

Re The Esther G. Castanera Scholarship Fund and Recent South African Judgments on Discriminatory Bursary Trusts

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I. INTRODUCTION

In *Re The Esther G. Castanera Scholarship Fund*¹ the Manitoba Court of Queen's Bench recently upheld a gender-exclusive testamentary bursary trust. Dewar J found that the trust bequest's gender exclusivity violated neither Manitoba's *Human Rights Code*² nor public policy.³ South African courts have, during the post-constitutional era,⁴ also been confronted with the question whether gender-exclusive testamentary bursary trusts occasion unfair discrimination against those excluded from eligibility and, if so, whether these trusts' provisions can be varied through the excision of the impugned gender restrictions from the wills concerned.

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¹ *Re the Esther G. Castanera Scholarship Fund*, 2015 MBQB 28, [2015] 7 WWR 191 [Castanera].

² CCSM c H175 [Manitoba Human Rights Code].

³ *Castanera*, *supra* note 1 at para 46.

⁴ The first fully-democratic South African elections took place on 27 April 1994, which was also the date upon which South Africa's interim Constitution came into effect. The *Constitution of the Republic of South Africa*, No 108 of 1996 [Constitution]; became South Africa's supreme law in 1996.

In each of the South African cases⁵ the gender restrictions were imposed in conjunction with other exclusions from eligibility, chief among which were race and religion. Current South African jurisprudence on discriminatory testamentary bursary trusts therefore features no judgment factually comparable to *Castanera* in which a court had to determine the tenability of only gender as a criterion for bursary eligibility in the light of policy imperatives on equality and non-discrimination.⁶

This difference raises the question whether a South African court would also have upheld the gender-exclusive *Castanera* Trust. This commentary suggests an affirmative answer to this question, and investigates some of the convergences that exist in South African and Canadian courts' treatment of bursary trusts under which testators have imposed discriminatory eligibility restrictions. The commentary shows that contemporary policy issues in regard to wills, gifts, and trusts are by and large universal in nature and that, consequently, legal-comparative engagement with these issues yields valuable perspectives on challenges common to diverse jurisdictions.

II. THE CASTANERA JUDGMENT

In *Castanera*, the testatrix, who passed away in 1997, executed a will in 1991 in terms of which she left 50% of her residuary estate “for scholarships at the University of Manitoba for needy and qualified women graduates of the Steinbach Collegiate Institute who will study for a Bachelor of Science degree with a major in one of the basic sciences...”⁷ The University of Manitoba was concerned from the outset that the gender exclusivity of the Esther G. Castanera Scholarship Fund,

⁵ Some of the principal judgments are discussed in Part III, *below*.

⁶ See, however, the analysis of *In re Heydenrych Testamentary Trust* (2012), [2012] 4 All SA 103 (WCC) [*Heydenrych*] under Part III. B. *In casu* two bursary trusts' additional gender exclusivity prompted the *amicus curiae* to challenge specifically the respective trusts' gender-based eligibility restrictions.

⁷ *Castanera*, *supra* note 1 at para 2. The testatrix left the other half of the residuary estate to the University of California Berkeley Foundation “to be used for fellowships for qualified graduate women students working toward a doctoral degree in the Department of Biochemistry at the Berkeley campus of the University of California”: *ibid* at para 3.

established pursuant to this bequest,⁸ contravened the University's policies on the non-acceptance of discriminatory scholarships, bursaries, and fellowships. However, the issue remained unresolved internally for more than a decade, and the University approached the court in 2013 with a request for the variation of the Scholarship Fund, inter alia to include also male graduates within its eligibility criteria.⁹ Dewar J adjourned this matter to allow the University time for further deliberation, which elicited an amended application from the University calling upon Dewar J to determine, inter alia, whether the "qualification in the Will that the Fund be used for 'women graduates' offend or violate The Human Rights Code ... or public policy?"¹⁰ The University's concerns regarding the tenability of the gender-exclusive bequest stemmed from the fact that, although female students were traditionally underrepresented in the sciences, their numbers in the University's relevant undergraduate programs had risen in recent times.¹¹

Dewar J commenced his judgment on the aforementioned question posed in the University's amended application by distinguishing the leading judgment in *Canada Trust Co v. Ontario (Human Rights Commission)*¹² – also known as the "Leonard Trust case" – from the one before him in *Castanera*. *Canada Trust* involved an *inter vivos* trust for educational scholarships. The trust's indenture restricted eligibility to, inter alia, Protestant Christians of the White race. The trust deed's recitals expressed the settlor's belief that the White race is best equipped to ensure global advancement; moreover, that the world's progress is dependent on the maintenance of Christianity.¹³ The trust's indenture also contained a proviso that limited the annual expenditure on any female recipient of a scholarship to no more than one quarter of the total allocation made for scholarships to male and female recipients in any given year.¹⁴ The Ontario Court of Appeal ruled that all restrictions with respect to race, colour, creed or religion, ethnic origin, and gender had to be deleted from

⁸ Note that Dewar J used "the Esther G. Castanera Scholarship Fund" and "the Castanera Trust" synonymously in his judgment.

⁹ *Castanera*, *supra* note 1 at paras 8–13.

¹⁰ *Ibid* at para 14.

¹¹ *Ibid* at para 24.

¹² [1990] 69 DLR (4th) 321, 74 OR (2d) 481 [*Canada Trust*].

¹³ *Ibid* at para 14.

¹⁴ *Ibid* at para 18.

the trust indenture on the ground that those conditions contravened public policy. The Court condemned explicitly the settlor's beliefs on racial and religious superiority, and found these beliefs patently at odds with contemporary public policy.¹⁵

Dewar J noted in *Castanera* that the majority judges in *Canada Trust* were "clearly offended" by the settlor's views on race and religion, but that their reasoning in this regard did not comment on the condition in the trust's indenture that restricted female scholarship-recipients to one quarter of the distributable annual fund. Dewar J consequently declined to interpret the majority's ruling in *Canada Trust*, namely to excise the gender restriction along with the other aforementioned restrictions from the trust's indenture, "as a conclusion that every gift that discriminates between the sexes will necessarily be contrary to public policy."¹⁶ In so finding, Dewar J aligned himself expressly with the view espoused in *University of Victoria v. British Columbia (Attorney General)*¹⁷ that there is nothing offensive in a testator who belongs to a particular faith wishing to promote others of the same faith (in *University of Victoria* through bursaries reserved for Roman-Catholic students) if the gift was not motivated by notions of supremacy.¹⁸ This very aspect served, according to Dewar J, to distinguish the Esther G. Castanera Scholarship Fund from the Leonard Scholarships:

Put very simply, the restrictions which drove the decision in the *Leonard Trust* case were motivated by a belief that white Anglo Protestant people were superior to all other people of different races and different creeds. It is this notion that a select group of people are superior to others simply because of who they are that

¹⁵ *Ibid* at para 39. See also the recent judgment of the Ontario Superior Court of Justice in *Royal Trust Corporation of Canada v The University of Western Ontario et al.*, 2016 ONSC 1143, [2006] 129 OR (3d) 772. Where Mitchell J declared qualifications relating to, inter alia, race, marital status, and sexual orientation contained in a testamentary bursary bequest void as being contrary to public policy. The Judge ruled that, although the will did not expressly state that the testator propounded racial supremacy and homophobia, *inter alia*, as was the case with the indenture under consideration in *Canada Trust*, the impugned qualifications nevertheless left no doubt as to the testator's views and his intention to discriminate on the aforementioned grounds: *ibid* at para 14.

¹⁶ *Castanera*, *supra* note 1 at para 35.

¹⁷ 2000 BCSC 445, [2000] 185 DLR (4th) 182 [*University of Victoria*].

¹⁸ *Castanera*, *supra* note 1 at paras 34, 37. See also *Re Ramsden Estate*, (1996) 139 DLR (4th) 746, [1996] 145 Nfld & PEIR 156.

makes the restrictions in the Leonard Scholarships so offensive. The restrictions contained in the Castanera Scholarship Fund are not motivated by superiority. If anything, they are motivated by a desire to promote women in a field which historically was a male-dominated field. There is no suggestion that women will make better scientists than men. There is only a suggestion that women should be encouraged to enter a discipline which Dr. Castanera appeared to have enjoyed, and which historically was not populated by women. The notion that these conditions can be construed as unreasonably discriminatory is simply not sustainable.¹⁹

Dewar J bolstered this view with reliance on a number of considerations:

- the testatrix's desire to promote women in her field of specialisation – one in which women were historically underrepresented – was a bona fide and reasonable cause to benefit only female students;²⁰
- the testatrix's freedom of testation had to be weighed against (potential) discrimination, but, absent an offensive motive on the testatrix's part, the Esther G. Castanera Scholarship Fund did not evince blatant discrimination;²¹
- male students excluded from the testatrix's beneficence might feel deprived, but that was not determinative – no male student was precluded from pursuing studies in the sciences simply by reason of his ineligibility for the particular scholarship; if a male student was truly dedicated to the sciences, he would find other opportunities to enter the field;²²
- even though the underrepresentation of women in the sciences between the time of the will's execution and the time the gift became effective had changed, a narrow focus on numbers to conclude discrimination, to the exclusion of other considerations such as the testatrix's background as well as the origin of the gift, would undermine the testatrix's last wishes;²³ and

¹⁹ *Castanera*, *supra* note 1 at para 37.

²⁰ *Ibid* at para 38.

²¹ *Ibid* at paras 39 - 40.

²² *Ibid* at para 40.

²³ *Ibid* at para 41.

- if a university's policies on the non-acceptance of discriminatory scholarships, bursaries and fellowships conflict with a testamentary bursary bequest, it should decline to accept the gift in the first place, or apply forthwith for its variation with service to all parties who might benefit if the variation was not allowed.²⁴

In light of the foregoing, Dewar J answered the question posed in the University's amended application in the negative: the bursary trust's gender exclusivity violated neither the *Human Rights Code*²⁵ nor public policy.²⁶

III. SOUTH AFRICAN JUDGMENTS

A. Racial Restrictions

During the post-constitutional era South African courts have been steadfast in their condemnation of race-based eligibility restrictions imposed under testamentary bursary trusts. This approach is mandated by the Constitution because the Constitution's Bill of Rights²⁷ is binding on all natural and juristic persons;²⁸ moreover, the Constitution demands that South African courts, in their application of a provision of the Bill of Rights to a natural or juristic person, apply or develop the common law to give effect to such a constitutional right.²⁹ Contemporary South African courts have therefore addressed policy issues in private law with reliance on the normative value system established by the Constitution in general and the Bill of Rights in particular. In *Minister of Education v. Syfrets Trust Ltd NO*,³⁰ for example, the Court struck a restriction from a testamentary bursary trust that limited eligibility to students "of European descent only" at the University of Cape Town. Griesel J ruled, having applied the constitutional unfair-discrimination test espoused in *Harksen v. Lane NO*³¹

²⁴ *Ibid* at para 42.

²⁵ *Manitoba Human Rights Code*, *supra* note 2.

²⁶ *Castanera*, *supra* note 1 at para 46.

²⁷ *Constitution*, *supra* note 4 at ch 2.

²⁸ *Ibid*, s 8(2).

²⁹ *Ibid*, s 8(3).

³⁰ [2006] ZAWCHC 65, [2006] 10 B Const LR 1214, 4 All SA 205 [*Syfrets Trust*].

³¹ [1997] 11 B Const LR 1489, [1998] 1 All SA 300 (S Afr Const Ct).

to the impugned testamentary provision, that the racial restriction occasioned unfair discrimination against non-White students and that it was, as such, contrary to public policy “as reflected in the foundational constitutional values of non-racialism [and] ... equality.”³² It is evident that Griesel J directly correlated the constitutional imperatives of racial equality and non-discrimination on the one hand, with the limiting effect of public policy on freedom of testation on the other hand.

Similarly, in *Curators, Emma Smith Educational Fund v. University of KwaZulu-Natal*³³ the Supreme Court of Appeal dismissed an appeal against an order of the Durban and Coast Local Division of the High Court³⁴ to strike a Whites-only restriction from a testamentary bursary trust. Bertelsmann AJA remarked in the course of his judgment on behalf of the Supreme Court of Appeal:

The constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust intended to benefit prospective students in need ... must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution and the constitutional imperative to move away from our racially divided past.³⁵

It is important to note that, notwithstanding the abovementioned judgments in which South African courts have ordered the excision of racial restrictions from charitable testamentary bursary trusts under the rubric of constitutionally-infused public policy as an established limitation on testamentary freedom, the courts have, in their engagement with these trusts, consistently acknowledged testators’ freedom of testation.³⁶ South African courts’ continued adherence to freedom of testation is significant when the judgments in the *BOE Trust*³⁷ case are evaluated. In *casu* the Western Cape High Court dismissed an application for the removal of a racial restriction in favour of White students from a testamentary bursary trust. Mitchell AJ opined³⁸ that the racially-restrictive bequest was not “as

³² *Syrets Trust*, *supra* note 30 at para 47.

³³ [2011] 1 B Const LR 40, [2010] 6 All SA 518 (S Afr SC) [*Emma Smith*].

³⁴ *University of KwaZulu-Natal v Makgoba* (2009), [2009] ZAKZDHC 28 [*Makgoba*].

³⁵ *Emma Smith*, *supra* note 33 at para 42.

³⁶ See also Part IV. B, *below*.

³⁷ *Ex parte: BOE Trust Ltd* (2009), [2009] ZAWCHC 88, [2009] 6 All SA 470 (WCC) [*BOE 1*]; *BOE Trust Ltd NO* (2012), [2012] ZASCA 147, [2013] 3 All SA 236 (S Afr SC) [*BOE 2*].

³⁸ Albeit in an obiter dictum because the matter was ultimately decided on the

clearly contrary to public policy as the trustees [the applicants *in casu*] believe.”³⁹ Mitchell AJ argued that the Constitution proscribes unfair discrimination, but that discrimination designed to achieve a legitimate purpose is not unfair.⁴⁰ He next remarked on anecdotal evidence regarding the high emigration rate among White South African graduates, and opined that a condition attached by the testatrix to the bursary bequest that demanded the return of bursary-recipients to South Africa could serve to ameliorate the skills loss consequent upon this emigration phenomenon. Therefore, according to Mitchell AJ, the racially-exclusive nature of the bursary trust in this case served a legitimate purpose and any discrimination occasioned by it could not be labelled as unfair.⁴¹

Erasmus AJA, writing for a full bench of the Supreme Court of Appeal, dismissed the appeal against Mitchell AJ’s judgment,⁴² and did so with particular emphasis on the testatrix’s freedom of testation. He acknowledged that freedom of testation is not only implicitly guaranteed in the Constitution’s property clause,⁴³ but that any subversion of testamentary freedom also offends the constitutionally-guaranteed right to human dignity⁴⁴ because “[t]he right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.”⁴⁵ Erasmus AJA ordered, therefore, that a residuary provision in favour of a number of charitable organisations, stipulated by the testatrix in the alternative should implementation of the bursary bequest be rendered impossible, had to take effect. He ruled that, since the four universities charged with the selection of bursary-recipients refused to participate in such selection (because they regarded the racial limitation as unconstitutional), an impossibility of the bursary bequest ensued which, in turn, necessitated

(in)applicability of section 13 of the *Trust Property Control Act*, (S Afr), No 57 of 1988 [*Trust Property Control Act*] regarding the court’s statutory power of trust variation.

³⁹ BOE 1, *supra* note 37 at para 14.

⁴⁰ *Ibid.*

⁴¹ *Ibid* at para 15.

⁴² BOE 2, *supra* note 37.

⁴³ *Constitution*, *supra* note 4, s 25.

⁴⁴ *Ibid*, s 10.

⁴⁵ BOE 2, *supra* note 37 at paras 26-7.

that “effect has to be given to the wishes of the testatrix so that the bequest to the named charitable organisations is enforced.”⁴⁶

The foregoing synopsis of South African courts’ approach to racially-restrictive bursary trusts reveals a judicial willingness to invoke constitutionally-infused policy considerations to curb testators’ freedom to prescribe racial exclusivity when making such bequests. Courts effected this limiting influence of public policy through the striking-out of racial restrictions on bursary eligibility, in particular in instances where the wills in issue were made decades prior to the advent of South Africa’s current constitutional dispensation,⁴⁷ and these racial restrictions violate the newly-emergent constitutional approach to policy matters in South African private law. Have South African courts followed a similar approach to gender restrictions on bursary eligibility imposed in conjunction with racial restrictions? This question is addressed hereafter in greater detail.

B. Gender Restrictions

In *Syfrets Trust*⁴⁸ the testator not only imposed a race-based eligibility restriction – he executed a later codicil in which he also excluded female students of all nationalities from eligibility.⁴⁹ Griesel J ruled that this restriction occasioned unfair discrimination against female students; consequently, that the codicil’s gender restriction, like its racial restriction, contravened public policy and, therefore, that the codicil had to be excised from the testator’s will on the common-law ground that a court does not give effect to testamentary provisions that offend public policy.⁵⁰ Griesel J based this ruling on the direct horizontality of the Constitution’s equality clause⁵¹ and the presumption created in terms of section 9(5) of the

⁴⁶ *Ibid* at para 31.

⁴⁷ For example, the will in *Syfrets Trust*, *supra* note 30, was executed in 1920, whereas the testator executed the will that established the Emma Smith Educational Fund in 1938.

⁴⁸ *Ibid*.

⁴⁹ The codicil further excluded all Jewish students from receiving bursaries.

⁵⁰ *Syfrets Trust*, *supra* note 30 at para 47.

⁵¹ *Constitution*, *supra* note 4 at s 9. The equality clause determines, inter alia, that no person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds listed in the clause, including race and gender. The equality clause operates not only vertically between the state and the individual, but it also protects individuals from the abuse of their equality rights by other individuals: *Syfrets Trust*,

Constitution that discrimination on any of the grounds listed in the equality clause – including gender – is unfair unless it is established that the discrimination is indeed fair.⁵²

An analysis of the aspects relating to gender discrimination in Griesel J's judgment reveals that he found it untenable for a charitable trust with the laudable objective of benefitting "deserving students with limited or no means" to exclude over half of the particular university's student population by reason of the restrictions that the testator imposed.⁵³ The unacceptability occasioned by the trust's restrictive nature was exacerbated, according to Griesel J, by the fact that those ineligible for the bursaries are members of the very groups that suffered from disadvantage in South Africa's past, namely Blacks and women.⁵⁴ Griesel J opined in this light that the trust did not advance marginalised groups but rather discriminated against them which, in turn, entrenched and perpetuated previously-existing patterns of advantage and privilege among White males.⁵⁵ Griesel J bolstered his view on this point with reliance on legislation adopted by the South African Parliament such as the *National Education Policy Act*⁵⁶ and the *Promotion of Equality and Prevention of Unfair Discrimination Act*.⁵⁷ The Judge also referenced international instruments ratified by the South African Parliament such as the *Convention on the Elimination of All Forms of Discrimination against Women*⁵⁸ as well as the *International Covenant on Civil and Political Rights*.⁵⁹ These national statutes and international instruments proscribe, inter alia, gender discrimination and demand the achievement of equitable education opportunities as well as the redress of past inequalities in education provision, including the

supra note 30 at para 28.

⁵² *Syfrets Trust*, *supra* note 30 at paras 27–28, 33.

⁵³ *Ibid* at para 34(b).

⁵⁴ *Ibid* at para 34(a).

⁵⁵ *Ibid* at para 34(b).

⁵⁶ *National Education Policy Act* (S Afr), No 27 of 1996.

⁵⁷ *Promotion of Equality and Prevention of Unfair Discrimination Act* (S Afr), No 4 of 2000.

⁵⁸ *Convention on the Elimination of All Forms of Discrimination Against Women*, 29 January 1993, 1249 UNTS 13 (entered into force 15 December 1995).

⁵⁹ *International Covenant on Civil and Political Rights*, 03 October 1994, 999 UNTS 171 (entered into force 10 December 1998).

promotion of gender equality and the advancement of the status of women.⁶⁰

The prospect of a future South African court vitiating a bursary trust's eligibility restriction that excludes women appears strong in the aftermath of *Syfre's Trust*.⁶¹ However, the Supreme Court of Appeal's subsequent judgment in *Emma Smith*⁶² supports the contention that a bursary trust that restricts eligibility to women only may not suffer a similar fate. It was shown above that this case involved the removal of a Whites-only eligibility restriction from a testator's testamentary bursary trust.⁶³ However, this racial restriction was in favour of "poor girls who but for such assistance would be unable to pursue their studies."⁶⁴ This gender restriction was not challenged before the court of first instance or before the Supreme Court of Appeal. A possible explanation for this is that women of all races have generally been regarded as persons subjected to previous disadvantage in South Africa.⁶⁵ Indeed, Bertelsmann AJA, who delivered the Supreme Court of Appeal's judgment in the matter, appeared quite comfortable with the notion of an educational fund for women only when he dismissed the argument of the Emma Smith Educational Fund's curators that, should the Fund be shorn of the racial restriction imposed by the testator, the Fund might be void for vagueness. Bertelsmann AJA said that such an argument would fall by the wayside if "it is clear that the Fund's proceeds may be applied to assist all South African women in need of financial support of a tertiary education."⁶⁶ It is arguable, therefore, that the *Emma Smith* judgment established, albeit indirectly, a precedent in favour of gender-exclusive bursary trusts under which only women benefit. Would the same hold true in respect of bursary trusts under which only men stood to benefit? This question was subsequently addressed in *In re Heydenrych Testamentary Trust*.⁶⁷

⁶⁰ *Syfre's Trust*, *supra* note 30 at para 34(c)-(f).

⁶¹ *Ibid.*

⁶² *Emma Smith*, *supra* note 33.

⁶³ See Part III. A, *above*.

⁶⁴ *Emma Smith*, *supra* note 33 at para 8.

⁶⁵ See, eg, the submission to this effect made by the Fund's curators in the court of first instance: *Makgoba*, *supra* note 34 at para 11.

⁶⁶ *Emma Smith*, *supra* note 33 at para 44.

⁶⁷ *Heydenrych*, *supra* note 6.

The applicant in *Heydenrych* was the administrator of three charitable testamentary trusts. The applicant sought the deletion of what it regarded as discriminatory provisions from the three wills in issue. The will that established the Heydenrych Trust determined that the testator's residuary estate had to be held in trust "for the education of European boys of good character of the Protestant faith to enable them to qualify for the civil service of the Union [of South Africa] or as a Pharmaceutical Chemist."⁶⁸ The Cyril Houghton Bursary Trust was established for the education of South African boys at Oundle School in Peterborough, Northamptonshire. The will provided that the bursaries were available to members of the white population group only.⁶⁹ The object of the George King Trust was to provide financial assistance to promising music students of good character in needy circumstances at the University of Cape Town. The testator's will limited eligibility to "members of the white group of Protestant Faith."⁷⁰

The applicant prayed only the excision from the three wills of the references to race and colour – it asked the court to delete the word "European" from the Heydenrych will; the reference to "the white population group" from the Houghton will; and the qualifier "members of the White Group" from the George King will.⁷¹ The applicant sought no order regarding the Heydenrych and Houghton trusts' gender restrictions because it opined that such "discrimination" should be treated "more circumspectly" than direct discrimination on the grounds of race and colour, and that the freedom of testators to impose gender-based conditions should remain unfettered.⁷² The Women's Legal Centre, a non-profit law centre for the advancement of equality for women,⁷³ intervened as *amicus curiae* on this point, and took issue with, inter alia, the gender-exclusivity of the Heydenrych and Houghton trusts insofar as these excluded girls and women from eligibility.⁷⁴ The *amicus curiae* prayed,

⁶⁸ *Ibid* at para 6.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

⁷¹ *Ibid* at paras 1–2.

⁷² *Ibid* at para 2.

⁷³ "Women's Legal Centre", (2017), *Women's Legal Centre* (website), online: <<http://www.wlce.co.za/>>.

⁷⁴ *Heydenrych*, *supra* note 6 at para 3.

inter alia, that the word “boys” be deleted from the Heydenrych will, and that the word “boy” in the Houghton will be replaced with “boy/s and girl/s.”⁷⁵

Goliath J ruled, with reliance on earlier judgments such as *Syfreds Trust*⁷⁶ and *Emma Smith*,⁷⁷ that the racial restrictions imposed under the wills in issue disqualified Black South Africans from benefitting from the scholarships; that such exclusion occasioned unfair discrimination in accordance with the Constitution’s equality clause; and, consequently, that these restrictions offended public policy.⁷⁸ She, therefore, ordered the excision of the racial restrictions from the various wills.⁷⁹ The applicant contended with regard to the gender restriction contained in the Heydenrych will that the testator’s motivation for favouring boys was not altogether clear, but conceded that, when he executed his will in 1943, positions in the civil service as well as in the profession of pharmaceutical chemistry were almost exclusively occupied by men and that, therefore, the testator might not have considered including girls under his bursary bequest.⁸⁰ The applicant argued with regard to the Houghton will’s gender restriction that the testatrix was not motivated by sexism when she restricted the bursaries to boys; moreover, that many scholarships are limited to single-sex schools and that the public would not generally regard such scholarships as unreasonable or offensive.⁸¹ The applicant contended, therefore, that the testator’s and testatrix’s decisions were of a personal nature and that their gender preferences should, accordingly, be treated circumspectly.⁸²

Goliath J rejected the applicant’s foregoing arguments. She pointed out regarding the Houghton will that the Oundle School was a boys’ school at the time when the testatrix executed her will, but that it converted to a co-educational school a mere six months later. She held that the testatrix did not foresee the transformation of the Oundle

⁷⁵ *Ibid.*

⁷⁶ *Syfreds Trust*, *supra* note 30.

⁷⁷ *Emma Smith*, *supra* note 33.

⁷⁸ *Heydenrych*, *supra* note 6 at para 14.

⁷⁹ *Ibid* at para 23.

⁸⁰ *Ibid* at paras 15, 19.

⁸¹ *Ibid* at paras 15, 18.

⁸² *Ibid* at para 15.

School's ethos and values into a gender-inclusive school when she executed her will.⁸³ Goliath J opined regarding the Heydenrych will that the testator's preference to support only boys to qualify for the civil service or as pharmaceutical chemists was motivated by his belief that women were incapable or unable to qualify in the civil service or as chemists. She reasoned that the testator contemplated neither the subsequent changes in the gender composition of the civil service, nor the recent advancement of women in the field of chemistry.⁸⁴

Goliath J decided the matter in terms of section 13 of the *Trust Property Control Act*⁸⁵ which permits the High Court to vary trust provisions that conflict with the public interest. Section 13 requires additionally that the trust provisions in question must have brought about consequences which the trust founder (the testator or settlor) did not contemplate or foresee. She held, in light of her abovementioned findings, that the impugned restrictions in the Heydenrych and Houghton wills occasioned unfair discrimination on the ground of gender; consequently, that they violated the Constitution's equality clause as well as the public interest.⁸⁶ She held further that these unfairly discriminatory trust provisions brought about consequences that the respective testators did not contemplate or foresee, particularly insofar as the wills in question were executed before the advent of South Africa's constitutional democracy – the testators did not foresee that discriminatory bursary trusts would be unconstitutional and unlawful under the new legal order, nor did they foresee that the charitable purposes of their trusts would be hampered by the imposition of discriminatory conditions.⁸⁷ Goliath J consequently ordered the striking-out of the word “boys” in the Heydenrych will and its replacement with “persons”; moreover, that all references to the male gender in the Houghton will be read and interpreted to incorporate the female gender.⁸⁸

⁸³ *Ibid* at para 18.

⁸⁴ *Ibid* at para 19.

⁸⁵ *Supra* note 38, s 13.

⁸⁶ *Hendemych*, *supra* note 6 at para 20.

⁸⁷ *Ibid* at para 21.

⁸⁸ *Ibid* at para 23.

IV. EVALUATION

The *Syffrets Trust* and *Heydenrych* judgments condemn, in the South African context, testamentary bursary trusts that either expressly exclude women, or that explicitly benefit men only. On the other hand, the *Emma Smith* judgment provides some support for the contention that a South African court will likely uphold a gender-exclusive trust such as the one in *Castanera* which restricts bursary eligibility to women only. It is submitted that two lines of reasoning taken in the *Castanera* case commend themselves in particular to the possibility of a South African court's concurrence with Dewar J's judgment.

A. The Redress of Historical Disadvantage

Dewar J emphasised throughout his judgment in *Castanera* that the testatrix's gender-exclusive trust bequest was motivated by her desire to promote women in her specialist discipline – one in which women were historically underrepresented.⁸⁹ He correlated this consideration explicitly with the exception contained in section 13 of the *Human Rights Code*,⁹⁰ namely that discrimination by any person with respect to, inter alia, any service, right, benefit or privilege available to the general public is prohibited unless bona fide and reasonable cause exists for the discrimination. Dewar J opined that a woman's promotion of other women in a discipline in which women were historically underrepresented “is a bona fide and reasonable cause to direct her money to women only.”⁹¹ He remarked, however, on a recent improvement in the enrolment numbers of female students at the University of Manitoba in the disciplines stipulated in the testatrix's will and he conceded that the enrolment of female students in these disciplines might in future even exceed that of male students.⁹² Dewar J opined, nevertheless, that numbers

⁸⁹ *Castanera*, *supra* note 1 at paras 37–40, 44.

⁹⁰ *Manitoba Human Rights Code*, *supra* note 25, s 13.

⁹¹ *Castanera*, *supra* note 1 at para 38. Tarnopolsky JA expressed similar sentiments in *Canada Trust* when he said that “[t]hose charitable trusts aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the *Human Rights Code* ... would not likely be found void because they promote rather than impede the public policy of equality”: *Canada Trust*, *supra* note 12 at para 104.

⁹² *Castanera*, *supra* note 1 at para 45.

alone is not the determinative consideration; rather, societal values regarding the redress of past inequalities should determine whether a testamentary bursary trust that benefits only women remains inoffensive to public policy notwithstanding the advancement of women in the disciplines in issue.⁹³

The aforementioned part of Dewar J's judgment stands firmly in the tradition of achieving substantive equality (as opposed to mere formal equality). The pursuit of substantive equality is vital when addressing the question whether discrimination has any place in charity law and, therefore, whether some forms of discrimination by charitable donors should be insulated from judicial interference. This question does not, however, yield an easy or obvious answer. Some scholars argue that *all* discriminatory bequests, gifts and trusts, regardless of any equality-promoting objectives they might have, fall to be invalidated on policy grounds. Eason, for example, reasons that disabusing charitable donors of discriminatory notions "articulates a more balanced donor-charity bargain" and that this bargain leaves ample room for other donor directives (in other words, dispositions devoid of any discrimination) that "contribute positively to a diverse and pluralistic charitable environment."⁹⁴ Harding argues in similar vein that the societal collective good, in pluralistic societies in particular, demands that others shall not be treated unfavourably with explicit reference to elements of their identity.⁹⁵ Harding reasons, furthermore, that denying charitable donors the possibility to discriminate will invariably limit the range of options available to them to pursue valuable goals, but he contends that, if a donor's goals may be achieved in a variety of other ways, the disallowance of dispositive options that expressly involve discrimination – even equality-promoting discrimination – will have a negligible impact on personal autonomy.⁹⁶ Other scholars favour the role of substantive-equality-promoting discrimination in charity law. Lamek, for example, argues that "discrimination which is aimed at advancing the legitimate

⁹³ *Ibid.*

⁹⁴ John K Eason, "Motive, Duty, and the Management of Restricted Charitable Gifts" (2010) 45 *Wake Forest L Rev* 123 at 173.

⁹⁵ Matthew Harding, "Some Arguments against Discriminatory Gifts and Trusts" (2011) 31 *Oxford J Leg Studies* 303 at 322.

⁹⁶ *Ibid* at 324-325.

interests of a particular group should not attract the wrath of the moralist, the indignation of the civil libertarian or the surgical attention of the court.”⁹⁷ Morris similarly points out that discrimination may bring with it public benefit – an essential element of charitable status – when such discrimination is essential to overcome some disadvantage or social exclusion.⁹⁸ Du Toit regards South African courts’ application of public policy to discriminatory testamentary bursary bequests in the post-constitutional era as “steadfastly normative” but he approves of the fact that these courts, in adjudicating on these matters, have distinguished permissible fair (or equality-promoting) discrimination from untenable unfair discrimination, thereby tempering the rigidity that could result from an objective, normative, strictly policy-based approach to discriminatory testamentary dispositions.⁹⁹

The South African Constitution certainly mandates the pursuit and achievement of substantive equality. The Constitutional Court affirmed this truism in, inter alia, *Minister of Finance v. Van Heerden*¹⁰⁰ when Moseneke J reasoned that the ambit of the equality right in the South African context is determined by the country’s history and the underlying values of its Constitution:

From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact ... This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but “situation sensitive” approach is indispensable because of shifting

⁹⁷ PSA Lamek, “In re Lysaght: Hill v. The Royal College of Surgeons [1965] 3 W.L.R. 391 (Ch. D.)” (1966) 4 Osgoode Hall L J 113 at 115.

⁹⁸ Debra Morris, “Charities and the Modern Equality Framework – Heading for a Collision?” (2012) 65 Current L Problems 295 at 303.

⁹⁹ François du Toit, “Constitutionalism, Public Policy and Discriminatory Testamentary Bequests – A Good Fit Between Common Law and Civil Law in South Africa’s Mixed Jurisdiction?” (2012) 27 Tul Eur & Civ L F 97 at 124–126.

¹⁰⁰ [2004] 11 B Const LR 1125, 6 All SA 121 (CC).

patterns of hurtful discrimination and stereotypical response in our evolving democratic society.¹⁰¹

It was shown earlier in the analysis of *Syffrets Trust* that Griesel J identified women collectively as suffering from past patterns of disadvantage in South Africa.¹⁰² Indeed, the South African Constitutional Court has repeatedly acknowledged the historical vulnerability of women in various spheres of South African society¹⁰³ and has asserted the constitutional imperative for affirmative measures to achieve substantive gender equality in South Africa.¹⁰⁴ It is in this light that Dewar J's positioning of the gender restriction under the Esther G. Castanera Scholarship Fund as exactly such an equality-promoting measure to redress historical gender imbalances assumes particular importance in the South African context. Gibson shows, for example, that parity has been achieved latterly in the enrolment of girls and boys at South African primary schools; moreover, that the number of female students actually exceeds the number of male students in South African secondary and tertiary education.¹⁰⁵ Gibson maintains, nevertheless, that the South African education system as a whole is still plagued by "a deeply engrained problem of gender inequality."¹⁰⁶ She advocates that cultural attitudes towards gender roles lie at the heart of this problem¹⁰⁷ which is, in turn, manifested by the absence of women's "public voice" in various sectors of

¹⁰¹ *Ibid* at paras 26-27.

¹⁰² See Part III. B, *above*.

¹⁰³ See, eg, *S v Jordan (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* (2002), [2002] 6 All SA 642 at paras 64-65, 11 B Const LR 1117 (CC); *Bhe v Magistrate Khayelitsha (Commission for Gender Equality as Amicus Curiae)* (2004), [2005] 1 B Const LR 1, 1 All SA 580 (CC); *Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* (2005), [2005] 1 B Const LR 1 at para 91, 1 All SA 580 (CC).

¹⁰⁴ See, eg, *Daniels v Campbell NO* (2004), [2004] 7 B Const LR 735 at para 22, 5 All SA 331 (CC); *Hassam v Jacobs NO* (2009), [2009] 11 B Const LR 1148 at para 37, [2009] 5 All SA 572 (CC).

¹⁰⁵ Sally Logan Gibson, "Gender Inequality in African Education: How Can the Lessons of South Africa Apply to the Rest of the Continent?" (2007) [unpublished, archived at Washington and Lee University Capstone Paper] at 13, online: <https://repository.wlu.edu/bitstream/handle/11021/26003/Gibson_Poverty_2007_wm.pdf?sequence=1&isAllowed=y>.

¹⁰⁶ *Ibid* at 14.

¹⁰⁷ *Ibid* at 20.

South African society.¹⁰⁸ She lists the dearth of female students in disciplines such as mathematics, science, engineering, law, and commerce as indicative of these phenomena.¹⁰⁹ Gibson notes, furthermore, a study by the South African National Commission of Higher Education conducted in the 1990s which found that women occupied only 32% of research and teaching positions at South African higher education institutions; moreover, that 89% of women academics were junior lecturers and that less than 3% of professors were female.¹¹⁰ While these statistics have certainly improved over the past two decades, Wolhuter et al shows in a more recent study on the trends at a South African university that the proportion of female academics remains comparatively high among young and emerging scholars; moreover, that the per capita research output of female academics lags behind that of their male counterparts.¹¹¹ The authors argue that gender equality in South African higher education must be achieved not only through the employment of more female academic staff, but also the employment of highly-qualified female scholars.¹¹² These arguments relate directly to Dewar J's view in *Castanera* that the enrolment numbers of female students might leave a false impression of equality within a given discipline, more so if there is an exodus of women from the discipline after graduation or an underrepresentation of women in leadership positions within the discipline.¹¹³ The foregoing scholarship indeed suggests that, despite numerical parity between the genders in South Africa's higher education sector, the "voices" of women to which Gibson refers is by and large still in the minority in the South African academic hierarchy.

It is submitted, therefore, that the advancement of women on all levels of South Africa's tertiary education sector remains of critical importance more than two decades after constitutional democratisation, and that the transformative changes in South Africa's post-constitutional legal-political landscape have to date not yielded substantive parity in the

¹⁰⁸ *Ibid* at 22.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid* at 22-23.

¹¹¹ CC Wolhuter et al, "The Research Output of Female Academics at a South African University: Progress with Gender Equity?" (2013) 10 *Africa Education Rev* 148 at 160.

¹¹² *Ibid* at 161.

¹¹³ *Castanera*, *supra* note 1 at para 39.

position of women in relation to men in the academic sphere. It is important to note in this regard that *Canada Trust* supports the contention that charitable trusts that contain *prima facie* discriminatory provisions, but that pursue legitimate purposes, do not fall foul of policy prescripts on equality and non-discrimination. Tarnopolsky JA remarked that “[i]t would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women ... or other historically disadvantaged groups would be void as against public policy.”¹¹⁴ Dewar J situated the *Castanera Trust* squarely within this paradigm when he said that “[w]here the gift can be articulated as promoting a cause or a belief with specific reference to a past inequality, there is nothing discriminatory about such a gift.”¹¹⁵ It is certainly arguable that contemporary societal values as well as constitutionally-infused public policy in South Africa, as indeed in Canada according to Dewar J in *Castanera*,¹¹⁶ will not be offended by a gender-exclusive bursary trust that encourages women to enter a discipline in which women have historically been underrepresented; nor indeed will it be unreasonable for a university to administer such a gender-exclusive trust. Although the manner in which such a trust is assessed in terms of public policy might change in the future, it is submitted that a contemporaneous application of the public policy yardstick in the South African context, with due cognisance of, first, the constitutional substantive-equality imperative and, secondly, the failure to achieve such equality gleaned from the abovementioned scholarship on the current status of women in South African higher education, lends considerable weight to the contention that a South African court would have concurred with the reasoning and ultimate ruling of Dewar J in *Castanera*.

B. Freedom of Testation

Dewar J’s approach in *Castanera* to the testatrix’s freedom of testation is another ground upon which a South African court would have arrived at a corresponding finding. He emphasised that the testatrix exercised a personal choice to encourage women to enter a discipline which she

¹¹⁴ *Canada Trust*, *supra* note 12 at para 105.

¹¹⁵ *Castanera*, *supra* note 1 at para 44.

¹¹⁶ *Ibid* at paras 37 - 38.

herself enjoyed and which historically was not populated by women;¹¹⁷ moreover, that this personal choice had to be respected.¹¹⁸ He also said that a context-sensitive adherence to freedom of testation provides “the necessary comfort to a testator that his/her gift will be treated in the manner anticipated by them.”¹¹⁹ This acknowledgment of the testatrix’s freedom to dispose of her residuary estate as she saw fit corresponds with both courts in the *BOE Trust* case’s firm adherence to freedom of testation and its constitutional underpinnings, particularly with Erasmus AJA’s correlation in the Supreme Court of Appeal of freedom of testation with the constitutionally-guaranteed right to human dignity.¹²⁰ It must be borne in mind, however, that Dewar J’s defence of testamentary freedom in *Castanera* effectuated substantive-equality-promoting discrimination. Erasmus AJA’s pro-freedom-of-testation stance in *BOE Trust*, on the other hand, activated the alternative devolution of trust income through the will’s residuary clause and, in so doing, obviated the need to engage the potential unfairness of the discrimination wrought by the bursary bequest’s racial exclusivity. Nevertheless, both judges set their respective sights firmly on testamentary freedom, albeit to different effect.

Dewar J is not alone in his defence of testamentary freedom in recent Canadian jurisprudence. Such reiteration of testators’ *ius disponendi* (and Canadian courts’ engagement with the question regarding policy-based limitation of testamentary freedom) arose also in judgments on discriminatory provisions in wills that were not concerned with charitable bursary trusts. In *Spence v. BMO Trust Company*,¹²¹ for example, the Ontario Court of Appeal referred to freedom of testation as “a deeply entrenched common law principle.”¹²² Cronk JA said:

Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator’s right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds. To conclude otherwise would undermine the vitality of

¹¹⁷ *Ibid* at para 37.

¹¹⁸ *Ibid* at para 41.

¹¹⁹ *Ibid* at para 42.

¹²⁰ See Part III. A, *above*.

¹²¹ 2016 ONCA 196, [2016] 129 OR (3d) 561 [*Spence*].

¹²² *Ibid* at para 30.

testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.¹²³

In *Spence* the testator explicitly excluded his one daughter from benefitting under his deceased estate. Cronk JA, in deciding that this unambiguous and unconditional testamentary wish was not open to scrutiny on policy grounds, distinguished *Canada Trust* from the matter before her *in casu*. She reasoned, *inter alia*, that the Leonard Trust's indenture required the administrators of a public charitable trust to engage in discriminatory conduct in the selection of scholarship candidates as well as eligible academic institutions - it was this requirement for discriminatory action on the part of the trust administrators in the operation of a public charitable trust that, according to Cronk JA, activated the court's policy-based intervention in *Canada Trust*.¹²⁴ In *Spence*, on the other hand, the testator's will did not require any discriminatory conduct by the estate trustee; nor, in contrast to *Canada Trust*, did it involve the creation or operation of a public charitable trust so as to require conformity to the public policy against discrimination.¹²⁵ Cronk JA concluded that there was no basis for the earlier policy-driven review of the deceased's will undertaken by the application judge and that that judge had erred in ordering a departure from the testator's clearly expressed wish regarding the disinheritance of his one daughter.¹²⁶

Cronk JA's view in *Spence* that the non-discrimination norm applies to charitable trusts because they operate in the public - and not in the private - sphere is aligned to a similar opinion expressed by Tarnopolsky JA in *Canada Trust*.¹²⁷ In *Emma Smith*, Bertelsmann AJA reasoned correspondingly that South African courts are under a constitutional imperative to remove racially restrictive testamentary clauses that conflict with public policy where these clauses relate to educational trusts

¹²³ *Ibid* at para 75.

¹²⁴ *Ibid* at para 68.

¹²⁵ *Ibid* at para 71.

¹²⁶ *Ibid* at para 86.

¹²⁷ *Canada Trust*, *supra* note 12 at para 107; where the Judge of Appeal said: "This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts."

administered by publicly-funded institutions such as universities.¹²⁸ The Acting Judge of Appeal opined, moreover, that “[i]n the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster.”¹²⁹ This view that it is the public nature of charitable educational trusts that subjects such trusts to the non-discrimination norm is not, however, uncontroverted. Harding points out, for example, that Robins JA, writing for the majority in *Canada Trust*, spoke, at least at times, in terms that were patently not directed exclusively at charitable trusts.¹³⁰ The Judge of Appeal opined, for example, that “a trust” – therefore, not only a charitable one – premised on racism and religious superiority contravenes public policy.¹³¹ Harding argues, moreover, that, even if such a broad reading of *Canada Trust* is not followed, public policy is an integral component of the law of gifts and trusts and, therefore, that it functions as an “entirely unremarkable method for importing into the private law considerations of a public nature.”¹³² Grattan and Conway reason in similar vein that the doctrine of public policy channels constitutional protections into private law and, consequently, that no “more exclusive personal sphere” exists within the private law domain that is immune from the influence of public policy.¹³³ They argue, therefore, that the doctrine of public policy can override purely private dispositions without the need to invoke some public “anchor” to achieve such an effect.¹³⁴

The aforementioned scholarly debate regarding the public/private divide and its implications for discriminatory trusts remains contentious but does not negate the truism that freedom of testation is not unfettered – public policy limits, in Canada as in South Africa, testators’ freedom to dispose absolutely capriciously of their property upon death. It is abundantly clear that human-rights-infused policy considerations underpinned the Ontario Court of Appeal’s judgment in *Canada Trust* as

¹²⁸ *Emma Smith*, *supra* note 33 at para 42.

¹²⁹ *Ibid* at para 38.

¹³⁰ *Harding*, *supra* note 95 at 307.

¹³¹ *Canada Trust*, *supra* note 12 at para 39.

¹³² *Harding*, *supra* note 95 at 312.

¹³³ Sheena Grattan & Heather Conway, “Testamentary Conditions in Restraint of Religion in the Twenty-first Century: An Anglo-Canadian Perspective” (2005) 50 *McGill L J* 511 at 534.

¹³⁴ *Ibid*.

well as the South African judgments in *Syffrets Trust*, *Emma Smith*, and *Heydenrych* where trust instruments were varied through the removal of discriminatory restrictions from the instruments in question. Moreover, Bertelsmann AJA was explicit in *Emma Smith* that freedom of testation must yield to the constitutional equality imperative when a restrictive testamentary bequest has discriminatory effect.¹³⁵ In Canada, authority even exists that public policy can be invoked to strike down unconditional testamentary bequests based on the discriminatory uses to which the beneficiary might put such bequests.¹³⁶ Why, then, would the public policy regarding non-discrimination not trump a South African testator's freedom to stipulate the setting-up of a gender-exclusive testamentary bursary trust such as the one in *Castanera*?

It is submitted that the answer to this question lies in the appreciation of the majority and minority judges in *Canada Trust* as well as Dewar J in *Castanera* for the need to consider carefully the factual peculiarities of each case in which reliance is placed upon public policy to interfere with the terms of a will. Robins JA said in *Canada Trust* that the Ontario Court of Appeal's policy-based intervention in that case was "mandated by the ... unique provisions in the trust document establishing the Leonard Foundation."¹³⁷ Tarnopolsky JA concurred when he opined with regard to charitable trusts that prescribe eligibility restrictions that "these trusts will have to be evaluated on a case by case basis."¹³⁸ He said, furthermore, that the *Canada Trust* case "should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy."¹³⁹ Dewar J expressed similar sentiments in *Castanera* when he reasoned that every gift requires a contextual assessment because a "one-size-fits-all policy" would be subversive of freedom of testation.¹⁴⁰ Some Canadian scholars concur – Parachin, for example, argues that courts invariably engage in a balancing

¹³⁵ *Emma Smith*, *supra* note 33 at para 42. Robins JA expressed similar sentiments in *Canada Trust*, *supra* note 12 at paras 37–40.

¹³⁶ *McCorkill v McCorkill Estate* 2014 NBQB 148, [2014] 377 DLR (4th) 537; *Canadian Association for Free Expression v Streed et al*, 2015 NBQA 50, [2015] 390 DLR (4th) 291.

¹³⁷ *Canada Trust*, *supra* note 12 at para 42.

¹³⁸ *Ibid* at para 103.

¹³⁹ *Ibid*.

¹⁴⁰ *Castanera*, *supra* note 1 at para 42.

exercise when they weigh the harm inflicted by a discriminatory charitable trust against its anticipated benefit; moreover, that this balancing exercise is “highly discretionary” and “context-sensitive.”¹⁴¹

The South African judgments under discussion contain statements to similar effect. For example, Griesel J, having made his policy finding on the impugned testamentary provisions in *Syfre's Trust*, said:

This conclusion does not, of course, mean that the principle of freedom of testation is being negated or ignored ... It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions - which discriminate *unfairly* on the grounds of race, gender and religion - are invalid.¹⁴²

It is submitted that, to establish the unfairness of discrimination, a context-sensitive examination of the facts of the particular case is a necessary and unavoidable part of the judicial inquiry. After all, the law of charitable trusts does not preclude testators or settlors from targeting their beneficence at discrete populations or distinctive groups in society.¹⁴³ It is, therefore, significant to note Mitchell AJ's stance in the court *a quo* in the *BOE Trust* case that the right to benefit a particular class of persons and, thus, to exclude others from benefit is inherent to freedom of testation.¹⁴⁴ The facts of the case at hand must, therefore, be decisive to any judgment on the application of the public policy yardstick to determine the (un)fairness of the discrimination occasioned by restrictive and exclusionary charitable trust provisions. What, then, are the facts in *Castanera* that would prompt a South African court not to interfere with the provisions of the *Castanera Trust* on policy grounds? The South African judgments under discussion reveal at least three instructive considerations in answer to this question.

The courts considered, first, a shift in public policy between the time that a trust was founded and the time a court is called upon to consider the tenability of its provisions.¹⁴⁵ Where no such shift occurred, the courts

¹⁴¹ Adam Parachin, “Public Benefit, Discrimination and the Definition of Charity” in Kit Barker & Darryn Jensen, eds, *Private Law – Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013) at 202, 204 [Parachin].

¹⁴² *Syfre's Trust*, *supra* note 30 at para 48.

¹⁴³ *Parachin*, *supra* note 141 at 183 - 184.

¹⁴⁴ *BOE 1*, *supra* note 37 at para 16.

¹⁴⁵ *Ibid* at para 21.

acknowledged testators' knowledge and understanding of contemporary societal views and policy imperatives in devising their testamentary trust bequests. In the *BOE Trust* judgments, for example, the testatrix executed the will containing the racial restriction on bursary eligibility in 2002 – eight years into South Africa's current constitutional dispensation – and Mitchell AJ opined in the court *a quo* that, consequently, the testatrix must have made her will with full appreciation of the prevailing demands of constitutionally-infused public policy.¹⁴⁶ She likely provided for the charitable organisations as substitute beneficiaries because she realised that the implementation of a racially-exclusive charitable trust bequest might be impossible for a variety of reasons.¹⁴⁷ Similarly, in *Castanera* the testatrix executed her will in 1991, four years after Manitoba's *Human Rights Code* was assented to in 1987. It is certainly likely that, at the time when she contemplated the gift to the University of Manitoba as well as the time when she made her will, the testatrix was aware of judicial views such as that expressed by Tarnopolsky JA in *Canada Trust* in favour of the advancement of women through gender-exclusive trusts, and she probably knew of the *Human Rights Code*'s express allowance for affirmative measures to redress historical gender imbalances.¹⁴⁸ The University's receptiveness to the testatrix's proposed testamentary gift for female students – evident during discussions between the testatrix and the University prior to the act of testation and culminating in the advertisement of the gift even before the testatrix's passing¹⁴⁹ – might have reinforced her belief that societal values had not changed to such an extent that a charitable testamentary gift to women only had become generally offensive to Canadian society. In fact, this inoffensiveness characterised Dewar J's own assessment of contemporary Canadian society's views on gender-exclusive charitable trusts under which only women benefit.¹⁵⁰ It is in this regard that Bertelsmann AJA's ostensible acceptance in *Emma Smith* of the tenability of an educational trust for women only in the South African context¹⁵¹ assumes particular

¹⁴⁶ *Ibid* at para 22.

¹⁴⁷ *BOE 2*, *supra* note 37 at para 30.

¹⁴⁸ *Manitoba Human Rights Code*, *supra* note 2, s 9 (2) (g).

¹⁴⁹ *Castanera*, *supra* note 1 at para 5.

¹⁵⁰ *Ibid* at paras 41, 45.

¹⁵¹ See Part III. B, *above*.

significance because it compliments Dewar J's assessment of how Canadian society regards such a trust. The aforementioned judgments support the contention that contemporary societal views in Canada and South Africa do not condemn bursary trusts for women only and, therefore, that a South African court, when called upon to adjudicate on a women-only testamentary bursary trust created during the post-constitutional era will likely concur with those aspects of Dewar J's judgment in which he adhered to the testatrix's testamentary freedom.

South African courts focused, secondly, on the question whether the impugned restrictions occasioned the frustration of a testator's charitable objective. In both *Emma Smith* and *Heydenrych* the respective courts ruled that the racial limitations – and in *Heydenrych* the gender limitations under the Heydenrych and Houghton wills – prevented the full realisation of the various testators' charitable objectives. Bertelsmann AJA noted in *Emma Smith* that the Emma Smith Educational Fund had grown exponentially since its establishment, but that the Fund had consistently paid out bursary amounts well below what it could afford.¹⁵² Bertelsmann AJA attributed this directly to the Fund's racial exclusivity¹⁵³ and said that “the racially restrictive nature of the Fund prevents the realisation of the testator's intentions.”¹⁵⁴ Goliath J opined in similar vein in *Heydenrych* that the testators of the three wills in issue “did not foresee that the charitable purpose of the trusts would be hampered by the discriminatory conditions imposed.”¹⁵⁵ The Esther G. Castanera Scholarship Fund was also under-utilised – the initial capital bequest of around \$270,000 amounted to over \$550,000 in 2015.¹⁵⁶ Dewar J did not, however, attribute this under-utilisation to the Fund's gender exclusivity; instead, it was, in all likelihood, attributable to the various delays caused by the University of Manitoba's attempts to address internally the concerns regarding the Fund's gender exclusivity¹⁵⁷ as well as uncertainty regarding the identity of the institution from which bursary-recipients had to be drawn.¹⁵⁸ In fact,

¹⁵² *Emma Smith*, *supra* note 33 at para 12.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* at para 40.

¹⁵⁵ *Heydenrych*, *supra* note 6 at para 21.

¹⁵⁶ *Castanera*, *supra* note 1 at para 7.

¹⁵⁷ *Ibid* at paras 9–12.

¹⁵⁸ The testatrix stipulated that recipients had to be women graduates of the Steinbach

Dewar J was favourably disposed to allowing the gender-exclusive Castanera Trust every opportunity to realise the testatrix's charitable objective in the format that she originally devised. He even dismissed concerns that the catchment area provided by the institution whose graduates the testatrix wished to benefit was too small to make reasonable use of the testatrix's gift. He opined that the gift "should be given a chance to operate" before any change to the catchment area is considered.¹⁵⁹ It is evident that the Esther G. Castanera Scholarship Fund's gender exclusivity did not, in Dewar J's estimation, frustrate the testatrix's charitable objective. The facts of the *Castanera* judgment are, therefore, not entirely on par with those of South African cases such as *Emma Smith* and *Heydenrych*, and a South African court could rely on similar factual differences to distinguish a *Castanera*-like case from these South African judgments in order to abide by a testator's freedom of testation.¹⁶⁰

A third and final consideration evident from South African courts' engagement with restrictive charitable bursary trusts is their willingness to consider statistics or numbers on underrepresentation and exclusion in cases where claims were made that such trusts occasioned unfair discrimination. Whilst Dewar J argued in *Castanera* that enrolment numbers are not necessarily decisive,¹⁶¹ it is, understandably, difficult for courts to ignore statistics and numbers altogether when adjudicating on averments of unfair discrimination. Griesel J lamented in *Syfrets Trust* that the restrictions imposed by the testator on bursary eligibility excluded over half of the students at the University of Cape Town.¹⁶² Goliath J noted in *Heydenrych* that women remained underrepresented among South African

Collegiate Institute; however, this institution ceased to exist in 1972 and was effectively succeeded by the Steinbach Regional Secondary School: *ibid* at para 16. Dewar J held that it was the testatrix's intention to benefit graduates of the public school in Steinbach, including the Steinbach Regional Secondary School: *ibid* at para 46.

¹⁵⁹ *Ibid* at para 48.

¹⁶⁰ The Supreme Court of Appeal in *BOE 2*, *supra* note 42 at paras 21–25; distinguished expressly the *Emma Smith* case from the one before it and, in so doing, escaped the strictures of the doctrine of precedent which would otherwise have bound it to the latter judgment. This paved the way for the Supreme Court of Appeal's pro-freedom-of-testation stance in *BOE 2*.

¹⁶¹ *Castanera*, *supra* note 1 at para 39.

¹⁶² *Syfrets Trust*, *supra* note 30 at para 34(b).

chemistry graduates; moreover, while women were overrepresented at the lower levels of the South African civil service, almost 68% of senior civil-service positions were held by men in 2008.¹⁶³ These figures informed both courts' assessment of the unfairness of the discrimination occasioned by the restrictive trusts in those two cases. In this light, a South African court would likely pay particular attention to the statistics, provided by the University of Manitoba, on the enrolment of female students in the disciplines that the testatrix in *Castanera* identified in her will. These statistics are:¹⁶⁴

	Chemistry	Physics	Mathematics	Biochemistry
2013	30%	17%	29%	44%
2012	26%	10%	27%	42%
2011	35%	11%	31%	44%
2010	38%	9%	18%	44%
2009	38%	15%	21%	42%

Even by the University of Manitoba's own standard, namely that an enrolment number of below 40% represents underrepresentation,¹⁶⁵ the foregoing statistics suggest underrepresentation – in some instances severe underrepresentation – of female students in the majority of the relevant disciplines. It is submitted that a South African court would, with little hesitancy, conclude that these numbers underscore the historical disadvantage of women in these disciplines, which conclusion would bolster such a court's judgment that a gender-exclusive charitable trust which benefits only women in the relevant disciplines is indeed an affirmative measure, and that it is, consequently, incumbent upon the court to, in the words of Dewar J in *Castanera*, "treat the testator or testatrix with the respect and gratitude to which he or she is entitled."¹⁶⁶

¹⁶³ *Heydenrych*, *supra* note 6 at para 6.

¹⁶⁴ *Castanera*, *supra* note 1 at para 21.

¹⁶⁵ *Ibid* at para 11.

¹⁶⁶ *Ibid* at para 41.

V. CONCLUDING REMARKS

Public policy is “an unruly horse” and its application as a normative yardstick invariably elicits differences in opinion.¹⁶⁷ South African courts have, in recent years, increasingly invoked constitutionally-founded public policy to limit testators’ freedom to impose eligibility restrictions under charitable bursary trusts. These courts have been particularly severe on racial restrictions, but have also invalidated co-existing gender restrictions. These judgments have elicited the approval of some South African scholars. Wood-Bodley, for example, concurs with the outcome of *Syfre’s Trust* insofar as the testator’s purpose in including the impugned provisions in his will amounted to “gratuitous discrimination ... of a particularly egregious kind” which, according to Wood-Bodley, could not survive judicial policy-based scrutiny informed by the values promoted by the South African Constitution’s Bill of Rights.¹⁶⁸ Other South African scholars have, however, been critical of some of these judgments. Van der Westhuizen and Slabbert, for example, do not regard the eligibility restrictions imposed by the will in *Syfre’s Trust* as occasioning any egregious infringement on fundamental rights; they argue, moreover, that, even if these restrictions are regarded as discriminatory, freedom of testation dictates that the restrictions should have been left untouched.¹⁶⁹ This pro-freedom-of-testation stance appears to be supported by the judgments in the *BOE Trust* case. However, some South African scholars have been critical of particularly the Supreme Court of Appeal’s judgment in *BOE Trust*. Modiri, for example, asserts that the court’s adherence to testamentary freedom occasioned a regrettable judicial disregard of the unlawfulness of the racial restriction imposed under the bursary trust *in casu*; moreover, it permitted the court to conveniently circumvent engagement with the issues of race and racism explicit in the bursary bequest.¹⁷⁰

¹⁶⁷ *BOE 1*, *supra* note 37 per Mitchell AJ at para 13.

¹⁶⁸ Michael Cameron Wood-Bodley, “Freedom of Testation and the Bill of Rights: *Minister of Education v Syfre’s Trust Ltd NO*” (2007) 124 South African L J 687 at 696-97.

¹⁶⁹ Carina van der Westhuizen & Magda Slabbert, “Wysigings van die Bepalings van ’n Liefdadigheidstrust” (2007) J South African L 206, at 213.

¹⁷⁰ JM Modiri, “Race as/and the Trace of the Ghost: Jurisprudential Escapism,

The aforementioned divergent scholarly views suggest that this commentary's thesis, namely that a South African court would have decided the *Castanera* case in a manner akin to Dewar J's judgment, is by no means certain. Nevertheless, the commentary highlighted various convergences between Canadian and South African courts' approaches to discriminatory bursary trusts. The redress of historical disadvantage as well as adherence to freedom of testation are the most significant of these convergences. The limiting effect of public policy on testamentary freedom is tempered by Canadian and South African courts' acknowledgment that each judgment on the tenability of an exclusionary eligibility restriction under a testamentary bursary trust must be considered on its own merits and with reference to its peculiar facts and circumstances. This acknowledgement occasions, in turn, an appreciation of shifts in public policy over time as well as a recognition of testators' knowledge and understanding of contemporary societal views and policy imperatives in devising their testamentary trust bequests; a considered evaluation of whether the impugned restrictions occasion the frustration of a testator's charitable objective; and due cognisance of statistics or numbers on underrepresentation and exclusion in cases where unfair discrimination under restrictive bursary trusts is averred. These points of contact between Canadian and South African courts' approaches to discriminatory bursary trusts certainly renders this commentary's thesis on a South African court's concurrence with Dewar J's judgment in *Castanera* highly probable.

Horizontal Anxiety and the Right to be Racist in BOE Trust Limited" (2013) 16 Potchefstroom Electronic L J 582 at 589, online: <<http://dspace.nwu.ac.za/bitstream/handle/10394/10243/2013%2816%295ModiriART%5B1%5D.pdf?sequence=1>>.

