File Number:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEW BRUNSWICK)

BETWEEN:

THE CANADIAN ASSOCIATION FOR FREE EXPRESSION (INTERVENOR)

Applicant
(Appellant in Court of Appeal)

- and –

FRED GENE STREED, EXECUTOR OF THE ESTATE OF HARRY ROBERT MCCORKILL (A.K.A. MCCORKELL), DECEASED (RESPONDENT), ISABELLE ROSE MCCORKILL (APPLICANT), LEAGUE FOR HUMAN RIGHTS OF B'NAI BRITH CANADA (INTERVENOR), CENTRE FOR ISRAEL AND JEWISH AFFAIRS (INTERVENOR), AND THE PROVINCE OF NEW BRUNSWICK, AS REPRESENTED BY THE ATTORNEY GENERAL (INTERVENOR)

Respondent
(Respondents in Court of Appeal)

MEMORANDUM OF ARGUMENT
(THE CANADIAN ASSOCIATION FOR FREE EXPRESSION, APPLICANT)

Section 40 of the *Supreme Court Act* and
Rule 25 of the *Rules of the Supreme Court of Canada*

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PART I – CONCISE OVERVIEW OF POSITION WITH RESPECT TO ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

1. Robert McCorkill executed his final will and testament on April 19, 2000.

2. The residue clause of this will states:

   RESIDUE

   (b) My Trustee shall pay or transfer the residue of my estate (sometimes referred to as "my residuary estate") to the NATIONAL ALLIANCE, a Virginia corporation, with principal offices at Post Office Box 90, Hillsboro, West Virginia 24946, United States of America.

3. Mr. McCorkill passed away on February 20, 2004 and his will was probated on May 14, 2013.

4. Shortly after probate, Mr. McCorkill's sister filed an Application challenging the gift contained in the residue clause on the ground that the residue clause was contrary to public policy.

5. The Centre for Israel and Jewish Affairs, Province of New Brunswick, League for Human Rights of B'Nai Brith Canada and the Canadian Association for Free Expression all applied for, and obtained, intervenor status during July and August of 2013.

6. The National Alliance was not a party in the Application process.

7. The Application Record contained 858 pages including seventeen (17) affidavits attaching numerous exhibits, the vast majority of which was focused on the National Alliance and what type of organization it was.

8. In a decision dated June 5, 2014, the Application Judge found at paragraph 90 of his decision, as follows:

> the purposes of the National Alliance and the activities and communications which it undertakes to promote its purposes are both illegal in Canada and contrary to the public policy of both Canada and New Brunswick. Consequently, I declare the residual bequest to it in the will of Harry Robert McCorkill to be void.

9. This rationale is ground-breaking in Canada where the beneficiary's purpose for existence and its activities and communications are considered in declaring a bequest to be void even if those activities and communications are not related to the gift itself.

10. The New Brunswick Court of Appeal succinctly dismissed the appeal as follows:

> The application judge invalidated a residual bequest to the beneficiary, National Alliance. He made this determination on the basis that the purposes of the National Alliance, and the activities and communications it undertakes to promote its purposes, are illegal and contrary to the public policy of Canada and New Brunswick. The decision is reported at *McCorkill v. McCorkill Estate*, 2014 NBQB 148 (CanLII), 424 N.B.R. (2d) 21. Having regard to the application judge's comprehensive reasons and his determination that the bequest was void as against public policy, we can find no justification to interfere. We are in substantial agreement with the essential features of the carefully considered reasons of the application judge.

Canadian Association for Free Expression v. Streed et al., 2015 NBCA 50

11. The decision of the Application Judge, including the analysis and rationale contained therein, represents the current state of the Common Law in New Brunswick.

PART II – QUESTIONS IN ISSUE

12. This application raises the issue of whether an unconditional bequest can be voided based upon the intended beneficiary's "raison d'être" being against public policy.

PART III – STATEMENT OF ARGUMENT

13. It is submitted that this appeal raises significant issues of public policy and national importance that warrant this Court's consideration. This Court has never considered whether Canadian Courts should evaluate the worthiness of beneficiaries in order to confirm or invalidate testamentary bequests.

14. This Court has refused to hear an appeal raising similar questions in *Bolianatz Estate v. Simon*, 2006 SKCA 16 (CanLII), 2006 SKCA 16, 264 D.L.R. (4th) 58, (leave to appeal refused [2006] S.C.C.A. No. 222).

15. The New Brunswick Court of Appeal has rendered a decision contrary to the principles enunciated in *Bolianatz*, supra. This Court now has the opportunity to clarify Canadian Common Law as to exactly which circumstances unconditional bequests can be voided under Canadian Common Law.

Significant Shift in Common Law

16. This case shifts the Court's focus when considering a testamentary bequest from the wording of the will and the intentions of the testator to the beneficiary's character, including its activities and communications.

17. The unavoidable ramifications of the McCorkill decision are an important consideration for estate law across our country.

18. This decision has created the first Canadian precedent where Courts can interfere with a testator's choice of beneficiary and substitute its own view as to the worthiness of an intended beneficiary. The New Brunswick Court of Appeal gave no weight to the long-standing freedom of testators to dispose of their property to whomever they

desire. It is respectfully submitted that this freedom should have been given significant weight and that it should not have been interfered with.

19. Provincial legislation across Canada does not prohibit gifts such as the residue clause in Mr. McCorkill's will and the Common Law generally did not interfere with unconditional gifts.

20. The practice of estate lawyers in Canada had always been to strongly caution testators with respect to inserting certain conditions in wills. Many conditions attached to gifts have caused the gifts to be voided for a multitude of reasons including public policy.

Wishart Estate, Re, 1992 CanLII 2679 (NB QB)

21. However, unconditional gifts have been upheld for over a century regardless of the character or actions of the intended beneficiary, except in extremely narrow circumstances that were directly related to the gift such as when the intended beneficiary killed the testator.

22. Never before have testators and estate lawyers been tasked with considering the worthiness of beneficiaries; whether under the guise of public policy or for any other reason before electing to leave someone a gift. If a testator wished to make an unconditional bequest to a legal entity, Canadian estate lawyers could be confident that, based upon long-standing Canadian Common Law, the unconditional bequest would be upheld by Canadian Courts if properly worded. This was true in all provinces of Canada and this certainty and predictability was essential in estate planning.

23. In 2006, the Saskatchewan Court of Appeal evaluated and summarized the state of the Common Law in Canada in the case of *Bolianatz, supra.* Although based upon different fact circumstances, it dealt with many of the same legal issues as the within matter.

24. In that case, one of the intended beneficiaries named Simon had been stealing money from the testator prior to the testator's death unbeknownst to the testator. A brother of the testator, acting as administrator of the estate, who was also an intended beneficiary, brought an application to have Simon disentitled from receiving any legacy from the estate.

25. Justice Lane summarized the issue in dispute at paragraph 16 of the majority decision as follows:

> ...whether an individual named as executor (and by implication this individual is thus considered by the testator to be honest and trustworthy) can be denied a bequest in his capacity as a legatee when he is shown to have been dishonest and such dishonesty was not known to the testator.

26. Justice Lane's most salient conclusions can be found at paragraph 29 of his reasons:

> In my view it was open to the Chambers judge to draw, had she chosen to do so, an inference Mr. Simon was named as *executor* because the Testator had confidence in him and believed him to be trustworthy. But I see no basis for drawing an inference he intended to make Mr. Simon a *legatee* because Mr. Simon was honest and trustworthy. In other words one may be able to draw a link between the attributes of honesty and trustworthiness to the position of *executor*, but I see no basis for drawing a link between those attributes and the position of *legatee*.

27. Justice Richards, for his part, put the issue before the Court as follows at paragraph 56:

> ... Perhaps put more accurately, the real question is whether the Court should take the position that immoral or illegal conduct by a beneficiary, not directly connected to the making of a bequest, can defeat that bequest

28. In his analysis, Justice Richards summarized over 100 years of Common Law at paragraphs 57 and 58:

> 57. In answering this question, it is helpful to consider the broader pattern of the law in this field. In that regard, the authorities appear to have recognized only a limited number of very particular situations where the conduct of a beneficiary, in and of itself, will invalidate an inheritance. The first of these is where the beneficiary perpetrates a fraud on the testator and obtains the legacy by virtue of that fraud. See: *Kennell v. Abbott*, 31 E.R. 416. The second is where the testator is coerced by the beneficiary into a bequest he or she does not want to make. See: *Hall v. Hall* (1868), L.R. 1 P. & D. 481; J. Martyn et al., *Theobald on Wills*, 16th ed. (London: Sweet & Maxwell, 2001) at 3-27. The third is where the beneficiary kills the testator. In such circumstances he or she is debarred from taking under the will or intestacy of the victim. See: *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; *In the Estate of Hall v. Knight and Baxter,* [1914] P. 1.
>
> 58. Aside from such exceptions, the general orientation of the law is very much against involving the Courts in superintending the question of whether particular beneficiaries merit their inheritances. Bequests are not denied because a beneficiary is of bad character, has behaved immorally or has been involved in criminal activity

29. These conclusions were confirmed in *Coffey (Estate) v. Coffey*, 2014 BCSC 110 (CanLII) and therefore represented the state of the law in Canada immediately prior to the McCorkill decision. Interestingly, the decision in *Coffey, supra*, was rendered on January 24, 2014; just two days before the Application was heard in the McCorkill case.

30. The Application Judge's decision in McCorkill substantially altered the Common Law by examining the beneficiary's morals in detail and voiding the bequest solely based on the character and actions of the beneficiary even though those actions were not directly related to creating or obtaining the gift itself.

31. The result is a new test whereby the "raison d'être" of beneficiaries is central to determine if the beneficiary is worthy of receiving the gift. With respect, this test will be very difficult to predict for Canadian estate lawyers and to apply uniformly by

Canadian Courts. It is also in stark contrast to the law under *Bolianatz, supra* and *Coffey, supra.*

32. The Application Judge attempted to limit the future application of the detailed examination process of intended beneficiaries at paragraph 74 of the Application Decision by ruling that it was only to occur for corporations and not individuals.

> [74] The facts of this case can be distinguished from most other cases because in most cases, a beneficiary of an estate does not "stand for" something identifiable. They don't have foundational documents. A drug dealer does not "stand for" dealing drugs. He or she may have a criminal record of doing that but that does not mean that that is what they stand for. Their crimes are not the purpose for which they exist, their *raison d'être*.

33. It is submitted with respect, the above distinction is artificial in this context and will likely be quickly erased in future court decisions across Canada. One early example occurred in *Spence v. BMO Trust Company*, 2015 ONSC 615 (CanLII) where the Court heard extensive evidence with respect to the reasons for which the testator failed to make a bequest to his adult daughter. The Court cited the McCorkill decision with extensive analysis and stated at paragraph 44 as follows:

> [44] While it is true that the relevant paragraph in the deceased's will does not, on its face, offend public policy I find that, like *McCorkill,* the matter bears further scrutiny...

34. The Court ultimately invalidated the will and found at paragraph 49:

> Were it not for the unchallenged evidence of Ms. Parchment and Verolin, the court would have no alternative but to go no further than the wording in the will. However, it is clear and uncontradicted, in my view, that the reason for disinheriting Verolin, as articulated by the deceased, was one based on a clearly stated racist principle. Does it offend public policy that the deceased's other daughter, Donna, should receive the entire estate simply because her children were fathered by a black man? That, in

> my view, offends not only human sensibilities but also public policy.

35. This decision is currently being appealed to the Ontario Court of Appeal but represents the current dichotomy in Canadian Common Law.

If the McCorkill Decision is Permitted to Stand

36. The beneficiary evaluation process of intended beneficiaries proposed by the New Brunswick Court of Appeal decision, as well as the Application Judge's decision before it, in addition to frustrating the freedom of testators, also creates numerous negative impacts on estate law.

37. In *Bolianatz, supra*, Justice Richards addressed the potential difficulties with deciding if a beneficiary was worthy of receiving a bequest. At paragraphs 39 and 44 of his concurring reasons, he states as follows:

> [39] Overall, I believe that allowing this appeal would effectively open the door to a system whereby beneficiaries can be assessed to determine if they are morally worthy of receiving their bequests. This is problematic because the principles on which such assessments could be made are not apparent. Secondarily, a move in that direction would tend to create undesirable uncertainty in relation to wills and, as a result, would tend to impose the expense and delay of litigation on many estates.
>
> ...
>
> [44] These gaps in the facts are significant because, in my opinion, it does not follow inevitably that a testator will disinherit a person found to be stealing from him or her. A testator's reaction to a theft by a beneficiary would normally be a function of several factors including: his or her relationship with the beneficiary, the relative significance of the theft, the beneficiary's reasons for the theft and, finally, the beneficiary's conduct after the theft comes to light. In the case of a parent-child relationship, or a close relationship of that general nature, I expect that many people would not automatically disinherit a person for stealing from them. More importantly, the motivation for the crime will no doubt almost always be a significant consideration for the testator. A beneficiary who steals

> to indulge a personal taste for luxury would be seen, presumably, in quite a different light than one who steals to pay for medical supplies or to meet the basic food and shelter needs of a child. Similarly, a beneficiary who is genuinely repentant after a theft is discovered is less apt to be left out of a will then one who shows no remorse.

38. By ruling that it was within the Court's jurisdiction to determine which beneficiaries are worthy of gifts, the New Brunswick Court of Appeal accepted that the beneficiary's actions, beliefs and purpose for existence are now relevant factors to be considered by the Court.

39. The Application Judge and the Court of Appeal did not, however, set out a framework to assess an intended beneficiary. This creates a system where predicting how the Courts will consider the competing morals, character traits and past actions of intended beneficiaries will be very difficult.

40. This difficulty lies largely in the idiosyncrasies of each Application Judge and how each might assess and balance competing morals and the "raison d'être" of a beneficiary, which in and of itself is not a concept created by statute or previously considered by Common Law and is therefore subject to a variety of interpretations.

41. With all due respect, the lack of framework to assess a beneficiary's worthiness was evident in the Application Judge's decision. The Court relied upon a multitude of sources of information of limited relevance, including how third parties viewed the beneficiary, and simply seemed to accept that the intended beneficiary was *de facto* unworthy. It appears that the Application Judge made an automatic link between immoral character or illegal actions with the heir being unworthy.

42. The Application Judge ruled in paragraphs 78 and 86 that the beneficiary would use the bequest to further its illegal or immoral goals.

> [78] Moreover, while the bequest doesn't advocate violence, it would unavoidably lead to violence because the NA, in its

> communications, both advocates violence and supports its use by others of like mind such as skinheads. It attempts, in some of its writings, to profess zero tolerance for violence or illegal activity but its writings and publications consistently expose those disclaimers as disingenuous.
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> ...
>
> [86] . . . The fact that it may use some of the bequest to pay someone to clean its office premises or to fund a cultural festival does not mean that the bequest is used for other purposes. All of its activities are clearly focused on achieving its core purposes and thus any money it spends, from whatever source or for any activity, contributes, either directly or indirectly, to achieving those purposes.

43. In effect, the Court concluded that because of who the beneficiary was, the beneficiary would likely use the bequest for purposes in-line with its "raison d'être" and these future actions of the beneficiary should therefore be prevented. This reasoning also created the precedent of Canadian Courts evaluating the worthiness of beneficiaries depending upon what the beneficiary might do with the bequest once received.

44. Canadian Common Law Courts have not previously opened this door. Unless a condition in a will requires an undesirable action, the process of determining what a beneficiary will ultimately do with a bequest has been avoided. Such an evaluation is froth with uncertainty and might deprive a beneficiary of a gift without justification.

45. Another undesirable effect of the system created by the Application Judge and the New Brunswick Court of Appeal in the McCorkill decision is rewarding personal attacks on intended beneficiaries.

46. Potential beneficiaries excluded from wills, such as the testator's sister in *McCorkill* or the testator's daughter in *Spence*, now have been provided with financial incentives to demonize either the testator or intended beneficiary. The damage, both to the people involved and to the judicial system as a whole, that this type of attacks can create is objectionable.

47. Some intended bequests may be frustrated simply because some beneficiaries may not have the financial means to defend themselves. Other intended beneficiaries may forfeit a bequest simply because it may not wish to have its "dirty laundry" aired in public.

48. The freedom of persons in Canada to dispose of their property upon death has been held paramount for decades. This is true especially of testators who were willing to dispose of their property to intended beneficiaries without conditions attached to those gifts. Only in the most extreme situations, have Canadian Courts intervened to avoid gifts with conditions and those situations always involved unfortunate actions of an intended beneficiary directly related to the gift itself.

49. A clearly stated Common Law in Canada is invaluable. Certainty, predictability and restraint are required in estate law in Canada when being asked to void a testator's gift. It must be clear when giving instructions and drafting wills, exactly which unconditional gifts will be upheld by Canadian Courts. Unfortunately, this is not the current state of the Common Law in Canada and must be clarified and corrected.

PART IV – SUBMISSIONS CONCERNING COSTS

50. The Applicant requests its costs of the within application.

PART V – ORDER OR ORDERS SOUGHT

51. The Applicant asks that leave to appeal be allowed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Rothesay, New Brunswick, this 28 day of September, 2015.

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PART VI – TABLE OF AUTHORITIES

No.	Authority	Cited at Paragraphs
1.	*Bolianatz Estate v. Simon*, 2006 SKCA 16 (CanLII), 2006 SKCA 16, 264 D.L.R. (4th) 58, (leave to appeal refused [2006] S.C.C.A. No. 222).	16, 29, 39, 44, 56, 57, 58
2.	*Coffey (Estate) v. Coffey*, 2014 BCSC 110 (CanLII)	16-31
3.	*Spence v. BMO Trust Company*, 2015 ONSC 615 (CanLII)	44, 49

PART VII – STATUTORY PROVISIONS

None Cited.