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***Spence v. BMO Trust Co.* — Should the decision be overturned at the Court of Appeal?**

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The authors believe that the Honourable Justice Gilmore was correct in *Spence v. BMO Trust Co.*<sup>1</sup> when she admitted extrinsic evidence to determine whether a will should be unenforceable for public policy reasons.

In *Spence* the court admitted evidence showing that the deceased changed his will and disinherited his daughter and grandson because the child's father was white. The will was set aside for contravening public policy.

Some critics of the *Spence* case see the decision as an attack on the doctrine of testamentary freedom.<sup>2</sup> This train has left the station.

Testamentary freedom is a doctrine that stands for the principle that people are free to entitle, or otherwise disentitle, anyone they wish from their estate after their death, regardless of any moral or natural claims on the testator.<sup>3</sup> But this cherished principle is far from absolute. As one learned author and senior member of the bar has written:

Ontario courts will strike down (or, void) bequests in situations wherein such bequests contain conditions which contravene public policy. Albeit a nonexhaustive list, and largely situation-specific, the following conditions are some examples in that regard: those intended to interfere with family relations, restrain/interfere with a marriage, interfere with parental relations, promote illegal acts, restrict the alienation of property, violate the in terrorem doctrine, discriminate against a group of people (i.e. based on race, religion, etc.) and/or generally go against the fundamental interests of the state. In a recent decision emanating out of New Brunswick, the court went one step further by voiding a bequest which, despite not containing any conditions, left a testator's estate to an organization whose actions were deemed by the court to be in contravention of public policy.<sup>4</sup>

*Spence* is not the first case where public policy considerations trumped testamentary freedom — there are many. As another senior member of the bar and learned author, Ms. Histrop, points out:<sup>5</sup>

- In *Mindlin v. Hurshman* (1956), 6 D.L.R. (2d) 615 (B.C. S.C.), Justice McInnes dealt with a clause providing that the testator's bequest to his daughter was conditional on her not marrying a Jew. This clause was voided with the comment, "insofar as those conditions involve racial discrimination, his language must be precise and explicit and clearly within the law if he expects the court to assist him in the fulfillment of his aims" (para. 13).
- In *Wren, Re*, [1945] O.R. 778 (Ont. H.C.), the Ontario Court of Appeal voided a covenant in a deed that required that the land not be sold to Jews.
- In *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486, 38 E.T.R. 1 (Ont. C.A.), multiple trusts were established by a settlor, wherein the trust monies were to be provided to students based in Canada and Great Britain in the form of education scholarships. The trusts contained various recitals which imposed specific conditions on how the trust monies were to be distributed. Excluded were all who are not Christians of the white race, and who are not of British nationality or of British parentage, and all who owe allegiance to any foreign government, prince, pope or potentate, or who recognize any such authority, temporal or spiritual.

So, while it is true that striking down conditions that contravene public policy circumscribes testamentary freedom, it is also true that Ontario courts have historically viewed this as an appropriate restriction.<sup>6</sup>

There are those who suggest that Justice Gilmore's decision in *Spence* runs contrary to Ontario's Court of Appeal decision in *Robinson Estate v. Robinson*.<sup>7</sup> *Robinson* stands for the proposition that the Court will first look to the words of the will itself to determine the testator's intentions, and not direct extrinsic evidence of the third parties.

The law properly regards the direct evidence of third parties about the testator's intentions to be inadmissible. There would be much uncertainty and estate litigation if disappointed beneficiaries like Dr. Rondel could challenge a will based on their belief that the testator had different intentions than those manifested in the will.<sup>8</sup>

In the context of interpreting a will, the question as to whether to permit extrinsic evidence is clear.<sup>9</sup> But, what is also equally clear is that there are instances where our society had decided to allow extrinsic evidence, in estate cases, to address a testator's misconduct. Let's review some examples.

Under the *Family Law Act*,<sup>10</sup> certain societal goals are set out including equitable settlement of the affairs of spouses and to provide for other mutual obligations in family relationships.<sup>11</sup> These goals trump<sup>12</sup> the exercise of testamentary freedom and courts look to extrinsic evidence to determine net family property. The same can be said when a disinherited spouse looks for support under the *Succession Law Reform Act* (SLRA). Again, the testamentary freedom and intention of the deceased is trumped by other factors set out in s. 62 of the SLRA. Once again the courts hear extrinsic evidence because the key issue is *not about will interpretation*, but how to remedy a wrong.

It is against this background that the authors argue that it is entirely appropriate for the court to consider extrinsic evidence where allegations are raised that certain testamentary dispositions violate public policy. It might be helpful to take a look at the principles behind why contravention of public policy merits setting aside a will. In this exercise it will be useful to analyze the reasons why, in certain circumstances, courts permit or bar extrinsic evidence to be introduced, and whether there's a common theme in the case law that supports Justice Gilmore's decision to allow extrinsic evidence in the *Spence* case. In our view, Justice Gilmore was not interpreting the will in order to implement the intention of the testator. Rather, the court was permitting the hearing of extrinsic evidence to prevent wrongful conduct which makes direct extrinsic evidence admissible.

*Spence* is presently being appealed to the Ontario Court of Appeal.  
*Spence v. BMO Trust Co.*

There were a number of undisputed facts. The deceased was Rector Emmanuel Spence ("father" or the "deceased"). He was black. At one time, he had a close relationship with his daughter Verolin and a non-existent relationship with his daughter Donna. Neither of his daughters qualified as a dependent at the time of his death in 2013.

In September 2002, Verolin told her father that she was pregnant and that the father of her child was a white man. The father stopped talking to Verolin. He did not see her again. He also did not see his other daughter Donna.

The father executed a will dated May 12, 2010. His will left the entirety of his estate, valued at approximately \$400,000, to his estranged daughter Donna. His will further included the following provision: "I specifically bequeath nothing to my daughter, Verolin Spence, as she has had no communication with me for several years, and has shown no interest in me as a father."

There was no ambiguity in the testamentary document.<sup>13</sup>

### ***Affidavit evidence at trial***

In *Spence*, the applicants tendered their evidence in the form of two sworn affidavits: one by Verolin and the other by Imogene Parchment ("Parchment"), an old family friend of the Spences and the deceased's caregiver immediately prior to his death.

Most notably, in Parchment's affidavit, she indicated that when Mr. Spence discovered in 2002 that the father of Verolin's son was not black, he said that he had no further use for Verolin and her "bastard white son." Most importantly, however, Justice Gilmore accepted as evidence that the deceased had told Parchment that the reason why he disinherited Verolin and her son from his estate was for the express reason that his grandson's father was white. He further advised Ms. Parchment that he changed his will because he specifically wanted to exclude Verolin and include Donna, since Donna's children were

black.

On the face of the will there was *no trace* of bias or prejudice. The will simply stated that the reason for Verolin's disinheritance had been her lack of communication with her father, and that reason was unambiguous in its wording. Arguably, the evidence admitted by Justice Gilmore falls within the surrounding circumstances/indirect extrinsic rule set out by Ontario's Court of Appeal.

### ***Decision of Justice Gilmore***

Verolin's argument was that her father disinherited her for having a child with a white man. She brought an application on her own behalf, and on behalf of her son as his litigation guardian, to void the will for contravening public policy. The court agreed. Few could argue that racism and discrimination do not contravene public policy. The concern was that by permitting extrinsic evidence (whether direct or indirect extrinsic evidence), the court permitted inadmissible evidence to arrive at its decision.

Justice Gilmore said this about the evidence: "While it is true that the relevant paragraph in the deceased's will does not, on its face, offend public policy I find that like *McCorkill*, the matter bears further scrutiny."<sup>14</sup> She continued:

Were it not for the unchallenged evidence of Ms. Parchment and Verolin, the Court would have no alternative but to go no further than the wording in the Will. However, it is clear and uncontradicted, in my view, that the reason for disinheriting Verolin, as articulated by the deceased, was one based on a clearly stated racist policy.<sup>15</sup>

Let's turn for the moment to the decision in *McCorkill v. McCorkill Estate*<sup>16</sup> which Justice Gilmore referred to in her *Spence* decision. In that case, the testator gave the residue of his estate to the National Alliance, a racist neo-Nazi group based in West Virginia that advocates hatred, violence, murder, and genocide. The New Brunswick court granted an injunction to prevent any distribution to the National Alliance and voided the gift on the grounds that it offended public policy. In that case, the court stated:

76 The evidence before the court convinces me that in the case of the [National Alliance] the purpose for which it exists is to promote white supremacy through the dissemination of propaganda which incites hatred of various identifiable groups which they deem to be non-white and therefore unworthy. Those purposes and the means they advocate to achieve them are criminal in Canada and that is what makes this bequest repugnant.

77 It is also what makes this situation comparable, in my view, to a gift to a trustee for a purpose that is contrary to public policy. The law of wills is concerned with the intent of the testator and from the very fact that Mr. McCorkill left his entire estate to the [National Alliance] I infer that he intended it to be used for their clearly stated, illegal purposes. For me to find that such a gift was valid would require that I ignore an overwhelming body of evidence. The Court of Appeal has made the point on more than one occasion that trial judges must not "check their common sense at the court room door." Allowing this bequest to stand because it doesn't repeat those stated purposes but bestows the bequest on the organization whose very existence is dedicated to achieving them would be doing just that, in my view.<sup>17</sup>

In his article, "Welcome the Newest Unworthy Heir," Bruce Ziff addresses to concerns about the *McCorkill* decision. Arguably, "[o]ne relates to the kinds of private discriminatory activity that the judgment does not purport to constrain. The second problem lies at the other end of the spectrum: the danger that the holding is so open-ended that the law is rendered overbroad and indeterminate."<sup>18</sup> I invite the reader to review Mr. Ziff's article to see how he addresses the difficulty over this decision not preventing *inter vivos* transfers to neo-Nazi organizations.

Let's review the second issue. The fear is that *McCorkill* and *Spence* will open the floodgates. Is there any statistical evidence of this claim? No. As pointed out by Bruce Ziff:

In the *Leonard* case,<sup>19</sup> the majority in the Court of Appeal acknowledged that there were many scholarships tenable at Canadian schools that contained discriminatory provisions. The Court deliberately refrained from considering the impact of its holding on subsequent challenges, adding that the Leonard Trust was "hopefully unique."<sup>20</sup>

Twenty-five years later, it would appear that the floodgates have not opened. On the contrary, judicial restraint has been exercised.

The thesis of this paper is not a "theory of everything"<sup>21</sup> with respect to the admissibility of direct extrinsic evidence. For

example, courts permit direct extrinsic evidence to adjudicate on issues of capacity even when *mala fides* or misconduct is not an issue. Rather, it's our observation that Ontario's legislature and courts permit direct extrinsic evidence *when it is necessary* to address a testator's misconduct.

Let's review several areas of the law, the reasons direct extrinsic evidence is permitted under those circumstances, and whether that reasoning should equally apply to public policy cases like *Spence*.

### ***Direct Extrinsic Evidence and Claims for support under the SLRA***

Ontario recognizes that by entering into certain relationships, responsibilities are created that survive death. Our legislatures and courts do not want those who were morally and legally reliant on the deceased to become the problem of the state. As stated, by the Ontario Court of Appeal in *Cummings v. Cummings*:<sup>22</sup>

The view of dependants' relief legislation as a vehicle to provide not only for the needs of dependants (thus preventing them from becoming a charge on the state) but also to ensure that spouses and children receive a fair share of family wealth, was also important to the court's analysis in that case.<sup>23</sup>

Under s. 215 of Canada's *Criminal Code*<sup>24</sup> one is liable to imprisonment for a term not exceeding five years for breaching the duty to provide necessaries. Specifically, parents have an obligation to provide necessaries of life for a child under the age of sixteen years. They also have the obligation to provide necessaries of life to their spouse or common-law partner. That obligation is echoed in the SLRA.

Section 57 of the SLRA defines a dependant to include a spouse. The definition, in part, states that a spouse "includes either of two persons who are not married to each other and have cohabited, continuously for a period of not less than three years, or in a relationship of some permanence, if they are the natural or adoptive parents of a child." Often there is a dispute as to whether there has been cohabitation or if the deceased is a natural parent of the child. Without consideration of the direct extrinsic evidence, a court would not be able to adjudicate these issues.

Section 62 of the SLRA sets out the factors to be considered by the court in determining the amount and duration of support. Such consideration includes the dependant's current assets and means; the age and physical and mental health of the dependant; the dependant's needs, having regard to the accustomed standard of living; and/or any agreement between the deceased and the dependant. There are more, but the factors enumerated all involved the court reviewing direct extrinsic evidence without which the court would be unable to determine if the applicant is truly a dependant, and what the appropriate quantum of support ought to be.

What flows from the Court of Appeal's comments in *Cummings*, s. 215 of the *Criminal Code*, and Part V of the SLRA is that Canadian society views the failure to provide adequate and proper support to dependants to be morally and legally wrong. In determining who is a dependant and the quantum of support, direct extrinsic evidence is considered. How then does this situation apply to *Spence* and public policy cases?

A deceased crosses the line by failing to provide adequate and proper support to a dependant. This is evidenced by the case law, the *Criminal Code* and the SLRA. So, too, the deceased in *Spence* crossed the line by contravening public policy when he discriminated against his daughter for having a child with a person of another race. That discrimination is a violation of the Canadian and Ontario human rights codes, case law and public policy. There is no viable rationale for allowing for the admissibility in the former case and not the latter. *Spence* was not about interpreting the deceased's last will and testament; *Spence* was about whether a contravention of public policy took place that warranted voiding the testamentary document. Just like in cases of fraud or undue influence or dependant's support, it was a matter of righting a wrong, addressing misconduct and the shirking of moral obligations and legal responsibilities.

### ***Determination of undue influence***

The seminal case dealing with undue influence in Canada is *Vout v. Hay*.<sup>25</sup> The Supreme Court of Canada said as follows:

The third issue casts upon those attacking the will the burden of proving undue influence. This requires proof that the testator's assent to the will was obtained by influence such that instead of representing what the testator wanted, the will is a product of coercion. Although fraud is sometimes treated as a separate issue, "fraud and undue influence" are generally coupled and the burden of proof with respect to fraud also lies on those attacking the will.<sup>26</sup>

The Supreme Court of Canada, in *Goodman Estate v. Geffen*,<sup>27</sup> also explained:

The equitable doctrine of undue influence was developed, as was pointed out by Lindley L.J. in *Allcard v. Skinner*, 36 Ch. D. 145, [1886-90] All E.R. Rep. 90 (C.A.), not to save people from the consequences of their own folly but to save them from being victimized by other people (at p. 99). In the context of gifts and other transactions, equity will intervene and set aside such arrangements if procured by undue influence...

These cases may be subdivided into two groups, which, however, often overlap. First, there are the cases in which there has been some unfair and improper conduct — some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor ... The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the courts throw upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made.<sup>28</sup>

Justice Penny, in *Gironda v. Gironda*,<sup>29</sup> spoke of the necessary evidence to prove undue influence. He stated:

54 Where suspicious circumstances exist, however, the rebuttable presumption that the testator knew and approved of the contents of the will no longer applies. In such circumstances, the propounder of the will assumes the legal burden of proving knowledge and approval. If the suspicious circumstances relate to mental capacity, the propounder of the will also assumes the legal burden of establishing testamentary capacity: *Vout v. Hay*, [1995] 2 S.C.R. 876 (S.C.C.), at paras. 25-27...

79 On the issue of undue influence, the applicants bear the onus of proof.

80 I certainly agree that there are grounds for the suspicion of undue influence in these circumstances and that, particularly given the signs of some cognitive decline, careful probing of the circumstances surrounding the execution of these documents is warranted. It is not sufficient, however, merely to allege the possibility or suspicion of undue influence. There must be evidence to establish the presence of undue influence on a balance of probabilities.<sup>30</sup>

Clearly, in cases of undue influence courts look at direct extrinsic evidence. They have to, because otherwise the courts would be unable to discern whether any wrongdoing took place.

This leads us back to *Spence* and public policy. If the courts are prepared to entertain direct extrinsic evidence to right the wrong of “coercion,” what reason could rationalize excluding it where there is an issue with respect to public policy?

Let’s not forget in what context direct extrinsic evidence is excluded. As stated by T.G. Feeney in his authoritative text *The Canadian Law of Wills*:<sup>31</sup>

10.24 It is to be remembered that before a will comes before a court of construction it must have been probated...

10.25 The only task facing the court of construction is to determine the meaning of the document or documents admitted to probate, and the admissibility of evidence depends upon the character of the evidence as perceived by the court. The evidence may be either direct evidence of intent or indirect evidence of the surrounding circumstance, the former is generally inadmissible for interpretation, the latter is generally admissible. But this differential in admissibility likely will change if the new principled approach to the admission of hearsay evidence has its expected impact on the law of wills.

10.26 At the probate stage, it may be possible to defeat a will on the grounds of fraud, undue influence or mistake by proving that the testator’s true intention differed from that set forth in the will. For this purpose, any extrinsic evidence, including direct evidence as to the testator’s true intention, is admissible. However, in the court of construction such questions cannot be raised, and direct evidence of intention is generally inadmissible.

10.28 Extrinsic evidence of direct intent will be rejected when there is a reasonable interpretation of the words that were

actually used in the will. Resorting to the extrinsic evidence of direct intent would provide an inconsistent result with the reasonable interpretation of the words itself.<sup>32</sup>

The author makes it clear that the extrinsic evidence rules are in place when the court's task is to determine the testator's intention from the language of the last will and testament and the meaning of the words. The extrinsic evidence rules are not in place when there are questions of wrongdoing. In cases of fraud or undue influence, any extrinsic evidence is admissible. The common nexus with *Spence* is that just like the courts admit extrinsic evidence to determine if some ne'er do well coerced or defrauded a testator, so too should they be permitted to entertain extrinsic evidence to determine if a rogue breached public policy.

*Spence* is not the first time where extrinsic evidence was deemed to be admissible in the context of an estate dispute involving public policy concerns. For example, in *McBride, Re*<sup>33</sup> there was a bequest in the deceased's will which made his son's entitlement contingent on not getting married. The court accepted uncontested affidavit evidence that the deceased had "always disliked Robert's female companions and had been successful in breaking up all relationships prior to his meeting Geraldine; that there was an argument between the testator and himself about Geraldine, that he believes the two paragraphs were inserted in the will to cause him to leave his wife..."<sup>34</sup> *McCorkill* is another example where extrinsic evidence was considered.

Just like in the *Spence* case, in *McCorkill*<sup>35</sup> there was nothing on the face of the will that showed any contravention of public policy. The clause at issue was "pay or transfer the residue of my estate ... to the NATIONAL ALLIANCE, a Virginia corporation, with principal offices at Post Office Box 70, Hillsboro, West Virginia 24946, United States of America."<sup>36</sup> There is no equivocation here. The language is simple and clear, as was the testator's intention and decision regarding the bequest. But the Court Of Queen's Bench of New Brunswick Trial Division Judicial District of Saint John could not have possibly known whether that bequest contravened public policy just from looking at this will. The court had to review an extensive body of evidence dealing with both the communications and activities of the National Alliance to make that determination.<sup>37</sup> There was no hesitation to review that extrinsic evidence in *McCorkill*, nor should there have been in *Spence*.

### Conclusion

Justice Gilmore's decision in *Spence* was correctly decided. The criticism that it unduly circumscribes testamentary freedom is without merit. The case law makes it clear, as does various statutes, that the doctrine of testamentary freedom is not absolute. The case law also makes clear that a racist testamentary bequest contravenes public policy and should be set aside notwithstanding the restriction it imposes on testamentary freedom. To say that in determining public policy issues one should only look to the will is to prefer form over substance. That is not what public policy is about. The fear about opening the floodgates is a specious argument. That concern was expressed in the *Leonard* case and history has proven it to be false.

Justice Gilmore correctly admitted extrinsic evidence to determine whether there was a contravention of public policy. Extrinsic evidence is readily, and often, admissible at the probate stage to defeat a will on the grounds of fraud, undue influence or wrongful conduct. In the context of estate litigation, there is no logical rationalization to bar extrinsic evidence in public policy cases while permitting extrinsic evidence in Part V claims under the SLRA, or in undue influence or fraud cases. Grafting the extrinsic evidence rule for will interpretation onto will challenges involving public policy does not make sense. To do so would not only be going against precedent, but it would also unduly restrict a very important role of our judges. Canadians rely on our courts to safeguard and guarantee the rights and values of Canadians. In *Spence* the court exercised its role to protect the public against wrongful conduct and breaches of public policy.

### Footnotes

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- <sup>1</sup> 2015 ONSC 615, 3 E.T.R. (4th) 214 (Ont. S.C.J.) [*Spence*].
- <sup>2</sup> As stated by Professor Waters, *Waters' Law of Trusts in Canada*, 4th ed., Chapter 8, Part II C, 1a. (Toronto, Ont: Carswell, 2012), p. 307 "The courts are traditionally loath to stop a person from disposing of property in the way the person thinks best." Also see Saman Jaffery, "Limits to Testamentary Freedom", online: Advocate Daily <<http://www.advocatedaily.com/limits-to-testamentary-freedom.html>>; *Renaud v. Lamothe*, 1902 CarswellQue 17 (S.C.C.) [*Renaud*].

3 *Renaud*, *ibid*.

4 Brian A. Schnurr, *Estate Litigation*, 2nd ed. (Carswell, 1994), Issues In Focus, IF-19, Memorandum by D. A. Rosenberg, B.A. (Hons), J.D.

5 Lindsay Ann Histrop, *Estate Planning Precedents*, (Carswell, 1989), Issues in Focus, IF-7, Legal Memorandum 7 “What are the Circumstances in Which Ontario Courts Will Strike Down a Condition or Bequest for Being Against Policy.”

6 Another case which struck down discriminatory conditions in wills was *Murley Estate, Re*, 405 A.P.R. 271, 1995 CarswellNfld 143 (Nfld. T.D.).

7 2011 ONCA 493, 67 E.T.R. (3d) 175 (Ont. C.A.) [*Robinson*].

8 See *ibid* at para. 27.

9 See Schnurr, *supra* note 4 at ch. 12.6, Admissibility of Extrinsic Evidence. The article is worthwhile to read. For our purposes, I quote a short excerpt:

The rule that direct extrinsic evidence of the testator’s intention is inadmissible in interpreting a will is subject to one exception, which applies where there is an equivocation in the will, meaning that the words of the will describe two or more persons or things equally well. In such cases, direct evidence of the testator’s intent is admissible to resolve the equivocation.

10 R.S.O. 1990, c. F.3.

11 The preamble of the *Family Law Act* (FLA) states,

Whereas it is desirable to encourage and strengthen the role of the family; and whereas for that purpose it is necessary to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership; and whereas in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the partnership, and to provide for other mutual obligations in family relationships, including the equitable sharing by parents of responsibility for their children.

12 The FLA trumps testamentary freedom in permitting a disinherited to equalize the net family property under Part 1 of the FLA.

13 Interestingly, if the court analyzed the will looking for an ambiguity in the will, the indirect extrinsic evidence of the surrounding circumstances would have been admissible under the common law exception to the exclusionary rules.

There is a certain line of cases that stands for the proposition that in interpreting a testamentary document, the introduction of indirect extrinsic evidence is acceptable. This includes information about the relationship between the testator and his immediate family. These surrounding circumstances assist the court within the “ordinary meaning” rule of construction. As stated in the Court of Appeal in paragraph 24 of *Robinson*, *supra* note 7,

The trend in Canadian jurisprudence is that extrinsic evidence of the testator’s circumstances and those surrounding the making of the will may be considered, even if the language of the will appears clear and unambiguous on first reading. Indeed, it may be that the existence of an ambiguity is only apparent in the light of the surrounding circumstances.

14 *Spence*, *supra* note 1 at para. 44.

15 *Ibid* at para. 49.

16 2014 NBQB 148, 1 E.T.R. (4th) 41 (N.B. Q.B.) [*McCorkill*]. For those who wish to review this decision, I refer the reader to Bruce Ziff, “Welcome the Newest Unworthy Heir”, 1 E.T.R. (4th) 76.

17 *Ibid* at paras. 76-77.

18 Ziff, *supra* note 16 at p. 4.

19 *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1990 CarswellOnt 486, 38 E.T.R. 1 (Ont. C.A.) [*Leonard*]. In this case the testator’s will outlined the reasons behind his bequest. He stated that he wanted to exclude “all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual” (para. 14). The court set aside the offensive provisions. While recognizing testamentary freedom that freedom was limited by public-policy considerations. The trust contravened public policy. In the opinion of Ontario’s Court of Appeal, the idea 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.

20 Ziff, *supra* note 16 at p. 5.

21 The theory of everything is an attempt to provide one single framework in physics that explains the universe. See Steven Weinberg, *Dreams of a Final Theory: The Scientist’s Search for the Ultimate Laws of Nature* (Knopf Doubleday Publishing Group) and John Ellis, “The Superstring: Theory of Everything, or of Nothing?” (16 October 1986) *Nature* 323 at 595-598.

22 5 E.T.R. (3d) 97 (Ont. C.A.) [*Cummings*].

23 *Ibid* at para. 48.

24 *Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 215.

25 (1995), 7 E.T.R. (2d) 209, 1995 CarswellOnt 186 (S.C.C.).  
26 *Ibid* at para. 21.  
27 (1991), 42 E.T.R. 97, 1991 CarswellAlta 91 (S.C.C.).  
28 *Ibid* at paras. 24, 27.  
29 2013 ONSC 4133, 89 E.T.R. (3d) 224 (Ont. S.C.J.).  
30 *Ibid* at paras. 54, 79-80.  
31 T.G. Feeney, *The Canadian Law of Wills*, 4th ed (Toronto: Butterworths, 1987).  
32 *Ibid* at paras. 10.24-10.28.  
33 1980 CarswellOnt 523, 6 E.T.R. 181 (Ont. H.C.) at para. 9.  
34 *Ibid*.  
35 The decision in *McCorkill* was recently upheld at the New Brunswick Court of Appeal. For the reasons of the Court of Appeal,  
36 please see 2015 CarswellNB 351, 2015 NBCA 50.  
37 *McCorkill* supra note 16 at para. 2.  
See *ibid*.