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# Testamentary Conditions in Restraint of Religion in the Twenty-first Century: An Anglo-Canadian Perspective

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The *Canadian Charter of Rights and Freedoms* and the United Kingdom's *Human Rights Act 1998* generate interesting questions concerning their application in the private sphere. In this paper, the authors explore how the norms embodied in these instruments affect testamentary conditions in restraint of religion, which create conflict between a will maker's testamentary freedom and the beneficiary's freedom of religion. This tension is particularly relevant in Northern Ireland, where there has been a history of such conditions.

The authors review jurisprudence of English, Irish, and Canadian courts to assess the treatment of testamentary conditions in restraint of religion to date, and to project trends for the future. The common law has traditionally defended testamentary freedom, but the adoption of human rights legislation to protect equality and freedom of religion suggests the position is shifting.

The longer history of *Charter* jurisprudence provides clues about future interpretation of the *Human Rights Act*. The adoption of the *Charter* has affected ideas of public policy in Canada, and Canadian courts have re-examined traditional positions. However, the tenor of judgments from the other side of the Atlantic is still unashamedly pro-testamentary freedom, and it remains to be seen if courts will be open to change.

La *Charte canadienne des droits et libertés* et le *Human Rights Act 1998* du Royaume-Uni posent des problèmes intéressants quant à leur application dans le domaine privé. Dans cet article, les auteures examinent comment les normes contenues dans ces instruments affectent les conditions testamentaires imposant des contraintes religieuses, puisqu'elles créent un conflit entre la liberté testamentaire de celui qui rédige ses dernières volontés et la liberté de religion du bénéficiaire. Cette tension est particulièrement palpable en Irlande du Nord, où de telles conditions ont existé de longue date.

Les auteures passent en revue la jurisprudence des tribunaux anglais, irlandais et canadiens afin de déterminer le traitement à ce jour des conditions testamentaires imposant des contraintes religieuses et afin d'en tracer la probable évolution future. La common law a traditionnellement veillé à préserver la liberté testamentaire, mais l'adoption de lois relatives aux droits humains et protégeant l'égalité et la liberté de religion suggère un changement de position.

La vécu jurisprudentiel de la *Charte* fournit des indices quant à l'interprétation future du *Human Rights Act*. L'adoption de la *Charte* a eu un impact sur la conception de politique publique au Canada et les tribunaux canadiens ont procédé à un nouvel examen de leurs positions traditionnelles. Toutefois, la teneur des jugements outre-Atlantique demeure nettement favorable à la liberté testamentaire, et il est encore incertain si les tribunaux seront ouverts au changement.

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“[Devise of lands and a house to X] but if [X] sells the land and the house it must be sold to a Protestant and he can only hold it so long as he remains a Protestant and the Purchaser cannot buy it for anyone but a Protestant. The house and land must not be given or willed or sold to anyone but a Protestant for ever.”

Will of a testator from Drumcree in Portadown, County Armagh, Northern Ireland, which was admitted to probate in Belfast in 1967.<sup>1</sup>

“The desire to dictate as long as possible to posterity, to connect property with his own name, and to preserve it in a sense as his own after his death, seems to be one of the strongest and most universal passions in the breast of Man. No one can have practised as a conveyancer without bearing constant testimony to this. The soul of the dying Testator beats against the barriers of the law, which appear to him to confine within such narrow limits the power which he thinks ought to be his, over the property which he fondly believes to be his ...”

Sir Arthur Hobhouse, *The Dead Hand: Addresses on the Subject of Endowments and Settlements of Property*.<sup>2</sup>

## Introduction

It was his review of the rule against perpetuities that prompted Sir Arthur Hobhouse to make the latter observation in the late nineteenth century. Its application, however, has a much wider currency than one of the most technical rules that the common law has produced, since it articulates the timeless conflict which throbs at the heart of the succession law of any society that recognizes private property. When the freedom of testators<sup>3</sup> to control and dispose of their property as they desire conflicts with the freedom of the donee to do the same, whose freedom should the law protect? And from this question stems another: what should be the position when the donor seeks to control not just the property and the uses to which it could be put but also the behaviour and lifestyle of the individual who receives it? Notwithstanding the inroads that discretionary dependants relief and matrimonial property statutes have made into the principle of free testamentary disposition, property owners in the

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<sup>1</sup> Drumcree Parish Church is at the centre of the ongoing “right to walk” dispute between members of the Orange Order and the Nationalist residents of the Garvaghy Road.

<sup>2</sup> (London: Chatto & Windus, 1880) at 16.

<sup>3</sup> The word “testator” as used in general discussions throughout this article is gender-neutral, indicating a male or a female will maker.

English-speaking Canadian provinces can still exercise considerable power over the distribution of their assets after death.<sup>4</sup> Those in England and Ireland enjoy a similar privilege.<sup>5</sup> Yet it is clear that testators have often craved a more extensive control than the mere power to designate the immediate successors to their bounty. Modern man has generally abandoned the practice of his forebears of interring worldly goods alongside their mortal remains and has looked instead to lawyers to ensure that the “dead hand” hovers over his property for generations after his own demise.

Much of the history of the English common law as exported to the dominions can be analyzed in terms of how both the legislature and the judiciary have sought to reconcile the potentially conflicting interests of the living and the dead. A comprehensive assessment of such fundamental issues relating to the proper function of the law of succession in contemporary society is clearly beyond the scope of a single paper. Instead, we wish to focus on one species of legal mechanism whereby testators have sought to impose their wishes upon future generations, namely, the so-called testamentary condition in restraint of religion.

At this juncture, something by way of definition is appropriate. It appears that the phrase “conditions in restraint of religion” was first coined by Lord Greene in *Re Samuel*.<sup>6</sup> The term is most typically associated with clauses in wills that require a beneficiary to continue with, convert to, or become involved with a particular religion on threat of forfeiture of the gift. However, conditions in partial restraint of marriage and in partial restraint of alienation, and those that tend to influence the upbringing of children may also have a “religious” aspect and are also discussed briefly in this article. A testator may be motivated by a desire to propagate his own religion and thus benefit its adherents or by an aversion to a particular faith, with the donee restricted accordingly, though it has been suggested that conditions in restraint of religion “proceed more often from spite than from benevolence.”<sup>7</sup> As with any testamentary condition, however, it is important never to lose sight of the fact that the “restriction” in question is artificial rather than real. The inherent nature of the animal is that the intended recipient is under no legal compulsion to, say, convert to or eschew a particular religion. The donee always has a choice: either to accept the gift with the conditions or to disclaim it and retain complete freedom as to the restriction.

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<sup>4</sup> See generally Cameron Harvey, *The Law of Dependants' Relief in Canada* (Toronto: Carswell, 1999).

<sup>5</sup> In England, there is also a system of discretionary family protection. The current legislation is the *Inheritance (Provision for Family and Dependants) Act 1975* (U.K.), 1975, c. 63 [*Inheritance Act 1975*]. Virtually identical legislation is in force in Northern Ireland: *Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979*, S.I. 1979/924 (N.I. 8). In the Republic of Ireland, spouses benefit from an elective share, but children of the testator may apply under the discretionary system found in the *Succession Act 1965*, No. 27/1965, s. 117.

<sup>6</sup> (1941), [1942] 1 Ch. 1 at 30 (C.A.).

<sup>7</sup> Jeffrey G. Sherman, “Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices” [1999] U. Ill. L. Rev. 1273 at 1276.

This article looks at testamentary conditions in restraint of religion from an Anglo-Canadian perspective. In terms of focusing on religious conditions, their interest to two property lawyers from Northern Ireland should not be unexpected. Moreover, a separate research project involving one of the authors has confirmed that these conditions have frequently appeared in wills drafted in the jurisdiction, especially in rural areas.<sup>8</sup> The subject matter was also influenced by the incorporation of the *European Convention on Human Rights*,<sup>9</sup> with its familiar guarantees of freedom of conscience and religion, and prohibition of discrimination, into United Kingdom domestic law in October 2000. Renewed speculation as to the effect of the *ECHR* on property law led the authors to consider the potential impact on religious restrictions in wills, and in particular whether the inherently discriminatory nature of these restrictions might fall foul of the rights enshrined in the former instrument. In trying to address this issue, Canada was chosen as an obvious comparator because of the *Canadian Charter of Rights and Freedoms*,<sup>10</sup> which contains similar guarantees of equality and religious freedom yet has a more developed jurisprudence, given that it was adopted in 1982. The focus here is on whether the rights enshrined in the *Charter* have shaped traditional concepts of public policy in the context of testamentary conditions in restraint of religion, and how this might inform a similar debate in England and Northern Ireland. Although the title of this paper refers to an *Anglo-Canadian* approach, the Northern Ireland testator, who provided its original inspiration, continues to feature strongly throughout in the context of the various anti-discrimination statutes that are in force there. We start by briefly outlining the current jurisprudence on testamentary conditions in restraint of religion in both England and Northern Ireland.<sup>11</sup> To date, the approach of the courts has differed little between the two jurisdictions, and they are generally discussed together.<sup>12</sup> We then chart the development of the law in Canada both before and after the *Charter*, before

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<sup>8</sup> Norma Dawson, Sheena Grattan & Laura Lundy, *Dying to Give* (Belfast: Her Majesty's Stationary Office, 2003). The extract that introduced this paper came to light in the course of this research.

<sup>9</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5 [*ECHR*].

<sup>10</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>11</sup> The reader may not be aware that Northern Ireland is an entirely separate legal jurisdiction. Many Commonwealth materials inaccurately refer to the United Kingdom as a sole legal jurisdiction. Some legislation does apply throughout the United Kingdom—for example, tax law and the *Human Rights Act 1998* (U.K.), 1998, c. 42 [*HRA*], which forms part of the central discussion in this paper.

<sup>12</sup> In theory, the courts in Northern Ireland (the basic structure in terms of hierarchy being the Northern Ireland High Court, Northern Ireland Court of Appeal, and the House of Lords in London) are not bound by decisions of the English courts and even a House of Lords decision is strictly binding only if it originated in Northern Ireland. See Brice Dickson, *The Legal System of Northern Ireland*, 4th ed. (Belfast: SLS, 2001) at 87-89. In practice, however, all decisions of the English appellate courts are treated as effectively binding while decisions of the English High Court are regarded as being of the strongest persuasive authority.

concluding with an assessment of the impact that the *ECHR* and other statutory developments are likely to have in England and Northern Ireland.

## I. Testamentary Conditions in Restraint of Religion: The Current Legal Landscape in England and Northern Ireland

Testamentary freedom has been described as the “corner-stone” of the common law.<sup>13</sup> It has also been described as “the greatest latitude ever given ... to the volition or caprice of the individual.”<sup>14</sup> One only has to look to the law reports for confirmation of the veracity of this last observation. Throughout the Commonwealth they abound with illustrations of malevolent and spiteful testators and judicial dicta that proclaim:

[N]o man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident ...<sup>15</sup>

Moreover, to “bribe” one’s nearest and dearest with the family patrimony is also within the prerogative accorded to testators, for the common law has raised no objection per se to the concept of the testamentary condition, recognizing both the condition precedent and the condition subsequent. Similarly, it has been no bar to such conditions that they are unreasonable, foolish, or absurd, or that their motivation is unadulterated vanity, malice, or spite. However, the principle of freedom of testation has never been so sacrosanct to the English common law that it has been totally without limit:

[A] testator may impose any condition that his whim and caprice may dictate, however unreasonable, unless it be contrary to the law or public policy ...<sup>16</sup>

A condition is “contrary to law” if it is repugnant to the estate granted, insufficiently certain, or impossible to perform.<sup>17</sup> All three have in the past had an impact on conditions in restraint of religion. However, it is that nebulous concept “contrary to public policy”—in the succession law context, an umbrella term for those social

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<sup>13</sup> Philip Hoser, “Family Provision for Non-spouse Dependents” (1984) 14 *Fam. Law* 171 at 171.

<sup>14</sup> Sir Henry Sumner Maine, *Village—Communities in the East and West*, rev. ed. (London: John Murray, 1890) at 42.

<sup>15</sup> *Bird v. Luckie* (1850), 8 Hare. 301 at 306 (Ch.), Knight Bruce V.C.

<sup>16</sup> “Conditions on Testamentary Gifts as a Device of Control”, Note (1936) 36 *Colum. L. Rev.* 439 at 439.

<sup>17</sup> In addition, it must not breach the rule against perpetuities. In England, at common law, if a right of re-entry (the right to repossess property that arises on the breach of a condition subsequent) could arise at the end of the perpetuity period it was ineffective, so the gift was absolute. However, the “wait and see” principle has been applied to such gifts (*Perpetuities and Accumulations Act 1964* (U.K.), 1964, c. 55, s. 12). In *Walsh v. Wightman*, [1927] N.I. 1 (C.A.), the Northern Ireland Court of Appeal held that the rule against perpetuities did not apply to a right of re-entry for condition broken, but the position has now been amended by statute and is the same as in England (*Perpetuities Act (Northern Ireland) 1966* (U.K.), 1966, c. 2, s. 13).

ideals that the law considers paramount to testamentary freedom—that is of particular interest to us.

### A. Repugnancy

“[B]ut if circumstances require [X] to sell the lands, they must be sold to a person professing the Protestant faith ...”

Will of a farmer from County Fermanagh, Northern Ireland, admitted to probate in 1967.

The principle that land should be freely alienable has been enshrined in Anglo-Irish law since *Quia Emptores*<sup>18</sup> in 1290, with the consequence that a total restraint on alienation is void as being repugnant to the estate given. However, the validity of the partial restraint is equally well-established,<sup>19</sup> and “[w]here the condition is not a total restriction, it is a question for the court as a matter of public policy whether it is so restrictive as to be void.”<sup>20</sup> That “as a matter of public policy” the nineteenth-century courts favoured a will maker’s freedom of testation over a legatee’s freedom of alienation is exemplified by the refusal of Sir George Jessel, Master of the Rolls, in *Re Macleay*<sup>21</sup> to void a clause that precluded the beneficiary from selling the land that he had been devised “out of the family.” Not only did this case demonstrate how the concept of freedom of testation was revered by the common law during an era that has become known as “the golden age of individualism,” but it provided the basis for the subsequent contention that a restraint forbidding alienation outside a particular racial or religious group, obviously much larger in number than a family, must also necessarily be valid. It is also rather ironic, in that Sir George Jessel was the first Jew to hold judicial office in England.<sup>22</sup>

Neither the subsequent retreat from unfettered freedom of testation during the twentieth century, nor Justice Harman’s narrowing of the ratio of *Macleay* in *Re Brown*,<sup>23</sup> which shifted the balance in favour of the legatee’s freedom of alienation, has as yet persuaded an English court that testamentary conditions in restraint of alienation to a particular religious (or racial) group are void—either for being repugnant to the estate given, or for being contrary to public policy for promoting or

<sup>18</sup> (U.K.), 18 Edw. I.

<sup>19</sup> Were the doctrine of repugnancy to be applied in its purest form, it would preclude any restriction on alienation. See generally Glanville L. Williams, “The Doctrine of Repugnancy” (1943) 59 Law Q. Rev. 343.

<sup>20</sup> J.C.W. Wylie, *Irish Land Law*, 3d ed. (Dublin: Butterworths, 1997) at 210.

<sup>21</sup> (1875), L.R. 20 Eq. 186 (M.R.) [*Macleay*].

<sup>22</sup> A point noted by D.A.L. Smout in “An Inquiry into the Law on Racial and Religious Restraints on Alienation” (1952) 30 Can. Bar Rev. 863 at 866.

<sup>23</sup> (1953), [1954] 1 Ch. 39.

harnessing intolerance.<sup>24</sup> However, a first-instance decision from the Republic of Ireland provides some evidence that courts in that jurisdiction may be prepared to take a less sympathetic approach to such conditions, especially where their motivation is the perpetuation of old resentments.<sup>25</sup> In *Re the Estate of Dunne*,<sup>26</sup> a will maker had devised his property to one Samuel Le Blanc and his wife “subject only to the condition that my dwelling house and lands or any part thereof shall not be sold or otherwise conveyed or transferred by them ... their successors or assigns, to any member of the Meredith families of O’Moore’s Forest, Mountmellick.” The Land Registry refused to register the restraint on alienation in the absence of a court order. When such an order was sought, Justice O’Hanlon ordered that the devise be registered without the condition. His first ground was that the word “family” was uncertain in this particular context. In addition, however, the learned judge had doubts about

the consistency with public policy of incorporating conditions in the grant or devise of freehold property, the obvious purpose of which is to perpetuate old resentments and antagonisms and bind the grantee or devisee to bear them in mind and give effect to them when contemplating any further disposition of the property.<sup>27</sup>

### **B. Public Policy**

“[Farm to daughter] on condition that she does not marry a member of the Roman Catholic Church or one who has previously been a member of the Roman Catholic Church.”

Will of a farmer from County  
Armagh, Northern Ireland, who died in  
1997.

In general, the common law has sought to override testamentary freedom on the ground of public policy in a relatively limited range of circumstances, one of which could broadly be described as “protecting or preserving the family.” Under this rubric, the judiciary has been prepared to override both total restraints on marriage and certain conditions that tend to interfere with a parent’s duty to bring up and educate

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<sup>24</sup> Compare the position with contracts for the sale of land in Northern Ireland in the wake of the *Fair Employment and Treatment (Northern Ireland) Order 1998*, S.I. 1998/3162 (N.I. 21) art. 29 [1998 Order]. See text accompanying note 181.

<sup>25</sup> While the Republic of Ireland has existed as an independent state since 1921, a significant part of its common law heritage is derived from pre-partition English authority, and many of the same issues have arisen in this jurisdiction as regards the validity of testamentary conditions in restraint of religion. A number of Irish cases are referred to throughout the course of this article for comparative purposes.

<sup>26</sup> [1988] I.R. 155 at 156 (Ir. H. Ct.).

<sup>27</sup> *Ibid.* at 157.

his or her children. However, the judiciary's revulsion for a total restraint of marriage<sup>28</sup> has not extended to partial restraints which have been repeatedly held valid (including those framed in terms of a religious denomination),<sup>29</sup> unless they attach to personality, in which case they will be invalid as being *in terrorem* in the absence of a gift over.<sup>30</sup> Some conditions by which a will maker has required someone else's child to belong to a particular denomination have been voided as tending to interfere with the parent's duty,<sup>31</sup> but neither the English nor Northern Irish judiciary have taken this approach consistently, and on other occasions they have construed the offending clause as being postponed until either a reasonable time after the beneficiary reaches majority<sup>32</sup> or the age of discretion.<sup>33</sup> The result is that the law is uncertain, but in light of dicta in *Blathwayt*,<sup>34</sup> the most recent pronouncement from the House of Lords, there is a strong possibility that lower courts would limit the parental interference principle to nonreligious clauses.

However, leaving aside the peculiar difficulty relating to infants, which, in any event, raises rather different policy considerations, the English and Northern Irish judiciary have consistently refused to void a condition in restraint of religion as being per se contrary to public policy, in that, for example, it interferes with the donee's freedom of conscience or discriminates against members of the will maker's family on grounds of religion. Indeed, there exists a plethora of older case law in which such public policy objections were apparently never raised. In *Hodgson v. Halford*,<sup>35</sup> one of the first reported decisions in which such objections were raised, Vice-Chancellor Hall was emphatic that he could not

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<sup>28</sup> See *Long v. Dennis* (1767), 4 Burr. 2052, 98 E.R. 69 (K.B.), where Lord Mansfield wrote: "Conditions in restraint of marriage are odious; and are therefore held to the utmost rigour and strictness. They are contrary to sound policy" (*ibid.* at 2055).

<sup>29</sup> See the comments of Lord Naish in *Re Knox* (1889), 23 L.R. Ir. 542 (Ch.) [*Knox*]: "Conditions ... requiring a legatee ... to marry persons of a particular religious denomination, and forfeiting their interest if they did not, have been repeatedly held valid, and it is now too late to question their validity" (*ibid.* at 554).

<sup>30</sup> See generally Olin Browder, "Conditions and Limitations in Restraint of Marriage" (1941) 39 Mich. L. Rev. 1288.

<sup>31</sup> See *Re Borwick*, [1933] 1 Ch. 657, [1933] All E.R. 737 [*Borwick* cited to Ch.]. The condition subsequent in this case, which provided for the forfeiture of the beneficiary's interest if he should before the age of twenty-one "be or become a Roman Catholic or not be openly or avowedly Protestant" (*ibid.* at 659) was also voided on the grounds that it was uncertain.

<sup>32</sup> See the views expressed by Lords Simon and Wilberforce in *Blathwayt v. Baron Cawley* (1975), [1976] A.C. 397, [1975] 3 All E.R. 625, [1975] 3 W.L.R. 684 (H.L.) [*Blathwayt* cited to A.C.] and by Justice Black of the Northern Ireland High Court in *McCausland v. Young*, [1948] N.I. 72 (Ch.) [*McCausland I*]. For criticisms of this approach, see K. Mackie, "Testamentary Conditions" (1998) 20 U.Q.L.J. 38 at 45.

<sup>33</sup> See *Re May*, [1917] 2 Ch. 126.

<sup>34</sup> *Supra* note 32: "To say that any condition which in any way might affect or influence the way in which a child is brought up, or in which parental duties are exercised, [is void] seems to me to state far too wide a rule. ..." (*ibid.*, Lord Wilberforce at 426).

<sup>35</sup> [1879] 11 Ch. D. 959.

in the absence of authority say that a parent or appointor ... disposing by will either of his own property or of any property over which he has a power of appointment, is not perfectly justified in making a provision in favour of such of his children as shall not embrace a particular faith—Christian, Roman Catholic, Mahommedan, or any other.<sup>36</sup>

Over half a century later, when the will of one Barnett Samuel came before the highest tribunal in the country in *Clayton v. Ramsden*,<sup>37</sup> members of the House of Lords made no attempt to hide their contempt for will makers who exercised their power “to control from their grave the choice in marriage of their beneficiaries.”<sup>38</sup> Barnett Samuel, observed Lord Romer, was

one of those testators, of whom I venture to think there have been far too many, who, by means of a forfeiture clause, have sought to compel a person to whom benefits are given by the will to act or refrain from acting in matters concerned with religion, not in accordance with the dictates of his own conscience, but in accordance with the religious convictions of the testator himself.<sup>39</sup>

Yet notwithstanding this obvious distaste for the type of clause they were asked to adjudicate upon, neither Lord Romer nor any of his fellow Law Lords were prepared to invoke public policy as a ground for voiding it. “That a testator may do this should he desire is beyond question ...” was how his Lordship concluded the above dictum, which had, until then, hinted at a more radical approach—although, in fact, the discontent did manifest itself in their Lordships establishing an alternative channel through which to render the offending restriction void.<sup>40</sup>

It was not surprising that just six years later the Northern Ireland Court of Appeal refused to depart from the reasoning of the House of Lords to pioneer a more radical approach to the application of public policy when it had to determine the validity of the forfeiture clause “become a Roman Catholic or profess that he or she is of the Roman Catholic religion.”<sup>41</sup> By 1976, however, when the House of Lords was asked to pronounce on the validity of a similar condition, “be or become a Roman Catholic” in *Blathwayt*,<sup>42</sup> there seemed some possibility that political and legal developments of the intervening quarter century might justify a difference in approach. The developments in question were the *European Convention on Human Rights*,<sup>43</sup> drafted in 1950 in the aftermath of the Holocaust, originally to prevent the re-emergence of

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<sup>36</sup> *Ibid.* at 966-67.

<sup>37</sup> (1942), [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.) [*Clayton* cited to A.C.]. The case involved a partial restraint on marriage: a beneficiary was required to marry a person “of Jewish parentage and of the Jewish faith.” See Part I.C, below.

<sup>38</sup> *Ibid.* at 325, Atkin L.J.

<sup>39</sup> *Ibid.* at 332.

<sup>40</sup> Specifically, their Lordships found that the restriction was insufficiently certain: see text accompanying note 56.

<sup>41</sup> *McCausland v. Young*, [1949] N.I. 49 (C.A.) [*McCausland II*], although the court consisted of two rather than three judges. In fact, the clause was contained in an *inter vivos* settlement.

<sup>42</sup> *Supra* note 32.

<sup>43</sup> *Supra* note 9.

other dictatorial and oppressive governments but already the driving force for the new culture of human rights that was pervading Western legal systems, and the *Race Relations Act 1976*,<sup>44</sup> which prohibited racial (but not religious) discrimination in the public sphere. Counsel duly submitted that, although neither of these provisions was directly applicable to the private document before the court, together they exemplified prevailing attitudes, in light of which the clause in question should be voided as discriminating against persons on religious grounds.

However, their Lordships unanimously held the condition valid. Lord Wilberforce, who gave the leading judgment, summed up the relevance of these anti-discrimination provisions as follows:

I do not doubt that conceptions of public policy should move with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move. It may well be that conditions such as this are, or at least are becoming, inconsistent with standards now widely accepted. But acceptance of this does not persuade me that we are justified ... in introducing for the first time a rule of law which would go far beyond the mere avoidance of discrimination on religious grounds. To do so would bring about a substantial reduction of another freedom, firmly rooted in our law, namely that of testamentary disposition. Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.<sup>45</sup>

In a similar vein, Lord Cross of Chelsea remarked,

[I]t is true that it is widely thought nowadays that it is wrong for a government to treat some of its citizens less favourably than others because of differences in their religious beliefs; but it does not follow from that that it is against public policy for an adherent of one religion to distinguish in disposing of his property between adherents of his faith and those of another.<sup>46</sup>

Meanwhile, Lord Fraser was in no doubt as to what the paramount consideration before him was: “One must remember also the public policy that a testator should be free, subject to the rights of his surviving spouse and children, to dispose of his property as he pleases.”<sup>47</sup> Indeed, the entire tenor of their Lordships’ judgments was extremely pro-testamentary freedom—much more so, in fact, than that of their predecessors in *Clayton*.<sup>48</sup> In particular, Lord Wilberforce’s obvious sympathy for those from “landed estates” where “family attitudes and traditions ... may often involve close association with one or another Church”<sup>49</sup> is in stark contrast to the

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<sup>44</sup> *Race Relations Act 1976* (U.K.), 1976, c. 74. The *Race Relations Act 1976* did not extend to Northern Ireland.

<sup>45</sup> *Blathwayt*, *supra* note 32 at 426.

<sup>46</sup> *Ibid.* at 429.

<sup>47</sup> *Ibid.* at 442.

<sup>48</sup> *Supra* note 37.

<sup>49</sup> *Blathwayt*, *supra* note 32 at 426.

judicial exhortations made in *Clayton* about the abuse of paternal power, which should have had Barnett Samuel blushing in his grave.

One wonders if this concerted effort to re-establish testamentary freedom as a central tenet of English property law was at least in part a reaction to the considerable enlargement just the previous year of the family provision jurisdiction<sup>50</sup>—a development that had faced significant resistance in the House of Lords.<sup>51</sup> Professors Davina Cooper and Didi Herman have, however, offered a different analysis,<sup>52</sup> namely, that the members of the House of Lords simply felt more distaste for an attempt to influence someone to marry a fellow Jew than they did for an attempt by a non-Catholic to ensure that his family was not tempted to embrace Roman Catholicism after his death.

### C. Uncertainty

While the obvious disfavour with which the judiciary has sometimes regarded conditions in restraint of religion (or, at least, those of a particular nature) has not persuaded it to resolve the conflict of interests openly in terms of public policy, English courts have been prepared on occasion to invoke the narrower doctrinal ground that such restraints are insufficiently precise to constitute legally acceptable conditions:

That a testator may [insert a condition in restraint of religion] should he so desire is beyond question, but in such a case it behoves him to define with the greatest precision and in the clearest language the events in which the forfeiture of the interest given to the beneficiary is to take place.<sup>53</sup>

This jurisprudence on conceptual certainty is arguably the best known of all litigation relating to testamentary conditions, and it is not proposed to rake over the entire debate again here.<sup>54</sup> In brief, from the mid-1930s there were several cases in which English courts voided religious conditions subsequent for being uncertain, a trend that culminated with the decision of the House of Lords in *Clayton*, wherein four of the five Law Lords held the expression “of the Jewish faith” void for uncertainty<sup>55</sup>

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<sup>50</sup> The *Inheritance Act 1975*, *supra* note 5, considerably extended the previous jurisdiction contained in the *Inheritance (Family Provision) Act, 1938* (U.K.), 1 & 2 Geo. VI., c. 45, by widening the range of eligible applicants, by including anti-avoidance provisions, and by not limiting surviving spouse applicants to a claim for maintenance.

<sup>51</sup> See generally Richard D. Oughton, *Tyler's Family Provision*, 3d ed. (London: Butterworths, 1997) c. 2.

<sup>52</sup> D. Cooper & D. Herman, “Jews and Other Uncertainties: Race, Faith and English Law” (1999) 19 L.S. 339.

<sup>53</sup> *Clayton*, *supra* note 37 at 332, Romer L.J.

<sup>54</sup> See e.g. P. Butt, “Testamentary Conditions in Restraint of Religion” (1977) 8 Sydney L. Rev. 400 and N.D.M. Parry, “Uncertainty and Conditional Gifts” (1982) 126 The Solicitors' Journal 518.

<sup>55</sup> *Clayton*, *supra* note 37. The testator had given his daughter a legacy conditional upon her marrying a person “of Jewish parentage and of the Jewish faith” and, in fact, the decision on “the Jewish faith” is strictly *obiter* because their Lordships construed the clause as a single condition of

because it was not such that a court could see “from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.”<sup>56</sup> Whether a person was “of the Jewish faith” was a matter of degree, and the testator had failed to give any indication as to what degree of faith was required to prevent forfeiture.

The decision in *Clayton* has been the object of considerable academic criticism,<sup>57</sup> primarily for failing properly to distinguish between certainty of expression and certainty of application.<sup>58</sup> In addition, the case emphasizes the “subtle and ... artificial”<sup>59</sup> distinctions that characterize the law relating to the validity of conditions, not least of which is the differing certainty tests for conditions subsequent and conditions precedent,<sup>60</sup> which can result in the absurdity of exactly the same clause being void as the former but valid as the latter.<sup>61</sup> In fact, however, the decision is of relatively limited interest for present purposes for two reasons. The first is that both Irish jurisdictions<sup>62</sup> have expressly declined to apply its reasoning and declare either of the two religious denominations that feature most frequently before them to be conceptually uncertain. The Irish judiciary has repeatedly eschewed theological and canon law definitions of what constitutes membership of a particular church in favour of a more practical approach, and has refused to allow the possible evidential difficulties of determining whether a particular individual is a member of a church to be confused with the question as to whether the testator has used sufficient certainty of expression:

I am confronted by a familiar expression, used by a Protestant farmer in his will; I know what he meant and practically every citizen in every walk of life, be he Catholic or Protestant, knows the meaning conveyed by the words “marry a Roman Catholic.” ... I do not concern myself with any theological definition of membership of the Church; I have only to construe the plain words used by a plain man in a sense plain to all of us; and I shall not make the law justly ridiculous in the eyes of persons of common sense by declaring a current expression, which the People knows and understands, to be unintelligible in the High Court of Justice of Ireland. I think it would be hard to

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forfeiture and not as two alternative conditions. Thus, the condition was void as a whole if one limb of it were void, and all five Law Lords held that the phrase “of Jewish parentage” was void.

<sup>56</sup> *Clavering v. Ellison* (1859), 7 H.L. Cas. 707 at 725, 11 E.R. 282, Cranworth L.J., cited in *Clayton*, *supra* note 35 at 326.

<sup>57</sup> See Butt, *supra* note 54, and Parry, *supra* note 54.

<sup>58</sup> See especially Butt, *ibid.* at 411.

<sup>59</sup> Parry, *supra* note 54 at 518.

<sup>60</sup> The certainty test for a condition precedent is that a condition will not be void for uncertainty “unless the terms of the condition or qualification are such that it is impossible to give them any meaning at all, or such that they involve repugnancies or inconsistencies in the possible tests which they postulate ...” (*Re Allen*, [1953] Ch. 810 at 818, [1953] 2 All E.R. 898 (C.A.), Evershed M.R. holding sufficiently certain the clause “who shall be a member of the Church of England and an adherent to the doctrine of that Church”).

<sup>61</sup> See *e.g.* the clauses in *Re Abrahams’ Will Trusts*, [1969] 1 Ch. 463, [1967] 2 All E.R. 1175.

<sup>62</sup> See *e.g.* *McCausland II*, *supra* note 41 (in Northern Ireland) and *Re McKenna*, [1947] I.R. 277 (H.C.) [*McKenna*] (in the Republic of Ireland).

find an expression that conveys more clearly exactly what it means throughout this country. We say that a man is a Catholic or that he is not; if he is, then in ordinary parlance whether he be a good Catholic or a bad Catholic or an indifferent one, a Catholic he remains. On the other hand, if a litigant undertakes to prove that a man who was a Catholic has actually given up the faith, so that he is no longer in ordinary parlance a Catholic, he may or may not succeed in Court, because his proofs of the fact that he set out to establish may or may not be adequate, but his success or failure will not be due to any doubt about the accepted meaning of the expression "Roman Catholic."<sup>63</sup>

The second is that even in England, *Clayton* has been virtually distinguished out of existence by the more recent decision of the House of Lords in *Blathwayt*. Their Lordships' refusal to accede to the public policy objections to a forfeiture clause that precluded beneficiaries from being or becoming Roman Catholics has already been discussed above. In addition, they refused to hold the condition "be or become a Roman Catholic" void for uncertainty. *Clayton* was, said Lord Wilberforce, "a particular decision on a condition expressed in a particular way about one kind of religious belief or profession. I do not think it right to apply it to Roman Catholicism."<sup>64</sup>

In sum, therefore, the judiciary in England and in Northern Ireland have to date refused to extend the relatively limited spheres in which "public policy" considerations have operated in the context of testamentary conditions to void those in restraint of religion. Their attitude to such conditions has varied from time to time, but the most recent pronouncement from the highest judicial forum (admittedly, now a quarter of a century ago) was unashamedly sympathetic to the interests of the late will makers who inserted them. The artificial nature of the restriction and the element of choice has been emphasized—beneficiaries who are torn between pecuniary self-interest and religious fealty cannot expect to have their cake and eat it—and the point has often been made that the truly spiritual (or those who are truly in love) will not allow themselves to be bribed by testamentary conditions. Now only the smallest remnant remains of the brief flirtation by the English courts with the indirect doctrinal approach to circumventing undesirable conditions on the ground that they are conceptually uncertain. Thus, so long as a will maker has taken a modicum of care

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<sup>63</sup> *McKenna*, *ibid.* at 285, Gavan Duffy P. However, in *Burke and O'Reilly v. Burke and Quail*, [1951] I.R. 216 (H.C.), the same judge held that a provision for forfeiture if the beneficiary should cease to "practice" the Roman Catholic faith was void for uncertainty. Similar views have been expressed in England: see *infra* note 64.

<sup>64</sup> *Blathwayt*, *supra* note 32 at 425. See also Cooper & Herman, *supra* note 52. It is only the Jewish faith which the English judiciary have considered to be insufficiently certain. While other religious restrictions have been voided for uncertainty, they have turned on the actual drafting used by the will maker ("at all times conform to" the Church of England as in *Re Tegg*, [1936] 2 All E.R. 878 (Ch.), and "openly or avowedly" Protestant as in *Borwick*, *supra* note 31) and not on the fact that the actual religion or denomination was uncertain.

with the precision of his drafting<sup>65</sup> (and, possibly, endeavours to avoid controlling someone else's children while they are still minors), he can go to the grave content that there exists virtually nothing in the *current* jurisprudence that would inspire confidence in those who might be minded to challenge a condition in restraint of religion.<sup>66</sup> A wiser, more perceptive will maker may, however, feel some unease that so much of the case law on which he relies is of considerable antiquity and that even *Blathwayt* is now rather dated. We will assess whether such caution is well-founded in light of the *Human Rights Act 1998*<sup>67</sup> and, in relation to Northern Ireland, recently enacted anti-discrimination legislation. First, however, we examine the impact that the *Canadian Charter of Rights and Freedoms* has had on Canadian jurisprudence.

## II. Canadian Perspectives on Testamentary Conditions in Restraint of Religion: A Pre-Charter Overview

Pre-Charter jurisprudence suggests that Canadian courts treated testamentary conditions in restraint of religion in essentially the same way as their English counterparts, with most impugned restrictions emerging unscathed from challenges to their validity.

### A. Repugnancy and Uncertainty

Despite a dearth of case law on the point, it appears that Canadian courts tolerated testamentary restrictions on beneficiaries selling land to persons of a certain faith on the basis that partial restraints on alienation do not fall foul of the doctrine of repugnancy, since the class of potential purchasers outside the prohibited religious group is sufficiently wide for the condition to be upheld.<sup>68</sup> A perusal of the decisions on conceptual uncertainty suggests that beneficiaries who invoked this particular doctrinal ground also fared badly. In the wake of *Clayton*, a gift of the residue of an estate to trustees to purchase land for the establishment of a “Jewish colony or colonies” was declared uncertain in *Re Schechter*.<sup>69</sup> However, judges consistently determined references to other established religions or denominations to be sufficiently certain, while demonstrating considerable latitude as regards the manner and degree of adherence specified by the testator. Thus, directions that a beneficiary

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<sup>65</sup> Northern Ireland will makers have a tendency to refer to “loyal Protestant”, which would not be conceptually certain.

<sup>66</sup> But note the position under the *Variation of Trusts Act, 1958* (U.K.), 6 & 7 Eliz. 2, c. 53 in *Re Remnant's Settlement Trusts*, [1970] Ch. 560, [1970] 2 All E.R. 554.

<sup>67</sup> *Supra* note 11.

<sup>68</sup> See the discussion in Smout, *supra* note 22 at 865-66. The author points to judicial endorsement of *Macleay*, *supra* note 21, in cases such as *O'Sullivan v. Phelan* (1889), 17 O.R. 730 (H.C.J.), and *Re Martin and Dagneau* (1906), 11 O.L.R. 349 (H.C.J.).

<sup>69</sup> (1964), 43 D.L.R. (2d) 417 at 421-22, 46 W.W.R. 577 (B.C.C.A.), Lett C.J. However, the gift ultimately failed on the basis that it did not qualify as a valid charitable trust and was void for remoteness.

“is and proves himself to be of the Lutheran religion”<sup>70</sup> or “is at that time a member of a Roman Catholic Parish”<sup>71</sup> were not questioned, while instructions to “embrace the faith of the New Church”<sup>72</sup> or to “rejoin the Catholic Church and practice the Catholic faith”<sup>73</sup> were upheld as sufficiently certain.<sup>74</sup> Distinctions between conditions subsequent and precedent and the associated tests for validity and certainty generally created few problems in this context. Thus, in *Laurence v. McQuarrie*, where the deceased’s will provided for a forfeiture in the event of the beneficiary “embracing the doctrines of the church of Rome” or “acknowledging himself in connection with that church,” the restriction was interpreted as a condition subsequent and, as such, had to be strictly construed.<sup>75</sup> Although this particular beneficiary attended the Roman Catholic Church, observed many of its rites and ceremonies, and “maintained it to be the true religion,” the court held that he never acknowledged himself in connection with this church, so the gift was not forfeited.<sup>76</sup>

While the use of repugnancy and uncertainty to challenge testamentary conditions in restraint of religion may have been constructive in focusing on technical requirements and thus circumventing the thorny issue of public policy, conflicts of interest between testator and beneficiary were traditionally resolved in favour of the former. Meanwhile, those who did adopt public policy arguments endured a similar fate.

### **B. Public Policy**

In the pre-*Charter* era, Canadian judges consistently refused to use the doctrine of public policy to void conditions in restraint of religion. Although prepared to override

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<sup>70</sup> *Re Patton*, [1938] O.W.N. 52 (C.A.) [*Patton*].

<sup>71</sup> *Re Curran*, [1939] O.W.N. 191 (H.C.J.) [*Curran*].

<sup>72</sup> *Re Doering*, [1948] O.R. 923, [1949] 1 D.L.R. 267 (H.C.J.) in which Schroder J. held that a trust for the education of male Canadian children embracing this faith and to be selected by the trustee in consultation with a minister of the General Church of New Jerusalem was sufficiently certain.

<sup>73</sup> *Re Starr*, [1946] O.R. 252, [1946] 2 D.L.R. 489 (C.A.).

<sup>74</sup> See also *Re Delahey* (1950), [1951] O.W.N. 143, [1951] 1 D.L.R. 710 (H.C.J.), in which a direction not to “become members of the Roman Catholic Church” was held to be sufficiently certain, applying the decision in *Re Evans*, [1940] Ch. 629. For a rare example of a condition to adhere to the Catholic faith being declared void for uncertainty, see *Re Landry Estate* (1940), 48 Man. R. 244, [1941] 1 W.W.R. 280 (K.B.).

<sup>75</sup> *Laurence v. McQuarrie* (1894), 26 N.S.R. 164 at 166 (S.C.).

<sup>76</sup> *Ibid.* at 165. In contrast, Canadian courts occasionally avoided questions of validity when dealing with conditions precedent on the basis that the beneficiary did not fulfil the relevant restriction. The deceased in *Re Mercer* (1953), [1954] 1 D.L.R. 295 (Ont. H.C.J.), having provided for her infant grandson on condition that he be “trained and educated in the Protestant faith”, Justice Treleaven held that it was immaterial whether the condition was void for uncertainty because the gift could not take effect unless the condition was fulfilled, and, although the grandson was being brought up in the Roman Catholic faith, the condition might still be fulfilled since he was only six years old. See also *Re Going*, [1951] O.R. 147, [1951] 2 D.L.R. 136 (C.A.).

testamentary freedom in respect of total restraints on marriage,<sup>77</sup> courts upheld partial restraints based on religious affiliation as well as more general stipulations that a beneficiary should embrace or eschew a particular religion after the will maker's death. For example, in *Renaud v. Lamothe*,<sup>78</sup> the testator specified that the marriages of his children should be celebrated according to the rites of the Roman Catholic Church and that any grandchildren should be educated in accordance with its teachings. A grandson who had not been brought up in this manner argued that the condition should be struck out for reasons evocative of *Charter* values some eighty years before it was enacted, namely, that the condition was in restraint of religious liberty and violated the public policy of Canada, which allows the free exercise of choice in matters of marriage and religion. The Supreme Court nevertheless upheld the restriction.<sup>79</sup>

Less than thirty years later, a similar outcome was reached by the Ontario High Court of Justice in *Curran*.<sup>80</sup> A bequest in favour of the deceased's grandchildren required each one to have reached the age of twenty-five and to be "a member of a Roman Catholic Parish and if then married be married to one of the same Faith."<sup>81</sup> Justice Godfrey upheld the marriage stipulation as a limited restraint.<sup>82</sup> On the question of whether the conditions were generally contrary to public policy, the learned judge came out strongly in favour of testamentary freedom by suggesting that the religious preferences of the deceased did not engender any public interest:

[T]hese conditions do not involve any question of public morality. The testatrix, a devout Roman Catholic, was evidently opposed to mixed marriages. She decided to distribute her estate so as to hold out an inducement to her Protestant grandchildren to return to what she believed to be the true Church. She also desired to prevent ... any further wandering from her Faith by her

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<sup>77</sup> See e.g. *Re Cutter* (1916), 37 O.L.R. 42, 31 D.L.R. 382 (S.C.).

<sup>78</sup> (1902), 32 S.C.R. 357.

<sup>79</sup> See also *Patton*, *supra* note 70 where, concerning the upbringing of children per se, a condition that the testator's grandson should embrace a particular faith was upheld on the basis that the effective date for compliance was postponed until after the child reached the age of majority, the grandson having then converted from Catholicism to the Lutheran religion specified by his grandfather. Other conditions interfering with parental duties in respect of raising and educating children have been set aside: see e.g. *Re Thorne* (1922), 22 O.W.N. 28 (S.C.).

<sup>80</sup> *Supra* note 71.

<sup>81</sup> *Ibid.* at 192.

<sup>82</sup> To similar effect is *Re Kennedy Estate* (1949), 60 Man. R. 1, [1950] 1 W.W.R. 151 (K.B.) [*Kennedy* cited to Man. R.], in which the will maker had stipulated that the donee should be "married to a Protestant husband of good repute" (*ibid.* at 3). The court noted that, if the condition was sufficiently certain, it would not be void on any other ground. As for conditions restricting the religious choices of the beneficiary per se, these were also upheld before the *Charter*. See e.g. *Re Forbes*, [1928] 3 D.L.R. 22 (Sask. K.B.), in which the court held that a condition that the legatee should be confirmed before the age of twenty-five as a member of the Church of England was not one that should be disregarded as being against public policy.

grandchildren marrying Protestants. That is not a matter in which the public has the slightest concern.<sup>83</sup>

The only pre-*Charter* instance of a restraint of this nature being struck out on the basis of public policy is the decision in *Re Hurshman*.<sup>84</sup> His daughter having married a man of Jewish faith, the testator made a will one month later stipulating that she could not inherit until she had “ceased to be the wife of a Jew.”<sup>85</sup> Justice McInnes held that, since the condition was intended to encourage marital breakdown, it was contrary to public policy and thus void. Having endorsed the comments of Lord Atkin in *Clayton* pouring scorn on the power of testators to control the choices of beneficiaries from beyond the grave,<sup>86</sup> Justice McInnes reluctantly conceded that racial (and religious) restraints in wills were generally acceptable in Canada:

[A]ny propensity toward racial discrimination has no place in this country and while it may be open to a testator to lay down the conditions upon which his children may or may not share in his bounty, yet insofar as those conditions involve racial discrimination, his language must be precise and explicit and clearly within the law if he expects the Courts to assist him in the fulfilment of his aims.<sup>87</sup>

The decisions in *Curran* and *Hurshman* highlight two issues that feature strongly in the Canadian debate on testamentary conditions in restraint of religion and public policy. The first concerns the nature of the condition itself. Encouraging one’s “nearest and dearest” to subscribe to a particular religion might be deemed acceptable where the underlying motive is to promote a certain faith, as in *Curran*. In contrast, courts may look less favourably on situations where the discrimination goes beyond an attempt to impose a particular form of ideology on another person and the condition is premised on religious (or racial) intolerance, as in *Hurshman*. The second and perhaps more compelling issue is the distinction between the public and private spheres. According to *Curran*, the fact that a will maker attempts to control the religious choices of a beneficiary is of no societal interest. It is between the individual and the objects of his or her bounty (thus negating the public policy debate), and within this privileged domain, the principle of testamentary freedom is paramount. However, judicial attitudes in both these cases contrast sharply with more recent Canadian jurisprudence, and in particular the extent to which courts post-*Charter* may be willing to encroach on private testamentary dispositions under the guise of public policy.

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<sup>83</sup> *Curran*, *supra* note 71 at 193-94.

<sup>84</sup> (1956), 6 D.L.R. (2d) 615 (B.C.S.C.) [*Hurshman*].

<sup>85</sup> *Ibid.* at 616.

<sup>86</sup> See text accompanying note 38.

<sup>87</sup> *Hurshman*, *supra* note 84 at 619. Despite focusing on racial discrimination, the outcome would presumably have been the same if the condition had been interpreted as a religious prohibition, since the offensive element was the requirement to abandon the spouse.

### III. Conditions in Restraint of Religion and the Influence of the Charter

The problem of determining the extent to which constitutional norms should be binding upon the private sphere is not novel and has arisen in every jurisdiction that has sought to adopt a charter of fundamental rights, with arguments ranging from exclusively “vertical” effect through “indirect” to “direct” horizontal effect.<sup>88</sup> Amid the anticipation that surrounded the enactment of the *Charter of Rights and Freedoms* in April 1982,<sup>89</sup> one question loomed large: would an instrument guaranteeing the rights of the people against the state bind individuals in private law disputes?<sup>90</sup> Five years later, this question was answered authoritatively by the Supreme Court of Canada in *Dolphin Delivery*,<sup>91</sup> in which the Court held that, although one private litigant does not owe a constitutional duty to the other, judges must nevertheless develop the common law in a manner which is consistent with *Charter* values.<sup>92</sup> Such values in turn feed into contemporary notions of public policy and introduce new social ideals into this concept. One might have expected the enactment of the *Charter* to prompt a change in judicial attitudes toward testamentary conditions in restraint of religion in light of the guarantees of freedom of conscience and religion in section 2 and of equality in section 15. This is borne out by the relevant case law, with judges seizing upon the equality provision in particular as a means of avoiding these restrictions on public policy grounds.

One of the first cases to consider the validity of testamentary conditions in restraint of religion in the aftermath of the *Charter* was *Re Murley Estate*,<sup>93</sup> a decision

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<sup>88</sup> Comparative illustrations may be cited of jurisdictions at both ends of the spectrum, and of those somewhere in between. See generally Justice Aharon Barak, “Constitutional Human Rights and Private Law” (1996) 3 *Rev. Const. Stud.* 218. The terms “horizontal” and “vertical” effect have been borrowed from European Union law, but tend to be used by most commentators. By vertical effect, we mean that the instrument in question has no application whatsoever to a private dispute, especially one which is governed exclusively by the common law. Direct horizontal effect means that the instrument creates an independent cause of action between private parties for breach of their rights under it, while indirect horizontal effect is a hybrid position.

<sup>89</sup> *Supra* note 10.

<sup>90</sup> See e.g. Dale Gibson, “The Charter of Rights and the Private Sphere” (1982) 12 *Man. L.J.* 213 and Brian Slattery, “Charter of Rights and Freedoms—Does It Bind Private Persons?” (1985) 63 *Can. Bar Rev.* 148.

<sup>91</sup> *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

<sup>92</sup> See also the decisions of the Supreme Court in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 and *Pepsi-Cola Beverages (West) Ltd. v. Retail, Wholesale and Department Store Union, Local 558*, [2002] 1 S.C.R. 156, 208 D.L.R. (4th) 385, 2002 SCC 8 [*Pepsi-Cola* cited to S.C.R.]. For an effective critique, see B. Slattery, “The *Charter*’s Relevance to Private Litigation: Does *Dolphin* Deliver?” (1987) 32 *McGill L.J.* 905 and Lorraine E. Weinrib & Ernest J. Weinrib, “Constitutional Values and Private Law in Canada” in Daniel Friedmann & Daphne Barak-Erez, eds., *Human Rights in Private Law* (Oxford: Hart Publishing, 2001) at 43.

<sup>93</sup> (1995), 130 Nfld. & P.E.I.R. 271 (Nfld. S.C. (T.D.)) [*Murley*].

of the Newfoundland Supreme Court. The testator was a retired United Church clergyman who left his estate to his niece's son, subject to the following clause:

In order ... to become heir to my Estate he must remain in one or the other main stream Christian Churches ... [The testator then listed Jehovah's Witnesses and Mormons as proscribed religious denominations, and concluded] I make these rules following Old Testament holy men who ordered that their sons or relatives never become part of lesser religious organizations. I want him to be a real Christian.<sup>94</sup>

While not specifically referring to the *Charter* in deciding the fate of the restriction, the issue was one which Justice Riche said could be "disposed of without lengthy reasoning" since he was "satisfied that such a provision which restricts the religious affiliation of any person is, in Canada, contrary to public policy."<sup>95</sup> It is regrettable that such an important decision did not merit further reasoning and that the judge did not offer any explanation for such an apparent about-turn from the cases discussed in the previous section of this article, in which the courts had refused to void religious restraints in wills as being contrary to public policy—these were not mentioned in the judgment. Likewise, Justice Riche did not make even passing reference to a decision of the Ontario Court of Appeal some five years earlier, which had addressed the issue of religious restrictions, albeit in a slightly different factual context.

The issue in *Canada Trust Co. v. Ontario Human Rights Commission*<sup>96</sup> was whether the terms of a scholarship trust known as the Leonard Foundation Trust were contrary to public policy. Established in 1923, the trust was intended to provide educational funds for students who were needy, white, of British parentage or nationality, and Protestant. Different benefits were available to male and female pupils seeking scholarships, while recitals in the trust made repeated references to the superiority of the white race and the importance of maintaining the Protestant religion. The Ontario Court of Appeal invalidated the entire trust, then used *cy pres* to resurrect it without the offending clauses on the basis of a general charitable intent to advance education. In deciding that the trust violated public policy, all three judges alluded to a delicate balancing process. Justice Robins (with whom Justice Osler concurred) acknowledged that the "freedom of an owner of property to dispose of his

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<sup>94</sup> *Ibid.* at 274.

<sup>95</sup> *Ibid.* Justice Riche went on to say that even if the condition was not contrary to public policy, it would nevertheless be declared void since the bequest could not take effect until the beneficiary's death because it would not be known until that stage whether he had become associated with a religious group not approved by the testator, and therefore the gift could never be perfected.

<sup>96</sup> (1990), 74 O.R. (2d) 481, 69 D.L.R. (4th) 321 (C.A.) [*Canada Trust* cited to O.R.]. See also Jim Philips, "Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on *Re Canada Trust Company and Ontario Human Rights Commission*" (1990) 9:3 *Philanthropist* 3. For an excellent account of the background to the case and its impact on the law governing private discriminatory action in Canada, see Bruce Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: University of Toronto Press, 2000).

or her property as he or she chooses is an important social interest<sup>97</sup> but had to be limited by public policy considerations in the present case. The judge continued:

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.<sup>98</sup>

In short, the terms of the Leonard Foundation Trust had to yield to contemporary 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.”<sup>99</sup> Delivering the other judgment in the case, Justice Tarnopolsky was equally critical of the trust but went a step further in declaring the eligibility requirements void. Having remarked that public policy is gleaned from a variety of sources, with particular emphasis placed on the equality provisions in section 15 of the *Charter* as well as the Ontario *Human Rights Code*,<sup>100</sup> he held that the trust was contrary to public policy in that it discriminated on the grounds of race, religion, and sex (though he stressed that courts might take a different view of discriminatory restrictions aimed at the amelioration of inequality). However, the outcome would have been different if the trust had been a “private” family trust instead of a “public” educational trust:

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 ... 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.<sup>101</sup>

The decision in *Canada Trust* is not only significant in affirming the equality provision of the *Charter* as infusing public policy. It suggests that the motive behind the restriction is important, a theme revisited in the subsequent case of *Re Ramsden Estate*,<sup>102</sup> in which the court held that a scholarship fund for Protestant students at the University of Prince Edward Island could stand, since it was not based on “blatant religious supremacy and racism” as in the Leonard Foundation Trust.<sup>103</sup> One of the

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<sup>97</sup> *Canada Trust*, *ibid.* at 495, citing *Blathwayt*, *supra* note 32.

<sup>98</sup> *Ibid.* at 495.

<sup>99</sup> *Ibid.* at 496.

<sup>100</sup> *Human Rights Code*, R.S.O. 1990, c. H-19.

<sup>101</sup> *Canada Trust*, *supra* note 96.

<sup>102</sup> (1996), 145 Nfld. & P.E.I.R. 156, 139 D.L.R. (4th) 746 (Nfld. S.C. (T.D.)) [*Ramsden* cited to Nfld. & P.E.I.R.].

<sup>103</sup> *Ibid.* at 159. The deceased having bequeathed part of her estate to establish these scholarships, the University was prevented by statute from holding funds devoted to denominational groups. Once again the court found a general charitable intent, and used the doctrine of *cy pres* to appoint a non-University body to administer the scholarships. In *University of Victoria Foundation v. British Columbia (A.G.)* (2000), 185 D.L.R. (4th) 182, 73 B.C.L.R. (3d) 375 (S.C.) [*University of Victoria*

most interesting features of *Canada Trust*, however, is the public/private divide advocated by Justice Tarnopolsky. While the public nature of this particular trust meant that it had to conform to the public policy of non-discrimination, private family trusts (and, we might also assume, private bequests in wills) would not be vulnerable to the same arguments, and the overriding interest in these circumstances would be freedom of testation. In contrast, the majority opinion in the case did not allude to any such divide<sup>104</sup> and openly implied that testamentary freedom could be sacrificed on public policy grounds, a view shared by a differently constituted Ontario Court of Appeal in the most recent decision on this issue.

In *Fox v. Fox Estate*,<sup>105</sup> the testator appointed his wife as executrix of his estate and gave her a life interest in seventy-five per cent of the residue. His son, Walter, was given a life interest in the remaining twenty-five per cent and was to receive any unallocated residue if he survived his mother. The will gave the widow extensive powers to encroach upon the capital for the benefit of Walter's children, and she used these powers to allocate the residue away from the son, because she disapproved of his marrying a non-Jew. The Ontario Court of Appeal held that this was an improper exercise of the power, since the widow's decision had been influenced by extraneous matters, and she had dealt with the estate assets as if they were her own property. The core of the decision is not so startling given that it is well established throughout the Commonwealth that a trustee's exercise of discretion can be challenged if it can be shown that it was exercised for any improper motive.<sup>106</sup> However, Justice Galligan (with whom the other two judges were in broad agreement) went on to deride the widow's actions as abhorrent to contemporary community standards in being motivated by religious prejudice, since "[i]t is now settled that it is against public policy to discriminate on grounds of race or religion."<sup>107</sup> In reaching this conclusion,

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cited to B.C.L.R.], the deceased had bequeathed part of his estate to the University of Victoria to establish bursaries for practising Roman Catholics. Justice Maczko held that the relevant provisions of the deceased's will did not violate public policy since they were inoffensive and merely designed to restrict the class of recipients to members of a particular faith, unlike the restrictions in the Leonard Foundation Trust. Likewise, the bequest did not violate the British Columbia *Human Rights Code* (R.S.B.C. 1996, c. 210), the court having to balance the interest of avoiding a "relatively inoffensive" breach of its terms against upholding testamentary freedom as an "important social interest that has long been recognized in our society and is firmly rooted in our law" (*University of Victoria, ibid.* at 380).

<sup>104</sup> Justice Robins and Justice Osler acknowledged that that Foundation may have been privately created, but had "a clear public aspect to its purpose and administration" (*Canada Trust, supra* note 96 at 494). However, unlike Justice Tarnopolsky, they did not explicitly link this to reasons for invalidating the trust on public policy grounds or use it as a reason for distinguishing private family arrangements.

<sup>105</sup> (1996), 28 O.R. (3d) 496, 88 O.A.C. 201 (C.A.) [*Fox* cited to O.R.].

<sup>106</sup> One of the older authorities to this effect is *Tempest v. Lord Camoys* (1882), 21 Ch. D. 571 (C.A.).

<sup>107</sup> *Fox, supra* note 105 at 502.

Justice Galligan cited the comments of Justice Robins in *Canada Trust* that are noted above,<sup>108</sup> and continued:

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

While there were decisions in the past which have upheld discriminatory conditions in wills, ... counsel in this case were not prepared to argue that any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a particular religious faith.<sup>109</sup>

The decision in *Fox* suggests that discriminatory conditions of a religious nature are contrary to public policy whether imposed in the context of a private family trust or as simple bequests in wills.<sup>110</sup> There is no mention of any public/private split, and although the restriction in this particular case was not imposed by the testator himself, it is implicit in Justice Galligan's judgment that it is not an option for will makers to insert clauses of this nature even in the private sphere; testamentary freedom must yield to public policy, and the decision is fairly strong on this point. Motive also appears to be irrelevant: like the decision in *Murley*,<sup>111</sup> the benevolent testator is given no preference over a spiteful will maker.

Though the respective pronouncements on testamentary conditions in restraint of religion in both *Canada Trust* and *Fox* are strictly *obiter*, we would argue that Justice Galligan's reasoning is more persuasive than that of Justice Tarnopolsky. The latter does have the support of two of Canada's leading constitutional academics, Lorraine Weinrib and Ernest Weinrib, who argue that since the essence of a charitable trust is a public benefit and testamentary freedom manifests itself through this public benefit, there is no conflict between freedom of testation and *Charter* values.<sup>112</sup> In the context of private family arrangements, however, the position is different:

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<sup>108</sup> See text accompanying note 98.

<sup>109</sup> *Ibid.*

<sup>110</sup> It is worth noting for comparative purposes that the position appears to be different in Australia, where certain aspects of testamentary freedom are regarded as sacrosanct. Notwithstanding the substantive equality provisions in both the *Racial Discrimination Act 1975* (Cth.) and *Anti-Discrimination Act 1977* (N.S.W.), both s. 8(2) of the former and s. 55 of the latter specifically exempt charitable gifts in wills. Thus, in *Kay v. South Eastern Sydney Area Health Service*, [2003] NSWSC 292, where the deceased bequeathed the sum of A\$10,000 to a children's hospital "for treatment of *White* babies", the New South Wales Supreme Court upheld the condition on the basis that it was not affected by either Act. However, the court held that a clause in the same will stipulating that the deceased's house should only be sold to a "young white Australian couple" was void for uncertainty.

<sup>111</sup> *Supra* note 93.

<sup>112</sup> *Supra* note 92 at 68.

Testamentary freedom is precisely the freedom to choose [the] beneficiary and to set the conditions for the benefaction. As with any gift, the grounds of this choice are entirely personal to the benefactor ... To invoke Charter values to upset what the testator has done strikes at the core of testamentary freedom in circumstances so personal that Charter values are peripheral.<sup>113</sup>

Yet this ignores the pervasive influence of public policy as shaped by, among other things, *Charter* values. The doctrine acts as a vessel for channelling constitutional protections into private law;<sup>114</sup> we cannot then claim that there is a more exclusive personal sphere within this private law domain that is immune from public policy arguments and associated judicial interference. While judges may be more reluctant to intrude in exclusively private arrangements and may be more deferential to the wishes of testators in a family context than in a scholarship context, surely Justice Tarnopolsky is wrong in suggesting that the court has no power to intervene in the former scenario because of a supposed public/private divide. The doctrine of policy can override clauses in private dispositions; it does not require some kind of public “anchor” to be applied. One only has to look at the law of contract for an illustration. Like freedom of testation, freedom of contract has traditionally been regarded as one of the hallmarks of the common law. Yet a contractual agreement between private individuals may be declared illegal on public policy grounds if its terms are deemed to be injurious to society or “*contra bonos mores*”,<sup>115</sup> a concept that extends to contracts involving religious and racial discrimination.<sup>116</sup>

In the context of the present discussion, the prohibition on discriminatory covenants on the sale or occupation of land provides a pertinent illustration. In *Re Drummond Wren*,<sup>117</sup> land was purchased subject to a restrictive covenant that it was “not to be sold to Jews or persons of objectionable nationality.” The purchaser having applied to the Ontario High Court to modify or discharge the covenant, Justice Mackay delivered a strong judgment on public policy and the need for parity.<sup>118</sup> Declaring the covenant void, the judge remarked:

If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. ... In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this Province, or in this country, than the

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<sup>113</sup> *Ibid.*

<sup>114</sup> Public policy is the “channel through which constitutional values flow into private law” (Barak, *supra* note 88 at 237).

<sup>115</sup> *Girardy v. Richardson* (1793), 1 Esp. 13, 170 E.R. 265 (K.B.), Lord Kenyon.

<sup>116</sup> See the comments of the English Court of Appeal in *Nagle v. Feilden*, [1966] 1 All E.R. 689, [1966] 2 W.L.R. 1027 (C.A.) [*Nagle* cited to All E.R.].

<sup>117</sup> [1945] O.R. 778, [1945] 4 D.L.R. 674 (H.C.J.) [*Drummond Wren* cited to D.L.R.].

<sup>118</sup> In ascertaining public policy, the judge considered a range of diverse sources including the Charter of the United Nations, the Atlantic Charter, and speeches of President Roosevelt, Winston Churchill and General de Gaulle, as well as burgeoning anti-discrimination legislation such as the *Racial Discrimination Act*, S.O. 1944, c. 51.

sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas ...<sup>119</sup>

He continued,

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 ... obviated the need for rigid constitutional guarantees in our polity by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal.<sup>120</sup>

However, the contrary view was put forward some three years later in *Re Noble and Wolf*.<sup>121</sup> The case concerned the sale of a plot of land to be used as a holiday cottage on the shores of Lake Huron but subject to a restrictive covenant that it should never be “sold, assigned, transferred, leased, ... to, and ... never be occupied or used ... by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood.” The judge at first instance upheld the clause, and the Ontario Court of Appeal reached the same conclusion. While the nature of a summer colony was such that property owners should be congenial with one another, Chief Justice Robertson pronounced that the law could not impose artificial standards of behaviour on the various occupants:

Doubtless, mutual goodwill and esteem among the people of the numerous races that inhabit Canada is greatly to be desired, ... but what is so desirable is not a mere show of goodwill or a pretended esteem, such as might be assumed to comply with a law made to enforce it. To be worth anything, ... there is required the goodwill and esteem of a free people, who genuinely feel, and sincerely act upon, the sentiments they express. A wise appreciation of the impotence of laws in the development of such genuine sentiments, rather than mere formal observances, no doubt restrains our legislators from enacting, and should restrain our Courts from propounding, rules of law to enforce what can only be of natural growth, if it is to be of any value to anyone.<sup>122</sup>

The case subsequently went to the Supreme Court,<sup>123</sup> though the Court avoided the public policy issue by invalidating the covenant on the basis that it was uncertain and did not “touch and concern” the land.<sup>124</sup> However, the effect of provincial

<sup>119</sup> *Drummond Wren*, *supra* note 117 at 678.

<sup>120</sup> *Ibid.* at 679. However, the condition was also invalidated on other grounds, namely, that it was an impermissible restraint on alienation and that it was uncertain on the basis of *Clayton*, *supra* note 37.

<sup>121</sup> [1948] O.R. 579, [1948] 4 D.L.R. 123 (H.C.J.) [*Noble* (H.C.) cited to D.L.R.] aff’d [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.) [*Noble* (C.A.) cited to D.L.R.]. For an overview of the case, see James W. St. G. Walker, “Race,” *Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Toronto: Wilfrid Laurier University Press for The Osgoode Society for Canadian Legal History, 1997) c. 4.

<sup>122</sup> *Noble* (C.A.), *ibid.* at 386.

<sup>123</sup> *Noble v. Alley*, [1951] S.C.R. 64, [1951] 1 D.L.R. 321.

<sup>124</sup> As required under the doctrine of *Tulk v. Moxhay* (1848), 2 Ph. 774, 41 E.R. 1143 (Ch.). However, it is worth noting that the Supreme Court of Canada has acknowledged that the Ontario Court of Appeal decision in *Noble* (C.A.) is still a valid precedent in *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193.

conveyancing statutes and human rights legislation is that such covenants and discriminatory conditions are now generally contrary to public policy.<sup>125</sup> This is significant given that the vendor and purchaser may have initially agreed to the restriction; the fact that an arranged term will be ignored perhaps strengthens the arguments for striking out a religious (or racial) condition that was not negotiated but imposed unilaterally by a will maker.

Finally, reference should be made to the standard work on succession law in Canada. Five years after the *Charter* was enacted, the third edition of *The Canadian Law of Wills* suggested that courts would still be unwilling to strike out conditions in restraint of religion: "It cannot be assumed that conditions attached to will gifts that require the beneficiary to discriminate against persons on the basis of race, creed or nationality are void as contrary to public policy."<sup>126</sup> In contrast, the latest edition is much more circumspect.<sup>127</sup> Having announced that it "seems safe to treat [such] conditions ... as void as contrary to public policy,"<sup>128</sup> the text refers to the provincial statutes mentioned above and to the decision in *Canada Trust*. As regards section 15 of the *Charter*, reference is made to the grant of probate as a state or governmental action, which in turn might prevent the granting of probate of a will that contains a potentially discriminatory bequest or devise.<sup>129</sup>

In sum, there are strong indications that testamentary conditions in restraint of religion are now open to challenge in Canada, as the constitutional guarantee of equality in the *Charter* and anti-discrimination provisions in provincial legislation combine to permeate private law and redefine traditional notions of public policy. While the concept of parity has not eclipsed testamentary freedom, courts have at least shown that they are willing to invalidate religious restraints on this basis, a situation that bodes well for England and Northern Ireland in light of recent developments in both jurisdictions.

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<sup>125</sup> See e.g. the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34, s. 22, which states that covenants purporting to restrict the sale, ownership, occupation, or use of land because of race, creed, or colour are void. Similar provisions are contained in the *Law of Property Act*, R.S.M. 1987, c. L-90, s. 7 and the *Land Title Act*, R.S.B.C. 1996, c. 250, s. 222. Likewise, the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 124, s. 5 prohibits discrimination as regards the purchase or sale of property on account of religion or creed, while the Ontario *Human Rights Code*, *supra* note 100, s. 3 provides that every person having legal capacity has a right to contract on equal terms without discrimination because of, *inter alia*, creed.

<sup>126</sup> Thomas G. Feeney, *The Canadian Law of Wills*, 3d ed., vol. 2 (Toronto: Butterworths, 1987) at 253.

<sup>127</sup> James MacKenzie, ed., *Feeney's Canadian Law of Wills*, 4th ed. (Ontario: Butterworths, 2000).

<sup>128</sup> *Ibid.* at 16.28.

<sup>129</sup> *Ibid.* at 16.29.

#### IV. Is Change Imminent in England and Northern Ireland?

The most likely catalyst for change in England and Northern Ireland is the *European Convention on Human Rights*.<sup>130</sup> Northern Ireland, with its unique history, also has a number of specific statutory measures that might strengthen arguments for voiding testamentary conditions in restraint of religion on public policy grounds.

##### A. Domestic Law and the Incorporation of the ECHR

For fifty years following its inception in November 1950, the *European Convention on Human Rights* influenced the law in the United Kingdom but was not binding on domestic courts: its status was that of an interpretative aid that could, for example, be cited to construe ambiguous legislation. However, any individual wishing to pursue a remedy could only do so at the European Court of Human Rights in Strasbourg.<sup>131</sup> The *Human Rights Act 1998*,<sup>132</sup> which came into effect throughout the United Kingdom on 2 October 2000, incorporates the provisions of the *ECHR* into domestic law, with the result that all courts are now bound to act in accordance with and to uphold *ECHR* values.<sup>133</sup> As with the *Charter*, the enactment of the *HRA* has generated a large volume of scholarly discussion as to the precise impact of the *ECHR* on private law disputes. Subsection 3(1) of the *HRA* stipulates that “primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the [*ECHR*] rights,” which suggests that the *ECHR* applies to all statutes, whether public or private in nature.<sup>134</sup> However, the extent to which it impacts on disputes governed exclusively by the common law is less clear. Subsection 6(1) of the *HRA* makes it unlawful for a “public authority” to act in a manner that is incompatible with an *ECHR* right, while subsection 6(3) specifically includes a “court or tribunal” within this definition.<sup>135</sup> The textual debates that have surrounded this provision have centred on whether the express inclusion of a “court” as a public authority merely requires the courts to apply the *ECHR* in their own sphere, say, in ensuring the right to a fair trial,<sup>136</sup> or whether it introduces a similar principle to that adopted by the United States Supreme Court in the famous case of *Shelley v. Kraemer*.<sup>137</sup> In that case, a private restrictive covenant that discriminated on racial grounds was not itself illegal, but once judicial enforcement of it was sought, the

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<sup>130</sup> *Supra* note 9.

<sup>131</sup> See generally P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d ed. (Boston: Kluwer Law International, 1998).

<sup>132</sup> *Supra* note 11.

<sup>133</sup> For an overview, see D. McGoldrick, “The United Kingdom’s Human Rights Act 1998 in Theory and Practice” (2001) 50 *I.C.L.Q.* 901.

<sup>134</sup> *HRA*, *supra* note 11, s. 3(1). See also Gavin Phillipson, “The Human Rights Act, ‘Horizontal Effect’ and the Common Law: A Bang or a Whimper?” (1999) 62 *Mod. L. Rev.* 824.

<sup>135</sup> *HRA*, *ibid.*, s. 6.

<sup>136</sup> See e.g. Sydney Kentridge, “Lessons from South Africa” in Basil S. Markesinis, ed., *The Impact of the Human Rights Bill on English Law* (Oxford: Oxford University Press, 1998) 25 at 28.

<sup>137</sup> 334 U.S. 1 (1948) [*Shelley*].

discrimination it contained could no longer be described as a “private choice” and would have violated the Fourteenth Amendment to the United States Constitution, which guarantees equal treatment before the law.<sup>138</sup> After all, the status “valid but unenforceable” is not unfamiliar to common law property systems in the form of the trust of imperfect obligation.

Not surprisingly, when the text of the *HRA* itself has generated such divisions of opinion, clarification has been sought from the parliamentary debates that preceded its enactment. During the second reading, Lord Irvine, the Lord Chancellor, seemed to reject emphatically the idea that the *HRA* should apply between private parties: “[Section 6] should apply only to public authorities, however defined, and not to private individuals. ... The [*ECHR*] had its origins in a desire to protect people from the misuse of power by the state, rather than from the actions of private individuals.”<sup>139</sup> However, although Lord Irvine made it clear that the *HRA* did not create private rights, if one looks again at Hansard, one finds the following comments, made in reply to an amendment proposed by Lord Wakeham that would have specifically provided that a court had no duty to act compatibly with the *ECHR* in a case where neither party before it was a public authority:

We ... believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the [*ECHR*] not only in cases involving other public authorities *but also in developing the common law in deciding cases between individuals*. Why should they not? In preparing this Bill, we have taken the view that it is the other course, that of excluding [*ECHR*] considerations altogether from cases between individuals, which would have to be justified. We do not think that that would be justifiable; nor, indeed, do we think it would be practicable.<sup>140</sup>

Thus, the debates do little to resolve the difficulty, although it would seem that the Lord Chancellor clearly envisaged that the *HRA* would have *some* effect on private litigation. No doubt much of this uncertainty will be removed in time as the jurisprudence on section 6 begins to develop. It would be surprising, however, in light both of the express inclusion of the courts<sup>141</sup> and of what Professor Wade has referred to as the “spirit of the act,”<sup>142</sup> if the *HRA* were not to have at least a “spill-over” effect on the development of the common law. Academic opinion has been divided, with

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<sup>138</sup> U.S. Const. amend. XIV. Note that *Shelley* was not about a testamentary condition. There is no US authority directly on testamentary conditions in restraint of race or religion, but while there is no guarantee that the *Shelley* principle would be applied, it is certainly arguable that judicial enforcement of religious and racial conditions in wills also violates the Fourteenth Amendment by analogy with *Shelley*.

<sup>139</sup> U.K., H.L., *Parliamentary Debates*, vol. 582, col. 1227 at cols. 1231-32 (3 November 1997).

<sup>140</sup> U.K., H.L., *Parliamentary Debates*, vol. 583, col. 783 at col. 783 (24 November 1997) [emphasis added].

<sup>141</sup> Murray Hunt argues that the inclusion of the word “court” must be intended “to ensure that all law, other than unavoidably incompatible legislation, is to be subjected to Convention rights” (Murray Hunt, “The ‘Horizontal Effect’ of the Human Rights Act” (1998) P.L. 423 at 440-41).

<sup>142</sup> H. Wade, “Horizons of Horizontability” (2000) 116 Law Q. Rev. 217 at 224.

some commentators suggesting that courts will be obliged to develop legal principles in accordance with the *ECHR* (“direct” horizontal effect).<sup>143</sup> However, the bulk of opinion suggests that the *HRA* will have a less pervasive effect, with judges merely being influenced by *ECHR* rights and values in developing the common law (“indirect” horizontal effect).<sup>144</sup>

### **B. Application of the ECHR to Testamentary Conditions in Restraint of Religion**

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom ... to manifest his religion or belief, in worship, teaching, practice and observance.”

Article 9(1) of the *ECHR*:  
Freedom of thought, conscience and religion.

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 14 of the *ECHR*:  
Prohibition of discrimination.

It has already been noted that when *Blathwayt* was before the House of Lords, Lord Wilberforce acknowledged that the *ECHR* had some relevance to the issue before him, because “conceptions of public policy should move with the times and ... widely accepted treaties ... may point the direction in which such conceptions, as applied by the courts, ought to move.”<sup>145</sup> Yet his Lordship was in no doubt as to how the English courts should resolve any clash between the values protected by the *ECHR* and those prioritized by the common law, for although he was prepared to concede that the forfeiture provision before him was potentially “inconsistent with standards now widely accepted,” he was unprepared to allow this to override another

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<sup>143</sup> See the discussion in Wade, *ibid.*

<sup>144</sup> See Hunt, *supra* note 141, Phillipson, *supra* note 134, and Nicholas Bamforth, “The True ‘Horizontal Effect’ of the Human Rights Act 1998” (2001) 117 Law Q. Rev. 34. For the minority view that the *ECHR* is specifically concerned with relations between an individual and the state and thus has purely “vertical” effect, see Richard Buxton, “The Human Rights Act and Private Law” (2000) 116 Law Q. Rev. 48 and Thomas Raphael, “The Problem of Horizontal Effect” (2000) Eur. H.R.L. Rev. 493.

<sup>145</sup> *Blathwayt*, *supra* note 32 at 426.

policy “firmly rooted in our law”—that of testamentary freedom.<sup>146</sup> Indeed, whenever courts in both England and Northern Ireland have been asked to balance the testator’s right to property against the rights of the beneficiary, they have unashamedly preferred the former. The key question now is whether the incorporation of the *ECHR* into domestic law will persuade the judiciary to shift this balance in favour of the beneficiary and allow his or her interests to take precedence over the policy of testamentary freedom. On the strength of the existing jurisprudence from the Strasbourg organs, it is by no means certain that UK courts will be prepared to regard testamentary conditions in restraint of religion as incompatible with *ECHR* values.

First, it must be remembered that an individual’s right to designate the successors to his or her property, subject to limited state interference,<sup>147</sup> is itself safeguarded by the *ECHR*. Article 1 of Protocol 1 gives a property owner the right to peaceful enjoyment of his or her possessions, free from unjustifiable interference by the state.<sup>148</sup> Secondly, the argument that a condition in restraint of religion infringes a donee’s rights under article 9 of the *ECHR* can be refuted by the element of choice that is inherent in any testamentary condition. This “choice” defence has in the past proved persuasive at Strasbourg in relation to whether an individual has been denied freedom of religion.<sup>149</sup> It would still be legitimate for UK courts to argue, based on these cases, that the artificial nature of the restraint does not actually infringe a beneficiary’s freedom of religion. However, domestic courts are free to develop their own distinct line of jurisprudence under the *ECHR*,<sup>150</sup> while the inherently discriminatory nature of the restriction may hold sway over arguments based on personal choice.

The testator’s right to property, as protected by article 1 of Protocol 1, and the beneficiary’s right to freedom of religion, as enshrined in article 9, are the most pertinent rights when considering the compatibility of conditions in restraint of religion with the *ECHR*. However, the balancing exercise would not be complete without some consideration of the *beneficiary’s* right to property under article 1 of

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<sup>146</sup> *Ibid.*

<sup>147</sup> For example, the family provision jurisdiction.

<sup>148</sup> Art. 1 of Protocol No. 1 to the *ECHR*, *supra* note 9, reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. ...” For a useful overview of this article, see Deborah Rook, *Property Law and Human Rights* (London: Blackstone Press, 2001) c. 4.

<sup>149</sup> See *Knudsen v. Norway* (1986), 8 E.H.R.R. 63 and *Karlsson v. Sweden* (8 September 1988), App. No. 12356/86 (Eur. Ct. H.R.), online: HUDOC Database <<http://cmiskp.echr.coe.int/tkp197/default.htm>>.

<sup>150</sup> It has already been noted that before the *HRA* came into force, an individual asserting the infringement of an *ECHR* right had to pursue his or her case before the European Court of Human Rights in Strasbourg: see text accompanying note 131. The *HRA* states that a UK court or tribunal, when determining a question that has arisen in connection with an *ECHR* right, must “take into account” the pre-existing Strasbourg case law insofar as it is relevant to the current proceedings: *HRA*, *supra* note 11, s. 2(1). However, domestic courts are not obliged to follow these decisions.

Protocol 1 (i.e., the right to inherit property freed from restrictions) and the *testator's* right to freedom of religion under article 9 (i.e., the right to encourage and promote adherence to his or her faith). To date, there is little authority to support either approach. It is particularly unlikely that a court would find an argument based on a breach of the testator's freedom of religion attractive. While there have been several cases concerning burial rights, which acknowledge that the dead may have the right to express their religion,<sup>151</sup> it would be very surprising if a court would be willing to extend this principle beyond the particular context of a very emotive issue. The argument based on the beneficiary's right to property is stronger but is still not compelling. It is well-established that the *ECHR* does not guarantee an individual's right to receive an inheritance (this being a mere *spes successionis* and not an actual interest in property).<sup>152</sup> In this respect, a distinction might usefully be drawn between conditions subsequent and conditions precedent. Breach of the former divests an interest that has already vested (and therefore could be said to interfere with a property interest), whereas when breach of a condition precedent occurs, the gift never vests in the beneficiary. Even in the case of a condition subsequent, however, it is unlikely that a UK court would be persuaded to void a testamentary condition (of any nature) on the ground that it breaches the donee's right to peaceful enjoyment of his or her property.<sup>153</sup> One might attempt to argue that cases such as *Marckx v. Belgium*<sup>154</sup> establish the general principle that when a state chooses to regulate the law of inheritance, it must do so in a nondiscriminatory manner. The discrimination outlawed in *Marckx* was the less favourable treatment of children whose parents were unmarried under Belgian intestacy law. Indeed, all of the *ECHR* cases to date that deal with discrimination in succession matters have involved intestate deaths,<sup>155</sup> and there has been no guidance whatsoever on the principles, if any, that might apply to testamentary succession.

As yet, there has been no post-incorporation litigation directly on the validity of testamentary conditions in restraint of religion in either England or Northern Ireland.<sup>156</sup> Within the last twenty-four months, however, the English High Court has

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<sup>151</sup> See *Re Durrington Cemetery*, [2000] 3 W.L.R. 1322 (Const. Ct.) and *Re Crawley Green Road Cemetery*, [2001] 2 W.L.R. 1175 (Const. Ct.). See also the discussion in Heather Conway, "Dead, but Not Buried: Bodies, Burial and Family Conflicts" (2003) 23 L.S. 423 at 447-48.

<sup>152</sup> See *Marckx v. Belgium* (1979), 31 Eur. Ct. H.R. (Ser. A) 1, 2 E.H.R.R. 330 [*Marckx* cited to E.H.R.R.].

<sup>153</sup> See Gary Watt, "Property Rights and Wrongs: The Frontiers of Forfeiture" in Elizabeth Cooke, ed., *Modern Studies in Property Law*, vol. 1 (Oxford: Hart Publishing, 2001) 115 at 125.

<sup>154</sup> *Supra* note 152.

<sup>155</sup> See *Inze v. Austria* (1987), 126 Eur. Ct. H.R. (Ser. A) 1, 10 E.H.R.R. 394 and *Camp and Bourimi v. Netherlands* (2000), X Eur. Ct. H.R. (Ser. A) 117.

<sup>156</sup> It is worth noting, however, that there is one isolated decision in the Republic of Ireland that suggests that conditions in restraint of religion are void as being unconstitutional. Article 44.2.1. of the Constitution of Ireland, 1937 guarantees freedom of conscience and profession of faith. In the unreported Ireland High Court decision *Re Doyle* (1972), the condition required the donee to be a Roman Catholic at the testator's death and to give an undertaking to her parish priest that she would

handed down a decision that tends to suggest that the judiciary in that country remains as pro-testamentary freedom today as it was in the mid-1970s when *Blathwayt*<sup>157</sup> was before the House of Lords. The case in question, *Nathan v. Leonard*,<sup>158</sup> concerned the validity of a clause in a will that provided that all of the beneficiaries lost their entitlement if any beneficiary challenged the terms of the will. One of the submissions made on behalf of some of the beneficiaries was that this clause was void on the grounds of public policy, because its effect was to deter an applicant from making a claim under the *Inheritance Act 1975*,<sup>159</sup> and that the policy of the law was that reasonable provision should be made for dependants. This type of clause is already regarded as being contrary to public policy in both Canada<sup>160</sup> and Australia.<sup>161</sup> However, John Martin, Q.C., sitting as a deputy judge of the English High Court, refused to follow these Commonwealth authorities on the ground that “mere deterrence” was insufficient to make a condition void as contrary to public policy. The deputy judge highlighted the fact that the condition did not prevent the applicant from making his claim: if he did, he forfeited his interest, but this would be taken into account by the court when deciding whether reasonable financial provision<sup>162</sup> had been made. Pertinent to the subject matter of this paper, the learned deputy judge also referred to the decision of the House of Lords in *Blathwayt*, observing that it “contain[ed] a warning against taking too narrow a view of public policy” and adding, perhaps rather ominously:

I do not think the fact that such conditions may present applicants with difficult choices is an adequate ground for holding them void on public policy grounds ...<sup>163</sup>

*Nathan* is a startling endorsement of testamentary freedom, upholding a clause whereby contented beneficiaries forfeit their entire entitlement under a will simply because another beneficiary decides to pursue a challenge.<sup>164</sup> If this decision is indicative of the prevailing judicial mindset, it is evident that the courts still regard testamentary freedom as a highly revered feature of the English common law. Moreover, it is clear that domestic courts are not afraid to take a different approach from their Commonwealth counterparts. Whether or not they would adopt a similar

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remain one. Justice Kenny held the condition void as being impossible to perform, but added that it was also void as being unconstitutional. However, unlike both Canada and the UK, the Republic of Ireland recognizes an independent cause of action between private parties for breach of certain constitutionally protected rights. It is surprising that such a significant decision has remained unreported.

<sup>157</sup> *Supra* note 32.

<sup>158</sup> [2003] 1 W.L.R. 827 (Ch.) [*Nathan*].

<sup>159</sup> *Supra* note 5. As has been noted, this is the English equivalent to the various dependants’ relief statutes in Canada, such as the *Succession Law Reform Act*, R.S.O. 1990, c. S-26, the *Family Relief Act*, R.S.A. 2000, c. F-5, or the *Wills Variation Act*, R.S.B.C. 1996, c. 490.

<sup>160</sup> See *Re Kent* (1982), 139 D.L.R. (3d) 318, 38 B.C.L.R. 216 (S.C.).

<sup>161</sup> *Re Gaynor*, [1960] V.R. 640 (Vic. S.C.).

<sup>162</sup> Note that the basis for any claim under the *Inheritance Act 1975*, *supra* note 5, is that the deceased failed to make reasonable financial provision for the applicant.

<sup>163</sup> *Nathan*, *supra* note 158 at 833.

<sup>164</sup> The actual clause in *Nathan* was voided on the grounds of uncertainty.

stance in respect of testamentary conditions in restraint of religion, given the burgeoning developments in Canada post-*Charter*, remains to be seen.

Finally, it has been seen that in Canada, the thrust for a more rigorous judicial scrutiny of testamentary conditions in restraint of religion has come from the equality provision of the *Charter*. It has not been necessary, therefore, for the Canadian courts to explore the scope of the *Charter*'s freedom of religion provision. Article 14 of the *ECHR* prohibits discrimination but, unlike its Canadian counterpart, is not free-standing and may only be invoked in conjunction with another *ECHR* right. In the context of the present discussion, the most likely provision is article 9: a disappointed beneficiary may argue discrimination in the curtailing of his or her religious freedom by the terms of the will. While article 14 is parasitic in nature, it would seem that a claimant merely has to show that his or her claim comes within the material scope of a substantive *ECHR* right. There is no need to establish an actual breach of that right.<sup>165</sup> Such an expansive approach to the application of article 14 may work in the beneficiary's favour, since he or she would not have to prove an actual violation of article 9. The mere fact that the condition touched on religious freedoms would suffice, with the consequent emphasis on equality under article 14 bringing it closer to the Canadian position.

### ***C. Religious Overtures and the Northern Ireland Dimension***

Writing in 1943 in defence of testamentary conditions in restraint of religion (and those who insert them), Benas wrote:

[R]estraints of [this] kind are not necessarily attributable to a negative attitude of intolerance but can be envisaged as directly or indirectly a positive urge in favour of limitation to the testator's own fold [and this] is probably one of the main factors which determined the Courts to hold that such provisions were valid as not being contrary to public policy.<sup>166</sup>

The context was an article aimed at the legal profession, instructing its members how to circumvent the "unsatisfactory" outcome in *Clayton*<sup>167</sup> and the description of a "positive urge" may well then have been appropriate to clauses inserted by a Jewish minority to prevent their children "marrying out". As regards Northern Ireland, however, it is clear that a good number of the conditions which we encountered were unquestionably inserted out of the very negative urges of blatant bigotry and sectarianism and involve a "discrimination which goes beyond an attempt to impose a particular form of ideology on another person."<sup>168</sup> Moreover, our research confirmed

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<sup>165</sup> See *Belgian Linguistic (No. 2)* (1968), 6 Eur. Ct. H.R. (Ser. A) 1, 1 E.H.R.R. 252; *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985), 94 Eur. Ct. H.R. (Ser. A) 1, 7 E.H.R.R. 471.

<sup>166</sup> Bertram B. Benas, "Conditions in Restraint of Religion" (1943) 8 *The Conveyancer and Property Lawyer* 6 at 10.

<sup>167</sup> *Supra* note 37.

<sup>168</sup> Andrew Lyall, *Land Law in Ireland* (Dublin: Oaktree Press, 1994) at 189, commenting on the condition in *Knox*, *supra* note 29.

something we had already suspected from reading the reported caselaw:<sup>169</sup> testamentary conditions in restraint of religion (whether related to the religious affiliation of the donee or tied to the alienation of land, marriage, or the upbringing of children) have almost invariably been inserted by Protestant testators. Of the conditions found in wills proved in Northern Ireland in 1937, 1967, and 1997, only a solitary example came from the will of a Catholic testator.<sup>170</sup> While one would expect a higher incidence of will making (and consequently testamentary conditions) among the wealthier Protestant community, this fact alone should not account for such a dearth of conditions in restraint of religion among the Catholic community. Protestants have historically owned more land in Northern Ireland, yet there have always been a number of Catholic-owned small holdings, especially in the west of the jurisdiction. There is clearly something in the psyche of the typical Ulster Protestant, particularly that of the Ulster Protestant farmer,<sup>171</sup> that prompts this urge to ensure that land does not fall under the control of members of the other religious community. This so-called “siege mentality” has been well-documented elsewhere,<sup>172</sup> and there can be few places in which land ownership has a greater political significance than in Northern Ireland.

Religious tensions have permeated all aspects of life in Northern Ireland. In contrast to England, where there are still no statutory provisions outlawing discrimination on grounds of religion, Northern Ireland has had anti-discrimination legislation (primarily relating to employment) for some years.<sup>173</sup> However, the current political climate and continuing peace process have resulted in the recent enactment of more extensive provisions. Under the terms of the Good Friday Agreement of April 1998, equality and human rights discourses assumed a central role in the new constitutional settlement for Northern Ireland.<sup>174</sup> It affirmed the commitment of the political parties to the civil rights and religious liberties of everyone in the community,

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<sup>169</sup> See e.g. *McCausland I*, *supra* note 32 and *McKenna*, *supra* note 62.

<sup>170</sup> See Dawson, Grattan & Lundy, *supra* note 8. These were the three sample years chosen for an unrelated research project exploring charitable giving in wills. While some thirty religious conditions were found in the course of the research, this figure is not exhaustive since the project was addressing other issues. However, it is still a significant number for such a small jurisdiction.

<sup>171</sup> Most of the conditions in restraint of religion were found in the wills of rural testators.

<sup>172</sup> See generally Pamela Clayton, *Enemies and Passing Friends: Settler Ideologies in Twentieth Century Ulster* (London: Pluto Press, 1996) and John D. Brewer & Gareth I. Higgins, *Anti-Catholicism in Northern Ireland, 1600-1998: The Mote and the Beam* (Basingstoke: Macmillan Press, 1998).

<sup>173</sup> The original legislation was the *Fair Employment (Northern Ireland) Act 1976* (U.K.), 1976, c. 25, which prohibited discrimination on grounds of religion or political opinion by *all* employers, and not just public authorities in Northern Ireland.

<sup>174</sup> The Good Friday Agreement (alternatively referred to as the Belfast Agreement) was signed on 18 April 1998 following months of delicate multi-party political negotiations, and was passed by the people of Northern Ireland and the Republic of Ireland in separate referenda held in May 1998. As to the formation, composition, and effect of the Good Friday Agreement, see the special issue of the *Fordham International Law Journal* entitled “Analysis of the Northern Ireland Peace Agreement” ((1999) 22:4 *Fordham Int'l L.J.*) and Colin J. Harvey, ed., *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford: Hart Publishing, 2001) c. 2.

with reference to the right to freedom and expression of religion and the right to equal opportunity in all social and economic activity as basic human rights, and to the need for promoting social inclusion as part of a broad spectrum of social, economic, and cultural issues.<sup>175</sup> One of the key pieces of legislation in the quest for a post-Good Friday Agreement mainstream equality agenda was the *Northern Ireland Act 1998*.<sup>176</sup> For present purposes, the main provisions of the *1998 Act* are sections 75 and 76. Section 75 imposes a statutory duty on public authorities to promote equality:

(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—

(a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;

...

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.<sup>177</sup>

Discrimination by public authorities is dealt with under section 76, which provides:

(1) It shall be unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion.<sup>178</sup>

Public authorities now have a statutory obligation to ensure that their various functions are carried out with due regard to promoting equality. It appears that Northern Ireland judges have been reluctant to make judicial decisions amenable to equality discourses to date.<sup>179</sup> In contrast to section 6 of the *HRA*,<sup>180</sup> the definition of a “public authority” for the purposes of the *1998 Act* does not expressly include a court. The extent to which the Northern Irish judiciary will allow the spirit of sections 75 and 76 to develop the common law in disputes between private individuals must be a matter of speculation, but there is a strong possibility that this legislative trend will precipitate a change in the courts’ policy to the validity of religious restraints in wills. The fact that statistically such conditions operate disproportionately against the

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<sup>175</sup> Good Friday Agreement, *ibid.*, under the heading “Rights, Safeguards and Equality of Opportunity.”

<sup>176</sup> *Northern Ireland Act 1998* (U.K.), 1998, c. 47 [*1998 Act*]. For an excellent overview, see Christopher McCrudden, “Equality” in Harvey, *supra* note 174 at 75.

<sup>177</sup> *1998 Act, ibid.*, s. 75.

<sup>178</sup> *Ibid.*, s. 76.

<sup>179</sup> For example, while the Northern Ireland Court Service now compiles statistics on employment and the religious affiliation of its employees, it has refused to collect information about the religious affiliation of parties before the courts in civil or criminal proceedings.

<sup>180</sup> See text accompanying note 135.

Catholic community may be the ultimate factor in persuading the judiciary that they should be struck down.

Another central piece of legislation in the pursuit of a post-conflict equality framework in Northern Ireland is the *Fair Employment and Treatment (Northern Ireland) Order 1998*.<sup>181</sup> While the primary aim of the *1998 Order* was to consolidate and extend the country's unique fair employment laws, it also prohibits unlawful discrimination in the provision of goods, facilities, and services, and in the management and disposal of premises. Article 29 makes it unlawful for a person to discriminate against another on grounds of religious belief or political opinion when selling land.<sup>182</sup> While this impacts particularly on the restraint of alienation to persons of a particular religious denomination, it is worth noting that devises (and *inter vivos* gifts) are outside its remit. Moreover, article 29 preserves an element of the public/private divide by expressly excluding "private" sales (namely, those that are not effected through an estate agent or that have not been advertised).<sup>183</sup> Even if a particular transaction falls within the scope of article 29, there is nothing to stop a vendor rejecting a bid from a purchaser who is perceived to be of a particular religious persuasion, since the vendor is not required to explain why he or she prefers one offer on his or her property to another. If, however, sales of land do become subject to scrutiny under article 29, this might also influence judicial attitudes toward testamentary conditions in restraint of religion in Northern Ireland on the basis that the legislative provision is an indicator of current public policy.

Finally, the most potent means of challenging religious restraints may yet emerge under the proposed Bill of Rights for Northern Ireland, as envisaged under the terms of the Good Friday Agreement.<sup>184</sup> Section 3 of the most recent *Draft Bill* safeguards identity and community rights and stipulates that the law of Northern Ireland "shall ensure just and equal treatment for the identities, ethos and aspirations of both main communities."<sup>185</sup> The equality agenda then manifests itself once again in section 4,

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<sup>181</sup> *Supra* note 24.

<sup>182</sup> *Ibid.*, para. 29(1).

<sup>183</sup> *Ibid.*, para. 29(2).

<sup>184</sup> The Northern Ireland Human Rights Commission was established by the *1998 Act*, and is required by the legislation to define a Bill of Rights for Northern Ireland in accordance with the Good Friday Agreement, which states that the Bill should reflect the particular circumstances of Northern Ireland, drawing on international standards but with rights reflecting the principles of mutual respect for the identity and ethos of both religious communities and parity of esteem. Progress on the Bill has been somewhat slow to date, with the consultation process on the most recent draft bill ending in April 2004. For information about the various stages in the process, see Northern Ireland Human Rights Commission, online: <<http://www.nihrc.org>>. The text of the latest draft bill is found in Northern Ireland Human Rights Commission, *Progressing A Bill of Rights for Northern Ireland: An Update* (Belfast: Northern Ireland Human Rights Commission, 2004) at 93, online: Northern Ireland Human Rights Commission <[http://www.nihrc.org/documents/pubs/bor/BOR\\_Progress\\_Report\\_Apr04.pdf](http://www.nihrc.org/documents/pubs/bor/BOR_Progress_Report_Apr04.pdf)> [*Draft Bill*].

<sup>185</sup> *Draft Bill, ibid.*, s. 3(2).

which begins with the basic affirmation that “[e]veryone is equal before and under the law and has the right to equal protection and equal benefit of the law” and continues:

- (3) Everyone has the right to be protected against any direct or indirect discrimination whatsoever on any ground (or combination of grounds) such as ... religion or belief, ... property ...<sup>186</sup>

Unlike article 14 of the *European Convention on Human Rights*, section 4 is a free-standing equality provision that protects against discrimination per se. The specific references to religion and property could conceivably allow a disgruntled beneficiary to attack the validity of a religious restraint on these grounds, while the notion of indirect discrimination might negate the counter-argument that the ultimate choice lies with the beneficiary. The practical effect of the condition is that it impacts on persons of a specified religion. However, the most significant feature of the *Draft Bill* for present purposes is its direct application to the private sphere. Subsection 1(3) states:

A court, tribunal or other body, when interpreting any legislation or when developing the common law, must, so far as it is possible to do so, read and give effect to the legislation or common law in a way which is compatible with the rights contained in this Bill of Rights.<sup>187</sup>

Unlike the Canadian *Charter* and the *ECHR*, or indeed the *1998 Act* itself, the proposed Bill of Rights is not dependent on judicial receptiveness to channelling public law concepts into the private domain by way of a “spill-over” effect. The Bill of Rights is intended to affect all relationships in Northern Ireland, including those between private individuals.

While these new measures have yet to prove their effectiveness, they may ultimately sound the death knell for testamentary conditions in restraint of religion in Northern Ireland. There certainly appears to be more armoury for attacking them than in any other comparable jurisdiction. The need for judges to be amenable to equality and anti-discrimination discourses is fundamental to the successful implementation of the post-Good Friday Agreement framework. In light of this groundswell, it may be difficult for the Northern Ireland judiciary to withstand the turning of the tide of testamentary freedom.

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<sup>186</sup> *Ibid.*, s. 4.

<sup>187</sup> *Ibid.*, s. 1(3).

## V. Testamentary Freedom, Religious Restraints, and the Changing Concept of Public Policy

“[T]estamentary freedom can remain the basic principle of the law on inheritance only so long as most people exercise that freedom in ways which are consistent with the public interest, however defined.”

Janet Finch *et al.*, *Wills, Inheritance and Families*.<sup>188</sup>

In *Pepsi-Cola*, the Supreme Court of Canada remarked that “the common law does not exist in a vacuum,” but “reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future.”<sup>189</sup> Such concerns and sensitivities are replicated in the doctrine of public policy. The fact that judges on both sides of the Atlantic must now develop the common law in accordance with the rights enshrined in the *Charter* and in the *ECHR* introduces a new range of societal ideals into this doctrine. In the context of testamentary conditions in restraint of religion, the fundamental guarantee of equality (and possibly also freedom of religion) may be harnessed to strike out these restrictions on public policy grounds. However, such constitutional norms must be reconciled with another central tenet of the common law: respect for private property rights and freedom of testation. How do we square this with notions of equal treatment for all citizens, irrespective of religious belief?

Testamentary freedom has been described as a “traditional and fundamental aspect of the right of property.”<sup>190</sup> Indeed, probably the most substantial argument for testamentary freedom is that it is a logical extension of an owner’s freedom to deal with his or her property while alive.<sup>191</sup> One might then argue that courts should tolerate attempts by will makers to control the lifestyle choices of a beneficiary by attaching religious conditions to certain bequests as a natural incident of freedom of testation.<sup>192</sup> This was certainly the case throughout the formative period of the common law: testamentary freedom was paramount, with judges championing the

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<sup>188</sup> (Oxford: Clarendon Press, 1996) at 23.

<sup>189</sup> *Pepsi-Cola*, *supra* note 92 at 167.

<sup>190</sup> *Marckx*, *supra* note 152 at para. 63.

<sup>191</sup> See Hugo Grotius, *The Jurisprudence of Holland*, 2nd ed. (Aalen: Scientia, 1977) vol. 2 at para. II.xiv.1; John Stuart Mill, *Principles of Political Economy* (Oxford: Oxford University Press, 1999) book 2, c. 2 at para. 4. A number of other arguments have been advanced. It has been argued that testamentary freedom is an incentive to industry, as it promotes the accumulation of wealth by testators and encourages self-reliance in their children, who are not guaranteed an inheritance. See generally James Morton Jr., “The Theory of Inheritance” (1894-1895) 8 *Harv. L. Rev.* 161. Today, the most compelling argument in favour of testamentary freedom is probably the fact that it has a greater likelihood of delivering justice in inheritance matters to a post-modern multicultural society in which there is no longer a consensus of social mores. See generally Finch *et al.*, *supra* note 188.

<sup>192</sup> See J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996) at 254.

unbridled right of testators to dispose of their property as they saw fit. However, the upholding of religious restraints does not reflect the norms and ideals of modern society as enshrined in the *Charter* and the *ECHR*. Public policy has traditionally been described as a tool that should only be used where the harm to the community is “substantially incontestable”.<sup>193</sup> The inherently discriminatory nature of conditions in restraint of religion abuses not only freedom of religion, but more importantly the core value of equality, which brings it firmly within the realms of public policy. All donative transfers are inherently discriminatory as will makers choose the objects of their bounty. Yet, in the case of testamentary conditions in restraint of religion, the discrimination goes a step further, since the gift is grounded in the belief that a class of individuals should be treated as inferior because of their religious background. Likewise, it is irrelevant whether testators are propagating their own beliefs or simply perpetuating individual prejudices, since the outcome is the same in each case: the beneficiary is required to act, not according to the dictates of his or her own conscience, but in accordance with the religious convictions of the testator. The fact that the beneficiary ultimately has the choice to accept the restriction or disclaim the gift is also of no consequence. While Lord Wilberforce in *Blathwayt* may have been swayed by this particular rationale for leaving as much power as possible in the hands of the testator,<sup>194</sup> the argument that choice negates public policy concerns prompts the simple riposte that it is bad public policy to accept discrimination at all.

It is noteworthy that in the twenty years that have passed since the enactment of the *Charter, Murley*<sup>195</sup> is the sole reported decision that deals directly with the validity of testamentary conditions in restraint of religion. One hopes that one explanation for the dearth of litigation is the fact that such clauses are becoming rarer, as lawyers are more wary of mechanically replicating their clients’ instructions, on the basis that courts may no longer be amenable to constraining beneficiaries’ choices should the offending restriction be challenged.<sup>196</sup> Research indicates that the incidence of such conditions in Northern Ireland decreased dramatically in the wills proved in 1997, when compared to those proved thirty years before.<sup>197</sup> It is likely that the *ECHR* and anti-discrimination legislation will accelerate this trend. This development is welcome, but unfortunately it remains the case that too many religious restraints are being inserted by Northern Ireland testators. Those who seek to uphold such conditions may argue for the sanctity of testamentary freedom and the fact that the restriction is operating exclusively in the non-public sphere. Yet where testamentary

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<sup>193</sup> *Fender v. St John-Mildmay* (1937), [1938] A.C. 1 at 12, [1937] 3 All E.R. 402 (H.L.), Lord Atkin, applied in *Re Millar Estate*, [1938] S.C.R. 1, 1 D.L.R. 65.

<sup>194</sup> *Supra* note 32 at 426.

<sup>195</sup> *Supra* note 93.

<sup>196</sup> Lawyers who draft wills that result in litigation risk being responsible for the legal cost of the challenge. See generally M. Frost and P. Reed, *With the Best Will in the World: Negligence in Will Preparation*, 2d ed. (London: Legalese, 2002). This book deals with authorities from throughout the Commonwealth.

<sup>197</sup> See Dawson, Grattan & Lundy, *supra* note 8.

freedom is being harnessed to promote religious intolerance, we would argue that the traditionally privileged status of the private domain can no longer be justified.

## Conclusion

“The welfare of society demands that the law should set limits to the power of the hand of the dead to control human affairs.”

Austin Wakeman Scott, “Control of Property by the Dead”.<sup>198</sup>

It is trite law that “public policy cannot remain immutable ... [and] must change with the passage of time.”<sup>199</sup> Yet, equally, every lawyer knows that public policy is:

“a very unruly horse”; it is also “a treacherous ground for legal decision”; “a very unstable and dangerous foundation on which to build until made safe by decision”; “slippery ground”; “a vague and unsatisfactory term and calculated to lead to uncertainty and error when applied to the decision of legal rights”; and much else.<sup>200</sup>

While it is prudent that the malleable concept of “public policy” is not changed lightly (especially in the realms of property law where the virtue of certainty is particularly valued), it is surely clear that the policies applied by courts in the case law discussed in Parts I and II of this article no longer reflect prevailing attitudes and values. There are now broader issues surrounding the interface between constitutional norms and private law, and the extent to which the rich rhetoric of the former have impacted on the traditional conservatism of the latter. Canadian courts have been receptive to change in the wake of the *Charter*, with the right to equal treatment for all citizens trumping discriminatory or offensive clauses in private documents. At present, it is unclear what impact the newly incorporated *European Convention on Human Rights* will have on testamentary conditions in restraint of religion in England and Northern Ireland. It is hoped, however, that courts will be persuaded that in any civilized society, discrimination, even when confined to private affairs, is contrary to the fundamental ideals of human dignity and equality. Of course, this is particularly so where the society in question has been torn apart by thirty years of sectarian violence and is currently in the midst of a conflict resolution process. There exists enough religious prejudice in Northern Ireland, without the law condoning its perpetuation from beyond the grave. Few—especially those who have experience in the jurisdiction—are naive enough to believe that striking out these clauses will of itself precipitate the necessary change in the attitudes or behaviour of property owners, let alone eradicate the ingrained religious intolerance that exists in some members of society. It has long been accepted that, where restrictions are placed on testamentary

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<sup>198</sup> (1916-1917) 65 U. Pa. L. Rev. 527 at 527.

<sup>199</sup> *Nagle*, *supra* note 116 at 696, Danckwerts L.J.

<sup>200</sup> *Church Property Trustees, Diocese of Newcastle v. Ebbeck* (1960), 104 C.L.R. 394 at 415 (H.C.A.), Windeyer J. [footnotes omitted].

freedom, property owners will find a way to circumvent the limitations. As William Godwin opined over two hundred years ago:

To attempt ... to take the disposal out of their hands, at the period of their decease, would be an abortive and pernicious project ... If we prevented them from bestowing it in the open and explicit mode of bequest, we could not prevent them from transferring it before the close of their lives, and we should open a door to vexatious and perpetual litigation.<sup>201</sup>

A testator minded to ensure that his or her property does not end up under the control of a beneficiary of a particular religious persuasion can, of course, simply make an *inter vivos* gift to someone else, without any fear of future challenge.<sup>202</sup>

We would argue, however, that voiding testamentary conditions in restraint of religion would serve as a useful preliminary step toward the necessary transformation of minds. Commenting some fifty years ago on the decision in *Noble*<sup>203</sup> that the law could not force a change in societal attitudes by striking out a discriminatory covenant on a contract for the sale of land, David Smout remarked:

[It] is readily conceded that one cannot legislate tolerance, but, with respect, surely there is nothing worthless in legislating against certain intolerant practices. ... The courts did not wait for education to convince the gamblers of the moral impropriety of gambling, but meanwhile held the wagering contract unenforceable. There would seem no reason why the courts should wait for the intolerant to become tolerant before holding the discrimination covenant to be also unenforceable.<sup>204</sup>

The same arguments apply to testamentary conditions in restraint of religion when judged against the rigorous standards of modern society. It has been said that “[m]aking a will is an exercise of power without responsibility.”<sup>205</sup> Yet the freedom accorded to a property owner in respect of testamentary dispositions has always been circumscribed by the imposition of certain obligations, integral to which is a moral responsibility. The classic enunciation of this principle remains the judgment of Chief Justice Cockburn in the context of the threshold of the mental capacity required for a sound disposing mind in the nineteenth-century case of *Banks v. Goodfellow*:

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<sup>201</sup> William Godwin, *Enquiry concerning Political Justice* (London: n.p., 1793), cited in Adam J. Hirsch and William K.S. Wang, “A Qualitative Theory of the Dead Hand” (1992) 68 *Ind. L.J.* 1 at 11.

<sup>202</sup> A more imaginative method employed by one testator in Northern Ireland and that has come to the attention of the authors was to leave his property to one son for life, but to the other four in remainder. In the course of the ensuing family dispute, it came to light that the testator’s motivation in ensuring that the first son did not have a capital interest to pass on was that he had married a wife of the Catholic faith. Acting purely out of spite, the first son sold the land as was his right as life tenant under the relevant legislation (*Settled Land Act, 1882* (U.K.), 45 & 46 *Vict.*, c. 38, s. 3), thus preventing his brothers from inheriting it on his death. The four brothers were confined to the proceeds of sale.

<sup>203</sup> *Supra* note 121.

<sup>204</sup> Smout, *supra* note 22 at 872.

<sup>205</sup> M. Meston, “The Power of the Will” [1982-1983] *Juridical Rev.* 172 at 173.

The law of every civilised people concedes to the owner of property the right of determining by his last will ... to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given.<sup>206</sup>

Finally, it should be remembered that while the discussion here has been confined to one illustration of undesirable posthumous control, it forms part of a much broader debate about how the law of succession should most appropriately balance the potentially conflicting interests that may exist between a deceased individual, his or her family, and society itself. The development and extension of the dependants' relief and family provision jurisdictions in the second half of the last century has seen the emphasis shift from the individualism that undergirded the law of succession for generations, to better protection of the interests of the surviving family and dependants.<sup>207</sup> It is submitted that the succession law as exemplified by the conditions under discussion in this paper is still unjustifiably weighted toward the individualistic interests of the dead, and it is time that the balance be redressed to better serve the interests of the living members of wider society. To quote Professor Rheinstein:

In no branch of our law has its individualistic character been more strikingly exhibited than in that relating to testamentary disposition. ... [I]f in an uncontrolled right of private ownership there lurk many dangers threatening the welfare of society, much more do such dangers lurk in an uncontrolled power of testamentary disposition. It is bad enough when the power conferred by the possession of property is exercised by a living man who is wicked or foolish; it is worse if it is exercised by the wicked or foolish dead; the living are at least open to the influence of the world about them; the dead are beyond our reach.<sup>208</sup>

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<sup>206</sup> (1870), L.R. 5 Q.B. 549 at 563.

<sup>207</sup> Due to constraints of space, the interplay between these family protection statutes and testamentary conditions has not been discussed in this paper. However, it is worth bearing in mind that a court may use its powers under this legislation to delete conditions, including those in restraint of religion. The only direct Commonwealth authority on this issue appears to be *Re Gunn*, [1912] N.Z.L.R. 153 (S.C.). For a similar principle, see *Re Lawther Estate* (1947), 55 Man. R. 142, [1947] 2 D.L.R. 510 (K.B.).

<sup>208</sup> Max Rheinstein, *The Law of Decedents' Estates*, 2d ed. (Indianapolis: Bobbs-Merrill, 1954) at 124-25.