaning which he intended them to convey and not the meaning which a philologist would put upon them. And in order to discover the meaning which he intended, you will not get much help by going to a dictionary. It is very unlikely that he used a dictionary, and even less likely that he used the same one as you.* What you should do is to place yourself as far as possible in his

> position, taking note of the facts and circumstances known to him at the time: and then say what he meant by his words.
>
> *All this follows, I think, from the case in the House of Lords of* Perrin v. Morgan, *[1943] A.C. 399 at p. 406 when Viscount Simon L.C. expressed it thus: 'the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended.' Lord Atkin wholeheartedly agreed, saying: 'The sole object is, of course, to ascertain from the will the testator's intentions.' He clearly thought that by the decision of the House the old mistaken approach would be corrected. 'I anticipate with satisfaction,' he said, 'that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills, may be considerably diminished.'*

[22] In construing intent, natural meaning is sought for, and only when this is not apparent are the rules of construction invoked. In ***National Trust Co. v. Fleury***, [1965] S.C.R. 817, Justice Ritchie stated at p. 829:

> *In the construction of wills, the primary purpose is to determine the intention of the testator and it is only when such intention cannot be arrived at with reasonable certainty by giving the natural and ordinary meaning to the words which he has used that resort is to be had to the rules of construction which have been developed by the Courts in the interpretation of other wills.*

[23] He goes on to quote Lord Birkenhead L.C. in ***Lucas-Tooth v. Lucas-Tooth***, [1921] 1 A.C. 594 (at p. 601):

> *Indeed, in approaching a problem of this kind it is important never to lose sight of the true principle of construction in such cases -- that it is the duty of the Court to discover the meaning of the words used by the testator, and, from them and from such surrounding circumstances as it is permissible in the particular case to take into account to ascertain his intention. For this purpose, it is important to have regard not only to the whole of the clause which is in question, but to the will as a whole which forms the context to the clause.*

> *Unless this is done, there is a grave danger that the canons of construction will be applied without due regard to the testator's intention, tending thereby to ascertain his wishes by rules which, in the particular case, may produce consequences contrary to that intention.* [Emphasis added.]

[24] In ***Lucas-Tooth***, *supra*, Lord Birkenhead L.C. cautioned that too rigid an application of the various rules which have been applied in these kinds of situations may produce consequences that are contrary to the very intention which the Court ought to respect.

[25] In my opinion, to compel the payment of the residue of Mr. Forbes' Estate to his first cousin would be to ignore the proper assumption that Mr. Forbes did not intend to die intestate in whole or in part and would produce the one result that we know Mr. Forbes did not intend, namely, to create an intestacy with respect to the residue of his estate.

[26] That has to be where the search for Mr. Forbes' intent must begin.

Does Mr. Forbes' Gift Fall Within the Definition of 'Legal Charity'?

[27] It is necessary to determine if Mr. Forbes' intended that the residue of his estate should be used for charitable purposes in the Sussex, New Brunswick area.

[28] A comprehensive definition of legal charity was set out by Lord Macnaghten in ***Commissioners for Special Purposes of Income Tax v. Pemsel***, [1891] A.C. 531 (H.L.) at p. 583:

> *'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.* [Emphasis added.]

[29] In order to fit within the fourth head of Lord Macnaghten's definition of '*charity*', the benefit of the gift must be available to a sufficiently large section of the public and there must be a charitable purpose to the gift.

[30] In a Comment, 1985 18 E.T.R. 120 on ***Re Laidlaw Foundation***, at page 77, Dr. D.W.M. Waters traces the evolution of the range of "*charitable purposes*" leading up to ***Pemsel***:

> *...Since the beginning of the seventeenth century common law courts have taken the preamble to the now repealed Statute of Charitable Uses, 1601, as setting out the types of activities which Parliament then conceived of as coming within the meaning of "charitable". At first by applying this list of purposes, and later more by analogy from decided cases, the courts developed a technical legal meaning for the word and the nature of the purposes or activities which fell within it. Indeed, it was important that they did this, and that they were not too ready to concede "charity" status to any purpose or activity that was in any way for the benefit of society, because important concessionary advantages attached to gifts for charitable purposes and to charitable institutions. As decade followed upon decade, and the character of society and its needs changed, so the scope of what is "charitable" was moulded by the Courts to reflect the contemporary scene. By 1891 the range of "charitable purposes" was very diverse, the specific 1601 purposes were long in the past, and to counter the argument that the Courts should adopt the more popular meaning for the word, which essentially involves the relief of poverty, Lord MacNaghten in Income Tax Special Purposes* Commrs. V. Pemsel *analyzed the legal meaning that the Courts had achieved, dividing the recognized purposes into four principal headings: the relief of poverty; the advancement of education; the advancement of religion; and "other purposes beneficial to the community not falling under any of the preceding heads".*

[31] ***Pemsel*** has been consistently followed in common law Canada. A recent instance of this occurs in ***Alliance for Life v. M.N.R.*** (1999), 27 E.T.R. (2d) 1 (Fed.C.A.), at p. 19, where the Court adopted Lord Macnaghten's description of

the fourth head – following the relief of poverty, the advancement of education and the advancement of religion – as "*trusts for other purposes beneficial to the community, not falling under any of the preceding heads.*" [Emphasis added.]

[32] Mr. Forbes directed that the residue of his estate is to be expended "*for such purpose or purposes as they [his Executors] may deem to be advisable and appropriate.*" He continued, "*bearing in mind my family's connection with and involvement in the general community and organizations of the Sussex, New Brunswick area.*"

[33] In my opinion, the words "*bearing in mind* " which are used immediately after the words, "*advisable and appropriate* " circumscribe the objects intended by Mr. Forbes. With these words, Mr. Forbes is describing the objects that he wishes his Executors to select among. That is what they are to focus upon. *'Bearing in mind* ' for Mr. Forbes was the language of circumscription. The objects in question are "*the general community and organizations of* " a given geographical area, namely, "*the Sussex, New Brunswick area.*" By speaking of his family's connections and involvement with the area "*community* " and "*organizations* ", Mr. Forbes is explaining the reasons for his choice of, and affection for, that geographic area. He is reducing the description of the objects he had in mind to something more particular, namely to activities within a specified area. Reasons are motives for giving.

[34] Mr. Forbes' selection of the word "*community* " to express his trust object, immediately attracts attention. In ***Law of Trusts In Canada***, Second Edition, *supra*, Dr. D.W.M. Waters writes at page 594:

> *The mention that the facility to be provided is for the community at large has always been a considerable incentive to the court to find that the purpose satisfies the spirit and intendment of*

> *the preamble to the fourth head, purposes beneficial to the community.*

[35] The residuary clause contained in Mr. Forbes' Will uses the very word '*community*' as Lord Macnaghten used it in ***Pemsel***, and Mr. Forbes' Will then proceeds immediately to '*organizations* ', impliedly within the '*general community.*' Together, in my opinion, there is enough with those words to find a charitable character to the activity Mr. Forbes intended to support. The area designation completes Mr. Forbes' intentions. No specific or particular purpose is stated in Mr. Forbes' description of his gift. Generality is the mark of his two connected purposes. Mr. Forbes, in my opinion, intended "*purposes beneficial to the community.*"

[36] In ***Pemsel***, Lord Macnaghten speaks of "*beneficial to the community* ", and Mr. Forbes in his Will refers to "*the general community.*" As I have said, it is immediately thereafter that the Testator refers to "*organizations* ", and, in my opinion he can be said thereby to be pointing to organizations in "*the general community.*" I am of the view that "*community* " is the key word, and that this word brings the gift contained in the residuary clause of Mr. Forbes' Will within ***Pemsel's*** fourth head.

[37] It is to be remembered that in his Will Mr. Forbes instructed his executors to bear in mind his "*family's connection with and involvement in the general community and organizations of the Sussex, New Brunswick area.*" It is my view that Mr. Forbes wanted to benefit the Sussex community at large.

[38] In his text, ***Law of Trusts in Canada***, Dr. Waters continues at page 594:

> *In* Re Toronto Humane Soc., *(1920), 18 O.W.N. 414, land was granted to the Society, and Lennox J. recognized the gift as charitable because the Society was incorporated for purposes*

> *"beneficial to the community." He said that the charitable purpose of the grant could therefore be inferred.*

[39] Likewise, in the case of Mr. Forbes, I find his stated objects characterize his intention with respect to the residue of his estate; he seeks to further charitable objects. His whole purpose was clearly to benefit his community, namely, the Sussex, New Brunswick area.

[40] Dr. Waters writes at page 595:

> *In* Re Vernon Estate, *[1948] 2 W.W.R. 46 (B.C.), however, a specific purpose was given. The bequest was to the directors of a co-operative growers' association for the erection of "a strictly non-sectarian community hall at Kaleden." Macfarlane J. found that the whole tenor of the will showed the testator's dominant purpose to be the benefit of the community as a whole. The definite purpose, he said, assisted in finding the gift to be charitable. It was true there was no definition of a community hall, who it was for, and how it was to be used; it was enough that it was a hall for the general benefit of the community. Somewhat the same attitude towards community benefit was taken by the Ontario Court of Appeal in* Re Knowles, *[1938] O.R. 369, [1938] 3 D.L.R. 178 (C.A.), which concerned a gift for the permanent paving and beautification of a named street in a named town, with any surplus to be used for the beautification of a particular property owned by the same town. A liberal attitude towards this purpose was designedly taken by the court, because the whole object of the donor was clearly to benefit the residents of the town. The same liberality can be seen in the decision of C.R. McQuaid J. in* Re Cotton Trust for Rural Beautification. *The object of the trust was the beautifying of the rural areas and highways of Prince Edward Island by the planting of trees, shrubs and flowers.*
>
> *These cases seem to confirm that Canadian courts would recognize those English authorities which have deemed gifts to be charitable simply because, with no stated purpose, they are in favour of an area such as a village, town, county, or country.* [Emphasis added.]

[41] Dr. Waters comments further on the *Knowles* and *Cotton* cases in footnote 57:

> *Both the* Knowles *court and the* Cotton *court drew support from the approach taken by Boyd C. in* Farewell v. Farewell *(1892), 22 O.R. 573, where he concluded (at 579) that any "legal, public or general trust purpose should be seen as included within the fourth head of Lord Macnaghten's division, provided only that it is lawful, and not contrary to morality or public policy. It was not for the courts otherwise to commend or disapprove of a trust purpose."*

[42] The residuary clause contained in Mr. Forbes' Will uses the very word '*community.*' In my opinion, Mr. Forbes intended to benefit his community, namely the Sussex, New Brunswick area.

[43] The Courts have given a literal interpretation to the expression of "*benefit to the community.*" '*Charity*' has an ever evolving or changing meaning when viewed in light of current exigencies: ***Granfield Estate v. Jackson***, 1999 CarswellBC 644 at ¶ 29. As Dr. D.W.M. Waters writes in his comment on ***Re Laidlaw Foundation***, *supra*: "*'charity' is a concept with subtle shading of content, as well as a process of evolution ...* "

[44] In ***Oosterhoff & Gillese: Text, Commentary and Cases on Trusts***, Carswell, 1998 the authors, A.H. Oosterhoff and Madam Justice E.E. Gillese explain at page 855 that the need of the state for increased tax revenue arose out of the prosecution of World War II and the establishment of the welfare state in England after that war. They stress that cases from the 1940's and 1950's must be read in that light where the Courts took a stricter approach to charity and struck down "*numbers of meritorious purposes.*" They write, at page 856:

> *Since then, a more lenient approach to charity can be discerned. Thus, for example, more recently the House of Lords stated that the courts should construe trusts in favour of charity benignly: Inland Revenue Commissioners v. Mullin (1980), [1981] A.C. 1 at 18. Similarly, in the area of relief of poverty the English case*

> Dingle v. Turner, [1972] A.C. 601 and the Canadian case, *Jones v. T. Eaton Co., [1973] S.C.R. 635 evidence a more lenient attitude. Such an attitude is also apparent in* Re Laidlaw Foundation, *as referred to above.* [Emphasis added.]

[45] Madam Justice Gillese comments further on ***Re Laidlaw Foundation***, (1984), 48 D.R. (2d) 549 in her text ***The Law of Trusts***, Irwin Law, 1997 where she writes at page 64:

> Laidlaw *heralds a flexible approach that would enable the courts to make more meaningful determinations of which trusts warrant being accorded charitable trust status.*

[46] In ***The Law and Practice Relating to Charities***, *supra*, the author, Hubert Picarda, suggests a new classification of charitable objects at pages 11 and 12:

> *The law of charities has progressed considerably since Lord MacNaghten put forward his classification of charitable purposes. It is still not possible to give an exhaustive list of charitable objects, so that any attempted classification will include a sweeping-up head to cover miscellaneous objects which have been held to be charitable. But, nevertheless, a new classification seems to be called for and the following classification of charitable objects is suggested as appropriate:*
>
> *relief of poverty*
> *advancement of education*
> *advancement of religion*
> *promotion of health*
> *provision of recreational facilities*
> *municipal betterment and relief of the tax and rating burden*
> *gifts for the benefit of a locality*
> *certain patriotic purposes*
> *protection of life and property*
> *social rehabilitation*
> *protection of animals*
> *other miscellaneous objects that are beneficial to the community* [Emphasis added.]

[47] In my view, Mr. Forbes exhibited a charitable intention or purpose in the residuary clause of his will. I find a charitable intention is manifested and established.

[48] I am of the view that the trust contained in the residuary clause of Mr. Forbes' Will has charitable trust status. Once established, a trust for charitable purposes does not fail for uncertainty.

The Benefit of a Locality

[49] The general words used in the residuary clause of Mr. Forbes' Will, which I find in themselves to be charitable in nature, are confined to a specific locality, namely, the Sussex, New Brunswick area.

[50] One of the kinds of testamentary gifts that has been accepted as charitable under the fourth ***Pemsel*** head is '*the benefit of a locality.*' It is described in ***Tudor on Charities***, 8th ed., 1995, eds. Jean Warburton and Debra Morris, Sweet & Maxwell, London, at page 105:

> *When no specific purpose is indicated, a gift in general terms for the benefit of a specified locality [is] charitable. Gifts of this kind which have been held charitable include gifts for the benefit of a parish, a ward in the City of London, a county, a borough or a town.*

[51] In ***Re Smith***, [1932] 1 Ch. 153, Romer L.J. writes at page 174:

> *In my opinion it is well established by authority that a gift for the inhabitants of a particular place is a good charitable gift.*

[52] In ***Tudor on Charities***, *supra*, the authors write at page 108:

> *In the absence of specified purposes, the principle in* Re Smith *applies and the property is applicable for charitable purposes for*

> *the benefit of the particular class of inhabitants in the specified locality.*

[53] In ***Re Williams***, [1947] A.C. 447 (H.L.) at p 459 it was held that,

> *it is possible to justify as charitable a gift 'to my country England' upon the ground that, where no purpose is defined, a charitable purpose is implicit in the context.*

[54] In ***Re Strakosch: Temperley v. Attorney General***, [1949] Ch. 529, [1949] 2 All E.R. 6 (C.A.) at p. 10 the principle was laid down that:

> *general words that money is to be applied for the benefit of a district or a country are construed as meaning for such purposes as are recognized by the law as charitable purposes.*

[55] In his text, ***The Law and Practice Relating to Charities***, *supra*, Hubert Picarda comments at page 95 on gifts for the benefit of a locality:

> *Gifts in general terms for the benefit of a country or of a district, not indicating a specific purpose, are charitable, apparently on the principle that they are impliedly for purposes recognised by the law as charitable. Gifts of this kind which have been upheld include gifts for the benefit of a county, a borough or a town, a ward, and a parish. Even a gift "unto my county England to and for – own use and benefit absolutely" has been upheld.*
>
> *Trusts in general terms for the inhabitants or a class of the inhabitants of particular localities have also been upheld as charitable. There are numerous examples in the books. A trust for the benefit of inhabitants of a town or of a borough or of a village or a parish is valid. Even the free inhabitants of certain tenements in a borough or cottages in a manor or the freemen of a borough are valid objects of this kind of charitable trust. These cases are anomalous, and attempts to reconcile them with the principle that a non-charitable purpose will not be rendered charitable by localising the benefits are surely doomed to failure.* [Emphasis added.]

[56] A gift subject to a condition or trust for the benefit of the inhabitants of a town, country or any other prescribed geographic location has been consistently held to be a valid bequest. In other words, if an area is identified and no other words descriptive of the intended trust objects are used, the court will assume charitable purposes within that area were intended. With respect to the words contained in Mr. Forbes' Will, I have already found that charitable purposes were intended by Mr. Forbes with respect to the expending of the residue of his estate. He also says those charitable purposes are to be carried out in the Sussex, New Brunswick area.

[57] In my opinion, the '*benefit of a locality*' was intended by Mr. Forbes, namely the Sussex, New Brunswick area.

[58] Mr. Forbes described "*the Sussex, New Brunswick area*" within which the benefits of the residue of his estate are to be dispensed. In my opinion, that clearly falls within the English authority whose decisions are summarized by ***Tudor*** in the above language.

[59] In summary, the juncture in the residuary clause of Mr. Forbes' Will of (1) "*the general community*" (Lord Macnaghten's words), and (2) a reference that follows immediately to "*organizations*" leads me to the conclusion that Mr. Forbes' gift is charitable. Mr. Forbes has also designated a precise area of New Brunswick in which the charitable activities must take place. This would clearly benefit a specific locality, namely, the Sussex, New Brunswick area.

Does Mr. Forbes' Will impose a valid trust of the residue upon his executors?

[60] In order for a trust to exist, it must have three essential elements, commonly referred to as the 'three certainties', namely: certainty of intention,

certainty of subject matter and certainty of objects: **LeBlanc Estate v. Belliveau** [1986] N.B.J. No. 921 (Q.B.).

[61] In ***Law of Trusts in Canada***, Dr. D.W.M. Waters writes at page 107:

> *For a trust to come into existence, it must have three essential characteristics... first, the language of the alleged settlor must be imperative; second, the subject matter or trust property must be certain; third, the objects of the trust must be certain... If any of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.*

Certainty of Intention

[62] I am satisfied and have found that Mr. Forbes had the requisite intention to create a trust when he devised his residuary estate in trust and that he intended a charitable trust.

Certainty of Subject Matter

[63] In paragraph 4 of his Will, Mr. Forbes devises his "*residue* " for the purposes he describes. The word '*residue* ' is a term clearly understood within the law of wills. It fully meets the requirement of certainty of subject matter.

Certainty of Objects

[64] Certainty of objects refers to the requirement that the beneficiaries of a trust be identifiable. As Dr. Waters, in his text ***Law of Trusts in Canada***, *supra*, writes at 107 "... *the objects of the trust must be equally clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary.*"

[65] However, provided the overall objects are charitable, such trusts are exempted from the requirement of specific certainty of objects: ***Law of Trusts in Canada***, *supra*, Dr. Waters at page 513. And at page 514, he writes:

> *Having relaxed the requirement of certainty in this way, the courts have always regarded themselves as having an inherent jurisdiction to supply specific purposes, where that need exists, so that the trust can be implemented. In this way the certainty of a public trust will be obtained.*

[66] Since I have found the trust contained in the residuary clause of Mr. Forbes' Will has charitable trust status, it is accordingly exempted from the requirement of specific certainty of objects. As mentioned, once established, a trust for charitable purposes does not fail for uncertainty.

[67] This brings to a close my findings in this case, but in recognition of the arguments advanced by Counsel for the Applicants, I will deal with their contentions and expand upon my understanding of specific and general charitable objects and how the law is stated in this regard.

Specific and General Charitable Objects

[68] The Applicants jointly argue that under the residuary clause contained in Mr. Forbes' Will there is a potentially infinite number of people or organizations who or which could claim to fall within these vague parameters and only Mr. Forbes could say with any certainty whether it was his intention to benefit any individual claimant.

[69] Counsel for the Applicants cited various cases where it was found by the courts that the trust the testator intended to create failed because of the vagueness and indefiniteness of its objects: ***Klassen Estate v. Klassen***, [1986] S.J. No. 536 (Sask.Q.B.); ***Connell v. Connell*** (1906), 37 S.C.R. 404; ***Re: Gilkinson***, [1930] O.J. No. 164 (Ont.C.A.); ***Daniels v. Daniels Estate***, [1991] A.J. No. 1019 (Alta.C.A.).

[70] However, in all of those cases the individual testator left the residue to an executor or executors to be distributed and used as the executor or executors "*determined*" or "*as to them may appear just*" or "*as they might think proper*" or "*to use their judgment*" in the distribution of the residue. The testator's instructions in each of those cases stopped there.

[71] However, the residuary clause contained in Mr. Forbes' Will goes further. Mr. Forbes directs his Executors "*to use such residue for such purpose or purposes as they may deem to be advisable and appropriate...*". But unlike ***Klassen, Connell, Gilkinson*** and ***Daniels***, Mr. Forbes' Will does not stop there. It goes on to say, "*bearing in mind my family's connection with and involvement in the general community and organizations of the Sussex, New Brunswick area.*"

[72] The Applicants stressed the difficulties that they say might be encountered in carrying out Mr. Forbes' intention and posed the following questions with respect to the residuary clause contained in Mr. Forbes' Will:

> *"What does the testator mean by his "family's connection?" How far does his family extend? What does he mean by "involvement in"? If the claimant is a church, does it mean attending the church services, contributing to the collection or something more? How does the executor determine what the testator meant by the terms "general community" and "Sussex, New Brunswick area"? Is the general community a geographic term, a social reference or something else? Is the "Sussex, New Brunswick area" restricted to the Town of Sussex or does it include neighboring communities? If neighboring communities are included, what are the geographic limits of the 'Sussex, New Brunswick area'?"*

[73] They argue that certainty has to exist unless it is a charitable purpose clause. However, having found the residuary clause contained in Mr. Forbes' Will to be a charitable purpose clause, I conclude there does not have to be certainty of objects.

[74] The validity of a charitable trust depends upon the construction of its constituting document and not on any practical arrangements made for its administration: ***Re Levy Estate*** (1989), 68 O.R. (2d) 385. The Court will determine and implement the donors intent.

[75] In ***Conroy Estate, Re***, [1973] 4 W.W.R. 537 (B.C.S.C.), the Court determined that once having found implicitly that the bequest was for a charitable purpose the Court will not allow the bequest to fall for uncertainty but instead will discover and implement the donor's intent.

[76] In ***Daley Estate, Re*** 1987 Carswell Sask 372 the testator gave the residue of his estate or trust to be used *"for relief and benefit of the deserving poor and needy in the district in which I farmed without regard to the race or creed of the recipient."*

[77] In ***Daley***, the Saskatchewan Court of Queen's Bench concluded that because there was certainty the testator intended to benefit charity by the use of the words *"for the relief and benefit of the deserving poor and needy"* there was a valid charitable trust notwithstanding the lack of certainty as to who was to receive the benefit of the gift.

[78] Justice Malone writes at paragraphs 4, 6 & 7:

> 4. *He (Counsel for the next of kin) does not take exception to the reference to "deserving poor and needy" but to the vagueness of the words "in the district in which I farmed". That is, what area did the testator intend to encompass with the use of these words? The problem is complicated by the fact the testator carried on farming operations at more than one location but all were situate within an area of approximately 18 miles by 18 miles. Counsel argues it is impossible to identify the proposed beneficiaries of the*

estate because the area in which they reside cannot be determined with precision. That is, did the testator intend the estate to be received by the "deserving poor and needy" within one mile of his farm, or five miles or ten miles? Accordingly, he argues the trust is invalid because of the lack of certainty with respect to the beneficiaries thereof resulting from the vagueness of the words used to describe the location where they must reside.

. . . .

6. *I believe a distinction must be drawn between the objects of the trust, that is, whether it is charitable or not, and the objects, or persons or organizations to be benefited by the trust. The question to be determined is "what" is the object of the trust, rather than "who" is the object.*

7. *I find support for this statement in the case of* **Re Gott; Glazebrook v. Leeds Univ.**, *[1944] Ch. 193, [1944] 1 All E.R. 293, and the case cited therein,* **Morice v. Bishop of Durham** *(1804), 9 Ves. 399, 32 E.R. 656. In* **Re Gott** *Uthwatt J. states the following at pp. 294-95:*

> No doubt, when a purpose is stated, no charitable trust is created unless the purpose is certainly charitable, but given that certainty, uncertainty as to the particular charitable purpose intended is, in my opinion, immaterial. No authority was cited to me which supports the proposition that certainty in the definition of an intended specific charitable purpose is necessary and the proposition appears to be wrong in principle and never to have been accepted in practice. If a gift to charity generally does not fail for uncertainty – and that is a proposition which is not open to dispute – it appears to me to be a natural consequence, though it may not be a necessary consequence, that a specific charitable purpose may be vaguely set out. *There is no practical reason why certainty of the exact ambit of a particular charitable purpose should be required, for the court has as regards all charitable trusts jurisdiction to settle a scheme for their administration – I am not referring to cy-pres*

> *schemes – and it is settled practice that these schemes may deal not only with methods of administration but also with the substance of the trust and define it...* [emphasis added]

[79] I would emphasize that the very existence of the scheme-making jurisdiction in the case of charitable objects allows the court to dispense with specific charitable intent and, to accept as sufficient, general charitable intent.

[80] Uthwatt, J. continues in ***Re Gott***:

> *The next case to which I propose to refer is* **Morice v. Bishop of Durham** *and I refer to it only for the purpose of citing a passage from the judgment of SIR B. [sic. W.] GRANT, M.R., at p. 404, in which he states the principle. The passage is as follows:*
>
> > ...If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of; and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. *There must be somebody, in whose favour the court can degree performance. But it is now settled, upon authority, which it is too late to controvert, that, where a charitable purpose is expressed, however general, the bequest shall not fail on account of the uncertainty of the object: but the particular mode of application will be directed by the King in some cases, in others by this court.* [emphasis added]

[81] A similar argument advanced by Counsel for the Applicants in the case of Mr. Forbes' Will was advanced by Counsel for the next of kin in ***Daley*** where the testator's Will used the words "*for the relief and benefit of the deserving poor and needy in the district in which I farmed without regard to the race or*

creed of the recipient." Counsel for the next of kin in ***Daley*** argued that the trust ought to fail because of a lack of certainty with respect to its objects. Counsel for the next of kin in ***Daley***, who were arguing for an intestacy, asserted that the words "*in the district in which I farmed* " were too vague. They questioned the area the testator intended to encompass by the use of those words.

[82] The problem in ***Daley*** was complicated by the fact the testator in that case carried on farming operations at more than one location, but all were situate within an area of approximately 18 miles by 18 miles. Counsel for the next of kin argued that the area could not be determined with precision. That argument was dismissed by the Court. A similar argument is being advanced by the Applicants in this case with respect to the "*Sussex, New Brunswick area*."

[83] In ***Daley***, Counsel for the next of kin argued that the trust was invalid because of the lack of certainty with respect to the beneficiaries thereof resulting from the vagueness of the words used to describe the location where they must reside. The Court disagreed. Justice Malone concluded that the vagueness argument of Counsel for the next of kin must fail.

[84] As mentioned, Justice Malone concluded at ¶ 6 that a distinction must be drawn "*between the objects of the trust, that is, whether it is charitable or not, and the objects, or persons or organizations to be benefited by the trust. The question to be determined is "what" is the object of the trust, rather than "who" is the object*."

[85] The Court in ***Daley*** went on to cite ***Re Gott; Glazebrook v. Leeds Univ.***, [1944] ch. 193 where Uthwatt J. concluded that a specific charitable purpose may be vaguely set out "*for the court has, as regards all charitable trusts jurisdiction to settle a scheme for their administration ... and it is settled*

practice that these schemes may deal not only with method of administration but also with the substance of the trust and define it...."

[86] The Court then concluded in ***Daley*** that because there was certainty the testator intended to benefit charity, there was a valid charitable trust notwithstanding the lack of certainty as to who was to receive the benefit of the trust.

[87] In the present case, I am of the view that Mr. Forbes intended to benefit charity in the Sussex, New Brunswick area, and accordingly there is a valid charitable trust notwithstanding the lack of precise certainty as to who in the Sussex, New Brunswick area is to receive the benefit of Mr. Forbes' trust.

[88] In ***Daley***, the Court concluded that, subject to appeal, the matter could be referred back to the Court for the determination of how the testator's trust would be implemented. In my opinion, the same ought to be done in the case of Mr. Forbes' charitable trust, in order to effectuate and respect his intention to benefit his community.

[89] The general rule is that a gift, once determined to be for a charitable purpose, will not be allowed to fail for uncertainty: ***Re Bethel*** (1971), 17 D.L.R. (3d) 652 (Ont.C.A.) affirmed [1973] S.C.R. 635 (S.C.C.).

[90] Dr. Waters writes at page 611 of his text, ***Law of Trusts in Canada***, *supra*:

> *Once it is ascertained that a trust object is charitable, then, as we have seen, it will not fail for uncertainty. The court has an inherent jurisdiction to compose a scheme, or to direct its officials to draw up a scheme, whereby any uncertainty is removed and the gift made operative.*

[91] Thus, where a testamentary instrument contains a charitable trust, the court will discover and implement the donor's intent: ***Mills v. Farmer*** (1915), 19 Ves 483 at 486 (L.C.), ***Re Conroy***, [1973] W.W.R. 537 (B.C.S.C.); ***Re Daley Estate Re***, *supra*.

[92] The superior court of each jurisdiction, as successor to the Court of Chancery, has broad jurisdiction in providing machinery to ensure the survival of charitable activities. Once it is established that a trust object is charitable, the court will not allow the trust to fail for uncertainty, but will compose a scheme whereby the uncertainty is removed and the gift made operative: ***Re Meikle***, [1943] 2 W.W.E. 156 (Alta. T.D.); ***Re McIntyre***, [1950] 2 W.W.R. 682 (Man. K.B.); ***Can. Perm. Trust Co. v. MacFarlane***, [1972] 4 W.W.R. 593 (B.C.C.A.); ***Harris v. Alexandra Non-Sectarian Orphanage***, [1923] 1 W.W.R. 624 (B.C. S.C.); ***Daley Estate, Re***, *supra*.

[93] The Supreme Court of Canada recently acknowledged the court's jurisdiction in respect of trusts and estates sometimes entailing detailed and continuing supervision and support of their administration in ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 S.C.C. 62 at ¶ 71 where the Court refers to Dr. D.W.M. Waters, ***Law of Trusts in Canada***, *supra*, and ***Oosterhoff on Wills and Succession***, (5th ed. 2001), at pp. 27-28.

Conclusion and Disposition

[94] I conclude that Mr. Forbes did not intend to die intestate in whole or in part. In my opinion, to strike down the trust created in the residuary clause of Mr. Forbes' Will would trigger an intestacy with respect to the gift of the residue, and would produce the one result that we know he did not intend. It is imperative not to produce consequences contrary to a testator's intentions. It is better to effectuate and respect Mr. Forbes' intention than to destroy it.

[95] The Courts do not favour an intestacy, and are even more concerned with preventing an intestacy in the case of a charitable bequest. The Courts lean in favour of charity when construing charitable gifts.

[96] In my view, the trust contained in the residuary clause of Mr. Forbes' Will falls within the spirit and intent of the advancement of miscellaneous activities beneficial to a community, namely the Sussex, New Brunswick area, and that charitable purposes were intended by Mr. Forbes. His whole purpose was clearly to benefit his community. Once established, a trust for charitable purposes does not fail for uncertainty.

[97] Accordingly, in answer to the first question put to this Court by the Applicants, namely, "*does the Will pose a valid trust of the residue on the executor*", the answer is yes, it poses a valid charitable trust.

[98] Having found that the gift of the residue of Mr. Forbes' estate is a valid charitable trust, the objects being certain under the laws of charity, I have thereby answered the second question. Accordingly, the bequest contained in the residuary clause of Mr. Forbes' Will does not fail for uncertainty.

[99] Since I have concluded that the gift of the residue established in the residuary clause of Mr. Forbes' Will has charitable trust status, an intestacy is not triggered and as a consequence there is no need to answer the third question posed by the Applicants as to who would take the residue of Mr. Forbes' estate in the event of an intestacy.

[100] Subject to appeal, this matter can be referred back to this Court by Mr. Madden, as the surviving executor under Mr. Forbes' Will, for determination of the implementation of the charitable trust created by Mr. Forbes.

[101] I direct that Counsel for the Applicants and Counsel for the Respondents be paid their costs on this application from the estate on a solicitor-and-client basis.

Peter S. Glennie
A Judge of the Court of Queen's Bench of New Brunswick