Case Comment

Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on *Re Canada Trust Company and Ontario Human Rights Commission*

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Introduction

Colonel Reuben Wells Leonard, sometime soldier, engineer, railroad entrepreneur, mine developer, philanthropist and empire booster[1] has just been given what for him would be a most uncomfortable memorial. For the first time a court in the Commonwealth has declared a testamentary provision that ordered choices to be made among potential beneficiaries on the grounds of race, religion, and (partially) sex, to be avoided as contrary to public policy.

The recent decision in *Re Canada Trust Co. and Ontario Human Rights Commission*[2] (hereafter Leonard Foundation case) concerns the extent to which a settlor[3] can impose conditions in trusts that discriminate on the grounds of, *inter alia*, race, ethnicity, sex and religion. Such conditions bring into conflict both the relative freedoms of different generations of property rights holders and, more important, the relative strengths of old and new fundamental political, social and economic values. Is upholding the traditional freedom of testation, which will involve permitting all forms of private discrimination, more important than asserting new principles of anti-discrimination, which will entail diminutions in property rights by restricting freedom of disposition? Should the answer to this question lead to the establishment of an absolute principle either way, or is it a case for balancing rights? What role is to be played in the "constitutionalizing" of trust law by other new political and constitutional ideas such as affirmative action and substantive equality?

This essay will examine these questions by means of an extended comment on the Leonard Foundation case. It is divided into four parts. I will begin

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by reviewing the factual background to the litigation and the judgments at trial and on appeal. Second, I will place this case in the broader context of the history of Anglo-Canadian and (to a much lesser extent) American jurisprudence on the issue. Third, I will argue that the decision of the Court of Appeal in the Leonard Foundation case is the right one, primarily because of the largely public nature of a charitable educational trust, so that concerns about a wholesale attack on the principle of free alienation of property and about the inability of a private philanthropists to advance their reasonable social goals are misplaced. Finally, I will analyze the limits of the newly widened scope of public policy, asking which apparently discriminatory charitable trusts should, and which should not, survive the newly assumed power of the courts to amend their terms.

The Leonard Foundation Case

A. The Leonard Foundation

In December 1923, seven years before his death, Colonel Leonard established a trust (Leonard Foundation), whose substantial endowment was to be used to provide scholarships (Leonard Scholarships) for students attending public schools, colleges or universities, in Canada and Great Britain. The terms of the recitals which begin the trust deed reflected the particular racial, religious and socio-political views of the settlor, and they are best quoted rather than summarized:

> 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 prosperity of the British Empire as a whole,...
>
> 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 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 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.[4]

The substantive provisions which followed incorporated these views into the terms of eligibility and the methods of administration of the trust. Eligibility was restricted in two ways. First, although scholarships were available irrespective of place of origin within Canada, "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... who, without financial assistance, would be unable to pursue a course of study". These conditions were followed by provisions that preference should be given to the sons and daughters of certain designated occupational groups,[5] that scholarships awarded to female students should not in any year exceed 25 per cent of the total money disbursed, that recipients take part in both physical exercise and military training if offered at the school or university, and that they work during the summer vacations. Second, while the administrators of the Foundation had discretion to pay the income to institutions or directly to students, and could largely choose the institutions which scholarship holders could attend, any such school, college or university was required to be "free from the domination or control of adherents of the class or classes of persons hereinbefore referred to".

The same racial and religious restrictions were applied to the administrators of the fund. While the trustee, Toronto General Trusts Corporation, was to manage the trust estate generally, the Leonard scholarships were to be administered by a body known as the General Committee and by a sub-committee of it known as the Committee on Scholarships. By the provisions of the fourth recital quoted above, members of the General Committee had also to be white Protestants of British nationality or parentage. Perhaps the most remarkable restriction imposed on the management of the Foundation was the following extreme example of "judge shopping"!:

> 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*... for the opinion, advice and direction of the Court in connection with the construction of this trust deed. [emphasis added]

The Foundation has continued to operate over the years, and at all times the General Committee has abided by the terms of the indenture in making its choices.[6] Application forms are made available to members of the General Committee and, on request, to individuals and to educational institutions. Each applicant must be interviewed by a member of the General Committee, and the Committee on Scholarships meets every spring to recommend recipients.[7] By the mid-1980s the Foundation, whose

capital amounted to some two million dollars, was receiving some 230 new and renewal applications each year.[8]

The Foundation has not operated without criticism. Press articles about the terms and individual complaints to Canada Trust (successor trustee to Toronto General Trusts Corporation) began in 1956. The earliest official complaint came in 1971, and since then the Human Rights Commissions (or equivalent bodies) of Alberta, British Columbia and Ontario have remonstrated with Canada Trust about the conditions of eligibility, but to no effect. From 1975 "various members of the General Committee... received correspondence from students, parents and academics expressing concerns and complaints with regard to the terms of eligibility". Some universities also complained, and from 1982 the University of Toronto stopped publicizing the scholarships and refused in any way to administer the award payments.

The representations from outside were supported by some members of the General Committee, and although a 1986 motion to apply to the court for changes was defeated,[9] the Committee and the Trustee were clearly somewhat embarrassed by the conditions. Educational institutions were asked not to post application forms on notice boards, and the current edition of the form tries to conceal the objectionable features of eligibility as far as is possible. It refers to the "Preferred Class" as being sons and daughters of the nominated occupational groups before it mentions the racial and religious qualifications. Nowhere in the form is it stated that females may not receive more than 25 per cent of the scholarship money disbursed, and nowhere is the applicant, his or her parents, or references, asked about race;[10] this aspect is presumably covered by the personal interview with a member of the General Committee. Overall the inquiries and complaints apparently had "an unsettling effect and have interfered with the due administration of the trusts... and the ability of the Trustee to carry on such administration effectively".

In 1986 the Ontario Human Rights Commission told the Foundation that the terms of eligibility "run contrary to the public policy of the Province of Ontario" and requested that the trustees "take appropriate action to have the terms of the Trust changed".[11] The Foundation's response was that it was "a private trust and not in any way a public, incorporated foundation", and that it had received legal advice to the effect that "the provisions of the Trust Deed do not offend the Human Rights Code".[12] Not satisfied, the Commission filed a formal complaint,[13] at which point Canada Trust applied for the guidance of the Court under s.60 of the *Trustee Act*.[14] Represented in the action in addition to the trustee and the

Commission were the "Class of Eligible Recipients", the Public Trustee, and the Royal Ontario Museum (ROM), the last-named being one of the beneficiaries of the residue into which the Foundation funds would fall if the trust failed.[15]

B. Judgment of the Ontario High Court

The trustee's principal questions to the Court were as follows:

1) Are any of the provisions of... the Indenture... void or illegal or not capable of being lawfully administered by the applicant..., by reason of:
   i) public policy as declared in the Human Rights Code, 1981
   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... above is in the affirmative..., does the trust... fail in whole or in part and if so, who is entitled to the trust fund...?
3) If the answer to any of the questions... in paragraph 1 above is in the affirmative..., but the answer to question 2 is in the negative, is there a general charitable intention... such that the Court in the exercise of its inherent jurisdiction in matters of charitable trusts will direct that the trust be administered *cy-près*?[16]

Before he could consider any of these issues, McKeown J. dealt with a challenge to his jurisdiction from the Commission, which argued that the first question was premature because the Commission itself had not yet formally investigated the trust. He noted that the trustee's questions were not limited to *Code* violations, and that moreover the case was before him on application by a trustee "for a response to questions concerning a private trust, one which I find... to be a charitable trust". In these circumstances "this court has inherent jurisdiction to answer the questions submitted to it and to vary the Leonard Trust if necessary".[17] McKeown J. also noted that if the Commission did consider the matter and find that the trust offended the *Code*, its remedial power did not extend to varying the terms of a trust. It could only declare the trust to infringe the *Code* and the trustee would have to return to court for assistance.

Before directly considering the first question, McKeown J. dealt with a further preliminary point: whether the recitals to the indenture, quoted above, were part of the trust terms. The standard rule of construction is that "the operative words prevail over the recitals unless the court must refer to the recitals for clarification".[18] He found that only the second half

of the fourth recital, that laying out the qualifications for involvement in the management and sharing in the benefits of the Foundation, was relevant. The other recitals merely expressed Leonard's motives for drawing up the indenture, and "the court's role is to determine whether a valid trust has been created, not pass judgment on the settlor's motives for doing so". He went on to say that those recitals "have become impossible and offensive to today's general community. As such they... must be regarded as having ceased to operate".[19] Thus the only issue was whether it is "illegal or unlawful in Ontario to provide scholarships to students of a restricted class, in this case white persons of Canadian citizenship who are Protestants, provided that the class can be defined with certainty".[20]

In this way McKeown J. returned to the trustee's first question, dealing first with the *Human Rights Code*. He noted that for the *Code* to be directly applicable, an educational trust would have to fall within the meaning of "goods, services and facilities" in s.1 of the *Code*, which reads:

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour,ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.[21]

McKeown J. had little difficulty in concluding that an educational trust was not a service or facility, although his reasoning consisted primarily of various quotations from dictionaries. He noted, by way of an alternative ground for holding the *Code* not applicable, that even if the trust was a service it was one covered by s.17 of the *Code* because it was "a philanthropic and educational institution that is primarily engaged in serving the interests of persons identified by prohibited grounds... and is an institution in which participation is restricted to persons similarly identified". There were "numerous educational scholarships in Ontario designed to benefit students of restricted classes defined by race, ethnic origin, sex, creed, and so on", and the Leonard Foundation is "but one more example of such an educational scholarship".[22]

McKeown J. moved on to trustee's questions 1 (ii) and 1 (iii), which he saw as one question. He defined public policy generally, outside of the *Human Rights Code*, in the traditional way enunciated in *Re Millar* and *Fender* v. *St John Mildmay*,[23] as "a doctrine to be invoked only in a clear case in which the harm to the public is substantially incontestable".[24] He asked, "is there harm to the Ontario public so obnoxious to the public good that the rules of law governing testamentary trusts cannot have their

normal operation?" He concluded that there was not, adopting the sentiments and reasoning in the English case of *Re Lysaght*. There Buckley J. had considered a medical scholarship that excluded Jews and Roman Catholics, and in holding it not contrary to public policy had said:

> I accept that racial and religious discrimination is nowadays widely accepted as deplorable..., 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... undesirable, but it is not, I think, contrary to public policy.[25]

McKeown J. concluded his terse analysis of the public policy issue by noting that "the freedom to contract and the freedom of testamentary disposition are firmly rooted in law and are important matters of public policy in their own right".[26]

The uncertainty challenge (question 1 (iv)), was disposed of as expeditiously as the others. McKeown, J. accepted that part of the fourth recital established a condition precedent, but found that it easily met the certainty test for such conditions, which was much less strict than that for conditions subsequent and required only that a given individual claiming the benefit can meet the conditions.[27] McKeown J.'s conclusion was thus that while the first three recitals of the deed were inoperative, as was the first part of the fourth recital, the rest of the fourth recital and deed itself could stand.

C. Judgment of the Ontario Court of Appeal

McKeown J.'s decision was appealed by the Ontario Human Rights Commission and by the ROM. The former argued only that McKeown J. should have declined to deal with the matter as it was within the exclusive primary jurisdiction of the Commission; the latter argued that the trust was invalid as violating public policy and that the trust fund should therefore be distributed to the residual beneficiaries, of which it was one. Canada Trust, as respondent, took no position other than to argue that the trial judge had jurisdiction and that should any of the conditions be declared void, the Court should strike them out and leave the charitable trust to operate without them. The Public Trustee and the Class of Persons Eligible both intervened in support of the trial decision, but they had different positions with respect to the disposition of the fund should it be found not in accordance with public policy. The Public Trustee argued for a *cy-près* without the offending conditions; the Class of Persons Eligible argued that failure would be complete and no *cy-près* possible.

Two concurring judgements were written, neither of which dealt with the issue raised before McKeown J. of whether the trust was a facility or service and therefore directly under the *Human Rights Code*. That of Robins J.A., concurred in by Osler J., agreed with Tarnopolsky J.A. on the jurisdictional issue, summarized below, and otherwise defined the issues in two 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-près* be applied to save the trust?

In considering public policy Robins J.A. first held that the recitals in the document could not be isolated from the rest of it nor "disregarded by the court in giving the advice and direction sought by the trustee". They contained "operative words" to which the settlor had made "constant reference" in the operative part of the deed. He "restricted the class of persons entitled to the benefits of the trust by reference to the recitals; he set the qualifications 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".[28] Overall, "the operative provisions were intended to be administered in accordance with the concepts articulated in the recitals", and the two parts of the deed were "inextricably interwoven". Robins J.A. went on to note that even if the recitals went only to motive and not to the meaning of the trust, they had a public aspect, for "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". Thus, "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".[29]

Robins J.A. then turned to the crucial issue of whether public policy was indeed violated. After noting the same "substantially incontestable harm" test as McKeown J. he asserted that there were nonetheless "cases where the interests of society require the court's intervention on the grounds of public policy", and this was "manifestly such a case". While freedom of property disposition was a significant value, this trust was "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". This was because "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.

These propositions were "patently at variance with the democratic principles governing our pluralistic society in which the multicultural heritage of Canadians is to be preserved and enhanced". Testamentary freedom must in these circumstances give way to the public policy of promoting racial equality.[30]

In light of his conclusion on the public policy issue Robins J.A. did not deal with the issue of uncertainty. He did, however, deal with the fact that many educational trusts give preference to one group or another. None of them, he noted, "is rooted in concepts in any way akin to those articulated here which proclaim... some students, because of their colour or their religion, less worthy of education or less qualified for leadership than others".[31] The validity of other potentially discriminatory trusts should be decided on their facts, and intervention in this instance was warranted not by any general principle but by the particular provisions of the Leonard indenture.

Robins J.A. then turned to the *cy-près* application. He held 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".[32] While this charitable trust had been practicable when it went into force, it had become impracticable through being contrary to public policy. In such circumstances "the trust should not fail". It was "only reasonable" that the Court "apply the *cy-près* 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".[33] This meant striking out the recitals and removing "all restrictions with respect to race, colour, creed or religion, ethnic origin and sex as they relate 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".[34] The preference for the children of those in certain occupational groups was accordingly retained.

The concurring judgment of Tarnopolsky J.A. began with the jurisdictional issue. He acknowledged that the Human Rights Commission should normally be the first resort of someone complaining of discrimination, but thought this a different case for a number of reasons. First, the superior courts had for centuries had inherent jurisdiction over the administration of trusts. Second, the Commission could not effect a settlement if its terms involved the trustee acting contrary to the trust conditions and, if there were no settlement and the matter went to the Board of Inquiry, the latter's remedial powers probably did not extend to altering the terms of a trust or declaring it void. Third, there was no need for the Commission to act as fact-finder: the issues were entirely ones of law.[35]

Tarnopolsky J.A. then dealt with the certainty issue, discussion of which he prefaced by noting that the beliefs of Colonel Leonard, as stated in the recitals, were "evidence of motive and... [therefore] irrelevant" for assessing validity on this ground.[36] The operative conditions were held to be conditions precedent, and under the individual ascertainability test of conceptual certainty[37] it need only be shown that there were applicants who could meet the criteria. This was obviously the case, for "there has been no difficulty over some six decades in ascertaining whether students qualify".[38]

On the principal issue of public policy Tarnopolsky J.A. began by noting 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", although there were cases in which such conditions had been struck down on other grounds. He purported to distinguish the English cases on the grounds that they had either involved race and been decided before the enactment of the *Race Relations Act*, or, in more recent instances, had involved religion which is "conspicuously" omitted from British anti-discrimination laws. He therefore did not find the English cases "to be of any help or guidance".[39] The Canadian cases were also reviewed, and they demonstrated an equally non-interventionist approach, but Tarnopolsky J.A. stated flatly that the lack of precedent was not to be determinative. There was ample guidance from, *inter alia*, provincial statues and regulations, from the *Charter of Rights*, and from international covenants, to the effect that "the promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern day Ontario" and thus intervention here would be taking place

in a "clear case" where there was "substantially incontestable harm to the public". This was "clearly" a trust which was "void on the ground of public policy to the extent that it discriminates on grounds of race... religion and sex".[40]

Tarnopolsky J.A. went on to consider in some detail the issue raised but not resolved by both McKeown J. and Robins J.A., i.e., that of the validity of other charitable, particularly educational, trusts that in some way restrict benefits to certain classes, including ones that favour "visible minorities, women or other disadvantaged groups". These should be looked at in their own terms, through an "equality analysis" like that used in human rights and *Charter of Rights* jurisprudence with reference to equality and affirmative action programs. He stressed that "not all restrictions will violate public policy", and adverted particularly to charitable trusts designed to assist "the education of women, aboriginal peoples, the physically or mentally handicapped", which he thought very unlikely to be found improper by the courts.[41]

Tarnopolsky J.A. then went on to consider the argument, so much relied on by McKeown J., that his decision interfered with freedom of contract and of testation, both important public policy goals in themselves. He did not deny their importance, but noted the many ways in which such freedoms were already limited by both statute and contract law. He also noted that freedom of testation would be but minimally affected, because his decision concerned only charitable trusts, that is, trusts that are given special protections and privileges such as tax exemptions and freedom from the rule against perpetuities. He stated unequivocally that his decision "does not affect private, family trusts", for "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".[42]

The final issue was *cy-près*, which was available only if a general charitable intention could be found. In this case that meant deciding whether Leonard's conditions were the essence of his intention, or whether they represented mere machinery of a general intention to educate. That is, "whether the testator's paramount intention was to provide scholarships for education or whether he intended to provide it for specific kinds of student and would not have created it otherwise". Tarnopolsky J.A.'s interpretation of the trust deed was that Leonard's intention had been "to promote leadership through education", and he chose a scheme "he thought best because of the time in which he lived". His attitudes are considered repugnant with hindsight, but "in his day... Colonel Leonard was a philanthropist" who "believed that education was the key to a strong

and prosperous country and a peaceful world... The fact that he chose to implement his desire to promote education through a discriminatory scheme cannot displace his general charitable intention". Tarnopolsky J.A.'s *cy-près* scheme was to strike "the provisions of the trust which confine management, judicial advice and benefit on grounds of race, colour, ethnic origin, creed or religion and sex", and otherwise to leave the Foundation intact.[43]

The Leonard Foundation Case: A New Direction in Public Policy

As noted in the Introduction to this comment, the Leonard Foundation case is the first in the Commonwealth to strike down a discriminatory condition of eligibility in a charitable trust on grounds of public policy. The case obviously raises a number of issues, and this comment will deal with only some of them. I will not discuss questions relating to the interpretation of trust deeds, the jurisdictional issues, the question of whether or not an educational trust is a service under the *Human Rights Code*, or matters relating to the particular details of the *cy-près* scheme that was ordered. I will also not examine in any detail the issue of general charitable intent, although I believe that Tarnopolsky J.A. was wrong in looking for it in a case of subsequent impossibility or impracticability.[44] Rather, since this is a landmark case in the area of conditional estates, I have chosen to place this decision in the general context of previous English, Canadian and American jurisprudence, to examine in detail the public policy issue, and to look at the relationship between the public policy affecting discriminatory trusts and the substantive equality underpinnings of current human rights and *Charter* jurisprudence.

A. Discriminatory Conditions Generally in Anglo-Canadian Law

This section will place the Leonard Foundation decision in context by reviewing briefly the Anglo-Canadian jurisprudence on public policy and discriminatory conditions and covenants; the one following will offer a more detailed analysis of the many fewer cases on charitable trusts. I will attempt to show that in almost all instances courts in the past have adopted an approach that formally favours traditional common law property rights over other values, but that some in the charitable trust area have resorted to other devices to make statements informally about the emerging importance of anti-discrimination measures.

There are a number of grounds on which the courts will strike conditions attached to estates granted, with repugnancy to public policy being just one of them.[45] This is not the place for a detailed analysis of the doctrine of public policy in the law of property and contract. Suffice it to say that although the doctrine tells us that a condition is against public policy if

it "tends to be injurious to the public or against the public good",[46] the courts have in the past restricted the categories of cases in which it will be invoked and, while one can find statements to the effect that these categories are closed,[47] the more correct view seems to be that the doctrine is capable of expansion, albeit limited and slow expansion. It is "a treacherous ground for legal decision", "a very unruly horse", and should 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".[48] Canadian decisions are to the same effect.[49] As a result the usual practice is to put public policy cases into factually defined categories. In the area of conditional estates the cases reveal the following principal categories of invalid conditions: conditions which cause a person to commit an illegal act; conditions which subvert the normal course of law; conditions which tend to restrain a person from doing his or her (usually parental) duty; conditions which encourage the separation of husband and wife; conditions which restrain marriage; and conditions which restrain substantially the ability of the grantee to alienate the property.[50]

Racial, ethnic, religious and sex discrimination have therefore not been considered grounds of invalidity in English law. There are numerous English cases dealing with such conditions outside the realm of charitable trusts, and in these discrimination is either not mentioned at all or arguments that it comes within the ambit of public policy are dismissed briefly and emphatically, primarily on the ground that it is a matter of private choice.[51] In a few instances, conditions subsequent have been held to be uncertain by the strict test applicable to them, but these, frankly, tend to be conditions favouring Jews or Catholics.[52] Conditions favouring Protestants are invariably sufficiently certain and always acceptable to judicially-defined public policy. This is clearly stated in the most recent House of Lords decision on the issue, *Blathwayt* v. *Baron Cawley*.[53] The condition that if any beneficiary under a will "shall... be or become a Roman Catholic", then "the estate hereby limited to him shall cease and determine and be utterly void" was held not to contravene either public policy or the certainty test. Lord Wilberforce noted that legislation making racial discrimination illegal had specifically excluded religious discrimination from its terms, but did not base his decision on legislative choices. Rather, he came down firmly on the side of the public policy of upholding testamentary freedom:

> I do not doubt that conceptions of public policy should move with the times ... It may well be that conditions such as this are, or at least are becoming, inconsistent with standards now widely accepted. But acceptance of this does

not persuade me that we are justified, particularly in relation to a will which came into effect as long ago as 1936..., in introducing for the first time a rule of law which would go far beyond the mere avoidance of discrimination on religious grounds. To do so would bring about a substantial reduction of another freedom, firmly rooted in our law, namely that of testamentary disposition. *Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.* [emphasis added]

Lord Simon came to the same conclusion on public policy, noting briefly that it did not cover religious preference.[54]

The same conservatism in defining the relationship between property rights and discrimination has generally influenced Canadian law. Almost all of the relevant cases, of which there are very few, deal with restrictive covenants, not conditions. I will discuss two of them only. The first is the famous 1945 decision in *Re Drummond Wren*[55], an atypical instance of judicial intervention. It involved a restrictive covenant which included the phrase: "Land not to be sold to Jews or persons of objectionable nationality". Mackay J. allowed an application to strike out the restriction on the ground that it offended public policy. He argued that the meaning of "public policy" varies from time to time, and that legislative statements can be used as an aid to determining principles. He then cited the San Francisco Charter (precursor to the United Nations Charter), which the Canadian Parliament had ratified, the Atlantic Charter, the provincial *Racial Discrimination Act*[56], and other provincial statutes which enunciated principles of non-discrimination in particular contexts. The operative part of Mackay J.'s judgment contains a remarkably modern invocation of ideas of racial harmony and "multiculturalism", and merits extensive quotation:

[N]othing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas... 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... eminent judges have... 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.
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> That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-Semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world... My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate.[57]

Just four years later, the Ontario Court of Appeal repudiated *Re Drummond Wren* in *Re Noble and Wolf*,[58] which dealt with a restrictive covenant in a summer cottage development containing a clause against the land being alienated in any way to "any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood". An argument that this contravened public policy was firmly rejected by the Court of Appeal, with four of the five judges delivering judgments.

Robertson C.J.O. made much of the special use of the land in dealing with public policy: "at such places [summer cottage complexes] there is much intermingling in an informal and social way, of the residents and their guests, especially at the beach". It was therefore very important that the atmosphere be "congenial", and the covenant was an attempt to ensure "that the residents are of a class who will get along together".[59] He confessed that to "magnify this innocent and modest effort to establish and maintain a place suitable for a pleasant summer residence into an enterprise that offends against some public policy, requires a stronger imagination than I possess". Robertson C.J.O. then asserted that had the covenant not said that some races were excluded, but that "only persons of specified race or blood should be admitted", then "nothing would have been said about public policy". The inadequacy of this logic needs no comment.[60] The Chief Justice also appealed to the virtues of private choice and freedom of disposition. Nowhere in his judgment is there discussion of the effect of the provincial *Racial Discrimination Act*, the legislation so persuasive to Mackay J. in *Re Drummond Wren*.

The other three judgments took much the same approach. Henderson J.A. bluntly stated that *Re Drummond Wren* "is wrong in law and should not be followed", because there was no public policy in Ontario concerning the matter. Indeed "in thousands of ways there exist restrictions... by which people are able to exercise a choice with respect to their friends

and neighbours". "I can think of no reason", he continued, "why a group of people who have adopted a manner of living during two or three months of the year as a summer colony, and who have by agreement among them placed restrictions upon those who may become owners of that colony, are infringing the rights of anybody". Moreover, the party now seeking to have the provision in the covenant voided had initially freely agreed to it, and "sanctity of contract is a matter of public policy which we should strive to maintain".[61] Hope J.A. also specifically overruled *Re Drummond Wren* and explicitly placed the covenant within the sphere of private choice.[62] Finally Hogg J.A. chose first to invoke a number of precedents to the effect that the heads of public policy ought not to be extended unless very clear direction was given by the legislature. This was not the case here: in particular, obligations set out in the United Nations Charter and other international documents, cited in *Re Drummond Wren*, were not part of the law of Canada or of Ontario, and could not serve as a justification for intervention.[63]

Following the decision in *Re Noble and Wolf* the Ontario legislature amended the *Conveyancing and Law of Property Act* to prevent the creation in future of such racially discriminatory covenants.[64] The new legislation did not extend to existing covenants, but the particular provision at issue in *Re Noble and Wolf* was struck down by the Supreme Court of Canada because of uncertainty and because it had nothing to do with "the use, or abstention from use, of land". That is, it did not "touch and concern the land", and was therefore not a valid restrictive covenant.[65] None of the judgments written by the Supreme Court judges tackled the issue of whether a racial covenant or condition contravened public policy. The Court of Appeal's decision on this question thus remained the law in Canada for conditions and for pre-abolition covenants, until presumably overturned in the Leonard Foundation case.[66] In this area, therefore, the courts have largely preferred traditional values about freedom of contract and property-holding; frequently they have not even felt it necessary to balance rights, the problem of discrimination not forming a part of the public policy equation.

B. Discriminatory Conditions and Charitable Trusts in Anglo-Canadian Law

The previous cases involving facts directly analogous to the Leonard Foundation situation—that is, those dealing with discriminatory charitable trusts—reveal a similar judicial attitude to public policy. But in two instances the English courts have nonetheless struck the conditions by using the doctrine of *cy-près* following an impossibility or impracticability, something unique to the law of charitable trusts. One suspects that the

remedy was motivated at least as much by substantial disapprobation of the content of the terms as by the imperatives of *cy-près* law. *In Re Dominion Students Trust*[67] concerned a student hostel in London for male students of the British Empire who were "of European origin". The trustees applied for a *cy-près* order which would strike out the racial restriction. No arguments on public policy were considered by Evershed J.; rather, he dealt with it as a matter of impossibility or impracticability in carrying out the terms of charitable trust as originally conceived. His judgment is short and the relevant passage can be quoted in full:

> I have... 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 antagonise those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain. The case, therefore, can be said to fall within the broad description of impossibility... In the circumstances, I am happy to think that I can make the order which I have been asked to make.[68]

Evershed J.'s decision was necessarily based on a finding that the racial restriction was not essential to the purposes of the charity; if it had been, the *cy-près* order requested would have been inappropriate. His conclusion on this point was, however, surely based on a dislike of the condition itself; it is interesting indeed to note that both *Dominion Students Hall Trust* and *Re Drummond Wren* were decided shortly after the end of the Second World War, and in result and in language they reflect the ideology of the struggle for equality and non-discrimination that infused that conflict and, obviously for sometime thereafter, continued to inform social and judicial attitudes.

A similar and much better known case is *Re Lysaght*,[69] in which a testatrix established a charitable trust to provide scholarships for medical students who were male, unmarried, between 19 and 30 years old, the sons of doctors, and British-born subjects "not of the Jewish or Roman Catholic faith". The council of the Royal College of Surgeons, the body named in the will to administer the scholarship program, declined to accept the bequest unless the bar on Jews and Catholics was removed.[70] An application was made for a *cy-près* order, which Buckley J. allowed. He first found that the testatrix's true intention was to provide medical scholarships, with the various qualifications attached to students being "mere machinery". That is, he found the general charitable intention that is always necessary in a

case of initial impossibility or impracticability. He then held that "the personality of the trustee [the College] was of the essence of the testatrix's intention", that "it was the particular wish of the testatrix that the college should be the trustee of this fund because of its peculiar aptitude for the office, and ... it was to the college and to no one else that she meant to confide ... discretionary powers".[71] Therefore to appoint another trustee who would be prepared to carry out all the terms of the trust would defeat the testatrix's intention.

That left Buckley J. to consider the consequences of the named trustee's refusal to carry out the trust in all its terms. Whereas "a trustee will not normally be permitted to modify the terms ... on the ground that his own opinions or convictions conflict with them", when it is the essence of the trust that particular trustees only should administer it, the trust becomes impracticable to carry out. Having said that, Buckley J. asserted that "the impracticability of giving effect to some inessential part of the testatrix's intention cannot, in my judgment, be allowed to defeat her paramount charitable intention".[72] The only way to avoid complete failure of the trust was to order a scheme in which the words "not of the Jewish or Roman Catholic faith" were omitted.

Buckley J.'s decision had the effect of removing the racial and religious restrictions, but he chose to take an indirect route to achieving this end. Indeed, he specifically repudiated the direct public policy analysis, merely making the short statement cited by McKeown J. at trial in the Leonard Foundation case, quoted above, which stressed the primacy of personal choice. Yet can it reasonably be maintained that it was *not* vital to the testatrix that the discriminatory conditions be imposed? The will was a recent one and the conditions detailed and thorough. The decision in *Lysaght* is based on a fiction, albeit one where it is easy to approve of the result,[73] and this fiction has never been employed in Canada.[74] In the only somewhat relevant Canadian case, one involving restrictions based on political beliefs, the scholarship conditions were struck on the ground of uncertainty.[75]

C. Discriminatory Conditions and Charitable Trusts in American Law

There are both similarities and differences between the Anglo-Canadian and American approaches to this issue.[76] The principal similarities are twofold. First, as in Britain and Canada prior to the Leonard Foundation case, there has been no case in which a discriminatory condition in a charitable trust, privately administered, has been held to be invalid on grounds of public policy. In *Re Will of Potter*,[77] which involved racial discrimination, the Delaware Chancery court held that "as a matter of

state trust law, a testator or trustor may cause the creation of a private trust for the benefit of one race just so long as the state does not become so involved in the affairs of such a legal entity as to run afoul of the constitutional guarantees of the equal protection clause of the Fourteenth Amendment". The same result has been reached in a number of sex discrimination cases,[78] where trusts have been found to be valid and their conditions the product of legitimate "personal predilection",[79] not unlawful choice, providing that no state action sufficient to invoke the Fourteenth Amendment is involved.

A second similarity lies in the American use of the *cy-près* doctrine in a manner reminiscent of *Lysaght*, in that refusal of the trustee to administer a discriminatory scholarship has been held to constitute an impracticability and to permit the ordering of a *cy-près* scheme.[80] This approach has the obvious difficulty that a general charitable intent must be found and that the court must conclude that the restrictions were not a central part of the testator's intention. This has led some commentators to criticize this approach as one in which form, that is the general charitable intent doctrine, can all too often triumph over substance, i.e., the desirability of removing the discriminatory restrictions.[81] Yet a recent review has shown that of the 40 reported cases in which this technique of challenge was employed, 29 resulted in a finding of impossibility or impracticability and a consequent reform by *cy-près* or, in states where *cy-près* is not available, the related doctrine of equitable deviation.[82]

In addition to the similarities there are also significant distinctions between Anglo-Canadian and American law. There is a line of cases in which, though the trusts have not been voided, tax exemptions have been denied to racially discriminatory trusts. In *Bob Jones University* v. *United States*[83] the United States Supreme Court first held that such trusts were contrary to public policy as enunciated for the purposes of federal law. It then held that the test for whether a trust was to be considered "charitable" for the purposes of the Code was whether it conferred a public benefit, and that "racially discriminatory private schools violate fundamental public policy and cannot be deemed to confer a benefit on the public". The court did not say that all discriminatory trusts were void, or indeed that none could qualify for tax exemptions. Rather, a balancing of interests must take place in which the harm to general public policy is measured against any public benefit that comes from the activity.

Unquestionably the most marked difference between Anglo-Canadian and American charities law lies in the fact that if the court finds sufficient state action, the equal protection guarantees of the Constitution's Four-

teenth Amendment are invoked and the discriminatory conditions invariably struck down. Although few racial or sexual discriminatory trusts have survived the challenge of equal protection, the problem is one of invoking the clause at all, that is, of finding sufficient state action. Where a state organ acts as trustee, as in the leading cases of *Pennsylvania* v. *Board of Directors* and *Evans* v. *Newton*,[84] there is usually no difficulty in finding state action, although the courts have also held that there was insufficient state action in quite similar cases.[85] Where no state organ is directly involved in the administration of the trust, there are cases which have followed the famous decision in *Shelley* v. *Kramer*,[86] in which the Supreme Court found that judicial enforcement of a racist restrictive covenant amounted to state action. It is clear, however, that the application of *Shelley* to discriminatory charitable trusts by state courts has been inconsistent, and no clear principles generally have emerged to guide the courts in deciding when a charitable trust is sufficiently imbued with state action to justify invoking the Fourteenth Amendment.[87]

I will return to this issue of "constitutionalizing" trust law in the following section. Suffice it to say for now that the injection of constitutional law into charities law in the United States, while it has produced many more instances of judicial intervention to strike discriminatory conditions, has not led to a consistent and purposive approach to this problem. The content of the conditions is not the focus of an inquiry into public policy; rather the cases turn on details of trust management, specifically the extent to which the state is involved.

The Charitable Trust and Public Policy: Anti-Discrimination, Testamentary Freedom, and Public Benefit

The previous sections of this comment have demonstrated that the decision in the Leonard Foundation case is nearly unique in British, Canadian and American law. This section will argue that the decision is correct and will also provide a more detailed justification for curial intervention than either of the judgments of the Court of Appeal. It will not be suggested that public policy should be substantially expanded in scope and invoked frequently by the judiciary, nor that testamentary freedom should be discarded as a value. Rather, I will argue that a balance needs to be struck which recognizes that whether or not public policy is invoked in a given case represents a value choice, and that the charitable trust is at least partly a creature of the state and owes obligations to society corresponding to the benefits it receives. The public nature of the charitable trust puts arguments about testamentary and contractual freedom in context and makes them factors to be considered but not, *pace*

McKeown J. and many of his predecessors, values of overriding importance. In the following section I will argue that the decision in the Leonard Foundation case does not mean that all charitable trusts which make distinctions on grounds prohibited by public law should be amended or voided. The analysis of which openly discriminatory trusts should fail and which should be retained must take into account the emerging conception of substantive equality which underlies current constitutional and human rights law.

A. The Judiciary and the Formulation of Public Policy

I begin with the sentiment, featured prominently in the previous cases, that public policy should not be easily broadened, that it is, as Lord Lindley stated early in this century, "a very unstable and dangerous foundation on which to build until made safe by decision".[88] There are two serious difficulties with such invocations of judicial restraint in this context. The first is that restraint is not neutral. It would perhaps be so if there was no such doctrine as public policy. The fact is that the doctrine exists and its parameters are the result of judges preferring some values to others. The various categories of public policy laid out earlier in this comment reflect primarily the values of eighteenth and nineteenth century England. Some may still be relevant, some may not, but in refusing to adapt the doctrine in a purposive manner to more modern concerns, the judiciary elevates older values over those more relevant to late twentieth century Canadian society. In questioning whether racist conditions in wills generally should be struck on the grounds of public policy, J.C. Shepherd makes this point succinctly: "public policy is commonly invoked to avoid conditions tending to induce the separation or divorce of a married couple, which is not really a more compelling social wrong [than racism]."[89]

The second problem with judicial restraint in this context flows from the first. If public policy ought to be capable of expansion one does not need to fix its precise limits in order to conclude that current Canadian public policy would find racism and religious bigotry utterly unacceptable. The introduction 30 years ago of the Canadian *Bill of Rights*, the increasing importance of Human Rights codes, the introduction of the equality rights in the *Charter*, and federal and provincial governments' commitment to programs like multiculturalism and employment equity all must be taken as indications that our society has unequivocally rejected most distinctions based on characteristics like race and religion. It is significant to note that a few years ago the Ontario Law Reform Commission had this to say about the *Dominion Students Hall* case: "How far is such a term [the colour bar] 'impracticable' as opposed to being undesirable? Human rights

legislation would today render such a term illegal, and thus make that trust term 'impossible' ".[90]

B. The State, the Charitable Trust, and Public Benefit

The foregoing has argued that there ought to be a public policy against the kind of discrimination contained in the terms of the Leonard trust, and it is well known that public policy as traditionally defined favours freedom of testamentary disposition and contract. Which of these public policies should prevail? In the cases reviewed above the answer was clearly the latter. In the Court of Appeal judgments in the Leonard Foundation case freedom of testation was recognized as a significant social value, but all judges held that it was outweighed by the principle of anti-discrimination. In the course of deciding whether the recitals to the trust deed were relevant to his decision, Robins J.A. stated that even if they went only to motive and not to the meaning of the substantive provisions of the deed, they should be taken into account because:

> ...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 operating in the public sphere. Operating in perpetuity as a charitable trust for educational purposes, as it has now for over half a century,... the Foundation has, in realistic terms, acquired a public or, at the very least, a quasi-public character.

Robins J.A. went on to say that as a result, when the trust terms are challenged as contrary to public policy, "the reasons... which motivated the Foundation's establishment and give meaning to its restrictive criteria, are highly germane".[91] I confess that I am unclear as to the precise meaning of this, and suspect that it really refers to how one is to decide which distinguishing terms are good and which are bad, a subject dealt with in the next section. But while recognition of the public nature of the charitable trust is timely, it is unfortunate that Robins J.A. did not expand on this point, and that Tarnopolsky J.A. did not discuss it at all, for their conclusions on the balancing of conflicting public policy interests would have been greatly strengthened by a more detailed analysis of the ways in which the apparently "private" freedom of testation is really, in the case of charitable trusts, largely imbued with public values and public consequences.

As a matter of political theory it can, of course, be argued that all property is the creation of the state and that all property relations are maintained or altered by state intervention.[92] More specifically one can argue that all trusts are even more "public" works since they have long both required and enjoyed the active supervision of the judiciary. But I will not deal

with these two more general propositions here. Instead, I will argue that, more than any other "private" area of property law, the charitable trust is a substantially public institution.

There are numerous special features of the charitable trust that make it, in the words of Robins J.A., at least "quasi-public". These features are contained both in statutes and in rules fashioned by the courts of equity over the centuries. Principal among the former, of course, are the numerous tax advantages enjoyed by all charitable trusts and gifts, at both the federal and provincial levels. Such exemptions effectively mean, in the words of the former Chief Justice of the United States, that not only the state but also "all taxpayers... can be said to be indirect and vicarious donors" to the charitable purpose being advanced by a tax exemption.[93] In addition to statutory tax exemptions, special privileges accorded to charitable trusts by the courts of equity include exemptions from the rules against perpetuities and accumulations, the *cy-près* doctrine by which impossible or impracticable charitable trusts are given new life where other trusts would be allowed to fail, and the rule that the Crown acts for all objects of charity as *parens patriae*.[94]

These aspects of the charitable trust are at the centre of the American debate over the interaction of trusts law and the Constitution, for it has been argued by some that in every case they amount to sufficient state action to invoke the equal protection guarantees.[95] I am not suggesting that those wishing to attack terms such as were contained in the Leonard Foundation trust should look to persuade the courts that American-style "state action" is involved and that the *Charter of Rights* applies directly to such trusts. The Supreme Court of Canada's ruling in *Dolphin Delivery* that the courts are not part of government has probably substantially precluded such an argument.[96] In any event the American experience reviewed above suggests that "state action" is a difficult concept to define and the standard laid down by the United States Supreme Court has been inconsistently applied. The point here is merely to recognize that one cannot simply characterize the contest as one between the public interest in preserving the private right of freedom of testation and the public policy of anti-discrimination. The private right of free testation requires considerable public intervention, at least in the context of charitable trusts.

This assertion that the charitable trust is a substantially public institution is supported by consideration of the reasons why charitable trusts receive the privileges they do. In part it is because the state wishes to encourage charitable giving by individuals. But this poses the question of why that should be encouraged, and the answer lies in the realm of public benefit,

which must always be found before a gift will be considered charitable. While the presence of public benefit is usually assumed if a trust promotes education among a sufficiently wide section of the public, it is not simply presumed, and whether or not it exists in a given case is not something to be decided by the settlor, but by the courts.[97] Professor Clark, again, succinctly delineates the relationship between public support and public benefit: "A charitable trust serves two masters—the property owner who created it and society which is its beneficiary. On the initial assumption that the interests of each coincide, the law guarantees the trust's enforcement, perpetual existence and tax immunity".[98]

Charitable status, therefore, is given state support because society believes that there is benefit in doing so. It is not conferred simply because we wish to allow a settlor to work towards whatever ends he or she considers desirable. When the settlor's ends, as measured by the terms of the trust, conflict with fundamental aspects of public policy, there is nothing wrong with refusing to allow him or her to continue to pursue them. More than 20 years ago Professor Lamek, commenting on *Re Lysaght* and arguing for a more open approach to removing discriminatory conditions, asked rhetorically: "... if the effect of malicious discrimination is to perpetuate prejudice and to foster division among members of society, how can it be said that [such] a scheme... promotes public benefit... Surely the society that grants the immunities and benefits cannot be precluded from having some say as to the kind of scheme which is to qualify for such a favour".[99] What the law gives in the form of charitable status, one might say, the law can take away. Similarly it can make its grant of such status conditional on new terms, as noted nearly 40 years ago by the 1952 *Report of the English Committee on the Law and Practice Relating to Charitable Trusts*, which states:

> ... the public should not be compelled to take whatever is offered to it, but should... have the right of considering whether that particular use which the Founder has fancied shall take effect, or whether the property should be turned to some other public use, or given back to private use... A certain deference should be paid to the donor's wishes, ... but they should never be allowed to interfere with the public welfare.[100]

Two final points merit mention here. First, the argument that the public policy of anti-discrimination should prevail over the freedom of testation is bolstered when one considers that there are already numerous ways—capacity rules, dependants' relief legislation, certainty requirements—in which absolute freedom of testation is limited.[101] Indeed in Quebec a combination of article 760 of the *Civil Code*, which provides that a condition in a will which is contrary to public order is to be struck, and

of s.13 of the *Quebec Charter of Human Rights and Freedoms*,[102] which forbids the inclusion of a discriminatory clause in a "juridical act" such as a will, gives the courts wide-ranging powers of intervention as well.[103] This is just another such limit in the pursuit of yet another significant social purpose.

Second, I noted a tendency in some previous cases for conditions to be removed where trustees objected to carrying them out. These cases, which effectively contravene the rule that no trust shall fail for want of a trustee by finding that the naming of a particular trustee was a *sine qua non* of the settlor's intention, and which also require an (equally fictitious) finding that the settlor had a general charitable intent outside of the particular discriminatory restriction, really represent judicial disapprobation of the terms themselves. There are two difficulties, however, with leaving this problem to be resolved in this way. The first is that it is intellectually dishonest. The second is exposed by the history of the Leonard Foundation: the trustees must be the catalysts of change and could, indeed, limit the extent of change by objecting only to some conditions and not to others.[104] The *Lysaght* approach therefore represents a partial solution based on a fiction.

Discriminatory Conditions and the Public Policy of Equality

A. The General Problem of "Floodgates"

A concern central to McKeown J.'s decision in the Leonard Foundation case was the fate of the numerous other scholarship trusts which draw distinctions on the basis of a ground prohibited by public policy as defined by enactments such as the *Human Rights Code* and the *Charter of Rights*. If we will not allow trusts for white Protestants premised on the superiority of the white race and the reformed Christian church, so the argument runs, we cannot permit trusts to provide scholarships for residents of British Columbia or for black Canadians to study medicine or for native women to attend university. This all or nothing approach leads to a conclusion that it is better that all such scholarships survive than that none do. It is this thinking that is largely reflected in the British legislative solution to this problem: trust conditions of eligibility based on "colour" are henceforth to be disregarded,[105] and distinctions based on religion, sex and on national or ethnic origin are to be maintained.[106]

While this argument is formally attractive, it ignores the fact that our public policy on racial, religious and sex distinctions recognizes that the propagation of such simple absolutes is misleading and "equality" does not simply mean "formal equality", i.e., treating all persons absolutely the

same. In many cases the better objective is the achievement of "substantive equality", which may mean treating some differently from others. Human rights legislation, which provides for protection against discrimination on prohibited grounds in a variety of non-governmental activities, permits individuals and communities to prefer some beneficiaries over others in some circumstances. The *Charter of Rights*, which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law", also provides an exception for "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups".[107] In sum, the very public policy that leads to a conclusion that trusts like that involved in the Leonard Foundation case should no longer be allowed to continue contains within it sufficient exemptions and more than adequate guidelines to enable the courts to make reasoned choices about which charitable trusts serve the best interests of society and which do not.

B. The Community Organization Exemption

The following section will review briefly the various statutory and constitutional provisions that provide exemptions and exceptions, the reasons for their existence, and the developing jurisprudence on each. It will argue that the courts can apply very similar criteria in their supervision of charitable trusts: the floodgates of wholesale amendment of trust terms need not be opened if the courts that adapt public policy to contemporary antidiscrimination laws also choose to take on board the latter's concomitant exceptions and exemptions.

There are essentially two types of exceptions from anti-discrimination law contained in current Canadian public policy. The first, which may be termed "the community organization exception", is presented by s.17 of the Ontario *Human Rights Code*, which reads:

> The rights under Part I with respect to equal treatment with respect to services and facilities, with or without accommodation, is not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.[108]

In this case McKeown J. stated that the Leonard Foundation was exempted by this clause because it was "a philanthropic and educational institution that is primarily engaged in serving the interests of persons identified by prohibited grounds... and is an institution in which participation is restricted to persons similarly identified".[109] The Court of

Appeal did not comment on this aspect of McKeown J.'s decision, and there are no other cases interpreting the provision.

McKeown J., however, was surely wrong.[110] The section is intended to protect the integrity of such entities as ethnic and cultural clubs and organizations, churches, and separate school boards, to name but a few, that define their membership by prohibited grounds. It is intended to enable differences to be maintained, promoted and celebrated within the general policy of eliminating invidious discrimination in the wider society. That is, it says that non-Muslims cannot complain of exclusion from a Muslim youth club geared to a mixture of activities and socio-religious instruction. Very similar British Columbia and Quebec provisions have been characterized in this way by the Supreme Court of Canada. In *Caldwell* v. *Stuart*, McIntyre J. stated that the British Columbia exemption "confers and protects" the rights of groups while "imposing a limitation on [individual] rights".[111] In *Commission des droits de la personne* v. *Ville de Brossard*, Beetz J. found that the Quebec section "was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits. Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances".[112] Accepting this purpose, it is difficult indeed to see how the Leonard Foundation qualifies, because it does not promote the kind of freedom of association—in the words of the section, "membership or participation in a[n]... institution or organization"—that the provision envisages. While the Foundation itself may be an organization, the recipients of its scholarships are not members or participants in it. They are members of other organizations, schools and universities, and it is those organizations that must bring themselves within the exemption.[113] Within the human rights jurisprudence it remains unclear whether this section could protect something like an all-white school,[114] but that is not the issue here.

C. The Affirmative Action Program Exemption

The second type of exception to anti-discrimination laws is what are variously called "special programs" or "affirmative action programs". Section 15(2) of the *Charter of Rights*, quoted above, is one such provision, and many *Human Rights Codes* have some such clause.[115] That of Ontario is s.13:

> A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal

opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

Such provisions as s.13 are premised on the notion that it may be necessary, to redress the effects of past discrimination or to eliminate continuing systemic discrimination, to favour in some way the victims of that discrimination. Bruce Feldthusen delineates the principal argument in favour of such programs while also dealing with the principal objection to them:

> Affirmative action programs are frequently referred to as a form of reverse discrimination... Admittedly, affirmative action requires one to draw overt distinctions amongst groups of people, which in turn would seem to retard the ultimate goal of treating people equally. It is for this reason that in an ideal world one might prefer to eliminate discrimination than to cure its effects. In the real world, at least for the foreseeable future, the choice is between ignoring the reality of discrimination by hiding behind a veil of formal justice, or dealing openly with the problems which persist.[116]

There has been, and no doubt will continue to be, substantial debate over the validity and scope of affirmative action programs.[117] I do not intend to review and comment extensively on that debate here. I would note only that such programs have their detractors, both within the groups benefited and among those who will be adversely affected, and that "affirmative action" covers a host of arrangements, including, for example, outreach, preference if other factors are equal, quotas, and mandatory total hiring. My own view is that social gains must be measured against losses, that programs designed to "level the playing field" are far more acceptable than those which simply require that only persons of a certain type are given jobs (such as the open decision by Dalhousie Law School to hire only female faculty and covert resolutions by other schools to do the same). My purpose here, however, is not to investigate the constitutional and moral limits on the scope of affirmative action, but to make four points about where public policy, like it or not, now stands on the issues of equality, discrimination, and affirmative action.[118]

The first is that the Supreme Court of Canada, while it has not yet considered s.15(2) of the *Charter of Rights* has, in its leading decision on s.15(1) (the general equality rights clause), firmly stated that equality can require different treatment.[119] In the majority decision on the meaning of s.15(1), McIntyre J. held that equality was "a comparative concept":

> ... the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the

> question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.

He went on to define discrimination in the way that it has been defined for the purposes of human rights law, that is, with a concentration on effects and on the ways in which apparently neutral rules can have a disadvantageous impact on some groups because of their special characteristics and historical circumstances.[120] My point here is simply this: the highest court in the land has sanctioned an approach to discrimination that stresses substantive, not formal, equality. While this has been done in a *Charter* context and is, per the *Dolphin Delivery* case, not directly transferable to a private dispute, *Dolphin Delivery* also instructs the courts to interpret and develop the common law, including therefore the common law of public policy, in conformity with the fundamental principles enshrined in the *Charter*.[121] It is therefore not necessary to adopt the "all or nothing" approach to discriminatory charitable trusts suggested by McKeown J.

The second point is that the Supreme Court has also sanctioned a variety of affirmative action programs ordered by Human Rights Commissions. In the circumstances of the cases that have come before it, the Court has accepted these as necessary and acceptable methods of combating inequalities.[122] The United States Supreme Court has done likewise.[123]

Third, the courts are free, when deciding charitable trusts cases, to adopt standards of review similar to those employed in human rights law in deciding whether a program is genuinely within the exempting provisions. That is to say, they can place the onus of proof on the party wanting to show that its trust's terms should be exempted,[124] and can, in particular, require that a *bona fide* belief in the ameliorative qualities of the program be demonstrated.[125] Courts make such judgments all the time, particularly in the area of charitable trusts where they are, *inter alia*, required to rule on whether a charitable purpose does indeed provide a public benefit.[126] There is nothing to stop them doing so on this issue.[127]

My fourth point is essentially derived from the above three. It is that, like it or not, our current public policy both virulently decries discrimination such as that featured in the Leonard Foundation's terms *and* provides exemptions where the distinctions are held to be benign or ameliorative. In legislating on both these points, governments have recently given substantial direction as to what public policy is.[128] The courts are duty bound to follow *both* leads. It will not always be easy to do so, for they

require judgments about who is disadvantaged in particular contexts and about the tailoring of programs to meet particular objectives. In truth the Leonard Foundation presented the Court with a very easy case, but there will be others where the question of whether a charitable trust that discriminates is to be saved by other aspects of public policy is difficult to decide. Perhaps, though, the area of scholarship trusts will not present too many difficulties. While, as noted above, affirmative action programs are controversial, and while many people would deplore preferences in educational entrance qualifications or in employment, there are few who object to programs that make it easier for the qualified to avail themselves of opportunities. Scholarships based on financial need alone have long been widely accepted as appropriate means of producing a more level playing field, and the kinds of private trust scholarships that will be acceptable to the new public policy perform much the same role and are equally unobjectionable.

As a final point it is worth noting that the argument that I have presented here is effectively the same as that of Tarnopolsky J.A. in the Court of Appeal in the Leonard Foundation case, although rather more detailed. In general I would agree that "it will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss.1 and 13 of the *Human Rights Code*, and that adopted by the courts when approaching s.15(2) of the *Charter*. Those charitable thrusts aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s.13 of the *Human Rights Codes* or s.15(2) of the *Charter* would not likely be found void because they promote, rather than impede, the public policy of equality". I am less certain about his additional statement that "[g]iven 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".[129] This seems to me to invite the courts not to make sufficient inquiry into the surrounding circumstances. Is it really any longer necessary, for example, to have a scholarship program restricted to native francophones? The logic of a decision that discriminatory trusts once acceptable can be now invalid because of changed circumstances must also lead us to conclude that once-ameliorative distinctions in trusts can, in time, be rendered objectionable by those same changed circumstances. Having said this, however, I should note that Tarnopolsky J.A. also held that "the court must, as it does in so many areas of law, engage in a balancing process".[130]

Conclusion

My conclusion is a simple one: the decision in the Leonard Foundation case represents a welcome and long overdue innovation which will give the courts the power to alter charitable trusts whose terms have become unacceptable, but it will not produce a rash of interventions nor unreasonably limit private choice. For too long the courts have restricted their view of what constitutes public policy to values of greater weight in the nineteenth than in the late twentieth century. The initiative taken here is really less bold than it appears, given the social context in which it has occurred and the techniques available for ensuring a balance between, on the one hand, encouraging charitable giving by supporting donors' intentions and, on the other hand, ensuring that conditions harmful to society are not imposed. The case will not discourage those who wish to create trusts that are clearly ameliorative, nor would such donors, one expects, balk at the prospect that their terms will at some point in the future be considered contrary to public policy because no longer necessary; they would simply be pleased to see that their aims have been achieved. To the extent that the case does discourage the establishment of trusts motivated similarly to the Leonard Foundation, society would seem to be better off without them.

FOOTNOTES

1. Information about Colonel Leonard can be found in J.C. Shepherd, "When the Common Law Fails" (1989), 9 *Estates and Trusts Quarterly* 117 at 117-118.
2. (1990), 69 D.L.R. (4th) 321 (Ont. C.A.), reversing *Re Canada Trust Co. and Ontario Human Rights Commission* (1987), 61 O.R. (2d) 75 (H.C.J.).
3. Although the Leonard Foundation case involved an *inter vivos* trust, all the issues raised here would apply equally to a testamentary trust.
4. The text of the recitals and indenture will be found *supra*, footnote 2, pp. 341-2.
5. These were: clergyman, school teachers, active or retired members of the armed forces, graduates of the Royal Military College, and members of the Engineering Institute of Canada and of the Mining and Metallurgical Institute of Canada.
6. Except that at some point the British citizenship requirement was amended to include Canadian citizenship.
7. Affidavit of Jack MacLeod, Employee of Canada Trust and Secretary to the Leonard Foundation, *Appeal Book*. The following section on the administration of the Foundation and on public reaction to it is taken largely from this affidavit, as are all quotations unless otherwise identified.
8. Actual scholarships awarded in the 1980s were as follows: 1980—47 women, 85 men; 1981—49 women, 80 men; 1981—71 women, 93 men; 1983—62 women, 93 men; 1984—64 women, 100 men; 1985—79 women, 108 men. Successful female applicants therefore clearly comprised more than 25 per cent of all

successful applicants, but as per the Trust Deed they did not receive more than 25 per cent of the moneys expended because the General Committee fixed female awards at around 50 per cent of the value of the male awards. According to my calculations for one sample year, in the spring of 1985 the 79 female recipients represented 42.2 per cent of all recipients but would have received approximately $39,500 out of the total of approximately $161,000 disbursed, (24.5 per cent). These figures are approximate because slightly different amounts were awarded within the gender categories depending on whether the student lived at home or not and on whether the application was new or a renewal. I have averaged these different figures, but my total of $161,000 is almost exactly the same as the actual figure of $160,950 disbursed, which total sum is available. (See Exhibit H to Affidavit of Jack MacLeod, and Affidavit, *Appeal Book*.)

9. By 13 votes to seven, with two abstentions.
10. Leonard Foundation Application Form, Exhibit G to Affidavit of Jack MacLeod, *Appeal Book*.
11. Letter of 17 January 1986, Exhibit I to Affidavit of Jack MacLeod, *Appeal Book*.
12. Letter of 4 February 1986, Exhibit J to Affidavit of Jack MacLeod, *Appeal Book*.
13. Letter of 13 August 1986, Exhibit K to Affidavit of Jack MacLeod, *Appeal Book*.
14. RSO 1980, c. 512.
15. The way in which the various arguments were presented to the courts was, to say the least, unfortunate. At trial no party apparently argued that the terms of the trust contravened public policy. The ROM chose to attack the trust on certainty only and the Human Rights Commission only defended its jurisdiction. Thus the only arguments on public policy were presented by the court-appointed lawyers for the class of eligible recipients. One commentator refers to these individuals as "counsel for the White Race", and asks "why did the Court not also appoint counsel to represent all those racially impure persons excluded from the trust?" (Shepherd, *supra*, footnote 1, pp. 121-122.) While it would obviously have been much better had the public policy arguments been more evenly presented, which could have been achieved by the Court ensuring that some party presented them, the blame perhaps does not lie only with the Court, but must be shared by the Commission, whose job it surely was to present alternative submissions on this issue. Before the Court of Appeal the ROM did present the public policy arguments, but the Commission again chose to be more concerned with its jurisdiction than with alternative public policy arguments, although it does appear to have made the latter briefly. (See Factum of the Ontario Human Rights Commission, *Appeal Book*.)
16. *(1987), 61 O.R. (2d) 75 H.C.J., at 77.*
17. *Ibid.*, at 86.
18. *Ibid.*, at 87.
19. *Ibid.*, at 89-90.

20. *Ibid.*, at 91.
21. S.O. 1981, c. 53, as am.
22. *Supra*, footnote 16, at 92. At p.84 McKeown J. had noted that:

> Evidence was introduced 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 handicapped status. Examples of these are: the Sir Wilfrid Laurier Memorial prizes, awarded at the University of Western Ontario only to English-speaking students of French parentage; the Amouney Jessie Award, at the University of Windsor, awarded to the sons or daughters of members of the Windsor Islamic Association; and the Dick Cousins Bursary, awarded at the University of Western Ontario to Roman Catholic student teachers. *An adverse decision in this case could affect the validity of many or all of these scholarships.* [emphasis added].

23. [1938] S.C.R. 1; [1938] A.C. 1 (H.L.).
24. *Supra*, footnote 16, at 93.
25. [1966] 1 Ch. 191. The quotation following is at 206.
26. *Supra*, footnote 16, at 93-94.
27. *Ibid.*, at 94.
28. *Supra*, footnote 2 at 332.
29. *Ibid.*, at 333.
30. *Ibid.*, at 334.
31. *Ibid.*, at 335.
32. *Ibid.*
33. *Ibid.*, at 336.
34. *Ibid.*, at 337.
35. *Ibid.*, at 343-6.
36. *Ibid.*, at 347.
37. *McPhail* v. *Doulton*, [1971] A.C. 424 (H.L.).
38. *Supra*, footnote 2 at 348.
39. *Ibid.*
40. *Ibid.*, at 349-52.
41. *Ibid.*, at 352-3. I deal in much more detail with this argument below in the text accompanying notes 115-130.
42. *Ibid.*, at 353.
43. *Ibid.*, at 354-5.
44. See D. Waters, *Law of Trusts in Canada* (2nd edn., Toronto, 1984), pp. 611-632 and Jim Phillips, "The Problem of Surpluses in Funds Raised by Public Appeal", IX, *Philanthrop.* No. 2, pp. 3-23.
45. The principal other grounds are illegality, uncertainty, and impossibility.

46. *Halsbury's Laws of England*, 4th edn., (1974), Vol. 9, para. 392.

47. See *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484 (H.L.), per Lord Halsbury at 491; *Re Mirams*, [1891] 1 Q.B. 594; *Wadgery* v. *Fall*, [1926] 4 D.L.R. 333 (Sask. C.A.).

48. *Janson*, *supra*, footnote 47, Lord Davey at 500; *Richardson* v. *Mellish* (1824), 2 Bing. 229 at 252, 130 E.R. 294, Burrough J.; *Fender*, *supra*, footnote 23, Lord Atkin at 12. For similar comments see, *inter alia*, *Rodriguez* v. *Speyer Brothers*, [1919] A.C. 59 (H.L.).

49. See *Millar*, *supra*, footnote 23; *Walkerville Brewing Co.* v. *Mayrand*, [1929] 2 D.L.R. 945 (Ont. C.A.).

50. Cheshire and Burn, *Modern Law of Real Property* (11th edition, London, 1972), pp. 319-326; Anger and Honsberger, *Canadian Law of Real Property* (2nd edition, Toronto, 1985), pp. 317-322.

51. See *Clavering* v. *Ellison* (1859), 7 H.L.C. 282; *Clayton* v. *Ramsden*, [1948] A.C. 320 (H.L.).

52. See *Clayton* v. *Ramsden*, *supra*, footnote 51, in which one Barnett Samuel left property to his daughter with the proviso that if she "at any time after my death contract a marriage with a person who is not of Jewish parentage and of the Jewish faith then as from the date of such marriage" a forfeiture would occur. The terms "Jewish parentage" and "Jewish faith" were held to be uncertain. Conversely in *Re Allen*, [1953] Ch. 810 (C.A.), a condition that gave property to the eldest of the sons of the testator's nephews "who shall be a member of the Church of England and adherent to the doctrine of that Church" was held to be quite certain enough. Those who see these cases being decided purely on the neutral application of doctrine point out that *Allen* involved a condition precedent, *Clayton* a condition subsequent, and that much greater certainty is required for the latter. This analysis is supported by *Re Selby's Will Trusts*, [1965] 3 All E.R. 386 (Ch.), where a pro-Jewish condition precedent was upheld. However, the more cynical view, that the content of the condition can be determinative, finds support in *Re Tarnpolsk*, [1958] 3 All E.R. 479 (Ch.) and *Re Wolffe's Will Trusts*, [1953] 2 All E.R. 967 (Ch.), in which pro-Jewish conditions precedent were involved but the conditions were invalidated. In truth, this is an area of the law with little coherence to recommend it.

53. [1975] 3 All E.R. 625 (H.L.); quotation at 636.

54. *Ibid.*, at 637-638. Speeches to the same effect were also delivered by Lord Cross, Lord Edmund Davies, and Lord Fraser.

55. [1945] O.R. 778 (H.C.J.).

56. S.O. 1944, c. 51.

57. *Supra*, footnote 55, at 783-4.

58. [1949] 4 D.L.R. 375 (Ont. C.A.).

59. *Ibid.*, at 386. All subsequent quotations from Robertson C.J.O. are also on p. 386.

60. There is an irony to this argument, in that Robertson C.J.O. is effectively saying that had the covenant been phrased *positively* it would not be offensive to its critics. But had it been a positive covenant *in substance* it would not have run against successors-in-title to the covenantee since restrictive covenant doctrine requires a covenant, *inter alia*, to be negative in substance before the burden will run. Thus if it were alternatively phrased as he suggests, he would either have had to declare it inoperative in the case before him because the burden could not run, or, in order to allow it to run, find that the positive wording was a difference of form, not substance, from one worded negatively as this one actually was!
61. *Supra.*, footnote 58, at 390.
62. *Ibid.*, at 391-392.
63. *Ibid.*, at 399.
64. S.O. 1950, c. 11, s.1; now *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s.22.
65. *Noble and Wolf* v. *Alley*, [1951] S.C.R. 64; quotation from Kerwin J. at 69.
66. Indeed I have found only one recent case outside of the charitable trust area which touches the issue at all. *Re Hurshman* (1956), 6 D.L.R. (2d) 615 (B.C.S.C.) involved a testamentary provision that the testator's daughter receive a bequest after the death of his wife only if "she is not at that time the wife of a Jew". McInnes J. held this to be both uncertain and contrary to public policy because, as the daughter was currently married to a Jew, she would have to divorce in order to inherit. He went on to deprecate but not to invalidate the condition because of the undesirability of racial discrimination, saying at p. 619:

    > ... any propensity towards racial discrimination has no place in this country and while it may be open to a testator to lay down the conditions upon which his children may or may not share in his bounty, yet insofar as those conditions involve racial discrimination, his language must be precise and explicit and clearly within the law if he expects the Courts to assist him in the fulfilment of his aims.

67. [1947] 1 Ch. 183.
68. *Ibid.*, at 186-187.
69. [1966] Ch 191.
70. It does not appear that there was any suggestion that the sex-based restriction be removed. Indeed I could find no Anglo-Canadian case in which a sex restriction has been removed either directly or by employing a *Lysaght*-type fiction.
71. *Supra*, footnote 69, at 205.
72. *Ibid.*, at 206 and 207.
73. See the relatively favourable comments in F.H. Newark, "Trustees Who Dislike The Terms of the Trust" (1966), 17 *Northern Ireland Legal Quarterly* 123 and P. Lamek, "Case Comment on *Re Lysaght*" (1966), 4 *Osgoode Hall Law*

Journal 113. Both authors, however, see problems with the *Lysaght* approach, and these are discussed below.

74. *Re Metcalfe*, [1972] 3 O.R. 598 (H.C.J.) involved an educational trust with a sex and religious bar. McGill University disclaimed it and did not attempt to have the condition only struck and the trust stand without it. There was consequently no discussion of the validity of such restrictions. The only issue was whether the trust could be administered by a body other than the named trustee (McGill) and Cromarty J. followed *Lysaght* in concluding that the trustee was a *sine qua non* of the gift, which therefore failed and reverted to the estate.

75. *Re Rattray* (1973), 38 D.L.R. (3d) 321 (Ont. H.C.); affd. (1974), 3. O.R. (2d) 117 (C.A.).

76. This is a necessarily limited survey of a large number of cases and a substantial literature. In addition to the cases cited, it is drawn from the following: S. Swanson, "Discriminatory Charitable Trusts: Time for a Legislative Solution", (1986), 48 *University of Pittsburgh Law Review* 153; D. Luria, "Prying Loose the Dead Hand of the Past: How Courts Apply Cy-Près to Race, Gender, and Religiously Restricted Trusts", (1986), 21 *University of San Francisco Law Review* 41; F. Parker, "*Evans* v. *Newton* and the Racially Restricted Charitable Trust", (1967), 13 *Howard Law Journal* 223; E. Clark, "Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard", (1957), 66 *Yale Law Journal* 979; S.M. Nelkin, "Cy-Près and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts", (1967), 56 *Georgia Law Journal* 272; R. Power, "The Racially Discriminatory Charitable Trusts: A Suggested Treatment", (1965), 9 *St. Louis University Law Journal* 478.

77. 275 A. 2d 574 (Del. Ch. 1970); quotation at 579.

78. See *Moore* v. *City and County of Denver*, 292 p.2d 986 (Colo. S.C., 1956): *In Re Will of Cram*, 606 p.2d 145 (Mont. S.C., 1980); *Shapiro* v. *Columbia Union National Bank and Trust Co.*, 576 S.W. 2d 310 (Mo. S.C., 1978), cert. denied 444 U.S. 831 (1979); *In Re Estate of Wilson*, 452 N.E. 2d 1228 (N.Y. Court of Appeals, 1983).

79. *Shapiro*, *supra*, footnote 78, at 320.

89. See, *inter alia*, *Howard Savings Institution* v. *Peep*, 179 A. 2d 39 (New Jersey S.C., 1961); *In Re Estate of Hawley*, 223 N.Y.S. 2d 803 (Surr. Ct., 1961); *Coffee* v. *William Marsh Rice University*, 408 S.W. 2d 269 (Tex. Civ. App., 1966).

81. See J.A. DiClerico, "Cy-Près: A Proposal for Change", (1967), 47 *Boston University Law Review* 153; C.R. Chester, "Cy-Près: A Promise Unfulfilled", (1979), 54 *Indiana Law Journal* 407; E.L. Fisch, "Changing Concepts and Cy-Près", (1959), 44 *Cornell Law Quarterly* 382.

82. See Luria, *supra*, footnote 76, *passim*. Since *cy-près* has its origins in the prerogative power of the Crown, courts in some American states have held that it is not available. They have instead invented "equitable deviation", a doctrine that permits them to alter the terms of a trust when changed circumstances so require it to effect its purposes. Like *cy-près* this doctrine has been held to be capable of removing discriminatory terms. For an example

see J.C. Brooks, "Equitable Deviation Extended to Eliminate Racial Restriction in Trusts", (1987), 39 *South Carolina Law Review* 145.

83. 461 U.S. 574 (1983); quotation at 596.
84. 353 U.S. 230 (1957); 382 U.S. 296 (1966).
85. See the discussion in Swanson, supra, footnote 76, pp. 173–4. He concludes at p. 174:

> Attempting to synthesize these cases to provide predictability is difficult. Cases with similar fact patterns have often been decided differently. The trend appears to favor finding state action when the state actually serves as trustee of the trust and no state action when the state is less involved... [h]owever, this is not always the case.

86. 334 U.S. 1 (1948).
87. Swanson, *supra*, footnote 85, pp. 178, 180–1, and 184.
88. *Janson*, *supra*, footnote 47, at 507.
89. J.C. Shepherd, "Racially Motivated Wills: *Dynna* v. *Grant*", (1981), 5 *Estates and Trusts Quarterly* 233 at p. 238, footnote 25.
90. O.L.R.C., *Report on the Law of Trusts* (2 vols., 1984), vol. 2, p. 459, footnote 142.
91. *Supra*, footnote 2, at 333.
92. See C.B. Macpherson, ed., Property: Mainstream and Critical Positions (Toronto, 1983), esp. introduction and *Democratic Theory: Essays in Retrieval* (Oxford, 1973); F.S. Cohen, "Dialogue on Private Property", (1954), 9 *Rutgers Law Review* 357; J. Waldron, "What is Private Property", (1985), 5 *Oxford Journal of Legal Studies* 313; T.C. Grey, "The Disintegration of Property", (1980) *Nomos XXII Property*; A. Reeve, *Property* (London, 1986), esp. ch. 4; A. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter", (1988), 38 *University of Toronto Law Journal* 378.
93. *Bob Jones University*, *supra*, footnote 83, at 591–592, Berger C.J.
94. See generally G.W. Keeton and L.A. Sheridan, *The Modern Law of Charities* (Belfast, 1971), esp. chs. 1, 14 and 15; G. Jones, *History of the Law of Charity, 1532–1837* (Cambridge, 1969).
95. Clark, *supra*, footnote 76, especially at p. 1008.
96. *Retail, Wholesale and Department Store Union, Local 580* v. *Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 (S.C.C.). For a scathing critique of this aspect of the decision see D.M. Beatty, "Constitutional Conceits: The Coercive Authority of the Courts", (1987), 37 *University of Toronto Law Journal* 183.
97. See *Incorporated Council for Law Reporting for England and Wales* v. *Attorney-General*, [1972] Ch. 3 (C.A.); *Oppenheim* v. *Tobacco Securities Trust Co.*, [1951] A.C. 297 (H.L.); *Re Pinion*, [1965] Ch. 85; *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*, [1948] A.C. 31 (H.L.).
98. Clark, *supra* footnote 76, at p. 979. See also Professor Lamek's statement, commenting on *Re Lysaght*, that "charitable trusts are public trusts and... when a donor creates a charitable trust, he gives his property into the public domain, for the public good": Lamek, *supra*, footnote 73, pp. 116–117.

99. *Ibid.*, pp. 120 and 117. Ironically in light of the trial decision in the Leonard Foundation case, Lamek's note, written in 1966, concludes by arguing that Canadian courts would be more receptive to public policy arguments than English ones, in part because of the existence of Human Rights Codes and in part because of "the present sensitive state of relations between certain ethnic groups in Canada" (p. 120).

100. Cited *ibid.*, p. 117.

101. This point is made in Shepherd, *supra*, footnote 89, at pp. 242-3.

102. R.S.Q. 1977, c. C-12, s. 13.

103. See the recent case of *Beland-Abraham* v. *Abraham-Kriaa* (1988), 35 E.T.R. 118 (Que. S.C.).

104. This argument is made much of in Newark, *supra*, footnote 73.

105. *Race Relations Act*, 1976 U.K., s. 34(1). The *Act* applies to all trusts, including those that came into effect before the legislation was passed, and simply prohibits the enforcement of all trust terms that confer benefits "on persons of a class defined by reference to colour".

106. The *Sex Discrimination Act*, 1975 U.K., s. 43 contains a specific exemption to permit charitable giving based on sex discrimination. My comments about religion and national or ethnic origin reflect a combination of the courts' attitude in cases like *Blathwayt*, *supra*, footnote 53, and the failure to legislate in these areas.

107. *Constitution Act 1982*, s. 15.

108. *Supra*, footnote 21. Two other Canadian *Codes* have substantially similar exempting clauses: see *Human Rights Act*, S.B.C. 1984, c. 22, s. 19 and *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 20. Most other *Codes* have narrower provisions which allow non-profit, charitable and community organizations to discriminate in certain areas: see *Individual Rights Protection Act*, R.S.A. 1980, C. I-2, s. 2; *Human Rights Code*, C.C.S.M., c. H-175, s. 6; *Human Rights Act*, S.N.S. 1969, c. 11, ss. 8, 11, 13; *Prince Edward Island Human Rights Act*, S.P.E.I. 1975, c. 72, ss. 6, 10, 14; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 2. No such exemptions are found in the *Codes* of Newfoundland and New Brunswick.

109. *Supra*, footnote 2, at 92.

110. His conclusion was offered without any analysis of the section, in stark contrast to the extensive investigation that underlay McKeown J.'s conclusion that an educational trust was not a "service or facility" under the *Code*.

111. [1984] 2 S.C.R. 603 at 626.

112. [1988] 2 S.C.R. 279 at 324.

113. *Sehdev* v. *Bayview Glen Junior Schools Ltd.* (1988), 9 C.H.R.R. D/4881 (Ont. Board of Inquiry) supports this argument by analogy.

114. See P. Macklem, "Developments in Employment Law: The 1988-89 Term", forthcoming in the *Supreme Court Law Review*.

115. See *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 16; *Human Rights Code*, C.C.S.M., c. H-175, s. 11; *Human Rights Code*, S.N. 1988, c. 62, s. 20; *Human Rights Code*, R.S.N.B. 1973, c. H-11, ss. 12 and 13 (re educational programs only); *Human Rights Act*, S.N.S. 1969, c. 11, s. 19; *Prince Edward Island Human Rights Act*, S.P.E.I. 1975, c. 72, s. 19; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, Part III; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 47. Alberta and British Columbia legislation contains no specific mention of affirmative action programs.

116. B. Feldthusen, "Affirmative Action: Taking Equality Seriously", (1988), 8 *Windsor Yearbook of Access to Justice* 292 at 299.

117. *Ibid.*, and, *inter alia*, W.S. Tarnopolsky and G.A. Beaudoin, *Canadian Charter of Rights and Freedoms: Commentary*, (Toronto, 1982) at pp. 423–437; C. Agocs, "Affirmative Action Canadian Style: A Reconnaissance", (1986), 12 *Canadian Public Policy* 148; J. Bankier, "Equality, Affirmative Action and the Charter: Reconciling Inconsistent Sections", (1985), 1 *Canadian Journal of Women and the Law* 134; R. Colker, "The Anti-Subordination Principle: Application", (1987), 3 *Wisconsin Women's Law Journal* 59; K. Greenawalt, *Discrimination and Reverse Discrimination* (New York, 1983); P. Brest, "Affirmative Action and the Constitution: Three Theories", (1987), 72 *Iowa Law Review* 281.

118. These are difficult concepts to treat separately: "The area of equality rights involves concepts that are so interwoven that it is virtually impossible to pick out and discuss one thread at a time. To state a definition of discrimination is to endorse a conception of equality". (W. Black and L. Smith, "Constitutional Law—Charter of Rights and Freedoms—Sections 15 and 1—Canadian Citizenship and the Right to Practice Law", (1989), 68 *Canadian Bar Review* 591 at 591-2.)

119. *Andrews* v. *Law Society of British Columbia*, [1989] 2 W.W.R. 289 (S.C.C.); quoted at 299.

120. See Black and Smith, *supra*, footnote 118, at pp. 599–600:" . . . one of the most striking features of the reasoning in *Andrews* is its reliance on jurisprudence interpreting human rights statutes. The statutory and constitutional jurisprudence now is highly interrelated."

121. *Supra*, footnote 96, at 190–101, McIntyre J.

121. See *Robichaud* v. *Canada Treasury Board*, [1987] 2 S.C.R. 84; *Action Travail des Femmes* v. *Canadian National Railway Co.*, [1987] 1 S.C.R. 1114.

123. *University of California Regents* v. *Bakke* 438 U.S. 265 (1978); *Morton* v. *Mancari* 417 U.S. 535 (1979); *United Steelworkers* v. *Weber* 443 U.S. 193 (1979); *Local 28 of Sheet Metal Workers* v. *Equal Employment Opportunity Commission* 106 S. Ct. 3019 (1986).

124. See *Federation of Women Teachers Association of Ontario* v. *Human Rights Commission et al* (1988), 30 O.A.C. 301 (Div. Ct.).

125. See *Roberts* v. *Ontario Ministry of Health* (1989), 10 C.H.R.R. D/6353.

126. See the *National Anti-Vivisection Society* case, *supra*, footnote 107.

127. For example, although there have been few decisions of consequence on the interpretation of s. 15(2) of the *Charter*, in two cases the British Columbia

Court of Appeal has indicated that it will scrutinize alleged affirmative action programs to assess whether they are genuinely intended to help the disadvantaged. (See *Shewchuk* v. *Richard* (1986), 2 B.C.L.R. (2d) 324 (C.A.) and *Harrison and Connell* v. *University of British Columbia* (1988), 21 B.C.L.R. (2d) 145 (C.A.). See also, to the same effect, *Apsit* v. *Manitoba Human Rights Commission* (1987), 50 Man. R. (2d) 92 (Q.B.)).

128. See *Re Rebic and Collver* (1986), 22 C.R.R. 66 (B.C.C.A.) in which the Court stated that the constitutionalization of affirmative action in s. 15(2) was intended to forestall debate about the authority of governments to implement such programs.

129. *Supra*, footnote 2, at 352-3. I think it unfortunate that Robins J.A. and Osler J. did not choose to adopt this approach also. They certainly indicated that they would not approve the wholesale invalidation of charitable trusts. The only statement that Robins J.A. made, having noted the "all or nothing" argument, was as follows, at 335:

> I think it inappropriate and indeed unwise to decide in the context of the present case and in the absence of any 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.

130. *Ibid.*, at 353.