

***Canada Trust Co v Ontario (Human
Rights Commission), [1990] 74 OR (2d) 481
(CA)***

Robins J.A. (Osler J. (ad hoc) concurring):

[1] The principal question in this appeal is whether the terms of a scholarship trust established in 1923 by the late Reuben Wells Leonard are now contrary to public policy.

[...]

The Facts

A. The Trust Document

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

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

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

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

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

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

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

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

[...]

PROVIDED further and as an addition to the class or type of schools above designated or in the Schedule 'A' hereto attached, the term 'School' may for the purposes of Scholarships hereunder, include Public Schools and Public Collegiate Institutes and High Schools in Canada of the class or type commonly known as such in the Province of Ontario as distinguished from Public Schools and Collegiate Institutes and High Schools (if any) *under the control and domination of the class or classes of persons hereinbefore referred to as intended to be excluded from the management of or benefits in said Foundation*, and shall also include a Protestant Separate School, Protestant Collegiate Institute or Protestant High School in the Province of Quebec.

PROVIDED further that in the selection of Schools, Colleges and Universities, as herein mentioned, preference must always be given by the Committee to the School, College or University, which, being otherwise in the opinion of the Committee eligible, prescribes physi-

cal training for female students and physical and military or naval training for male students.

[Emphasis added.]

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

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

- (a) Clergymen,
- (b) School Teachers,
- (c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,
- (d) Graduates of the Royal Military College of Canada,
- (e) Members of the Engineering Institute of Canada,

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

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

[Emphasis added.]

[8] The settlor expressed the wish that:

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

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

[Emphasis added.]

[9] The trustee is empowered at the expense of the trust to apply to a Judge of the Supreme Court of Ontario, possessing the qualifications set out in the recitals, for the opinion, advice and direction of the Court: “9. The Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario *possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out*, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared.” [Emphasis added.] I should perhaps note that no challenge was put forth on this basis in either this Court or the Court below.

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

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

B. The Circumstances Leading Up to the Application

[12] The circumstances leading up to this application are described in the affidavit

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

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

[14] Since 1971, the Human Rights Commissions of Alberta and Ontario and the Human Rights Branch of the Department of Labour of British Columbia have complained to the trustee and officials of the General Committee about the conditions of eligibility. Other bodies, such as the Saskatoon Legal Assistance Clinic and units of the Anglican Church of Canada, have made similar complaints.

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

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

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

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

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

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

[19] In August 1986, the Ontario Human Rights Commission, not satisfied with the response to its earlier letter, filed a formal complaint against the Leonard Foundation, alleging that the trust contravened the *Human Rights Code, 1981*. [...]

The Public Policy Issue

B. Does the Trust Violate Public Policy?

[20] Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that “public policy is an unruly horse” or of the admonition that public policy “ ‘should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds’ ”: *Re Millar*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, at 7 [S.C.R.]. I have regard also to the observation of Professor Waters in his text on the *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 240 to the effect that:

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

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

[21] The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law: *Blathwayt v. Lord Cawley*, [1976]

A.C. 397, [1975] 3 All E.R. 625 (H.L.). That interest must, however, be limited in the case of this trust by public-policy considerations. In my opinion, the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.

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

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

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

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

[26] On the material before the Court, it appears that many scholarships are currently available to students at colleges and universities in Ontario and elsewhere in Canada which restrict eligibility or grant preference on the basis of such factors as an applicant's religion, ethnic origin, sex, or language. None, however, so far as the material reveals, is rooted in concepts in any way akin to those articulated here which proclaim, in effect, some students, because of their colour or their religion, less worthy of education or less qualified for leadership than others. I think it inappropriate and indeed unwise to decide in the context of the present case and in the absence of any proper factual basis whether these other

scholarships are contrary to public policy or what approach is to be adopted in determining their validity should the issue arise. The Court's intervention on public-policy grounds in this case is mandated by the, hopefully, unique provisions in the trust document establishing the Leonard Foundation.

Disposition

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

Tarnopolsky J.A.:

[...]

(2) Is the Trust Void in Whole or in Part Either for Uncertainty or Because it Violates Public Policy

[...]

[28] Next, it is necessary to consider whether the trust could be invalid because of uncertainty. It is important to note that in analyzing the validity of the trust on this basis, the Court may refer only to the operative words, unless they are ambiguous, in which case it can refer to the recitals. Regular rules of statutory construction apply (*Re Moon; Ex parte Dawes* (1886), 17 Q.B.D. 275, 34 W.R. 753 (C.A.)). Since recitals are descriptions of motive and are normally irrelevant to determining validity, McKeown J. held that they were irrelevant and inoperative. However, it could be argued that many sections of the Indenture refer to the recitals and thereby incorporate them. In fact, McKeown J. noted eight references, after the recitals, to the definition of the class of beneficiaries but then went on to state [at 214-215]:

At no time throughout the operative clauses does Colonel Leonard refer back to the three opening recitals; thus his beliefs as stated therein are not incorporated into the operative words and play no part in the interpretation of this instrument.

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

For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this

Indenture, all who are not Christians of the White Race, all who are not of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

[30] This definition of the class of beneficiaries is a condition precedent. A condition precedent is one in which no gift is intended until the condition is fulfilled. A condition subsequent differs in that non-compliance with the condition will put an end to an already existing gift. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class (*Jones v. T. Eaton Co.*, [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at 650-651 [S.C.R.] and *McPhail v. Doultton*, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) at 456 [A.C.]). It is enough that some claimants can satisfy the condition (*Re Selby's Will Trusts; Donn v. Selby*, [1966] 1 W.L.R. 43, [1965] 3 All E.R. 386 (Ch.D.)). The condition will not fail for uncertainty unless it is clearly impossible for anyone to qualify (*Re Allen; Faith v. Allen*, [1953] Ch. 810, [1953] 2 All E.R. 898 (C.A.), subsequent proceedings [1954] Ch. 259, [1954] 1 All E.R. 526). It is well established that a charitable trust should not fail for uncertainty (see *Re Gott*, [1944] Ch. 193, [1944] 1 All E.R. 293). Historically, courts have been reluctant to strike down such gifts if it can be avoided. If a condition is uncertain, the court can consider it inoperative, but rarely will a trust fail because of uncertainty if the condition is a condition precedent.

[31] In this case, there has been no difficulty over some 6 decades in ascertaining whether students qualify. The clause referred to above is sufficiently certain, except possibly for the “allegiance” exclusion. In my view, however, the clause as a whole meets the requirements established for a condition precedent, and the provisions containing the conditions are sufficiently certain. If I am wrong, however, I would find only the clause referring to “allegiance” to be uncertain and I would hold that it is severable from the other restrictions as to class.

[32] Turning now to the public-policy issue, it must first be acknowledged that there has been no finding by a Canadian or a British court that at common law a charitable trust established to offer scholarships or other benefits to a restricted class is void as against public policy because it is discriminatory. In some cases, British courts have chosen to delete offensive clauses as “uncertain”, as in *Re Lysaght; Hill v. Royal College of Surgeons of England*, [1966] Ch. 191, [1965] 2 All E.R. 888; *Clayton v. Ramsden*, [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.) and *Re Tarnopolsk; Barclay's Bank Ltd. v. Hyer*, [1958] 1 W.L.R. 1157, [1958] 3 All E.R. 479 or “impracticable” as in *Re Dominion Students' Hall Trust*, [1947] Ch. 183. In the latter case, the Court found a general charitable intention and then applied the trust property cy-près. The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in *Re Lysaght*, supra, at 206, quoted by McKeown J. at 220:

I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects and I am aware that there is

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

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

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

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

[36] Subsequently, in *Bhadauria*, supra, at 715 [D.L.R.], in concluding that the common law had evolved to the point of recognizing a new tort of discrimination, Wilson J.A. referred to the preamble to the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, the first two paragraphs of which then provided:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin.

[37] She then observed: "I regard the preamble to the Code as evidencing what is

now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights.” That the *Human Rights Code* recognizes public policy in Ontario was acknowledged a few years later by the Supreme Court of Canada in *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), 3 C.H.R.R. D/781, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at 23-24 [D.L.R.].

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

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

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

AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights

and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

[40] It is relevant in this case to refer as well to the “Ontario Policy on Race Relations” (Race Relations Directorate, Ministry of Citizenship) as well as the Premier’s statement in the Legislature concerning the policy (*Hansard Official Report of Debates of Legislative Assembly of Ontario*, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-941). The Policy on Race Relations states:

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

[41] In introducing it in the Legislature, Premier David Peterson said (*Hansard* at 937):

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

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

The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in *Insurance Corp. of B.C. v. Heerspink et al.* . . . [1982] 2 S.C.R. 145 at pp. 157-158 . . .), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special

nature, not quite constitutional, but certainly more than ordinary — and it is for the courts to seek out its purpose and give it effect.

[43] In addition, equality rights “without discrimination” are now enshrined in the *Constitution Act, 1982* [*Canadian Charter of Rights and Freedoms*] in s. 15; the equal rights of men and women are reinforced in s. 28, and the protection and enhancement of our multicultural heritage is provided for in s. 27.

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

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

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

[47] 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, 1981*, and that adopted by the courts when approaching s. 15(2) of the *Charter*. Those charitable trusts aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the *Human Rights Code* or s. 15(2) of the *Charter* would not likely be found void because they promote rather than impede the public policy of equality. In such an analysis, attention will have to be paid to the social and historical context of the group concerned (see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255, at 152-153 [S.C.R.] per Wilson J. and 175 per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

[48] Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the *Charter* (*Andrews*, supra, at 168-169 per McIntyre J.). In the Indenture in this case, for example, there is nothing contrary to public policy as expressed in the preferences for children of “clergymen”, “school teachers”, etc. It would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women, aboriginal peoples, the physically or mentally handicapped, or other historically disadvantaged groups would be void as against public policy. Clearly, public trusts restricted to those in financial need would be permissible. Given the history and importance of bilingualism and multiculturalism in this country, restrictions on the basis of language would probably not be void as against public policy, subject, of course, to an analysis of the context, purpose and effect of the restriction.

[49] In this case, the Court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions on freedom of both contract and testamentary disposition. Under the *Conveyancing and Law of Property Act*, s. 22, for instance, covenants that purport to restrict sale, ownership, occupation or use of land because of, inter alia, race, creed or colour are void. Under the *Human Rights Code*, discriminatory contracts relating to leasing of accommodation are prohibited. With respect to testamentary dispositions, as mentioned earlier, one cannot establish a charitable trust unless it is for an exclusively charitable purpose (see *Waters*, supra, at 601-603 and 626; and *Ministry of Health v. Simpson*, supra). Similarly, public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void.

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

Appeal allowed.