

WELCOME THE NEWEST UNWORTHY DONOR?

JANE THOMSON*

This article explores the cy-près doctrine, the administrative scheme-making power of superior courts, and the application of these concepts to discrimination in the private law. The author considers whether these doctrines can be applied to rename a charitable purpose trust named after Kenneth Hilborn — a professor who expressed views offensive to the University of Western Ontario’s goals of equity, diversity, and inclusion — even though the trust itself includes no discriminatory conditions or terms. After examining the University of Western Ontario’s pleadings, the author concludes that the law as it stands does not support a Superior Court exercising its inherent jurisdiction to sanction the removal of Professor Hilborn’s name from the Hilborn Scholarships. However, given that the action is unopposed, it is possible that Western’s application may, nevertheless, be granted. Short of this, the author discusses other non-legal options available to Western to deal with the problem of an “unworthy donor.”

TABLE OF CONTENTS

I.	INTRODUCTION	137
II.	THE HILBORN SCHOLARSHIPS	139
III.	THE INHERENT POWERS OF CANADA’S SUPERIOR COURTS: CY-PRÈS AND THE ADMINISTRATIVE SCHEME-MAKING POWER	141
	A. THE DOCTRINE OF CY-PRÈS	142
	B. THE ADMINISTRATIVE SCHEME-MAKING POWER	142
IV.	WESTERN’S APPLICATION	143
V.	EXCLUSIONARY SCHOLARSHIPS AND PUBLIC POLICY	144

I. INTRODUCTION

In 2014, Bruce Ziff wrote an article about the decision of *McCorkill v. Streed, Executor of the Estate of Harry Robert McCorkill (aka McCorkell), Deceased*.¹ In that case, a justice of New Brunswick’s Court of Queen’s Bench, as it then was, voided an unconditional testamentary gift to an American white supremacist group because the nature of the beneficiary was found to be contrary to public policy.

Bruce’s article was called “Welcome the Newest Unworthy Heir.” Its title was a reference to the exclusive club of beneficiaries barred from receiving anything through a will, insurance policy, or any other benefits related to a person’s death. Up until the *McCorkill*

* Associate Professor, Faculty of Law, University of New Brunswick. The author would like to thank UNB Law students Amanda Sooley and Jacob Stoddard for their excellent research assistance, as well as Professors David Freedman and Adam Parachin for their insights on this challenging area of trust law. Finally the author would like to thank Kenzie Duffin for walking over to the Hamilton Superior Court to request a copy of a court order when no one there would answer the phone.

¹ 2014 NBQB 148 [*McCorkill*]; Bruce Ziff, “Welcome the Newest Unworthy Heir” (2014) 1 ETR (4th) 76.



decision, the “unworthy heirs” was a club of two: anyone who intentionally killed the testator² and those organizations designated as terrorist entities by the Canadian government.³ The National Alliance, the beneficiary in *McCorkill*, is not listed as a terrorist entity in Canada or the United States. While its publications likely would contravene Canada’s hate speech laws,⁴ no such laws apply to the state of Virginia. Justice Grant’s decision, therefore, welcomed a new member into this elite and nefarious group: organizations whose *raison d’être* included starting a race war, denying the Holocaust, and perpetuating hate speech.⁵

The *McCorkill* decision informs a larger area of scholarship that I write about, discrimination and the private law, specifically, the perpetuation of harmful discrimination in those areas immune to the scrutiny of the *Charter* or human rights laws, and how courts deal with this issue.⁶ In Canada, the preferred way since the 1800s has been via the doctrine of public policy, or its codified version in the *Civil Code of Québec*,⁷ to void otherwise legal operations of the law that contravened public policy.

This article explores what might be the latest development in this legal area, with its title inspired by Bruce’s 2014 article.

In June 2022, the University of Western Ontario (Western) filed an application requesting that the Ontario Superior Court of Justice exercise its inherent jurisdiction to change the name of several scholarships established in 2016 in its history department. The scholarships were named after the deceased Professor Kenneth Hilborn, in accordance with his testamentary gift to the university that funded the scholarships. In 2019, information about Hilborn’s political views and publicly expressed beliefs were published online by other academics. These articles detailed Hilborn’s racist views, his association with hate groups, and his promotion of white supremacy and apartheid in his writing. The crux of the university’s argument for removing Hilborn’s name from the scholarships was its fear that if it did not, “the University would be seen as tacitly condoning and endorsing his views — views which conflict with the University’s goals and values of equity, diversity, and inclusion.”⁸

The question mark included in the title of this article refers to the novelty of this request and the lack of legal support for it. Upon review of the law and the pleadings associated with Western’s application, it is unclear how this request can be granted.

² And was found guilty of some form of murder or manslaughter. For the case of persons who were found not criminally responsible see: *Dhingra v Dhingra*, 2011 ONSC 3741; *Dhingra v Dhingra Estate*, 2012 ONCA 261.

³ A full list of which can be found online: Public Safety Canada, “Currently Listed Entities,” online: *Government of Canada* [perma.cc/7AKG-AWAE]. It should be noted that donating in life or death to terrorist entities is not dealt with by way of public policy. As Bruce notes in his article, it is a criminal offence to donate to any of these organizations. See *Criminal Code*, RSC 1985, c C-46, ss 83.02–83.03.

⁴ See Justice Grant’s review of the organization, its stated purposes and its publications: *McCorkill*, *supra* note 1 at paras 15–41.

⁵ For a detailed review of the *McCorkill* decision, apart from Bruce’s article please see: Jane Thomson, “Discrimination and the Private Law in Canada: Reflections on *Spence v. BMO Trust Co.*” (2019) 36 Windsor YB Access Just 138. See also Adam Parachin, “*Spence v BMO Trust Co.*: Public Policy and the Excluded Heir” (2015) 34:4 Est Tr & Pensions J 361.

⁶ Thomson, *ibid*; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

⁷ CQLR c CCQ-1991.

⁸ *Kenneth HW Hilborn Scholarships (Re)* (15 June 2022), Hamilton CV-22-00078966-0000 (Ont Sup Ct J) (Factum of the Applicant at para 26) [Factum of the Applicant].

Below I explain the scholarships at issue, the legal arguments of Western, the pragmatic realities of this application, and provide some thoughts on how I think Western should deal with this dilemma. As Bruce noted in his article, “[i]t must be acknowledged that the law can do only so much to make the world a better place. Nevertheless, it should do as much as is feasible.”⁹ Here I think the law has reached its limits; Western’s problem is not one that requires a legal solution. The better remedy, proposed by one of the academics who exposed Hilborn’s views, is the dissemination of more information about Hilborn, not less, a task very much suited to a department of history.

II. THE HILBORN SCHOLARSHIPS

Kenneth Hilborn, a Professor in the Department of History (Department) at Western, died in 2013. His will bequeathed an estate gift of \$1,000,000 to Western, of which \$750,000 was directed to the Department to establish awards for undergraduate and graduate students. The conditions of the gift included that some of the scholarships were to be called the Kenneth H. W. Hilborn Scholarships. Others were to be named after Hilborn’s parents, Marguerite and Harry W. Hilborn. The university accepted the gift and settled the trust, posting about it online in 2016:

Ken Hilborn’s generous gift to the history department gives a great boost to undergraduate and graduate students,” said Francine McKenzie, Chair of the Department of History. “The Hilborn awards recognize students with exceptional academic records and make it possible for students to enrich their studies through internships, conferences and travel for research.”¹⁰

This announcement described Hilborn as follows:

Hilborn was a graduate of Queen’s University and the University of Oxford, where his supervisor was A.J.P. Taylor. He taught courses in History and International Relations at The University of Western Ontario from 1961 to 1997. He died in 2013 at age 79.¹¹

The scholarships began to be awarded on an annual basis. Shortly thereafter the trouble began. In 2019, two scholars published online articles detailing Hilborn’s views. Below is a sample of the article by Professor William Langford:

Though an ultimately obscure figure, Kenneth Hilborn combined his work as an international relations historian with unrelenting fringe-right activism. And though he would have denied it, the central tenet of his intellectual project was white supremacy.

...

Hilborn was among the self-described conservatives who held fast to the racial assumptions baked into a defence of Western interests and values. Condemning those “obsessed” with racial equality, Hilborn

⁹ Ziff, *supra* note 1 at 85.

¹⁰ Since writing, Western University has removed the quoted webpage: “Donation from the Estate of Professor Ken Hilborn Creates Awards for History Students (1 September 2016), online: *Western Social Science* <www.ssc.uwo.ca/news/2016/hilborn_awards.html>. See now “404 – File Not Found,” online: *Western Social Science* [perma.cc/U6YR-YPRD].

¹¹ *Ibid.*

recurrently defended apartheid and white-minority rule in southern Africa against the spectre of “black domination” posed by “one man, one vote” democracy.

From the 1980s, Hilborn began to cultivate far-right ties. He started publishing pamphlets under the imprint of Canadians for Foreign Aid Reform (CFAR), one of the front organizations run by white supremacist Paul Fromm. As Asa McKercher explains, Hilborn’s pamphlets offered broadside attacks on multiculturalism (“a doctrine that portrays all cultures as equally valid and worthy of respect”), feminism, and any other element of “collectivist-egalitarian ideology.”

Hilborn joined the Northern Foundation, whose bland geographic name doubled as a dog-whistle alluding to Nordicism. The Foundation united disparate Canadian right-wing activists in a defence of apartheid in South Africa.

...

Hilborn also brought his views to campus, where, over several decades, he more than once disrupted student events he considered to be leftist. Whether student activists supported divestment from South Africa or directly challenged Hilborn’s political activities, Hilborn’s own autobiographical account indicates that he relied on bullying, intimidation, and insult to assert the intellectual and ideological superiority of his views.¹²

Langford’s publication also detailed how, in the final years of his tenure, Hilborn “transitioned”¹³ to perpetuating Islamophobia as well as his dismissal of the term “racist”¹⁴ as “a leftist term of abuse.”¹⁵

Hilborn’s retirement years were described by Professor Asa McKercher in a similar post, that explained how — in the span of his over four decades of teaching at Western — Hilborn failed to produce a single peer-reviewed article and instead focused on exposing “the evils of multiculturalism, feminism, student activism, and LGBTQ rights”:

A sampling of the titles of several of his publications from this period are instructive: *The Quest for “Equality”: From Robespierre to Rae and Beyond* (1996); *The Cult of the Victim: Leftist Ideology in the 90’s* (1998); *Fighting Bad Ideas: Thoughts on Fools, Fanatics, Conspirators & Spies* (2005); and *In the Cause of the West: Thoughts on the Past, Present, and Future of a Threatened Civilization* (2010). Given the lack of rigour behind his writing — many of his retirement era ‘thoughts’ amounted to little more than a written version of Old Man Yells at Cloud — no serious publisher touched these screeds. Rather they were pumped out by Citizens for Foreign Aid Reform (CFAR), a Toronto-based organization founded in 1976 by Paul Fromm, the infamous neo-Nazi, and James Hull.¹⁶

In August 2020, a committee was struck called the Hilborn Working Group (the HWG). The purpose of the committee was to review the claims of the two online publications and

¹² Will Langford, “Congress 2020, Interrupted: Racism and Commemoration in Western University’s Department of History” (5 May 2020), online: *Active History* [perma.cc/6SE4-Q65a] [footnotes omitted].

¹³ *Ibid.*

¹⁴ *Ibid.*, quoting Kenneth HW Hilborn, *Fools, Fanatics, Conspirators, Spies* (Rexdale, ON: Citizens for Foreign Aid Reform, 2005).

¹⁵ Langford, *ibid.*

¹⁶ Asa McKercher, “University Donations and the Legitimization of Far-Right Views” (12 September Western University Canada 2019), online: *Active History* [perma.cc/EDM4-HXZX].

determine if “they had any merit.”¹⁷ Members of the HWG included Western University faculty members, one professor emerita, and undergraduate and graduate students, including a former undergraduate student in the department, as Western’s factum describes, “with diverse perspectives and experiences.”¹⁸

That committee, drawing a distinction “between opinions that the members did not like and publications causing harm”¹⁹ concluded that:

Hilborn participated in epistemic violence by suppressing, dismissing, and trivializing people who were oppressed, vulnerable, or discriminated against. The HWG believed that Hilborn’s academic work bolstered white supremacist arguments, attached importance to the safety of white people, never black people, and affirmed the goodness and superiority of white people explicitly.²⁰

The committee recommended Western revisit its decision to accept the gift or, if the university decided to retain the bequest, that Hilborn’s name be removed from the scholarships.²¹ No similar recommendation was made to remove his parents’ names from the scholarships named for them.

The problem with both recommendations lay with the fact that the charitable trust had already been settled. Therefore, any modification to it — be it a collapse of the trust or its renaming — required the Ontario Superior Court to exercise its powers of inherent jurisdiction to modify the trust.

The university chose the second option.

III. THE INHERENT POWERS OF CANADA’S SUPERIOR COURTS: CY-PRÈS AND THE ADMINISTRATIVE SCHEME-MAKING POWER

While courts can always assist when matters arise with respect to the interpretation, administration, or other “isolated administrative difficulties” of trusts,²² in the case of private trusts, a court cannot perfect an indefinite trust object, nor can it interfere with otherwise clear instructions of the settlor that have resulted in inefficiency or even impracticability of the trust’s functioning. The law is different for charitable trusts. Superior courts can order changes to a charitable trust to prevent it from failing or running inefficiently.

The powers to modify a settled, charitable trust stem from the inherent jurisdiction of the superior courts. There are essentially two: a court’s administrative scheme-making power and the doctrine of cy-près. In order for a court to exercise either of these, a trust must first be charitable in nature. Determining this is its own legal issue. However, if the issue that requires a scheme or application of cy-près arises before the trust is settled, the purpose of

¹⁷ *Kenneth HW Hilborn Scholarships (Re)* (15 June 2022), Hamilton CV-22-00078966-0000 (Ont Sup Ct J) (Affidavit of Paul Eluchok at para 8) [Affidavit of Eluchok].

¹⁸ Factum of the Applicant, *supra* note 8 at para 9.

¹⁹ *Ibid* at para 11.

²⁰ *Ibid* at para 12.

²¹ Affidavit of Eluchok, *supra* note 17 at para 12.

²² Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters’ Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 811.

the trust must have a “general charitable intent.”²³ If it develops subsequent to the settling of the trust this test can be dispensed with.

A. THE DOCTRINE OF CY-PRÈS

Most scholars agree that the cy-près doctrine is limited to those cases where there is a failure of a particular charitable purpose of a trust.²⁴ The cy-près doctrine can only be applied to alter the terms of a trust once it is proven that one or more of the trust’s purposes are impossible or impractical to carry out as settled. However, even if a court chooses to exercise the power, the court must still order the scheme to purposes as near to those as the settler intended.²⁵

B. THE ADMINISTRATIVE SCHEME-MAKING POWER

The administrative scheme-making power is described by courts and academics as related “to the mechanics of how the property devoted to charity is to be distributed.”²⁶ It is perhaps easier to understand this power as one that allows for remedies not applicable to private trusts, but applicable to issues with charitable trusts that do not meet the standard of cy-près.

While the standard for the application of the administrative scheme power appears to be less than cy-près, what that standard is, is not abundantly clear from the jurisprudence. Take for example this description: “[E]ven absent a finding of impracticability or impossibility, the court retains the inherent jurisdiction for administrative scheme-making.”²⁷ A trust lacking “efficiency”²⁸ is another way the standard has been described. However, any changes that propose to increase the efficiency of a charitable trust must not override the “spirit of the [t]rust.”²⁹ As Justice Kennedy wrote in *Sprott Estate*, the kind of issue that attracts the exercise of the administrative scheme-making power, “is not a situation in which the cy-près doctrine is applicable. The [t]rust can function, albeit less well, if the terms remain unaltered. What is sought in the present circumstances is a variation of the administrative terms so that it can be implemented in a better way to advance the intentions of the [t]estator.”³⁰

The following are examples of changes made to a charitable trust by way of the administrative scheme power: delaying the distribution date of a charitable trust;³¹ broadening the age qualifications for a scholarship to make it more inclusive, and allowing the trustee not to award it in years where there were no “outstanding” candidates;³² supplying

²³ *Ibid* at 813.

²⁴ Hubert Picarda, *The Law and Practice Relating to Charities*, 4th ed (Haywards Heath: Bloomsbury Professional, 2010) at 437.

²⁵ Albert H Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts*, 9th ed (Toronto: Thomson Reuters, 2019) at 479.

²⁶ *Killam Estate, Re*, 1999 CanLII 9404 at para 67 (NS SC) [*Killam Estate*] quoting *Killam Estate, ibid* (Expert Report of Dr. Walters for the Applicant).

²⁷ *The Sidney and North Saanich Memorial Park Society v British Columbia (Attorney General)*, 2016 BCSC 589 at para 56.

²⁸ *Ibid* at paras 48, 68.

²⁹ *Sprott Estate (Re)*, 2011 NSSC 327 at para 50 [*Sprott Estate*].

³⁰ *Ibid* at para 48.

³¹ *JW Laing Trust Stewards' Co Ltd v AG* (1982), [1983] 3 WLR 886 (UK ChD).

³² *Sprott Estate, supra* note 29 at para 34.

administrative terms to a charitable trust where none had been provided in the trust document;³³ and authorizing the sale or exchange of land held in charitable trust.³⁴

There is also conflicting case law in Canada on what a court may do with either power. For example, a well-known point of contention between jurists is whether altering the investment scheme of a trust can be done under the administrative scheme-making power or if this requires the application of the *cy-près* doctrine.³⁵ This article makes no attempt to resolve that conflict or any other legal gray area when it comes to this area of trust law. However, what is clear, is that there is no recently reported decision in Canada, or elsewhere, in which a trustee has received or even sought the remedy requested by Western in its factum, be it by way of *cy-près* or the administrative scheme-making power.

This is likely because neither standard, even when broadly viewed, appears to be met by the facts and legal arguments of Western's application.

IV. WESTERN'S APPLICATION

Western sought the following relief in its pleadings:

- (1) Declaration and Order that the Applicant, as trustee of the Scholarships, is entitled to re-name and re-describe the Scholarships to delete Hilborn's name;
- (2) Such further and other relief as counsel may advise and this Honourable Court may allow.³⁶

The Office of the Public Guardian (OPG) was served with a copy of Western's pleadings pursuant to section 5(4) of the *Charities Accounting Act*,³⁷ that allows that OPG to intervene, consent, or object to any application brought to authorize the variation of a charitable trust. Counsel for the OPG indicated to me in an email that while it had consented to the application itself, it would not be participating in the litigation nor taking a position on the matter.³⁸

In its factum, Western asked that the scheme-making power be used to remove Hilborn's name from the scholarship, arguing that his direction that the scholarships be named after him was "properly characterized as merely administrative machinery, and not a matter going to the Scholarships' charitable purposes."³⁹ Western then relied on language used in one decision, *Killam Estate*, in which D.M. Water's account of the administrative scheme-making power was reproduced: "[t]his scheme-making power of the courts was (and is) also employed where there has been a breakdown in the administrative terms of the charitable

³³ *Johnston Estate (Re)*, 2008 BCSC 1185.

³⁴ *Oldham Borough Council v Attorney General* (1992), [1993] 2 All ER 432 (UK CA).

³⁵ *Killam Estate*, *supra* note 26 at para 67. See also *Toronto Aged Men's and Women's Homes v Loyal True Blue and Orange Home* (2003), 68 OR (3d) 777 at 793 (Sup Ct).

³⁶ Factum of the Applicant, *supra* note 8 at para 28.

³⁷ RSO 1990, c C.10, s 5(4).

³⁸ Emails from OPG to Jane Thomson (1 February 2023, 16 February 2023). Notably, the OPG did not consent to a section 13 Order concerning Western's application. A section 13 Order is a simplified out-of-court procedure which when filed with the court is deemed to be an order of the court. A section 13 Order cannot be obtained unless all parties including the Public Guardian and Trustee consent to the Order.

³⁹ Factum of the Applicant, *supra* note 8 at para 25.

trust, or the administrative terms in being are inadequate for contemporary needs.”⁴⁰ Focusing on the last line of that paragraph, Western argued that the administrative names and descriptions of the Hilborn Scholarships were: “[I]n fact inadequate for contemporary needs ... especially given the stated concern that by maintaining the scholarships in Dr. Hilborn’s name, the University would be seen as tacitly condoning and endorsing his views — views which conflict with the University’s goals and values of equity, diversity, and inclusion.”⁴¹

It is important to pause here and understand that *Killam Estate*, upon which Western rests its legal argument, was about, quite literally, changing the machinery of a trust. In that case the issue was whether the court could allow encroachment upon trust capital to supplement trust income rather than have it operate on an “income only” expenditure model.⁴² The “contemporary needs” in *Killam Estate* was a reference to modern-day management principles of educational endowment funds that would maximize the trust’s income and allow for greater spending of its funds.⁴³ Further, these principles were proven through expert evidence.⁴⁴ While acknowledging the difference between *Killam Estate* and its own case, Western nevertheless argued that Kenneth Hilborn’s instruction to name the scholarship after himself was “similar to Ms. Killam’s unequivocal direction regarding ‘income only’” with respect to the trust settled in her name.⁴⁵

No other explanation of why the removal of Hilborn’s name would meet a “contemporary need” is provided in Western’s pleadings. Certainly, its removal meets a need of Western to solve the less-than-desirable situation it currently finds itself in, but it is unclear how altering this term of the trust will allow it to be “implemented in a better way to advance the intentions of the Testator.”⁴⁶

The only way Western’s application makes any sense is to look beyond its factum at the law surrounding exclusionary scholarships and public policy. The term “contemporary needs” seems to allude to this line of case law. Upon its review, however, it becomes clear why Western relied on that veiled term without further elaboration. There is simply nothing in the facts of the university’s case that support an exercise of a court’s inherent jurisdiction to alter the terms of the Hilborn Scholarships.

V. EXCLUSIONARY SCHOLARSHIPS AND PUBLIC POLICY

While *McCorkill* was about a gift to an organization by way of private will, public policy has also justified an exercise of a court’s inherent jurisdiction to modify scholarships and bursaries established through charitable trusts on the basis that an aspect of them offended public policy.

⁴⁰ *Killam Estate*, *supra* note 26 at para 61, quoting *Killam Estate*, *ibid* (Expert Report of Dr. Waters for the Applicant).

⁴¹ Factum of the Applicant, *supra* note 8 at para 26.

⁴² *Killam Estate*, *supra* note 26 at para 19 quoting *Killam Estate*, *ibid* (Expert Report of Dr. Waters for the Applicant).

⁴³ *Ibid* at para 61, quoting *Killam Estate*, *ibid* (Expert Report of Dr. Waters for the Applicant).

⁴⁴ *Ibid* at paras 31–49.

⁴⁵ Factum of the Applicant, *supra* note 8 at para 26.

⁴⁶ *Sprott Estate*, *supra* note 29 at para 28.

The first and most important of these decisions was *Canada Trust Co. v. Ontario Human Rights Commission*.⁴⁷ Its interesting history is chronicled by Bruce in his book *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust*.⁴⁸ That case involved the Leonard Foundation scholarship which limited its recipients to students who were “White,” “Protestant,” and “British . . . or of British parentage.”⁴⁹ Further, on any given year, no more than 25 percent of the available income of the trust could be used to fund female recipients of the scholarship. The trust that founded the scholarships also contained a recital that espoused, among other things, 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.”⁵⁰ By the time the case was heard by the Ontario Court of Appeal, a number of universities had refused to administer the trust due to its problematic language and its discrimination towards members of minority groups.

Though they disagreed on why, the majority and minority of the Ontario Court of Appeal found that the Leonard Foundation scholarships contravened public policy. The majority was content to rest this finding on the trust’s recital and its explicit endorsement of white supremacy. For them, this kind of discrimination — even in the private law — was at odds with contemporary public policy.⁵¹ The minority decision, written by Justice Tarnopolski, held that the recitals need not be considered in order to find that the scholarships themselves contravened public policy.⁵² Regardless, all three judges agreed that the Court was justified in exercising its inherent jurisdiction of *cy-près* to modify the scholarships, removing all discriminatory terms while leaving the gifts intact. This was because it had become impracticable to carry on the administration of the trust in the manner originally dictated by the settlor.

Since *Canada Trust Co.*, four cases have been reported where universities have sought the guidance of courts in determining whether conditions attached to scholarships have contravened public policy.

The cases of *Ramsden Estate (Re)*,⁵³ and *University of Victoria Foundation v. British Columbia (Attorney General)*,⁵⁴ involved scholarships that required recipients to be members of a specific religion. *Re The Esther G. Castanera Scholarship Fund*⁵⁵ concerned two scholarships reserved exclusively for female candidates pursuing specific kinds of science degrees. Finally, *Royal Trust Corporation of Canada v. The University of Western Ontario*⁵⁶ involved a scholarship that excluded any applicants who were not Caucasian, who identified as gay, feminist, or lesbian, and curiously, “anyone who play[ed] intercollegiate sports.”⁵⁷

⁴⁷ (1990), 74 OR (2d) 481 (CA) [*Canada Trust Co.*].

⁴⁸ Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press, 2000).

⁴⁹ *Canada Trust Co*, *supra* note 47 at 487, 489.

⁵⁰ *Ibid* at 487.

⁵¹ *Ibid* at 492–94.

⁵² *Ibid* at 509–15; Eran Kaplinsky, Malcolm Lavoie & Jane Thomson, *Ziff’s Principles of Property Law*, 8th ed (Toronto: Thomson Reuters, 2023).

⁵³ (1996), 139 DLR (4th) 746 (PEI SC (TD)) [*Ramsden*].

⁵⁴ 2000 BCSC 445 [*Victoria Foundation*].

⁵⁵ 2015 MBQB 28 [*Castanera*].

⁵⁶ 2016 ONSC 1143 [*Royal Trust*].

⁵⁷ *Ibid* at para 8.

In all of these cases, a court was asked to determine whether conditions attached to a scholarship which discriminated on grounds such as religion, race, or sex contravened public policy. In each case the presiding court did one of two things. It either held that certain conditions in a scholarship violated public policy because they demonstrated a clear intention of a testator to discriminate in a way that contravened public policy (*Royal Trust*) or it declined to do so because it was, in the opinion of the presiding judge, clearly not the intention of the testator to discriminate in a manner that ran contrary to public policy (*Ramsden, Victoria Foundation, and Castanera*). As I have written elsewhere, these cases are few but suggest an interesting trend: allowing the concept of direct instead of adverse effect discrimination to dictate a public policy finding with respect to charitable trusts.⁵⁸ But that is a topic for another day.

Of the cases that followed *Canada Trust Co.*, only *Royal Trust* is relevant to Western's legal argument. As noted above, that case attracted a public policy ruling similar to the one in *Canada Trust Co.* Its result, however, was much different than what happened with the Leonard Foundation scholarships. In *Royal Trust*, the Court was precluded from exercising the *cy-près* doctrine to remove conditions from the scholarship due to a "kill clause" in the testator's will. Specifically, he instructed that: "In the event that one or more of the foregoing provisions shall be declared to be of a non-charitable nature, or, if the qualifications set forth for receipt of an award referred to above are adjudged by a court of competent jurisdiction to be void for public policy, then the provision for such gift shall be deleted."⁵⁹

As the Court in *Royal Trust* explained, "[t]he doctrine of *cy-pres* can have no application in the present case because the Will contains an express provision as to the consequences of a declaration by the court that the qualifications for entitlement of an award or bursary are void as against public policy."⁶⁰ The result was that the universities named in the will, Western and Windsor, did not get the scholarship money at all.

Canada Trust Co. and *Royal Trust* are relevant to Western's argument due to the discrimination at issue in those cases. In all three, the settlors of these scholarships espoused views of white supremacy, misogyny, and xenophobia. Where they differ lies in the fact that the scholarships in *Royal Trust* and *Canada Trust Co.* contained actual discriminatory conditions of eligibility that were found to contravene Canadian public policy. This made the purposes of those charitable trusts impractical or even impossible to administer, thus triggering the potential exercise of *cy-près*. While the HWG concluded that Hilborn shared a similar world view to the settlors of those other trusts, that view cannot be discerned by reading the conditions or terms of the scholarships established in his name. Instead, all Western can argue is that Hilborn's name itself is emblematic of these views.

Western's situation is perhaps most similar to that of *Spence v. BMO Trust Company*,⁶¹ in which the Ontario Court of Appeal reversed a lower court's decision to void an entire will due to the racist motivations of the testator that resulted in him leaving nothing to one of his daughters. Justice Cronk observed that one of the problems with the trial judge's decision was that the will itself was innocuous and contained no discriminatory language. In other

⁵⁸ Thomson, *supra* note 5.

⁵⁹ *Royal Trust*, *supra* note 56 at para 8 [emphasis in original].

⁶⁰ *Ibid* at para 15.

⁶¹ 2016 ONCA 196.

words, there was nothing in the will to which public policy could be applied.⁶² It may be that, if Western's application is refused and the scholarships retain their name, there will come a time when students refuse to accept the awards or the stigma in awarding them rises to a level where it is impractical or impossible for Western to administer them. So far, this does not appear to be the case.

Western's initial application was heard on 13 July 2022.⁶³ On 21 July 2022, an order was issued by Justice Sheard of the Hamilton Superior Court, Civil Division. The order was brief. It outlined the basis of Western's request in two paragraphs and concluded that the materials submitted were "insufficient to grant the relief sought."⁶⁴ It adjourned the Application sine die and invited Western to file additional materials to clarify the following questions:

1. Does the applicant seek the authorization of this court:
 - (i) to change the name of the trust and/or to remove any reference to the testator?
 - (ii) to delete any reference to the testator as the source of the trust funds, or only to remove the testator's name from the scholarships funded from income earned on the trust. If so, would an applicant still be able to learn the name of the source of the scholarship fund? and/or,
 - (iii) to change the name of the scholarships, and if so, to what name?⁶⁵

While this information might clarify exactly what Western wants to change about the Hilborn Scholarships, it is doubtful that any of it would assist Western in clearing the legal hurdles in this case.

Absent a legal resolution, how then should this issue be resolved? Ironically the most viable solution was proposed by Professor Langford, the academic who first posted about Hilborn's views after the trust was established.

What remedy should the Western University's Department of History pursue? Give the estate money back? Take Hilborn's name off the scholarships? Give the awards more pointed titles? Maybe. The Kenneth Hilborn Scholarship for Anti-Racist and Feminist Research does have a nice ring to it.

No, the best remedy is history. The department should produce and make publicly available a critical appraisal of Hilborn's career and activism, perhaps accompanied by an annotated bibliography.⁶⁶

Prior to its application, this suggestion appeared to be well received by at least some of the history department's faculty. In 2020, former Department Chair and eventual member of the HWG, Francine McKenzie, wrote an essay in response to Langford's online

⁶² *Ibid* at para 53.

⁶³ *Kenneth HW Hilborn Scholarships (Re)* (15 June 2022), Hamilton CV-22-00078966-0000 (Ont Sup Ct J) (Notice of Application).

⁶⁴ *Kenneth HW Hilborn Scholarships (Re)* (22 July 2022), Hamilton CV-22-00078966-0000 (Ont Sup Ct J) (Court Order).

⁶⁵ *Ibid*.

⁶⁶ Langford, *supra* note 12.

publication. While taking issue with his failure to consult any members of the Department before publishing his article, she seemingly agreed with him on this point:

The Hilborn awards can and should be turned into an opportunity for reflection and improvement. Issues of commemoration are dealt with explicitly in the undergraduate and graduate programs in Public History at Western. As a department, and in consultation with our students, we will consider how we can better acknowledge Hilborn's beliefs, career and activism so that the awards in his name advance our historical consciousness.⁶⁷

It is unclear why, only a few months after McKenzie's post, the History Department and the university decided to change course. The answer is likely as complicated as the law that surrounds this subject.

It should be noted that despite its lack of legal support, it is very possible that Western's application will be granted. Hilborn is far from a sympathetic character and while the OPG has shown no support of Western's position, they have not actively opposed it either. Absent strong legal intervention — which does not appear to be forthcoming — or a judge who is not satisfied with Western's arguments, it may well be that the draft judgment contained in Western's pleadings will be signed. Notably, after finding Western's materials insufficient, Justice Sheard did not seize herself of the application. Another judge may find that there is enough material to grant the request.

At the time of this article's submission, there had been no action on the file since September 2022. Western has yet to file any supplementary materials. Meanwhile, quiet changes appear to have taken place at Western. On the University of Western Ontario's webpage called "In Memoriam 2013" where it lists now-deceased faculty, each person's name is accompanied by their years of service and a link to their obituary. Though his name remains, Hilborn's years of service and link to his obituary have been removed.⁶⁸ Further, though the scholarships established in his parents' names remain on the Department of Languages and Culture site,⁶⁹ the Hilborn Scholarships have been removed from the Department's awards webpage.⁷⁰

As a member of a university faculty myself, and a person who cares deeply about issues of discrimination, it is easy for me to understand the difficult position in which Western finds itself. Putting aside the polarizing views that crop up around this issue, what is clear is that Hilborn's writings and actions perpetuated discrimination of a sort that dehumanized groups of people and supported their continued oppression. That is not the kind of reputation with which anyone who believes in the basic tenets of Canada's multicultural, constitutional democracy wishes to be associated.

But this does not change the fact that the gift was accepted and the trust was settled. It is too late to turn back now. Now the hard work begins.

⁶⁷ Francine McKenzie, "Western's History Department and the Hilborn Student Awards" (7 May 2020), online: *Active History* [perma.cc/HDK9-A547].

⁶⁸ "In Memoriam 2013," online: *Western University Canada* [perma.cc/YZ9B-66J2].

⁶⁹ "Scholarships and Awards," online: *Western University Canada* [perma.cc/D954-BEHY].

⁷⁰ "Awards and Scholarships," online: *Western University Canada* [perma.cc/6JYZ-PNZX].

Academics on both sides of this issue can likely agree that universities exist to disseminate information and knowledge rather than erase it or avoid it. The question is how they should go about doing this. The answer is with great care but also with perseverance. The Hilborn Scholarships are not a problem that requires a legal solution but, as Professors Langford and McKenzie wrote, an opportunity for education and reflection.

So what does this case add to the canon of discrimination and the private law? Perhaps it is simply this: that it should never have been a case at all. Western has all the tools it needs to address the problem of an unworthy donor. It does not need the help of the courts. I would like to think that Bruce would agree with me on that.

[this page is intentionally blank]