Court of Appeal File No.: 81/14/CA
Cause No.: S/M/49/13

IN THE COURT OF APPEAL OF NEW BRUNSWICK
IN THE MATTER OF THE ESTATE OF HARRY ROBERT MCCORKILL

BETWEEN:

**THE CANADIAN ASSOCIATION FOR FREE EXPRESSION (Intervener),**

APPELLANT,

- 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 (Intervener), CENTRE FOR ISRAEL AND JEWISH AFFAIRS (Intervener), and THE PROVINCE OF NEW BRUNSWICK AS REPRESENTED BY THE ATTORNEY GENERAL (Intervener),**

RESPONDENTS.

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# SUBMISSION ON BEHALF OF THE RESPONDENT, ISABELLE ROSE MCCORKILL.

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**Andy W. Lodge and**
**Jean-Yves Bernard**
BLR Law
20 Marr Road, Suite 200
Rothesay, NB E2E 5X5
andylodge@blrlaw.ca
jybernard@blrlaw.ca
Tel: 506.848.4444
Fax: 506.848.4445

Solicitors for the Appellant (Intevener), The Canadian Association for Free Expression.

**John D. Hughes**
Barrister & Solicitor
145 Whitfield Trites Road
Moncton, NB E1G 4R3

johndhugheslawoffice@nb.aibn.com

Tel: 506.382.9072
Fax: 506.382.9073

Solicitor for the Respondent (Respondent), Fred Gene Streed, Executor of the Estate of Harry Robert McCorkill (a.k.a. McCorkell) deceased.

**Marc-Antoine Chiasson**
McInnes Cooper
Blue Cross Centre, South Tower
400-644 Main Street
Moncton NB E1C 8T6
marc.chiasson@mcinnescooper.com
Tel: 506.857.8970
Fax : 506.857.4095

Solicitors for the Respondent (Applicant), Isabelle Rose McCorkill.

**Danys R. X. Delaquis**
Canty Lutz Delaquis Grant
43 Broad Street
Saint John, NB E2L 1Y3

ddelaquis@cldglaw.com
Tel: 506.658.0433
Fax: 506.658.0599

Solicitors for the Respondent (Intervener), Center for Israel and Jewish Affairs

**Richard A. Williams**
Office of the Attorney General
Chancery Place
675 King Street
Fredericton, NB E3B 1E9
richard.williams@gnb.ca
Tel: 506.453.8492
Fax: 506.453.3275

Solicitors for the Respondent (Intervener), the Province of New Brunswick as represented by the Attorney General.

## PART I - INDEX

## PART II – STATEMENT OF FACTS

### A. The Appellant's Facts

1. The Respondent, Isabelle Rose McCorkill (the "Respondent McCorkill"), accepts as correct the facts set out in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9and 12 at Part II of the Appellant's Submission other than as indicated below.

2. The Respondent McCorkill disagrees with the facts set out in paragraphs 10, 11 and 13 at Part II of the Appellant's Submission.

### B. The Respondent McCorkill's Additional Facts

3. The Respondent McCorkill is the sister of the late Harry Robert McCorkill ("Mr. McCorkill"). There is one brother, William Francis McCorkill, who is believed to reside in Manitoba.

**Reference:** Affidavit of Isabelle Rose McCorkill at paragraphs 3 and 17; Appeal Book at page 68.

4. Mr. McCorkill appointed William Luther Pierce ("Mr. Pierce") as the primary executor and trustee of his estate and Frederick Streed as the alternate. The National Alliance is the sole beneficiary under Mr. McCorkill's Will.

**Reference:** The Last Will of Robert McCorkell; Appeal Book at pages 139-144.

5. The National Alliance is a neo-Nazi, anti-Semitic and white supremacist organization that is active in Canada and the United States and that calls for, *inter alia,* the eradication of Jews and other races.

**Reference:** Affidavit of Shimon Koffler Fogel at paragraphs 20, 29; Appeal Book at pages 603, 605.

6. According to the National Alliance's "What is the National Alliance" document, one of the organization's key objectives is to create a "White Living Space" which is reminiscent of the Nazi *Lebensraum.* The following can be read under the heading "White Living Space":

> (...). After the sickness of "multiculturalism," which is destroying America, Britain, and every other Aryan nation in which it is being promoted, has been swept away, we must again have a racially clean area of the earth for the further development of our people. **We must have White schools, White residential neighborhoods and recreational areas, White workplaces, White farms and countryside. We must have no non-Whites in our living space, and we must have open space around us for expansion.**
>
> **We will do whatever is necessary to achieve this White living space and to keep it White.** We will not be deterred by the difficulty or temporary unpleasantness involved, because we realize that it is absolutely necessary for our racial survival. (...).
>
> [Emphasis added].

**References:** Further Supplementary Affidavit of Mark Potok at Exhibit "1"; Appeal Book at page 115.

Affidavit of Shimon Koffler Fogel at paragraph 22; Appeal Book at page 603.

7. Under the heading "A Responsible Government", the document calls for "a strong, centralized government spanning several continents to coordinate (...) the racial cleansing of the land (...)". The "central task of a new government will be to reverse the racially devolutionary course" by implementing a "long-term eugenics program".

**Reference:** Further Supplementary Affidavit of Mark Potok at Exhibit "1"; Appeal Book at page 115.

8. The National Alliance has had significant influence on its sympathizers through its distribution of Mr. Pierce's publications including "The Turner Diaries" which calls for the violent overthrow of the government and the systematic murder of Jews and non-Whites. This publication has been implicated as a motivation for the Timothy McVeigh bombing that killed 168 people and injured 680 others.

**Reference:** Affidavit of Shimon Koffler Fogel at paragraph 32; Appeal Book at page 605.

9. Mr. Pierce also contributed to the National Alliance's *National Vanguard* publication. In an editorial piece entitled "The Measure of Greatness", Mr. Pierce described Adolf Hitler as the "greatest man of our era".

**Reference:** Affidavit of Mark Potok at Exhibit "4"; Appeal Book at page 80.

10. In the National Alliance's April/May 1990 Bulletin, Mr. Pierce published an article entitled "On Being a Front-Line Soldier" in which he described a conversation that he had with a skinhead. Mr. Pierce wrote

as follows:

> (...). It was clear that his conception of a "front-line soldier" is someone who cracks the enemy's skull in the street with a baseball bat, rips his face open with a bicycle chain, or breaks his legs across a curbstone. And that's fine. It's a healthy, red-blooded response to the current situation in America's cities. Any decent White person -- certainly, any White male -- who can walk six blocks in a major American city without feeling rage rising in himself and a growing desire to engage in such activity needs to have his hormone level checked. **It is clear that if most White males would respond to their rage in a direct, physical way, as skinheads do, then we would have no race problem, no Jewish problem, no homosexual problem, and no problem with White race traitors in America. Our cities would be clean, decent, safe, and White once again, after a relatively brief period of bloodletting.**
>
> (...).
>
> **Ultimately, we will win the war only by killing our enemies, not by any clever, indirect schemes which involve no personal risk. We should never forget that, and even if the skinheads served no other purpose than to remind us of it, we should be grateful for their activity. Our only regret in that regard should be that their activity is not better organized and better disciplined.**
>
> [Emphasis added].

**Reference:** Further Supplementary Affidavit of Mark Potok at Exhibit "2"; Appeal Book at page 122.

11. Mr. Pierce also published an article entitled "Reorienting ourselves for Success" in which he wrote as follows:

> **All the homosexuals, racemixers, and hard-case collaborators in the country who are too far gone to be re-educated can be rounded up, packed into 10,000 or so railroad cattle cars, and eventually double-timed into an abandoned coal mine in a few days time.**
>
> (...).
>
> Those who speak against us now should be looked at as dead men – as men marching in lockstep toward their own graves – (...).
>
> [Emphasis added].

**Reference:** Further Supplementary Affidavit of Mark Potok at Exhibit "3"; Appeal Book at page 126.

12. The National Alliance's members have also been connected to at least 14 violent crimes between 1984 and 2005 including bank robberies, shootouts with the police and a plan to bomb the main approach to Disney World.

**Reference:** Affidavit of Shimon Koffler Fogel at paragraph 30; Appeal Book at page 605.

13. In the Amended Notice of Application dated August 29, 2013, the Respondent McCorkill requested an order declaring the bequest provided to the National Alliance at paragraph 3(b) of Mr. McCorkill's Will void as being illegal and/or contrary to public policy.

**Reference:** Amended Notice of Application at paragraph 1(a); Appeal Book at page 18.

14. In his judgment dated June 5, 2014, Mr. Justice Grant concluded as follows:

90 In summary, I find that 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.

**Reference:** The decision on appeal at paragraph 90; Appeal Book at page 65.

## PART III– THE POSITION OF THE RESPONDENT MCCORKILL

### A. The Appropriate Standards of Review.

15. The Respondent McCorkill submits that while the Appellant characterizes its eight grounds of appeal as errors in law, the majority of the grounds of appeal are based on questions of mixed fact law and fact or questions of fact.

16. Where a ground of appeal involves a question of law, the appropriate standard of review is that of correctness. However, issues involving the application of a legal standard to a set of facts are questions of mixed law and fact and a judge's findings on these types of questions cannot be overturned absent a palpable and overriding error.

**Reference:** ***Housen v Nikolaisen***, 2002 SCC 33 at paras 8, 36, [2002] 2 SCR 235.

17. Further, findings and inferences of fact are not reversible unless it is established that the judge has made a palpable and overriding error.

**Reference:** ***Doucet v LeBlanc***, 2010 NBCA 13 at para 1, 354 NBR (2d) 117.

**B. Grounds of Appeal 1 and 2: The Application Judge decided the evidence's relevance and admissibility and considered the evidence's credibility, reliability and weight.**

18. The Appellant contends that the Application Judge failed to assess the evidence's relevance and admissibility and failed to analyze the evidence's credibility, reliability and weight in his written decision.

19. The Respondent McCorkill submits that the Appellant is challenging the sufficiency of the Application Judge's reasons. In ***Atwin v Kingsclear First Nation***, 2013 NBCA 66 at para 2, 411 NBR (2d) 336 ["***Atwin***"], the unanimous New Brunswick Court of Appeal confirmed that a judge's findings of credibility and assessment of the evidence are factual determinations that will stand unless they are tainted by a palpable and overriding error.

20. The Court of Appeal in ***Atwin,*** *supra,* held that the assessment of a judge's reasons should be performed through the functionality test that was described by Mr. Justice Bell in ***R v RDH***, 2009 NBCA 28 at paras 7-8, as follows:

> 7 In *R. v. R.(D.),* [1996] 2 S.C.R. 291 (...), (QL), Major J., for the majority addressed the issue of sufficiency of reasons of the trial judge:
>
> > [...] **Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons**, (...), **appellate courts will not interfere.** [ ... ] [para. 55].

> More recently, in *R. v. Sheppard*, (...) 2002 SCC 26, the Court again addresses the issue of the sufficiency of reasons. Binnie J., writing the judgment of the Court, states that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). Binnie, J. further states that the duty to give reasons "should be given a functional and purposeful interpretation" (para. 53) and failure of this duty does not provide a "[...] free-standing right of appeal and [...] entitlement to appellate intervention" (para. 53). Essentially, *Sheppard* holds that appellate courts should ask whether the reasons respond to the case's issues, having regard to the evidence as a whole and the submissions of counsel. An appeal based upon insufficient reasons will only be allowed when the trial judge's reasons are so deficient that they foreclose meaningful appellate review (...).
>
> 8 In *R. v. R.E.M.*, (...) 2008 SCC 51, the court was required to consider the adequacy of reasons of a trial judge in his assessment of the credibility of witnesses. McLachlin C.J. explains that credibility findings may involve factors that are difficult to verbalize. The Chief Justice goes on to state that **an appellate court reviewing reasons for sufficiency should start from a deferential stance toward the trial judge's findings of fact. Next, the appellate court, proceeding with deference, must determine whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveal the basis for the verdict reached** (para. 67) (...).
>
> [Emphasis added].
>
> **Reference:** ***Atwin v Kingsclear First Nation***, 2013 NBCA 66 at para 3, 411 NBR (2d) 336.

21. In ***R v REM***, 2008 SCC 51 at para 17, [2008] 3 SCR 3, Chief Justice McLachlin explained that the purpose of reasons is "not to show *how* the judge arrived at his or her decision, in a 'watch me think' fashion. It

is rather to show *why* the judge made that decision [Emphasis original]."

22. The Respondent McCorkill submits that the Application Judge's 96-paragraph decision thoroughly explains why he decided all of the relevant issues. Further, a reading of the judgment in conjunction with the evidentiary record, which contained 17 affidavits and an 858-page record, clearly reveals the reasons for his findings.

23. The Respondent McCorkill further submits that the decision summarizes the extensive evidentiary record in a clear and concise fashion. A detailed analysis of the entire body of evidence's relevance, admissibility, credibility, reliability and weight was unnecessary and impractical in the circumstances given the voluminous record. Further, such a detailed analysis would have necessarily resulted in prolix reasons, which this Honourable Court has cautioned constitutes an impediment to access to justice on appeal.

**Reference:** ***Atwin v Kingsclear First Nation***, 2013 NBCA 66 at para 4, 411 NBR (2d) 336.

24. The Appellant further contends that certain affidavit evidence that was considered by the Application Judge was inadmissible. Specifically, the Appellant raises the inclusion of a radio broadcast transcript in the Affidavit of Kevin Fornshill dated November 26, 2013.

**Reference:** Appellant's Submission at paragraphs 26-33.

25. During the Application proceedings, the Appellant filed a motion

requesting that affidavit evidence be excluded from the record. On November 13, 2013, the Application Judge rendered a detailed decision in which he accepted several of the Appellant's arguments and struck numerous paragraphs contained in the affidavits filed in support of the Respondent McCorkill's position.

**Reference:** ***McCorkill v McCorkill Estate,*** 2013 NBQB 419, [2013] NBJ 430.

26. The Respondent McCorkill submits that the Application Judge correctly determined the admissibility of all affidavit evidence, including the Affidavit of Kevin Fornshill dated November 26, 2013. In the alternative, even if the impugned affidavit evidence was inadmissible, the evidence as a whole, including the National Alliance's Handbook, clearly explained the National Alliance's purposes and objectives.

**C. Grounds of Appeal 3 and 5: The Application Judge correctly concluded that the bequest was contrary to public policy.**

27. The Appellant submits that the Application Judge erred in determining that Mr. McCorkill's bequest to the National Alliance was contrary to public policy and in considering the National Alliance's character in coming to this conclusion.

28. The Respondent McCorkill submits that these grounds of appeal are based upon questions of mixed law and fact and, therefore, require a finding of a palpable and overriding error to be overturned on appeal.

29. An action violates public policy when it contravenes established interests of society. In ***Wishart Estate (Re)*** (1992), 129 NBR (2d) 397, 1992 CanLII 2679 at 14 (QB) ["***Wishart Estate***"], Mr. Justice Riordon considered whether a testator's direction to destroy four horses was void as being contrary to public policy. Mr. Justice Riordon cited ***Eyerman et al v Mercantile Trust Co NA et al,*** 524 SW 2d 210 (CA Mo 1975), which stated as follows with respect to the phrase "against public policy":

> The term 'public policy' cannot be comprehensively defined in specific terms but **the phrase 'against public policy' has been characterized as that which conflicts with the morals of the time and contravenes any established interest of society.** Acts are said to be against public policy 'when the law refuses to enforce or recognize them, on the ground that they have a mischievous tendency, so as to be injurious to the interests of the state, apart from illegality or immorality'. (...).
>
> [Emphasis added.]

30. Mr. Justice Riordon in ***Wishart Estate***, *supra* at 10, also cited the following excerpt from *The Canadian Law of Wills: Construction* for the principle that a testamentary condition inciting the commission of an act prohibited by law is void as being contrary to public policy:

> It may be in the interest of the public or the Crown that a condition should not be performed and such a condition is said to be contrary to public policy and void. Whether or not a condition is contrary to public policy may vary from time to time; today many conditions formerly held void may be held valid because of changes in public opinion. **There is no question, however, that a condition inciting the commission of crime, or any act prohibited by law** (...) **is void.**

[Emphasis added].

31. Similarly, Lord Brougham of the House of Lords in ***Egerton v Earl Brownlow*** (1853), 4 HL Cas 1 at 174 confirmed that bequests will be illegal if they promote unlawful acts:

> The tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded. **Gifts, bequests, conditions, contracts, are illegal from their tendency to promote unlawful acts**, without regard to the amount of the inducement held out, or interest created, the position of the parties, or any other circumstances which go to affect the probability of the unlawful act being done."

[Emphasis added].

32. In ***Canada Trust Co v Ontario Human Rights Commission*** (1990), 74 OR (2d) 481 at para 92, 1990 CanLII 6849 (CA), Mr. Justice Tarnopolsky, in a concurring decision, held that public policy is to be gleaned from a variety of sources:

> 92 **Public policy** is not determined by reference to only one statute or even one province, but **is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti-discrimination laws of every jurisdiction in Canada**. (...).

[Emphasis added].

33. The Application Judge found that the National Alliance disseminates hate propaganda that is available on the internet in Canada. The

Respondent McCorkill submits that this finding is a finding of fact that cannot be overturned absent a palpable and overriding error.

**Reference:** The decision on appeal at paragraph 56; Appeal Book at page 53.

34. The Respondent submits that the Application Judge correctly determined that the dissemination of hate propaganda contravenes established interests of society as reflected in various pieces of legislation. Parliament has specifically prohibited the dissemination of hate propaganda in the *Criminal Code*, RSC, 1985, c C-46. Section 319(2) of the *Criminal Code* reads as follows:

> **Wilful promotion of hatred**
>
> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> > (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> >
> > (*b*) an offence punishable on summary conviction.

35. Human rights legislation in Canada and New Brunswick also demonstrates that discrimination is contrary to public policy. For example, section 2 of the *Canadian Human Rights Act,* RSC 1985, c H-6 states, in part, that the purpose of the Act is to give effect to the principle that all individuals should have an equal opportunity to be free of "discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation" and other grounds.

36. Further, the Supreme Court of Canada has held that the dissemination of hate propaganda must be strictly prohibited given its grave social consequences. In the matter of ***Canada (Human Rights Commission) v Taylor***, [1990] 3 SCR 892 at para 41, 75 DLR (4th) 577, Chief Justice Dickson, for the majority of the Court, stated as follows:

> 41 (...). It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.

37. In the article "Canada's Use of Criminal and Human Rights Legislation to Control Hate Propaganda" (1999), 26 Man LJ 299 at paras 3-4, author Jeff Brunner stated as follows with respect to racism:

> 3 Racism occurs where one racial or ethnic group considers itself to be superior to another and, as a result, believes that any unequal treatment of the inferior group is justified. A typical component of racist ideology is to make any social or economic inequality seem natural or right. Tied into racism is discrimination. Discrimination is the actual unequal treatment of individuals because of their ethnic, religious, or cultural membership.
>
> 4 Discrimination serves to:
>
> > [u]ndermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural

> society which is committed to the idea of equality.
>
> [Footnotes omitted].

38. With respect to the National Alliance, the Canadian Human Rights Tribunal has concluded on several occasions that the messages propagated by the National Alliance and its founder and former leader, Mr. Pierce, promulgated hatred and contempt on the basis of race, colour, religion, nationality and ethnic origin. For example, the Tribunal in ***Warman v Kulbashian***, 2006 CHRT 11 at paras 47-50, stated as follows regarding Mr. Pierce's propaganda:

> 47 The extreme ill will and malevolence towards black persons pervades other parts of the tri-cityskins.com website as well. **The Pierce articles encourage white South Africans to "get rid of all Blacks and other non-Whites", and to "force them out", "sterilize them" or "kill them". His articles urge those whom he is addressing to be "prepared to kill, annihilate, any and all competitors". Such statements (exhorting the death, sterilization, or expulsion of non-Caucasians) denote extreme ill will and hatred against non- Caucasians**, and suggest that the victims of this violence lack any redeeming qualities, thereby dehumanizing them.
>
> 48 Mr. Pierce's attempts at portraying Jewish persons as enemies of the state, "working behind the scenes", and controlling media, serve to develop and encourage envy, mistrust or resentment of them, which in turn breeds hatred against them. **These hateful messages are combined with signs of contempt: "[Dershowitz]'s not even a fellow human being. [He] is a Jew and that says it all".** Mr. Pierce reinforces his contempt directed towards Jewish persons and further exhorts hatred against them, by asserting that Dershowitz and "his tribe" advocate

> widespread torture of all non-Jews who resist Jewish supremacy.
>
> 49 The website manages to encourage the visitor to feel contempt against these groups even through its links to other websites. It invites visitors to travel, with one click of a mouse button, to the site of the Canadian Ethnic Cleansing Team. **Taking into account the opinions expressed in the Pierce articles, it is quite easy to draw the connection between this group's name and a call for the forceful exclusion from Canadian society of non- Caucasians.** Another of the linked websites is named whitesonly.net, which has a logo that unabashedly harks back to the lynching of black persons.
>
> [Emphasis added].

39. The Canadian Human Rights Tribunal made similar comments regarding Mr. Pierce's publications in ***Warman v Kyburz,*** 2003 CHRT 18 at paras 25, 48, and ***Warman v Guille***, 2008 CHRT 40.

40. In the context of testamentary dispositions, the Courts have held that bequests containing discriminatory conditions and instructions are void as being against public policy. In ***Peach Estate (Re)***, 2009 NSSC 383 at para 18, 287 NSR (2d) 186, Mr. Justice MacAdam stated as follows:

> 18 **Paragraph 4 of the will is clearly discriminatory on the basis of religion. It seeks to limit the potential purchasers of the property to persons of the "Anglican" or "Presbyterian" faiths and no one else.** Counsel for the executor cites *Feeney's Canadian Law of Wills* at s. 16.58, where the following appears:
>
> > **It seems safe to treat conditions attached to gifts in wills in which require the beneficiary to discriminate against persons**

> **on the basis of race, creed or nationality as void as contrary to public policy.** (...).
>
> [Emphasis added].

41. In ***Canada Trust Co v Ontario Human Rights Commission*** (1990), 74 OR (2d) 481 at paras 37-38, 1990 CanLII 6849 (CA) [“***Canada Trust***”], the Ontario Court of Appeal held that a scholarship trust fund confining management, judicial advice and benefit on the grounds of race, colour, ethnic origin, creed or religion was void as contravening public policy. Mr. Justice Robins, for the majority of the Court, explained that limitations must be imposed on an individual’s freedom to dispose of his or her property:

> 37 **To say that a trust premised on notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that one race or any other religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society, in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced.** The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.
>
> 38 **To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settler would not, in my opinion, be conducive to the public interest.** The settlor’s freedom to dispose of his property through the creation of a charitable

> trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.
>
> [Emphasis added].

42. The Appellant suggests that ***Canada Trust***, *supra,* does not apply in the context of testamentary dispositions. However, the text *Feeney's Canadian Law of Wills* confirms that the principles set out in the decision also apply to the law of wills.

> **References:** Appellant's Submission at paragraphs 48-49.
>
> James MacKenzie, *Feeney's Canadian Law of Wills,* 4th ed (Markham, ON: LexisNexis Canada Inc., 2000) at §16.59.

43. The Appellant further contends that the Courts have only interfered with bequests when a condition or instruction is found to be contrary to public policy and, in this case, no such condition or instruct exists. The Application Judge stated as follows with respect to this argument:

> 72 While the jurisprudence on voiding bequests on the grounds of public policy tends to deal with conditions attached to specific bequests, in my opinion the facts of this case are so strong that they render this case indistinguishable from those.
>
> **Reference:** The decision on appeal at paragraph 72; Appeal Book at page 59.

44. The Respondent McCorkill submits that it is trite law that an individual's freedom to dispose of property is limited by public policy

considerations. In ***Canada Trust Co v Ontario Human Rights Commission*** (1990), 74 OR (2d) 481 at para 35, 1990 CanLII 6849 (ONCA), Mr. Justice Robins stated as follows:

> 35 The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law (...). That interest must, however, be limited in the case of this trust by public policy considerations. In my opinion, **the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.**
>
> [Emphasis added].

45. Similarly, Mr. Justice Riordon in ***Re Wishart Estate*** (1992), 129 NBR (2d) 397, 1992 CanLII 2679 at 8 (QB), confirmed that a whether a bequest is contrary to public policy depends upon the result of carrying it out:

> (...). legal authority is clear that **although the general rule is that the intention of a testator should be followed, it is not permitted to be performed where to carry it out would be contrary to public policy.**
>
> [Emphasis added].

46. Similarly, the British Columbia Supreme Court in ***Simpson Estate (Re)*** (1969), 70 WWR 626 at para 24, [1969] BCJ 313 (SC), stated as follows with respect to what must be considered when interpreting a will and the importance of public policy:

> 24 The cases that I have referred to here, none of which, by the way, were cited to me by counsel, indicate to me that in interpreting this will **one must look to more than the bare words of the bequest**. Consideration must be given to the intention of the testator, all the circumstances surrounding the relationship between the testator and the beneficiary **and the effect of public policy relating to this particular issue**.
>
> [Emphasis added].

47. The Appellant also suggests that the Courts have only interfered with testamentary bequests in a limited number of cases. The Appellant, however, has not provided any authority suggesting that the list of recognized cases requiring judicial intervention is exhaustive.

**References:** Appellant's Submission at paragraphs 50-51.

48. The Respondent McCorkill submits that Mr. Justice Crocket's reasons in ***Millar Estate (Re),*** [1938] SCR 1, 1937 CanLII 10 at 16-17, are instructive on the appropriate approach to take when the Court is faced with a novel challenge to a testamentary bequest:

> (...). But what is he to do in a case involving a ground of public policy which has never before been considered by any Canadian judge? Presumably he must then canvass the public opinion of the country as a whole in relation to the purpose or tendency of the particular contract or bequest and determine whether there would be likely to be anything like unanimity among the people as a whole in regarding it as injurious to the public good.

49. In the present matter, the Respondent McCorkill submits that the uncontradicted evidence establishes that Mr. McCorkill appointed Mr.

Pierce as the primary executor and trustee of his estate and that Mr. Pierce was the Chairman of the National Alliance when Mr. McCorkill executed his will. The evidence is also clear that the National Alliance was the sole beneficiary of Mr. McCorkill's estate.

50. It is also uncontradicted that the National Alliance is an anti-Semitic organization that is anchored in white supremacist principles and ideologies and that it will "do whatever is necessary to achieve [a] White living space and to keep it White." It is also undisputed that the National Alliance aims to create "a strong, centralized government spanning several continents to coordinate (...) the racial cleansing of the land (...)". Further, the Respondent McCorkill submits that the Application Judge correctly determined that there was no evidence demonstrating that the National Alliance has changed its principles, ideologies or objectives over time.

**References:** Further Supplementary Affidavit of Mark Potok at Exhibit "1"; Appeal Book at page 115.

The decision on appeal at paragraphs 73, 76; Appeal Book at pages 59-60.

51. Further, the evidence is clear that the National Alliance disseminates hate propaganda targeting various minority populations including Jews, non-Caucasians and homosexuals. The Appellant does not dispute that section 319(2) of the *Criminal Code* RSC, 1985, c C-46 specifically prohibits the dissemination of such hate propaganda. The Respondent McCorkill submits that the Application Judge's determination at paragraph 62 that "engaging in activity which is prohibited by Parliament through the enactment of the *Criminal Code of Canada* falls

squarely within the rubric of a public policy violation" is correct at law.

52. The Appellant's position is based upon the premise that the sole consideration in determining whether the bequest is contrary to public policy is the bequest's language and that the surrounding circumstances identified in paragraphs 47 to 49 of this Submission are irrelevant. The Respondent McCorkill submits that the Application Judge correctly stated that the Court cannot "check [its] common sense at the court room door" and inferred that Mr. McCorkill intended the bequest to be used for the National Alliance's clearly stated and illegal purposes, particularly given the facts that Mr. Pierce was the primary executor of Mr. McCorkill's Will and that the National Alliance was the sole beneficiary of the estate. This is further supported by the British Columbia Supreme court in ***Simpson Estate (Re)***, op. cit.

**Reference:** The decision on appeal at paragraph 77; Exhibit Book at pages 60-61.

53. The Respondent McCorkill submits that the Application Judge correctly applied the law to the facts of this matter in finding that the bequest to the National Alliance was void as being contrary to public policy. Testamentary bequests premised on racism and discrimination, such as the one in question, undoubtedly contravene contemporary public policy. As Mr. Justice Robins explained in ***Canada Trust Co v Ontario Human Rights Commission*** (1990), 74 OR (2d) 481 at para 37, 1990 CanLII 6849 (ONCA), "[t]he concept that one race or any other 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."

54. Based on the foregoing, the Respondent McCorkill submits that the Application Judge committed no errors, reversible or otherwise, in determining that the testamentary bequest to the National Alliance was contrary to public policy or in considering the character of the National Alliance as a beneficiary.

**D. Ground 4: The Application Judge correctly determined that the National Alliance's *raison d'être* is contrary to public policy.**

55. The Appellant submits that the Application Judge erred in voiding the bequest because of the beneficiary's *raison d'être*.

56. It is clear that the Application Judge was applying a factual meaning, and not a legal meaning as suggested by the Appellant, to the term *raison d'être* when he stated that "it is abundantly clear that what the National Alliance stands for and has stood for since its inception, its *raison d'être*, is contrary to public policy in Canada. (...)." It is equally clear that the Appellant has not appealed the Application Judge's findings of fact regarding the National Alliance's purposes. The Application Judge stated as follows:

> 75 (...). In fact, as mentioned earlier, **what it stands for, anti-semitism, eugenics, discrimination, racism and white supremacy, violates numerous statutes and conventions that have been passed by Parliament and the Legislatures and endorsed by the Government of Canada, including the *Criminal Code*.**

[Emphasis added].

**Reference:** The decision on appeal at paragraph 75; Exhibit Book at page 60.

57. The Application Judge then connected the National Alliance's *raison d'être* to the facts of this matter as follows:

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

**Reference:** The decision on appeal at paragraph 76; Exhibit Book at page 60.

58. The case of ***Jake Estate v Antleman***, 2006 NBQB 371 at para 22, 313 NBR (2d) 80, stands for the principle that the Court may assess an intended beneficiary's *raison d'être* or purpose to determine whether it is entitled to receive a testamentary bequest. In that case, Mr. Justice Creaghan considered the policies of the State of Israel in determining whether a testamentary gift to the state was contrary to public policy.

59. The Appellant suggests that the Application Judge erred in finding that individuals with criminal records such as drug dealers do not "stand for" something identifiable like the National Alliance. The Respondent McCorkill submits that the Application Judge was correct in finding that an individual does not stand for the contents of their criminal record.

There is a significant difference between an organization whose sole purpose is to promote a white supremacist and discriminatory agenda and individuals with criminal records who may stand for several beneficial purposes such as being a parent, a spouse, a caregiver and/or a volunteer.

**Reference:** Appellant's Submission at paragraph 63.

60. The Appellant further contends that the bequest should not have been voided as it is not illegal for individuals to give money to the National Alliance while they are alive. In ***Wishart Estate (Re)*** (1992), 129 NBR (2d) 397, 1992 CanLII 2679 at 9 (QB), Mr. Justice Riordon reproduced the following excerpt from *Will of Pace,* 400 NY Supp (2d) 488 (NYSC):

> 4 To violate public policy the act in question need not be something which the testator could not have done with his own land while he was alive. **There is a greater need for the protection of the community interests after the death of the testator. Although a person may wish to deal capriciously with his property, while he is alive, his self-interest will usually prevent him from doing so. After his death there is no such restraint and it is against public policy to permit the decedent to confer this power upon someone else where his purpose is merely capricious**. (...).
>
> [Emphasis added].

**Reference:** Appellant's Submission at paragraph 69.

61. Therefore, the Respondent McCorkill submits that the Application Judge correctly determined that the National Alliance's *raison d'être* is

contrary to public policy.

**E. Ground 6: The Application Judge correctly found that the National Alliance's activities offend section 319(2) of the *Criminal Code* and that the testamentary gift was illegal.**

62. The Appellant contends that the Application Judge erred in finding that the National Alliance had breached section 319(2) of the *Criminal Code.*

63. The Respondent McCorkill submits that the Application Judge's finding that the National Alliance engages in activities that are prohibited by section 319(2) of the *Criminal Code*, namely the dissemination of hate propaganda, was a question of mixed law and fact. The Application Judge found that "the information the [National Alliance] disseminates is hate propaganda (...) which is the kind targeted by the *Criminal Code* which makes its dissemination illegal."

**Reference:** The decision on appeal at paragraphs 62-63; Exhibit Book at page 56-57.

64. The dissemination of hate propaganda is specifically prohibited in section 319(2) of the *Criminal Code* which reads as follows:

> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
>
> (*b*) an offence punishable on summary conviction.

**Reference:** *Criminal Code,* RSC, 1985, c C-46 at s 319(2).

65. The Respondent McCorkill submits that the Application Judge did not find that the National Alliance "breached" section 319(2) of the *Criminal Code* but, rather, that the dissemination of hate propaganda was illegal. The ninth edition of *Black's Law Dictionary* defines the terms "illegal" and "illegality as follows:

> **illegal**, *adj.* Forbidden by law; unlawful (...) <illegal dumping> <an illegal drug>.
>
> **illegality**, *n.* (17c). **1.** An act that is not authorized by law. **2.** The state of not being legally authorized (...).
>
> [Emphasis original].

**Reference:** *Black's Law Dictionary,* 9th ed, *sub verbo* "illegal" and "illegality".

66. After finding that the National Alliance's dissemination of hate propaganda was illegal, the Application Judge confirmed that engaging in a prohibited activity "falls squarely within the rubric of a public policy violation."

**Reference:** The decision on appeal at paragraph 62; Exhibit Book at page 56.

67. The Appellant suggests that the Application Judge failed to consider various factors in his discussion of section 319(2) of the *Criminal Code*. Specifically, the Appellant suggests that the National Alliance and Mr. McCorkill were found criminally culpable without having been criminally charged and without having had the opportunity to defend. With respect, the Respondent McCorkill submits that these submissions are vexatious and without any merit. In fact, the Application Judge did not assess whether the National Alliance or Mr. McCorkill was criminally culpable; rather, he was demonstrating that the dissemination of hate propaganda was illegal and, therefore, fell "squarely within the rubric of a public policy violation."

**Reference:** Appellant's Submission at paragraphs 73-77.

68. The Appellant also contends that any limitation on a testator's ability to dispose of property should be left to the legislature. The Respondent McCorkill submits that the Application Judge correctly determined that it would not be practical for the legislature to legislate individual wills and that the Attorney General's intervention in this matter was the only way to ensure that public policy principles are upheld.

**Reference:** Appellant's Submission at paragraphs 84-85.

The decision on appeal at paragraph 82; Exhibit Book at page 62.

69. As such, the Respondent McCorkill submits that the Application Judge committed no error, reversible or otherwise, in determining that the National Alliance's dissemination of hate propaganda was prohibited by section 319(2) of the *Criminal Code* and that the testamentary gift to

the National Alliance was illegal.

**F. Ground 7: The Application Judge correctly inferred that Mr. McCorkill intended the bequest to be used for illegal purposes.**

70. The Appellant submits that the Application Judge erred in inferring that Mr. McCorkill intended the testamentary gift to the National Alliance to be used for illegal purposes.

71. The Respondent McCorkill submits that this was a finding of fact and, therefore, is not reversible unless it can be established that the Application Judge made a palpable and overriding error.

72. In considering a testator's intention, the Court must consider whether carrying out the bequest would be contrary to public policy. In ***Wishart Estate (Re)*** (1992), 129 NBR (2d) 397, 1992 CanLII 2679 at 8 (QB), Mr. Justice Riordon stated as follows:

> Should I be mistaken in my conclusion as to the real intention of Clive Wishart, legal authority **is clear that although the general rule is that the intention of a testator should be followed, it is not permitted to be performed where to carry it out would be contrary to public policy**.
>
> [Emphasis added].

73. The Respondent McCorkill submits that the evidentiary record clearly demonstrates that Mr. McCorkill intended the bequest to be used for the National Alliance's clearly stated and illegal purposes. Mr.

McCorkill nominated Mr. Pierce as the estate's primary executor and trustee at a time when Mr. Pierce was the leader of the National Alliance and the National Alliance was the only beneficiary under Mr. McCorkill's will. Further, the Application Judge correctly determined that there was no evidence demonstrating that the National Alliance has changed its objectives from those set out in its foundational documents and discussed in Part II (Statement of Facts) of this Submission.

**Reference:** The decision on appeal at paragraph 73; Exhibit Book at pages 59-60.

74. The Respondent McCorkill submits that Mr. McCorkill would have made a different bequest had he not wanted the bequest to go towards the National Alliance's clearly stated and illegal purposes.

75. Therefore, the Respondent McCorkill submits that the Application Judge correctly inferred that Mr. McCorkill intended the bequest to be used for the National Alliance's illegal purposes.

**G. Ground 8: The Application Judge correctly determined that section 2(b) of the *Canadian Charter of Rights and Freedoms* did not protect Mr. McCorkill's bequest to the National Alliance**

76. The Appellant submits that section 2(b) of the *Canadian Charter of Rights and Freedoms* protected Mr. McCorkill's freedom to choose how to distribute his estate.

77. The Supreme Court of Canada has confirmed that section 1 of the *Canadian Charter of Rights and Freedoms* imposes limits on all freedoms, including the freedom of expression. Section 1 reads as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

78. In ***Canada (Human Rights Commission) v Taylor***, [1990] 3 SCR 892 at para 41, 75 DLR (4th) 577, Chief Justice Dickson, for the majority of the Supreme Court of Canada, considered the profound harm imposed on targets of hate propaganda:

> 41 (...). It can thus be concluded that messages of hate propaganda undermine the dignity and self-worth of target group members and, more generally, contribute to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.

79. The Application Judge adopted the reasoning of Chief Justice Dickson in ***R v Andrews,*** [1990] 3 SCR 870, 77 DLR (4th) 128, who held that section 1 of the *Canadian Charter of Rights and Freedoms* saved the constitutionality of the predecessor to section 319(2) of the *Criminal Code*. The Application Judge stated that Chief Justice Dickson's comments regarding the section 1 analysis "are equally applicable to the evidence that is before the court in this application."

**Reference:** The decision on appeal at paragraphs 51-54; Exhibit Book at pages 49-52.

80. The Supreme Court of Canada also affirmed the constitutionality of section 319 of the *Criminal Code* in ***R v Keegstra***, [1990] 3 SCR 697, 114 AR 81.

81. In ***Saskatchewan (Human Rights Commission) v Whatcott***, 2013 SCC 11, 409 Sask R 75, the Supreme Court of Canada unanimously upheld civil law controls on hate speech in finding that a provision in the Saskatchewan *Human Rights Code* prohibiting the publishing of materials that would expose individuals to hatred violated section 2(b) of the *Canadian Charter of Rights and Freedoms* but that the infringement was justified pursuant to section 1. In that case, Mr. Whatcott was found to have contravened the provision by publishing flyers targeting homosexuals.

82. Further, the Courts have imposed limitations of a testator's right to dispose of property when the testator's intentions are contrary to public policy. In ***Wishart Estate (Re)*** (1992), 129 NBR (2d) 397, 1992 CanLII 2679 at 8 (QB), Justice Riordon considered that a testator's intention should not be "permitted to be performed where to carry it out would be contrary to public policy." Similarly, Justice Robins in ***Canada Trust Co v Ontario Human Rights Commission*** (1990), 74 OR (2d) 481 at para 35, 1990 CanLII 6849 (CA), stated as follows:

> 35 The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is

> firmly rooted in our law (...). That interest must, however, be limited in the case of this trust by public policy considerations. In my opinion, **the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.**
>
> [Emphasis added].

83. The Respondent McCorkill submits that the evidence clearly establishes that the National Alliance disseminates hate propaganda, that the propaganda is available in Canada and that this activity is prohibited by section 319(2) of the *Criminal Code*. The evidence also establishes that Mr. McCorkill intended the bequest to be used for the National Alliance's clearly stated and illegal purposes. Further, the law is clear that public policy considerations in the testamentary context require a full analysis of the circumstances including the likely outcome of a testator's intentions. The Appellant's submission with respect to the freedom of expression does not take into account any of these factors and suggests that a testator is entitled to do what is contrary to public policy on the basis of a freedom of expression argument.

84. As such, the Respondent McCorkill submits that the Application Judge correctly determined that section 2(b) of the *Canadian Charter of Rights and Freedoms* did not protect Mr. McCorkill's bequest to the National Alliance.

## PART IV – ADDITIONAL ISSUES

85. There are no additional issues.

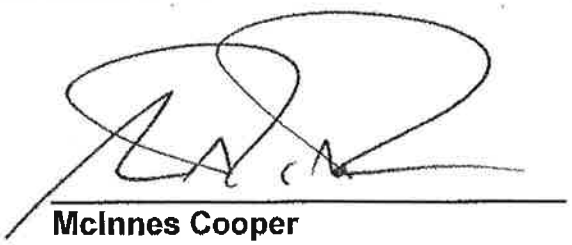
## PART V – ORDER SOUGHT

86. The Respondent, Isabelle Rose McCorkill, respectfully requests the following relief:

    a. that the appeal of the decision of Mr. Justice Grant dated June 5, 2014, be denied with costs; and

    b. such further order as this Honourable Court deems just and reasonable.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 20th day of January, 2015.



**McInnes Cooper**
Per: Marc-Antoine Chiasson
Blue Cross Center
South Tower, Suite 400
644 Main Street, PO Box 1368
Moncton, NB E1C 8T6
Telephone: (506) 857-8970
Facsimile: (506) 858-8454
Email: marc.chiasson@mcinnescooper.com

Solicitors for the Respondent,
Isabelle Rose McCorkill (Applicant).