SILENT ALL THESE YEARS: PUBLIC POLICY, EXPRESSIVE HARM, AND THE LEGACY OF *CHRISTIE V YORK CORPORATION*

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1. Introduction

Twenty years ago, Chief Justice Beverly McLachlin (as she then was) wrote of the vital role played by judges in preventing discrimination and building a society rooted in dignity and respect for all.[1] She sketched out three phases in the evolution of law's relationship to racism in Canada. In the first phase, from the start of colonialism to the mid-twentieth century, Canadian law actively supported and enabled the subordination of non-white racialized social groups, and the courts applying those laws largely followed suit. As a case in point from this era she cited *Christie v York Corporation*,[2] in which the Supreme Court of Canada upheld the right of business owners to engage in race discrimination on the grounds of freedom of commerce. The next two eras she identified (of equal opportunity and then substantive equality) sought to undo the legacy of decisions like *Christie* by developing an increasingly muscular approach to race discrimination, one that saw a closer link between *de jure* and *de facto* equality.[3] Notably, these eras saw the introduction of robust public law measures such as provincial, territorial, and federal human rights legislation and the entrenchment of Canada's *Charter of Rights and Freedoms*.[4] Her account explains how the Supreme Court was instrumental in not only applying these tools but interpreting them in a fashion that encouraged substantive rather than formal equality in Canada.

Chief Justice McLachlin's account of public law's evolution and the Supreme Court of Canada's role in dismantling systemic inequality is heartening, but it tells only half of the story. It fails to account for the very different trajectory—one of failure, avoidance, and silence—that the Supreme Court has followed when faced with

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[1] The Right Honourable Beverley McLachlin, "Racism and the Law: The Canadian Experience" (2002) 1:1 JL & Equality 7.

[2] [1940] SCR 139, [1940] 1 DLR 81 [*Christie* SCC 1940].

[3] McLachlin, *supra* note 1 at 15.

[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*The Charter*].

instances of discrimination in the private law. Indeed, an early and egregious example of its failure to recognize and uphold basic principles of equality through the application of private law doctrine occurred in *Christie*. While this case was referenced by Justice McLachlin as a relic of a bygone time that preceded the *Charter* and human rights legislation, the fact remains that even in 1937 the Supreme Court of Canada possessed the necessary legal tools to censure the discrimination at issue. A central argument advanced by Fred Christie's legal team was that race discrimination was contrary to Quebec's "good morals or public order," the province's codified version of the common law doctrine of public policy. The Supreme Court held that it was not.

Remarkably, *Christie* represents the last time the Supreme Court of Canada considered the issue of public policy and discrimination within the private law, despite several opportunities to do so over the 80+ years since the decision was handed down. While lower courts in Canada have since used the doctrine as a means of voiding discriminatory provisions in wills, trusts, and restrictive covenants, the Supreme Court, when presented with the opportunity to rule on this area of law, has remained silent.

The substantive harms of *Christie* have been well documented by other scholars. The primary focus of this paper is on the *expressive* harm caused by that decision and by the Supreme Court of Canada's subsequent avoidance of the question of public policy's application to discrimination in the private law. "Expressive harm" is the injury stemming from the expression of a negative or inappropriate attitude that is distinct from its subsequent, material consequences.[5] The harm lies in the expression itself and the message it sends. Canadian courts have implicitly recognised the concept of expressive harm before. For instance, the Supreme Court has been willing to limit state action on the grounds that it sends a harmful message impairing the status of vulnerable groups in society, without requiring evidence of further material harms.[6]

This paper begins with a brief overview of the doctrine of public policy and its role in curbing discriminatory private law arrangements in Canada. We then provide a counter-narrative of sorts to that proposed by the former Chief Justice. We adopt her same starting point: the era of judicially sanctioned racism, marked by the

[5] See Elizabeth S Anderson & Richard H Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148:5 U Pa L Rev 1503; Richard H Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism" (1998) 27:2 J Leg Stud 725.

[6] See e.g. *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385 [*Vriend*]. Holding that the province could not lawfully exclude sexual orientation from the list of prohibited grounds of discrimination in its human rights code, the Supreme Court of Canada pointed to the "strong and sinister message" sent by that exclusion. It held that even if the omission of sexual orientation did not lead to an increased incidence of overt discrimination against LGBTQ+ people, it would still constitute a violation of the Charter's equality guarantee because of its implicit statement that LGBTQ+ people do not deserve the same level of legal protection as others. For a discussion on how section 15 *Charter* decisions implicating human dignity reflect concerns about expressive harm, see Ron Levy, "Expressive Harms and the Strands of Charter Equality: Drawing out Parallel Coherent Approaches to Discrimination" (2002) 40:2 Alta L Rev 393; Tarunabh Khaitan, "Dignity as an Expressive Norm: Neither Vacuous nor a Panacea" (2012) 32:1 Oxford J Leg Stud 1 at 7–8.

Christie decision in 1939. We review *Christie* in detail, explaining how and why the Court could and should have found that the discrimination at issue contravened public policy. We then discuss the expressive harm of the decision, contrasting the messages conveyed by both the majority and dissenting reasons in *Christie* with contemporaneous judgments condemning discrimination.

Next, we consider "the era of avoidance," characterized by the case of *Noble and Wolf v Alley* in 1950[7] and later *Seneca College v Bhadauria*[8] in 1981, in which the Supreme Court of Canada avoided any pronouncement on the doctrine of public policy's application to discrimination. We explain that although these cases are separated by over 30 years, they both represent a missed opportunity to overturn the Court's decision in *Christie.* We highlight the expressive dimension of the judgments and the somewhat ironic coincidence of Chief Justice Bora Laskin's involvement in both cases.

In the final part of this paper, we examine the post-*Charter* "era of silence", in which the Supreme Court has declined to grant leave in cases involving the application of public policy to instances of discrimination in private law.[9] We argue that its decision not to hear the cases in this area at all fosters a harmful silence on the propriety or legitimacy of discrimination in the private law.

Through this counter-narrative we demonstrate that the expressive harm from the Supreme Court's judgment in *Christie*, which condoned and legitimized racist behaviour by private establishments in Canada, is rivalled by the Court's subsequent failures to overturn that decision or to directly address the issue of public policy's application to discrimination in the private law. Of course, not every instance of discrimination in the private law will, if challenged, be voided for reasons of public policy.[10] However, when faced with future cases concerning discriminatory wills, scholarships, and trusts, the Court must take the opportunity to acknowledge that the discrimination faced by Fred Christie in 1937 was contrary to public policy then, just as it is today. We maintain that the reversal of *Christie* is not simply about redressing the harms of that decision; it is about the Supreme Court acknowledging and engaging with the problem of discrimination in both public and private law and, in doing so, upholding the values of Chief Justice McLachlin's era of substantive equality in Canada.

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[7] [1951] SCR 64, 1950 CarswellOnt 127, rev'g [1949] 4 DLR 375 (ONCA), aff'g [1948] 4 DLR 123 (ONSC) [*Noble* SCC cited to CarswellOnt].

[8] [1981] 2 SCR 181, 124 DLR (3d) 193, rev'g 105 DLR (3d) 707 (ONCA) [*Bhadauria* SCC].

[9] *Canadian Association for Free Expression v Streed et al*, 2015 NBCA 50, leave to appeal to SCC refused, 36658 (9 June 2016) [*McCorkill* CA leave]; *Spence v BMO Trust Company*, 2016 ONCA 196, leave to appeal to SCC refused, 36904 (9 June 2016) [*Spence* CA leave].

[10] There will always be instances of discrimination that are tolerated, whatever the mechanism for review. What is important is that no area of the law, private or public, should be immune from such review.

2. The Doctrine of Public Policy and Discrimination in the Private Law

The practice of voiding otherwise legal operations of the common law that contravene public policy dates back centuries.[11] Some of the doctrine's earliest applications involved the voiding of contracts that sought to restrain trade,[12] or clauses in wills that contained restrictive conditions concerning a beneficiary's ability to marry.[13] In the 18th century jurists began to refer to it as a doctrine of public policy aimed at ensuring the common good of the community, its power rendering void that which is against the public good.[14]

Judicial determination of what constitutes "the public good" is a contextual exercise without clear or consistent legal parameters.[15] As a result, most courts treat the doctrine as something to be used sparingly and cautiously.[16] Indeed, there have been some historical attempts to limit the development of the doctrine or even eradicate it completely.[17] Nevertheless, the doctrine has endured and evolved, and has been applied by all levels of court in Canada.[18]

What is considered in keeping with public policy is informed by a variety of sources including, chiefly, other existing laws and policies of a given jurisdiction. As Bruce Ziff has noted, "[c]ourts look to legislation in *pari materia* for guidance as to the current state of public policy. It operates to complement extant statutory and other provisions: to fill gaps where necessary."[19] Public policy decisions by Canadian courts have been informed by Canada's Constitution[20] and its democratic system of

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[11] The earliest cases were reported in the 15th century; see WSM Knight, "Public Policy in English Law" (1922) 38:1 Law Q Rev 207.

[12] *Dyer's Case* (1414), YB Anon 2 Hen V, pl 26, fol 5.

[13] *Baker v White*, [1690] 2 Vern 215, 23 ER 740 (Ch).

[14] Jane Thomson, "Discrimination and the Private Law in Canada: Reflections on *Spence v BMO Trust Co*." (2019) 36:2 Windsor YB Access Just 138 at 143. For an early example of the doctrine's recognition by courts of common law see *Mitchel v Reynolds*, [1711] Fortes Rep 296, 24 ER 347 (KB).

[15] As Justice McCardie best put it in *Naylor, Benzon and Co, Limited v Krainische Industrie Gesellschaft*: "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time… The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary." *Naylor, Benzon and Co, Limited v Krainische Industrie Gesellschaft*, [1918] 1 KB 331 at 342–43, aff'd [1918] 2 KB 486 (CA).

[16] See *In Re Estate of Charles Millar, Deceased*, [1938] SCR 1, [1938] 1 DLR 65 [*Re Millar*].

[17] See *Egerton v Earl Brownlow*, (1853) 4 HL Cas 1, 10 ER 359, *Janson v Driefontein Consolidated Mines Ltd*, [1902] AC 484, [1900-3] All ER Rep 426 (HL Eng).

[18] See Thomson, *supra* note 14 at 160–62. For the most recent applications of the doctrine by the Supreme Court of Canada see *Uber Technologies Inc v Heller*, 2020 SCC 16 at paras 101–46, Brown J [*Uber Technologies*]; *Chandos Construction Ltd v Deloitte*, 2020 SCC 25.

[19] Bruce Ziff, "Welcome the Newest Unworthy Heir" 1 ETR (4th) 76 at 87.

[20] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

government,[21] federal and provincial statutes,[22] principles of the common law and previously established heads of public policy, [23] political speeches,[24] and, after its adoption in 1982, Canada's *Charter of Rights and Freedoms.*[25]

One of the doctrine's contemporary and for many years uniquely Canadian applications[26] is its use to censure discrimination within private law. Over the past half century, Canadian lower courts have invoked the common law doctrine in the areas of estate law, the law of trusts, and property law to void conditions on a testamentary gift, a trust, or a land covenant that discriminated on grounds such as race, religion, or ethnicity.[27] Absent from the jurisprudence, however, is any contemporary Supreme Court of Canada ruling on how the doctrine of public policy should be applied to discrimination in the private law. Indeed, the last time the Court opined on the subject at all was to hold that the policy of a Montreal tavern not to serve Black patrons was in keeping with public policy.

3. The Era of Judicially Sanctioned Racism: *Christie v York Corporation*

While the Supreme Court of Canada had heard and pronounced on challenges to other racist laws both before and after 1940,[28] the majority decision in *Christie* has become emblematic of judicially sanctioned racism against Black Canadians.

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[21] See e.g. *Brassard v Langevin*, (1877) 1 SCR 145 at 218, 1877 CarswellQue 6 (WL Can).

[22] See e.g. *Re Drummond Wren*, [1945] OR 778, 1945 CarswellOnt 62 (WL Can) at para 13 (Ont H Ct J) [*Wren* cited to CarswellOnt]; *Walkerville Brewing Co v Mayrand*, [1929] 2 DLR 945 at 949-50, 63 OLR 573 (ONCA) [*Walkerville Brewing*]; *McCorkill v McCorkill Estate*, 2014 NBQB 148 at para 62 [*McCorkill* QB].

[23] See e.g. *Brissette v Westbury Life Insurance Co*, [1992] 3 SCR 87, 96 DLR (4th) 609; *Uber Technologies*, *supra* note 18 at para 110; *Re Millar*, *supra* note 16 at 4–6.

[24] See e.g. *Canada Trust Co v Ontario Human Rights Commission*, [1990] OJ No 615 (QL) at para 91, 74 OR (2d) 481 [*Canada Trust Co*].

[25] See e.g. *Canada Trust Co*, *supra* note 24 at paras 93, 97; Sheena Grattan & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 McGill LJ 511.

[26] Until 2006, the application of public policy to instances of discrimination in the common law was exclusively Canadian. In *Minister of Education v Syfrets Trust Ltd NO*, [2006] ZAWCHC 65, [2006] 10 B Const LR 1214, 4 All SA 205, the High Court of South Africa expressly adopted Canadian authority to void discriminatory conditions on a scholarship established by way of testamentary trust (at para 38).

[27] For a detailed discussion on this area of the law see: Thomson, *supra* note 14; Ziff, *supra* note 19; Adam Parachin, "Discrimination in Wills and Trusts" (20 September 2015), online: *SSRN* <ssrn.com/abstract=2579844> [perma.cc/ZQJ8-TBTT].

[28] See e.g. *R v Quong-Wing*, [1914] 49 SCR 440, 18 DLR 121 (Saskatchewan law that forbade Chinese Canadians from employing White women or girls in their places of business was challenged on the basis that it was *ultra vires*; the Supreme Court of Canada held that it was not). For a fascinating historical review of the Canadian judicial treatment of race see Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900–1950* (Toronto: University of Toronto Press, 1999).

Fred Christie was a Black resident of Montreal who was refused service by the York Tavern in 1936 because of his race. On the night in question Christie was accompanied by two of his friends, one White and the other Black. After being refused service by their waiter, a bartender, and an assistant manager, Christie called the police. Nothing came of this and Christie and his colleagues eventually left the bar.[29] Christie sued the York Tavern on multiple grounds including tort, breach of contract, and on the basis that taverns in Quebec were forbidden by statute from arbitrarily discriminating between members of the public.[30] An additional ground, most forcefully argued by Christie's counsel at the Supreme Court, was that the tavern's policy of not serving Black patrons was a rule contrary to the "good morals or public order" of the province. This term, good morals or public order, was Quebec's codified version of the common law doctrine of public policy as found in earlier decisions of the Supreme Court of Canada.[31]

Christie was successful at trial on one of his grounds of claim. Justice Demers found that because the York Tavern held itself out as a public establishment, it was bound by the laws that governed hotels and restaurants. Those laws, enumerated under then sections 19 and 33 of Quebec's *Licence Act*,[32] precluded the owner of a hotel or restaurant from discriminating between guests ("travellers") based on arbitrary reasons such as skin colour.[33] Christie was awarded 25 dollars in damages and 200 dollars in costs.[34] The York Tavern appealed.

The appeal was heard by a panel of five at the Court of King's Bench. Four justices allowed the appeal, three of whom departed from the lower court by finding that the relevant provisions of the *Licence Act* did not apply to taverns, and that Christie was not a "traveller" within the terms of that Act.[35] Absent express inclusion of taverns into sections 19 and 33, the only way the policy could be invalidated was if it were contrary to public policy. Those in the majority who bothered to opine on the issue[36] held, in separate judgments, that nothing about the tavern's policy offended the good morals or public order of Quebec. They held, variously, that as the tavern was not a monopoly, Black patrons could still be served elsewhere,[37] and that even if the

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[29] For an in-depth account of the incident see Eric M Adams, "Errors of Fact and Law: Race, Space, and Hockey in *Christie v York*" (2012) 62:4 UTLJ 463.

[30] These arguments were addressed in detail at the appeal before Quebec's Court of King's Bench: *York v Christie* (1938), 65 Que KB 104, 1938 CarswellQue 60 (WL Can) [*Christie* KB].

[31] See e.g. *Renaud v Lamothe* (1902), 32 SCR 357, 1902 CarswellQue 17 (WL Can) at para 6.

[32] RSQ 1925, c–25, ss 19, 33.

[33] *York v Christie* (1937), 75 Que SC 136, 1937 CarswellQue 204 (WL Can) at paras 4–6.

[34] *Ibid* at para 9.

[35] *Christie* KB, *supra* note 30 at paras 32–51.

[36] Justice Bond, for example, focused mainly on the definition of the word "hotel" and refused to engage with the question of public policy at all (*ibid* at paras 42–43).

[37] *Ibid* at para 62.

issue were "a matter of public concern" (which it was not), it would fall to be examined by the legislature and not the courts.[38] One judge simply stated:

> The fact that a tavern-keeper decides in his own business interests that it would harm his establishment if he catered to people of colour cannot be said to be an action which is against public morals or good order.[39]

The odd man out was Justice Galipeault. Not only did he disagree with the majority on its interpretation of the statutory prohibition on discrimination in the *Licence Act*, but he also found the tavern's policy to be in contravention of public policy.[40] In his view, the York Tavern's policy threatened the public order and good morals of Quebec. He queried where one would draw the line on discrimination if tavern owners were permitted to refuse to serve Black patrons. Listing the many minority racialized, religious, and linguistic groups present in 1930s Montreal, he wondered which social group would be next to suffer the same treatment as Black Montrealers like Fred Christie.[41]

Leave to appeal was refused by the Court of King's Bench. Accordingly, Christie's legal team applied for special leave under section 41 of the *Supreme Court Act*.[42] In granting leave, the Supreme Court held:

> We think that the matter in controversy in this appeal will involve "matters by which rights in future of the parties may be affected" within the meaning of section 41 of the *Supreme Court Act.* We also think the matter in controversy is of such general importance that leave to appeal ought to be granted.[43]

By the time the case reached the Supreme Court, public policy had moved to the forefront as one of Christie's leading grounds of appeal. The public policy argument advanced by Christie's team was very much in the vein of Justice Galipeault's dissent. They argued that the policy of the York Tavern contravened public order and the good morals of Quebec because of the multicultural nature of the province and of Canada:

> Quebec law is against any discrimination against a citizen on the ground of religion, language or colour. Bilingualism exists by law in Canada. All religions are free to practice their faiths, without control. All citizens are subject to taxation, without discrimination as to colour. The common law

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[38] *Ibid* at para 78.

[39] *Ibid*.

[40] *Ibid* at para 147.

[41] *Ibid* at para 141.

[42] *Ibid*; RSC 1927, c 35, s 41.

[43] *Christie v York Corp*, [1939] SCR 50, 1939 CarswellQue 36 (WL Can) at para 1 [*Christie* SCC 1939].

> of Quebec is the free enjoyment by all its citizens of the facilities for education, nourishment and happiness which are available.[44]

This, Christie's lawyers argued, was demonstrated by the fact that the Government of Quebec had specifically legislated a duty on hotels and restaurants to accommodate all patrons. Its failure to do so with respect to taverns was not intentional, due to the obvious presumption that they too fell under this obligation. Certainly, the significance of the case with respect to what was happening overseas in 1939 was not lost on Christie's lawyers; as they argued in their factum, "[i]f this ridiculous exclusion is sanctioned by law, it could be extended without limitation… until this country bristled with racial, religious and colour discriminations, like certain European countries."[45]

Although special leave to appeal had been granted, the Supreme Court of Canada's decision in *Christie* was brief and categorical. The majority judgment started with a recitation of the facts, in which Rinfret J painted a picture of the tavern employees acting "quietly" and "politely" in refusing service to Christie. Justice Rinfret suggested that in fact it was Christie who was out of order, as he had "persisted in demanding beer after he had been so refused" and had dared to call the police, "which was entirely unwarranted by the circumstances."[46]

The Court then summarily rejected the argument that the tavern's practice of refusing service to Black patrons was contrary to public policy. First, Rinfret J made it clear that the "law of Quebec" was one of "complete freedom of commerce."[47] While any regulations made in accordance with such freedom were subject to good morals and public order, nothing, he believed, suggested that public policy was at issue in the present case. He cited a passage from a French case that explained how monopolies were restrained from complete freedom of trade due to notions of "public order."[48] The York Tavern, he later concluded, held no such monopoly over the sale of beer in Quebec.[49]

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[44] James W St G Walker, *"Race", Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Waterloo, Ontario: The Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997) at 159, citing *Christie* SCC 1940, *supra* note 2 (Factum of the Appellant).

[45] *Ibid*.

[46] *Christie* SCC 1940, *supra* note 2 at 141.

[47] *Ibid* at 142.

[48] "Cependant la liberté du commerçant ou de l'industriel de n'entrer en rapport qu'avec des personnes de son choix comporte certaines restrictions, basées sur des raisons d'ordre public. Il en est de la sorte, par exemple, lorsque le commerçant ou l'industriel jouit, ainsi que les compagnies de chemin de fer, d'un monopole de droit ou même de fait" (*ibid*).

[49] *Ibid* at 144.

In further support of his public policy finding, Rinfret J cited the case of *Loew's Montréal Theatres Ltd v Reynolds.*[50] In that case the Quebec Court of King's Bench reversed a judgment awarding damages for breach of contract between Mr Reynolds, a Black citizen of Montreal, and Loew's Theatre. Reynolds had sued after being refused admission to the "whites only" orchestra section of the theatre.[51] While *Loew's* was decided on the grounds that there was no breach of contract, the Court also found that nothing about the seating policy offended good morals or public order in Quebec. Forcing Black patrons to sit in the balcony was merely a business decision. Writing for the majority in *Christie*, Rinfret J reproduced the analogy of Quebec's Chief Justice who had compared the theatre's racist seating policy to a requirement that attendees wear evening dress. While both might be arbitrary in nature, he wrote, neither were contrary to the good morals or public order of Quebec so as to make them illegal.[52]

Justice Rinfret concluded that "in this case, either under the law or upon the record, it cannot be argued that the rule adopted by the respondent in the conduct of its establishment was contrary to good morals or public order."[53] Rinfret J then went on to agree with the Court of King's Bench with respect to the finding that taverns were not implicitly included in section 33 of Quebec's *Licence Act*, which forbade arbitrary discrimination by hotels and restaurants in providing food to travellers.[54] In the remaining eleven paragraphs of the majority's decision, Rinfret J exhaustively defined the term "traveller" and explored the pressing questions of whether a tavern that served sandwiches could be considered a restaurant, and whether or not beer was food.[55]

Justice Davis, dissenting, would have found the York Tavern liable on the grounds that it was part of a licensed monopoly of liquor providers tightly regulated by the province and subject to a statute stipulating those persons who could legitimately be refused service of alcohol.[56] As "non-White" persons were not included on this list, liquor licence holders were not permitted to discriminate among prospective clientele on the grounds of colour.[57] However, on the specific topic of

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[50] (1919), 30 BR 459, 1919 CarswellQue 61 (WL Can) [*Loew's* cited to CarswellQue].

[51] For a detailed account of the facts of this suit and the companion suit brought by Mr Norris Dobson, Mr Reynolds' companion who was present with him at Loew's Theatre, see Walker, *supra* note 44 at 147–48.

[52] *Christie* SCC 1940, *supra* note 2 at 142-43, citing *Loew's*, *supra* note 50.

[53] *Ibid* at 142.

[54] *Ibid* at 144–46.

[55] *Ibid* at 144–45.

[56] *Alcoholic Liquor Act*, RSQ 1925, c 37, s 43. This provision stipulated that alcohol shall not be served to anyone under the age of 18, any 'interdicted person', any 'keeper or inmate of a disorderly house', anyone previously convicted of offences concerning drunkenness, or anyone barred from the purchase of alcohol by the Quebec Liquor Commission on the grounds of habitually drinking alcohol to excess. The majority of the Court did not consider the application of this statute.

[57] *Christie* SCC 1940, *supra* note 2 at 152–53.

public policy, Justice Davis made no comment at all. Indeed, Davis J noted that the freedom of commerce argument was still applicable to "an ordinary merchant",[58] just not to one so heavily regulated and controlled by the state. As Justice Bertha Wilson would observe four decades later, "none of the members of the Court appear to have found anything reprehensible *per se* about the defendant's conduct."[59]

Christie v York Corporation and the Doctrine of Public Policy

The academic commentary on *Christie* has been suitably scathing, even dating back to the time of its release in 1939. In his comprehensive historical account of the case, James Walker documents some of these scholarly reactions, including one by a young Bora Laskin in 1940.[60] Some lauded the dissent of Justice Davis, while others argued that the "inkeeper's law"—the common law version of sections 19 and 33 of Quebec's *Licence Act*—applied to taverns and should have led to success for Christie.

Curiously, none of these authors focused on the question of public policy.

While some might dismiss the decision in *Christie* as a product of its time, the facts, the legal arguments, and legal precedent all supported a finding—even in 1939—that the York Tavern's refusal to serve Fred Christie because he was Black was contrary to public policy.

The primary purpose of the doctrine of public policy has been, for at least the past 500 years, to ensure that an otherwise legal operation of the common law does not cause harm to the public good. As noted above, the argument that racial discrimination contravenes public policy was expressed in the dissent of Justice Galipeault and, likewise, put to the Supreme Court by Christie's counsel. Moreover, it was articulated in previous reported judgments of Quebec. Prior to the Supreme Court's decision in *Christie*, at least two court challenges were mounted by Black citizens against racist policies of public establishments in Quebec. Although only one was ultimately successful, judges in both cases publicly denounced the racism at issue, finding such policies contravened the public policy of Quebec.

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[58] *Ibid* at 152.

[59] *Bhadauria v Board of Governors of Seneca College of Applied Arts and Technology* (1979), 27 OR (2d) 142, 1979 CarswellOnt 173 at para 8 (ON CA) [*Bhadauria* CA].

[60] Walker, *supra* note 44 at 164–65. These include: Bora Laskin, "Tavern Refusing to Serve Negro – Discrimination" (1940) 18:4 Can Bar Rev 314 [Laskin, "Tavern Refusing"]; Douglas A Schmeiser, *Civil Liberties in Canada*, (London: Oxford University Press, 1964) 269 at 274; Henry L Molot, "The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation" (1968) 46:4 Can Bar Rev 612 at 612, 641; W S Tarnopolsky, "The Supreme Court and Civil Liberties" (1976) 14:1 Alta L Rev 58; Ian A Hunter, "The Origin, Development and Interpretation of Human Rights Legislation" in Ronald St J MacDonald & John P Humphrey, eds, *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) 79; F R Scott, *The Canadian Constitution and Human Rights* (Toronto: Canadian Broadcasting Corp, 1959) at 37; F R Scott, *Civil Liberties and Canadian Federalism* (Toronto: University of Toronto Press, 1959) at 36. Bora Laskin would go on to play his own role in the *Christie* saga, which we come to in the next part of this paper.

The first was the 1899 case of *Johnson v Sparrow*.[61] In that case Mr Frederick Johnson, a Black Montrealer, sued the manager of the Academy of Music for refusing him and his companion admittance to its "whites only" orchestra section.[62] Archibald J held that the theatre had breached its contract with Johnson as the racist condition it sought to rely on was not officially advertised or consistently enforced.[63] More interestingly, after making this finding in relation to contract, Justice Archibald raised (on his own motion[64]) the question of race discrimination in public establishments of Quebec.[65] He expressed the belief that theatres were equivalent to hotels (which clearly fell under the *Licence Act*) when it came to their roles and representations to the public, as both were public places licensed by the province. This, he held, constituted "a privilege granted to the licensees by the public, and naturally the public ought to receive a corresponding benefit."[66] Both, he believed, should be subject to the same laws when it came to unlawful discrimination.[67] While he could find "… no French decisions affirming categorically the obligation of the theatre to admit all decently behaved and dressed persons", he thought "the whole law upon the subject seems to assume that obligation."[68] Referencing the legacy of slavery, its abolishment in Quebec, and Canada's status as a constitutional democracy, Justice Archibald held that "any regulation which deprived negroes as a class of privileges which all other members of the community had a right to demand, was not only unreasonable but entirely incompatible with our free democratic institutions."[69]

The second case, referenced above in the majority's decision in *Christie*, was *Loew's Theatres*.[70] The plaintiff in that case was unsuccessful. Apart from the Chief Justice of Quebec's dehumanizing analogy of evening dress to the colour of one's skin, *Loew's* is also notable for the dissenting judgment of Justice Carroll. His reasoning focused on the fact that the revocation clause on the back of Reynold's theatre ticket, relied upon by the theatre in its arguments related to breach of contract, could only be

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[61] (1899), 15 Que SC 104, 1899 CarswellQue 310 (WL Can) [*Sparrow* cited to CarswellQue].

[62] *Ibid*. Johnson testified that when he had exchanged the voucher for tickets at the Academy, he made no representations that they were for anyone but himself. Johnson then sued for breach of contract and won (*ibid*).

[63] Ibid at paras 25–26. At trial, Mr Johnson called "nearly a dozen coloured persons" to testify claiming that they had been seated in the orchestra of the Academy of Music on occasion (*ibid* at para 7).

[64] "I find that the issue … is clearly raised in the written pleadings, and I do not feel justified in avoiding its discussion" (*ibid* at para 10).

[65] *Ibid* at paras 19–27.

[66] *Ibid* at para 22.

[67] *Ibid* at para 16.

[68] *Ibid* at para 24.

[69] *Ibid* at para 14. The judgment was affirmed on appeal by the Court of King's Bench. The Court distanced itself from any of the trial judge's opinions on the evils of racism, agreeing only with its ruling on breach of contract: *Sparrow c Johnson* (1899), 8 Que QB 379, 1899 CarswellQue 48.

[70] *Loew's*, *supra* note 50.

exercised by the theatre for a valid reason. He held that the fact that Reynolds was Black did not qualify as a valid reason. He noted that since 1789 no such policy would be legal in France,[71] nor should it be recognized as such in Canada where "tous les citoyens de ce pays, blancs et noirs, sont soumis à la même loi et tenus aux mêmes obligations."[72]

In *Christie*, Rinfret J also cited the Ontario decision of *Franklin v Evans*[73] to support his finding that the Tavern's policy was not contrary to public policy. That case involved the refusal of service to a Black customer by a restaurant in London, Ontario. The trial judge, though sympathetic to "the pathetic eloquence of [the plaintiff's] appeal for recognition as a human being, of common origin with ourselves",[74] had ruled that the common law "innkeepers' law" did not apply in the context of a restaurant. Ironically, that decision concludes with this statement: "[Plaintiff's counsel] referred me to *Egerton v. Earl Brownlow* (1853), 4 H.L.C, 1, at pp. 195… The Brownlow case -- about a will -- covers 256 pages. I have not time to read it carefully."[75]

Egerton v Brownlow is indeed about a will; it is also the decision that preserved and justified the use of public policy in voiding operations of the common law that offend the common good.[76] Who knows what conclusions the judge in *Franklin* might have reached had he found the time to read *Brownlow* carefully. Such was the observation of Justice O'Halloran in his dissent in *Rogers v Clarence Hotel*,[77] in which he refused to follow the majority in applying *Christie*'s precedent to an identical scenario at a Vancouver tavern a year after the Supreme Court judgment in *Christie* was released.[78]

Finally, as noted above, the doctrine of public policy had long been interpreted and applied *in pari materia* with pre-existing common law and other statutes.[79] The effort taken by both the Supreme Court of Canada and Quebec Court of King's Bench to explain why the relevant Quebec statutes did not apply to the particular scenario in *Christie* was an obtuse avoidance, rather than a careful

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[71] *Ibid at* paras 8–10.

[72] *Ibid* at para 8.

[73] (1924), 55 OLR 349 (Ont HC), [1924] OJ No 33 (QL) [*Franklin*, cited to QL].

[74] *Ibid* at para 6.

[75] *Ibid* at para 15.

[76] See Thomson, *supra* note 14 at 160; Knight, *supra* note 11 at 211–12; Percy H Winfield "Public Policy in the English Common Law" (1928) 42:1 Harv L Rev 76 at 88–90.

[77] [1940] 3 DLR 583, [1940] 2 WWR 545 [*Rogers* cited to DLR].

[78] O'Halloran J held that refusal to serve a customer based only on their race was contrary to the common law, writing that "All British subjects have the same rights and privileges under the common law—it makes no difference whether white or coloured; or of what class, race or religion" (*ibid* at 588).

[79] See e.g. *Walkerville Brewing*, *supra* note 22.

application, of the law. Instead of producing a technical interpretation of the law to condone the tavern's racism, the Supreme Court of Canada could and should have viewed those Quebec statutes that forbade arbitrary discrimination in public places as informing the application of Quebec's public policy to the York Tavern's racist actions. This was clear enough to Justice Archibald at the turn of the century in *Johnson v Sparrow*, and it should have been clear to the Supreme Court of Canada 40 years later when it granted special leave to hear *Christie* as "the matter in controversy" was "of such general importance."[80] By focusing with ardour on the minutiae of the law and the question of whether beer was in fact a food,[81] the larger picture of what Quebec's public policy dictated was lost.

It is true that in 1939 Canada was very much beset by both informal and institutionalized racism.[82] *Christie* was handed down at a time when racial segregation and discrimination were commonplace and considered acceptable by a large number of Canadians.[83] However, Canada was also a multicultural democracy that required a certain level of freedom from discrimination in everyday public life in order to properly function.[84] Moreover, the nation was not uniformly or monolithically racist.[85] The Court would not have had to look far to find strong, vocal pockets of resistance to racist ideology and practice: in public discourse, politics, and, as noted above, in the cases themselves. As Constance Backhouse argues, the judges hearing these cases were not, as so many of them implied, bound by clear legal precedents. These disputes lacked legal certainty and the judges therefore had a choice as to whether to apply those precedents favouring freedom of commerce or the equally persuasive precedents affirming principles of equality and freedom from discrimination.[86] Justices Archibald, Carroll, and Galipeault chose the latter. It was entirely possible for the justices of the Supreme Court of Canada in *Christie* to have also exercised their considerable discretion in this area differently and to take a strong stance against race discrimination. The doctrine of public policy was perfectly suited to this task and clearly provided the Court with the legal grounds for such a stance. But the Court's

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[80] *Christie* SCC 1939, *supra* note 43 at para 1.

[81] *Christie* SCC 1940, *supra* note 2 at 144–45.

[82] Racial barriers to equal participation in Canadian society existed in all areas of public life including education, employment, recreation, military service, suffrage, housing, public services, and criminal justice. See e.g. Backhouse, *supra* note 28; Walker, *supra* note 44 at 315; Timothy J Stanley, *Contesting White Supremacy: School Segregation, Anti-Racism, and the Making of Chinese Canadians* (Vancouver: UBC Press, 2011); Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press, 2010).

[83] See e.g. Walker, *supra* note 44.

[84] As alluded to by Justice Galipeault, dissenting in *Christie* KB, *supra* note 30 at paras 141–42; by Justice Archibald in the lower court decision of *Sparrow*, *supra* note 61 at para 14; and by Justice Carroll, dissenting in *Loew's*, *supra* note 50 at paras 8–10.

[85] See e.g. Walker, *supra* note 44 at 321; Backhouse, *supra* note 28 at 260, 275–78. Backhouse writes that, although racism in the first half of the 20th century was systemic, it "did not entirely envelop white Canadian society in an unrelieved manner" (*ibid* at 277).

[86] Backhouse, *supra* note 28 at 256. See also Walker, *supra* note 44 at 167.

decision in *Christie* instead reflected, as Walker argues, the pervasive "legal sensibility" of the time,[87] preferring a narrow, formalist solution that pushed questions of race and justice outside the bounds of legal inquiry.

The Harms of Christie

The harm that emanated from *Christie* was both material and expressive in nature. We need not point out the serious material effects of the Supreme Court of Canada ruling that discrimination in public bars or taverns was legal. State-sanctioned segregation denied Black individuals the freedom to fully participate as equals in Canadian society, inflicted humiliation, shame, and psychological injury on racialized people, and served to entrench other racist segregation policies and practices. Notably, the decision's impact was not limited to the province of Quebec. At the time of *Christie*'s release, the editor of the Dominion Law Reports wrote that the case served as authoritative precedent that "socially enforced" racism was not contrary to public policy, with respect to both the civil and common law of Canada.[88] This prediction was borne out, with several similar decisions in British Columbia and Ontario following the precedent set in *Christie*.[89] Even the federal deputy Minister of Justice, in response to a Black constituent who complained that he had been refused service at a restaurant due to his race, wrote:

> …to adopt a law requiring a merchant or restaurant keeper to transact business with every member of the public who presented himself, since it would be entirely one-sided, might operate to the serious detriment of business. The principle of freedom of contract which I have mentioned has been recognized and accepted by the Supreme Court of Canada in a decision rendered as recently as 1939. This was on an appeal from the Court of Appeal of the Province of Quebec.[90]

Compounding the clear material or tangible harm of the case is the expressive harm it caused. It is now widely accepted that law has an important expressive dimension, sending messages about what society values and believes in. Legislation, court decisions, and regulatory measures all communicate and build up law's normative character. They create a set of public meanings that influence how people understand their relationship to the state and to one another.[91] Even unenforced laws can have an expressive effect, the law "on the books" signalling society's disapproval of the underlying conduct.[92]

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[87] Walker, *supra* note 44 at 314-19.

[88] *Ibid* at 164.

[89] See e.g. *Rogers*, *supra* note 77; *King v Barclay* (1960), 24 DLR (2d) 418, 31 WWR (ns) 451 (AB QB).

[90] Walker, *supra* note 44 at 176.

[91] See Anderson & Pildes, *supra* note 5; Wibren van der Burg, "The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues" (2001) 20:1 Law & Phil 31.

[92] See Cass R Sunstein, "On the Expressive Function of Law" (1996) 144:5 U Pa L Rev 2021 at 2032; Richard D Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* (New York: Columbia University

The concept of "expressive harm" builds on this foundation. Expressive harm is the harm inhering in the public or social meaning of an action, rather than in its tangible effects.[93] In other words, the harm lies in what a law, judgment, or state practice *says* as opposed to what it *does*. Race segregation, for instance, constrained and threatened the lives of Black individuals in obvious measurable ways. However, the expressive wrong would persist even in the absence of material consequences like denied opportunities and emotional harm. The attitude of contempt, disrespect, or disgust at racialized persons expressed through race segregation is harmful in and of itself.[94] The harm lies in how race segregation alters social relationships and positions one class of persons as inferior to others. It is a status harm, and it affects all members of society. In the words of Richard Pildes and Richard Niemi,

> Expressive harms are therefore, in general, social rather than individual. Their primary effect is not as much the tangible burdens they impose on particular individuals, but the way in which they undermine collective understandings.[95]

The judiciary can play a key role in perpetuating expressive harm. A court—particularly a nation's highest court—is a speaker with authority and its pronouncements are thought to articulate a nation's core values,[96] even where they elicit disagreement or resistance. Judgments send powerful messages about social norms and values, and shape "how we understand our shared political community."[97] What a court says, how it says it, and even what it fails to say can be as important as the functional consequences of its ruling.[98]

Press, 1998) at 60; *Norris v Ireland* (App no 10581/83) [1988] ECHR 10581/83 at paras 46–47 (unenforced ban on consensual gay sex declared in violation of article 8 of the European Convention on Human Rights). Conversely, systemic failures to enforce existing laws can signal that those acts are less deserving of censure, *viz*. failures to punish the murders of Black or Indigenous victims by white killers.

[93] Anderson & Pildes, *supra* note 5. Deontological expressivists such as Anderson and Pildes maintain that expressive harm *precedes* the realisation of adverse consequences, while instrumental or consequentialist expressivists focus on how the state's expressive acts go on to influence social norms and behaviour. See e.g. Sunstein, *supra* note 92; Lawrence Lessig, "The Regulation of Social Meaning" (1995) 62:3 U Chicago L Rev 943; Richard H McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge, Massachusetts: Harvard University Press, 2015).

[94] See Anderson & Pildes, *supra* note 5 at 1528, 1542–43; Charles L Black Jr, "The Lawfulness of the Segregation Decisions" (1960) 69:3 Yale LJ 421 at 427; Andrew Koppelman, "Commentary: On the Moral Foundations of Legal Expressivism" (2001) 60:3 Md L Rev 777 at 781–84; Deborah Hellman, "The Expressive Dimension of Equal Protection" (2000) 85:1 Minn L Rev 1 at 3, 8–13.

[95] Richard H Pildes & Richard G Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*" (1993) 92:3 Mich L Rev 483 at 507.

[96] Sunstein, *supra* note 92 at 2028.

[97] See Margot Young, "Social Justice and the Charter: Comparison and Choice" (2013) 50:3 Osgoode Hall LJ 669 at 670–71; Jason Mazzone, "When Courts Speak: Social Capital and Law's Expressive Function" (1999) 49:3 Syracuse L Rev 1039 at 1039–43.

[98] Sunstein, *supra* note 92 at 2028. See also Kyle C Velte, "*Obergefell*'s Expressive Promise" (2015) 6:1 HLRe: Off the Record 157.

The Supreme Court of Canada's decision in *Christie* served to proclaim the lesser status of Black Canadians like Fred Christie. Even if no Black person were barred entry from a tavern as a result of the judgment, its expressive effect was to declare their second-class citizenship loud and clear. Indeed, while the social meaning of state action can admittedly be difficult to pin down with certainty,[99] the expressive meaning of state-sanctioned racial segregation is "as clear a sign of disrespect as one might find, and about as hard as a social fact can be."[100] When segregation as social practice receives the backing of the law, it assumes a legitimacy it did not have before. This is one of the gravest harms of *Christie*. By refusing to find that race segregation was contrary to public policy, by characterizing Christie as the party who acted unreasonably, and by focusing on the nutritive qualities of beer as opposed to the violation of Christie's dignity, the Court sent a "strong and sinister message"[101] legitimizing racism. The decision put the Court's stamp of approval on discrimination and served to reify racist hierarchies and divisions in Canadian society.

What, then, does one make of Justice Davis's dissent? In his reasons, Justice Davis distinguished himself from the majority by humanizing Fred Christie, painting him as a respectable gentleman with a suitably Canadian interest in hockey.[102] However, like the majority, Davis J refrained from denouncing the discrimination perpetrated by the tavern as contrary to public policy and did not explore the scope of Christie's right to be treated with equality and dignity, despite the Court having granted special leave under section 41 of the *Supreme Court Act* on the grounds that it was "of such general importance that leave to appeal ought to be granted."[103] It is true that Justice Davis would have found for Christie as the York Tavern had to abide strictly by the terms of the *Alcoholic Liquor Act*, which listed certain permissible grounds for refusing a customer service of alcohol.[104] However, he also held that an "ordinary merchant", not so tightly regulated by the state, would have been free to discriminate on any grounds not listed.[105] The contrast between his dissenting

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[99] The difficulty in identifying an expressive act's meaning is commonly targeted by critics of legal expressivism. See e.g. Matthew D Adler, "Expressive Theories of Law: A Skeptical Overview" (2000) 148:5 U Pa L Rev 1363; Heidi M Hurd, "Expressing Doubts about Expressivism" (2005) 2005 U Chicago Legal F 405 at 418–428; Steven D Smith, "Expressivist Jurisprudence and the Depletion of Meaning" (2001) 60:3 Md L Rev 506. Some take issue with the very concept of social meaning as morally significant. Richard Ekins, for example, describes social meaning as "an exercise in make believe": Richard Ekins, "Equal Protection and Social Meaning" (2012) 57 Am J Juris 21 at 34.

[100] Leslie Green, "Two Worries about Respect for Persons" (2010) 120:2 Ethics 212 at 228; see also Black Jr, *supra* note 94; Charles R Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39:2 Stan L Rev 317 at 361–64.

[101] This phrase is from *Vriend*, *supra* note 6 at 550, used by the Court to describe the message sent by the exclusion of sexual orientation grounds from Alberta's anti-discrimination legislation.

[102] See Adams, *supra* note 29 (on the mischaracterization of why Christie and his friends were at the Tavern to begin with: they were attending a boxing match, not a hockey game).

[103] *Christie* SCC 1939, *supra* note 43 at para 1.

[104] *Christie* SCC 1940, *supra* note 2 at 150, 153.

[105] *Ibid* at 152.

judgment and the clear condemnation of race discrimination from lower court judges like Justices Archibald, Carroll, and Galipeault is striking.

The expressive failures in *Christie* can also be contrasted with another race discrimination case of that era, *The King v Desmond*.[106] Viola Desmond is now well known as the Black Nova Scotian businesswoman who was arrested for seating herself in the "whites only" section of a New Glasgow movie theatre and who challenged her arrest and conviction at trial. The Nova Scotia Court of Appeal delivered a disappointing ruling in her case. The judges maintained that they were unable to rule in her favour because of the legal strategy adopted by her lawyer, who had sought a writ of *certiorari* rather than pursuing an appeal of her conviction on the merits.[107] However, in a brief concurring judgment, Mr Justice Hall (despite also finding his hands tied) expressed regret at this outcome, writing:

> Had the matter reached the Court by some method other than *certiorari*, there might have been opportunity to right the wrong done this unfortunate woman.
>
> One wonders if the manager of the theatre who laid the complaint was so zealous because of a *bona fide* belief there had been an attempt to defraud the Province of Nova Scotia of the sum of one cent, or was it a surreptitious endeavour to enforce a Jim Crow rule by misuse of a public statute.[108]

Halifax's Black newspaper, *The Clarion*, seized upon this concurrence and wrote in response to Hall's statements:

> The Court did not hesitate to place the blame for the whole sordid affair where it belonged. […] It is gratifying to know that such a shoddy attempt to hide behind the law has been recognized as such by the highest Court in our Province. We feel that owners and managers of places of amusement will now realize that such practices are recognized by those in authority for what they are, – cowardly devices to persecute innocent people because of their outmoded racial biases.[109]

This comment demonstrates the expressive power of court decisions. Even though Mr Justice Hall did not rule in Ms Desmond's favour, *The Clarion* saw in his reasons a much-needed judicial acknowledgement of the harms of racism. Such an acknowledgement would have been even more powerful had it emanated from the

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[106] [1947] 4 DLR 81, 1947 CarswellNS 1 (NS SC) [*Desmond* cited to CarswellNS].

[107] Constance Backhouse describes the NSCA judges as "sanctimoniously concluding that it was a pity that she didn't choose the proper legal avenue for redress": Backhouse, *supra* note 28 at 281. For a thorough review of the case, see *ibid* at 226–271.

[108] *Desmond*, *supra* note 106 at para 26.

[109] Backhouse, *supra* note 28 at 268, citing "The Desmond case", *The Clarion* (April 1947) at 2.

Supreme Court of Canada, the "power centre" of legal authority,[110] and yet not one of the justices in *Christie* could bring themselves to declare race segregation as a wrong.

Subsequent cases failed to take up the Supreme Court's missed opportunity to produce, at a minimum, a decision based on public policy. With few exceptions,[111] the courts continued to cite *Christie* for its ratio on freedom of commerce without denouncing the court-endorsed racism in the case.[112] In 1972, for instance, long after Canada had passed its *Bill of Rights*,[113] Justice Léon Laland of the Quebec Superior Court referenced *Christie* on freedom of commerce uncritically, describing it simply as "the case of a tavern refusing to serve beer to a negro."[114] As we explain below, the Supreme Court began to take a more uncompromising position on discrimination in the decades after *Christie* but continued to circumvent the question of whether discrimination in private law was contrary to public policy by deciding the cases on other grounds, leaving the ratio in *Christie* intact.

4. The Era of Avoidance: *Noble and Wolf v Alley* & *Bhadauria v Seneca College*

The era of avoidance spanned forty years. It began with a decision on a discriminatory restrictive covenant in 1949 and ended with the Supreme Court of Canada's refusal to acknowledge a common law tort of discrimination in 1981. In both decisions the issue of public policy and discrimination was raised by the parties, and in both the Supreme Court avoided addressing the question altogether, declining to overturn *Christie* or to denounce any form of race discrimination as contrary to public policy.

Noble and *Wolf v Alley*

In 1948 Bernard Wolf entered into an agreement for the purchase and sale of cottage property near Lake Huron. The property was part of a summer resort subject to a restrictive covenant entered into by the original purchasers fifteen years earlier and due to expire in 1962. The terms of the covenant included a promise to never sell the land to "any person of the Jewish, Hebrew, Semitic, Negro or coloured race or

[110] A nod to Michel Foucault: Walker, *supra* note 44 at 318.

[111] Over 35 years later, Justice Nadeau of the Quebec Superior Court described the actions of the Tavern as "reprehensible": *Philippe Beaubien & Cie c Canadian General Electric Co*, [1976] CS 1459, 1976 CarswellQue 97 at para 169. Notably, Justice Nadeau (without citing *Christie*) found the breach of an oral contract based on racism contrary to public policy in 1965: *Gooding v Edlow Investment Corp*, [1966] CS 436, 1965 Carswell Que 139.

[112] See e.g. *Laporte v Wawanesa Mutual Ins Co*, [1946] 4 DLR 433, 1946 CarswellQue 278 at para 29.

[113] *Canadian Bill of Rights*, SC 1960, c 44.

[114] *Turcotte c Blue Bonnets Raceway Inc*, [1972] CS 753 at 756, 1972 CarswellQue 142.

blood."[115] Jewish himself, Wolf sought a court order that the conditions on the covenant were null and void.[116]

The history of court challenges to discriminatory restrictive covenants in Canada dates back to 1911. In an unreported in-chambers decision, Chief Justice Hunter of the British Columbia Supreme Court voided a condition of a restrictive covenant that forbade the sale of certain land to persons "of Chinese or Japanese origin." According to one authority,[117] Hunter CJ's judgment dulled the use of discriminatory restrictive covenants at a key period of rapid development in British Columbia's lower mainland.[118] The story of racism and real property was different in Ontario. Until 1950, restrictive covenants containing bans on the sale or occupation of land to persons based on their race, religion, or ethnicity remained legal and enforced by decisions of the Ontario Superior Court.[119]

Bernard Wolf's motion in *Noble* was opposed by the Beach O'Pines Protective Association, a private group that initially consisted of the original 35 purchasers of the land. They claimed that the current owners of the land were "congenial" with one another and that, without the impugned terms of the covenant, the character of the community would be altered to such an extent that the value of the land would decrease.[120] In response, Wolf challenged the covenant on the grounds of restraint of alienation, uncertainty, and public policy.[121]

Predating *Noble* by less than a year was the case of *Re Drummond Wren.*[122] In that decision, Justice Mackay of the Ontario High Court of Justice voided a restrictive covenant that prohibited the sale of land to anyone of the Jewish faith or

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[115] *Noble v Alley*, [1948] 4 DLR 123, 1948 CarswellOnt 58 at para 6 (H Ct J) [*Noble* H Ct J cited to CarswellOnt].

[116] *Ibid* at para 10.

[117] The only account of the case was provided by HS Robinson, Registrar of Titles for the City of Vancouver, who published a short article in the *Vancouver Advocate* on racist land covenants 40 years later. The unreported decision is reproduced in HS Robinson, "Limited Restraints on Alienation" (1950) 8 Advocate 250 at 251, referenced as Ref Chamber applications VR 111/Fol 65 Jany 11th 1911.

[118] To the best of Robinson's knowledge, even where such covenants had been successfully registered with the Land Titles Office in Vancouver, any conditions that limited the sale of the property to persons of a certain race or religion were considered void by city officials. Robinson claimed that as of 1950, there had never been a case where a Registrar of Titles had requested evidence of a grantee's race or religion prior to perfecting a conveyance of property (*ibid*).

[119] See *Essex Real Estate Co Ltd v Holmes*, [1930] OJ No 296, 37 OWN 392 (H Ct J); *Re Bryers & Morris*, [1931] OJ No 229, 40 OWN 572 (H Ct J); *McDougall v Waddel*, [1945] 2 DLR 244, [1945] OJ No 82 (H Ct J).

[120] *Noble* H Ct J, *supra* note 115 at para 7.

[121] *Ibid* at para 11.

[122] *Wren*, *supra* note 22.

other "persons of objectionable nationality" for reasons of public policy.[123] While it was not appealed, the judgment in *Wren* was a landmark decision at the time and is still considered as such by adjudicators and scholars.[124] *Wren*'s importance was both symbolic and functional. It symbolized an express rejection of antisemitism and discrimination following on the heels of the Second World War[125] and was also the first common law judgment (the earlier Quebec decision of *Johnson v Sparrow* being one of civil law) that expressly found discrimination of any kind contrary to public policy.

Justice Mackay's reasoning in *Wren* echoed the arguments of Fred Christie's counsel and Justice Galipeault's dissent six years earlier in *Christie*. Noting that it was "a well-recognized rule that courts may look at various Dominion and Provincial Acts and public law as an aid in determining principles relative to public policy",[126] Mackay J looked to all such legislation in effect in 1945 that prohibited the type of discrimination at issue. In addition, he referenced international covenants and treaties to which Canada was either a signatory or subscribed.[127] He held that all of these sources pointed to a growing intolerance for discrimination based on race, religion, or similar factors within a democratic society that comprised multiple ethnicities, cultures, and religions. This was because of the harm such discrimination posed to these societies. Nothing, he reasoned, could "be more calculated to create or deepen divisions between existing religious and ethnic groups."[128] To allow discrimination in property law would serve only to segregate and isolate certain groups of persons from residential and business areas alike, leading to the fragmentation of society. Such fragmentation was a threat to national unity and injurious to the Canadian public, and

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[123] *Ibid* at paras 6, 23. Justice Mackay also found the covenant void for being an invalid restraint on alienation, for being uncertain, and for contravening Ontario's *Racial Discrimination Act* (*ibid* at paras 30–35).

[124] See *Bekele v Cierpich*, 2008 HRTO 7 at para 88; D A L Smout, "An Inquiry into the Law on Racial and Religious Restraints on Alienation" (1952) 30:9 Can Bar Rev 863 at 868; C B Bourne, "Case and Comment" (1951) 29:9 Can Bar Rev 969 at 974. See also the arguments of JR Cartwright, lawyer for appellants in *Noble and Wolf*, [1949] OR 503, 1949 CarswellOnt 47 [*Noble* CA, cited to CarswellOnt], who spoke of the "very wide publicity" received by the case and its corresponding absence of "legislative disapproval." Cartwright also noted that it was also applied in an unreported decision by Barlow J.

[125] The decision was noted in Time Magazine and cited by American Courts; see Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) at 251.

[126] *Wren*, *supra* note 22 at para 13.

[127] These included the *San Francisco Charter*, 2 January 1942, Can TS 1942 No 1 to which Canada was a signatory; the *Atlantic Charter*, RSO 1937, c 284 to which Canada had subscribed; Ontario's *Racial Discrimination Act*, RSO 1944, c 51, s 1; regulations pursuant to *The Community Halls Act*, RSO 1937, c 284; and even an anti-discriminatory provision found in Ontario's *Insurance Act*, RSO 1937 c 256, s 99 (*ibid* at paras 14–19). Doctrinally, this decision departed from precedents from the Ontario Court of Appeal which sought to restrict the application of the doctrine: see *Re Millar*, *supra* note 16. Justice Mackay believed the doctrine of public policy applied "whenever the facts demanded its application," and that violations of public policy were caused by "whatever is injurious to the interests of the public": *Wren*, *supra* note 22 at para 12.

[128] *Wren*, *supra* note 22 at para 20.

hence contrary to the public policy of Ontario and Canada.[129] If any judge were to sanction such a covenant, Mackay J reasoned, the effect on a multicultural society such as Ontario's would be severely damaging.[130]

The motion judge in *Noble,* however, held that he was neither bound by *Wren* with respect to its public policy findings, nor was he in agreement with them.[131] In Schroeder J's opinion, Mackay J had placed too much weight on international treaties and the policies of other countries that did not bind Canadian legislators.[132] Looking instead to domestic laws that influenced public policy on this issue, Justice Schroeder believed that Justice Mackay had engaged in an "arbitrary extension" of the doctrine[133] and had created "a novel head of public policy."[134] Citing UK jurisprudence with the most restrictive dicta on public policy, Justice Schroeder expressed his disdain for judicial interference with freedom of contract.[135] He characterized Justice Mackay's belief that these types of covenants were dangerous to Canadian society as "fanciful and unreal."[136] At best, this was a matter to be resolved by the legislature, not the courts.[137]

The Ontario Court of Appeal unanimously upheld Justice Schroeder's decision on all grounds.[138] Four of the five justices specifically addressed the public policy ground, explaining why they believed the clause to be valid in this respect. Chief Justice Robertson, in accepting Justice Schroeder's grounds for distinguishing *Wren*, held that the covenant was a private agreement between a small group of people that affected "property of their own in which no one else has an interest."[139] Given that the summer colony in question involved "much intermingling" in shared spaces such as the beach, the clause was simply an "innocent and modest effort" to ensure that residents were "of a class" who would "get along well together."[140] He held that to

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[129] *Ibid* at paras 20–21.

[130] *Ibid* at para 20.

[131] *Noble* H Ct J, *supra* note 115 at para 36. The trial judge also rejected Wolf's arguments that the covenant constituted an impermissible restraint on alienation and that it was uncertain (*ibid* at paras 12–16, 21–23).

[132] *Ibid* at paras 38–43.

[133] *Ibid* at para 51.

[134] *Ibid* at para 44.

[135] *Ibid* at paras 45–52.

[136] *Ibid* at para 52.

[137] *Ibid* at para 53.

[138] *Noble* CA, *supra* note 124. For a detailed account of the hostility and overt racism expressed by sitting judges at both levels of court before the case was heard by the Supreme Court of Canada, see Walker, *supra* note 44 at 207–18.

[139] *Noble* CA, *supra* note 124 at para 28.

[140] *Ibid*.

consider such an effort as offensive to public policy "requires a stronger imagination than I possess."[141] In his concluding paragraph, Robertson CJ noted that although "goodwill and esteem among the people of the numerous races that inhabit Canada" was a laudable goal, to legislate such tolerance would be meaningless if the populace did not genuinely share such a view.[142] This, in the Chief Justice's opinion, was why there had been no legislative action in this area and, furthermore, why the courts should not become involved.[143] Henderson JA stated that the judgment in *Wren* was "wrong in law and should not be followed."[144] In his opinion, the true principle of public policy to which courts should adhere was sanctity of contract.[145] Hope JA believed that voiding such a clause would amount to undue restriction of the parties' right to freedom of association.[146] Finally, Hogg JA provided pages of history on the doctrine of public policy and cited the usual cases containing the most conservative of dicta, including the test set out in *Re Millar*,[147] which he held was not met in the case at bar. In *Re Millar*, decided two years before *Christie*, the Supreme Court of Canada held that in order for something to be found contrary to public policy the harm it posed to the public had to be "substantially incontestable."[148] Curiously, no mention of *Millar* was made in the *Christie* decision, even though the panel of judges was nearly identical in both cases.

The Ontario Court of Appeal's decision in *Noble* received widespread public condemnation, not just by civil liberty associations but also by the mainstream media.[149] The decision was appealed and leave granted by the Supreme Court of Canada. The appeal was funded and spearheaded by the Canadian Jewish Congress,

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[141] *Ibid*.

[142] *Ibid* at para 29. The bizarre nature of this statement was not lost on legal commentators of the time, particularly given that anti-discrimination legislation already existed in Ontario at the time of the ONCA's decision. As Smout noted, if government waited for general acceptance of a law prior to its passage this would result in "precious little" of it: Smout, *supra* note 124 at 871–72.

[143] *Noble* CA, *supra* note 124 at para 29.

[144] *Ibid* at para 32.

[145] *Ibid* at para 33.

[146] *Ibid* at para 42.

[147] *Ibid* at para 64.

[148] *Re Millar*, *supra* note 16 at 2. *Re Millar* concerned another attempt to categorize a clause in a will as contrary to public policy. In that case, the will provided a large amount of money to the woman in Toronto who had the most children within a 10-year period following the testator's death. The testator's relatives challenged the provision but lost, the Supreme Court of Canada finding that for the doctrine to be invoked, the issue had to involve "the safety of the state, or the economic or social well-being of the state and its people as a whole" and that "harm to the public [had to be] substantially incontestable" (*ibid*). In the context of discrimination and public policy, this test has been cited only four times and applied only once, in *Canada Trust Co*, *supra* note 24. See Thomson, *supra* note 14 at 150. The test has been applied in only twelve reported decisions outside the context of discrimination.

[149] Walker, *supra* note 44 at 218–20.

which expressed "full confidence that the court would confirm the full civil rights of all citizens, irrespective of race or religion."[150]

Accounts of the judges' demeanour during the Supreme Court of Canada hearing in *Noble* suggest that the majority of the bench was openly hostile to antisemitic arguments,[151] but none of this concern translated into the written decision. The Supreme Court overturned the Court of Appeal on grounds other than public policy. On that issue it remained conspicuously silent, except for one dissenting judge who found the practice to be in keeping with public policy, endorsing the findings of the Ontario Court of Appeal.[152]

Majority Justices Kerwin and Taschereau invalidated the racist, antisemitic covenant for technical reasons. They found that the condition of the covenant did not run with the land and thereby violated the rule in *Tulk v Moxhay*.[153] They reasoned that this rule ought to have been considered by the Ontario Court of Appeal, and they allowed the appeal on this ground alone.[154] Rand, Kellock, and Fauteux JJ found the clause void not only for not running with the land, but also for creating an impermissible restraint on alienation and for uncertainty.[155] Estey J found the clause void only for reasons of uncertainty.[156]

The only portion of the Supreme Court's judgment containing the words "public policy" is Locke J's dissent, which implicitly found that the terms of the covenant did *not* contravene public policy. The bulk of Justice Locke's dissent focused on a procedural issue.[157] With respect to the public policy question and "all remaining issues," Justice Locke stated his agreement with "the learned Chief Justice of Ontario."[158]

It may appear that the majority's silence in *Noble* with respect to public policy was influenced by the fact that, while the case was winding through the courts, the

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[150] *Ibid* at 220.

[151] "The judges appeared sympathetic to Robinette and Denison, and this time it was Morden who was subjected to interruptions. For example, when he suggested that his clients' property would depreciate in value if Jews were allowed, Justice Ivan Rand interjected that if Albert Einstein and Arthur Rubinstein purchased cottages there the property values would increase, and the Association 'should be honoured to have them as neighbours'" (*ibid* at 229).

[152] *Noble* SCC, *supra* note 7.

[153] *Tulk v Moxhay*, (1848) 2 Ph 774, 41 ER 1143; *Noble* SCC, *supra* note 7 at paras 7, 12–13.

[154] *Noble* SCC, *supra* note 7 at para 14.

[155] *Ibid* at paras 15–21.

[156] *Ibid* at para 36.

[157] This concerned the Supreme Court's deciding the appeal on a question that the lower court had refused to consider (*ibid* at para 44). Indeed, public policy is only mentioned by Locke J when it is listed as a ground that was considered by the Ontario Court of Appeal.

[158] *Ibid* at para 46.

government of Ontario had amended its conveyancing legislation to make restrictive covenants based on the personal attributes of a purchaser illegal.[159] However, this amendment did not prevent the Court from considering the legality of the covenant with respect to alternative property law rules such as uncertainty, impermissible restraints on alienation, or the rule in *Tulk v Moxhay*.

In all material respects, the decision in *Noble* arguably left the parties in the same position as in *Wren*. The covenants in both cases were declared invalid and the racist conditions voided accordingly. However, the decision in *Noble* stands out as a colossal failure in its expressive dimension. As noted by Walter Tarnopolsky prior to his appointment to the Ontario Court of Appeal, the Supreme Court failed in *Noble* to take seriously its role of providing guidance to the public and the legislature on how to "achieve an egalitarian society."[160] This stands in marked contrast to Justice Mackay's overt refusal to sanction race discrimination in private property arrangements and his explicit commitment to law's egalitarian function. Though the result in *Noble* was certainly more favourable than that in cases of the prior era, such as *Christie*, the *Noble* Court's failure to condemn racism and to find it contrary to public policy signaled an unacceptable ambiguity about the propriety of racist private law arrangements. Tarnopolsky was quite right to note that *Noble* would "not go down in the annals of judicial history as one of the more inspiring judgments of our Supreme Court."[161]

Seneca College of Applied Arts & Technology v Bhadauria

The era of avoidance concluded with *Seneca College v Bhadauria*,[162] which marks the last time the Supreme Court of Canada granted leave to hear a case that concerned public policy and discrimination in the private law. The case involved the lawsuit of Dr Pushpa Bhadauria, in which she alleged that Seneca College refused to hire her because of her ethnic background. One of the grounds of action was that Seneca College "was in breach of its common law duty not to discriminate against her."[163]

In her affirmation of a common law tort of discrimination, Wilson JA (as she then was), writing for the Court of Appeal, held:

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[159] "Every covenant made after the 24th day of March 1950, which but for this section would be annexed to and run with land and which restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person shall be void and of no effect": *The Conveyancing and Law of Property Act*, RSO 1950, c 68, s 21. As the legislation was enacted after the Ontario Court of Appeal decision in *Noble* had been handed down, it did not form any part of Noble and Wolf's litigation strategy and was not considered by the Court. For insight into the development of this legislative provision and its role in the litigation, see Walker, *supra* note 44 at 222–26.

[160] Tarnopolsky, *supra* note 60 at 76.

[161] *Ibid* at 77.

[162] *Bhadauria* SCC, *supra* note 8.

[163] *Bhadauria CA*, *supra* note 59 at para 7.

> I regard the preamble to [Ontario's Human Rights] Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights. If we accept that "every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin", as we do, then it is appropriate that these rights receive the full protection of the common law.[164]

Justice Wilson's conclusion relied on judgments where discrimination had been found to contravene the common law, including Justice Mackay's decision in *Wren.* She noted in particular that Mackay J had had the option of invalidating the restrictive covenant based on the breach of Ontario's then *Racial Discrimination Act* but had instead found its discriminatory conditions contrary to public policy.[165] She concluded that the common law was fully capable of grounding Dr Bhadauria's claim of discrimination.

The Supreme Court allowed Seneca College's appeal. Writing for a unanimous court, Laskin CJ relied primarily on the existence of the province's *Human Rights Code*,[166] holding that it provided an exhaustive recourse for discrimination. Contrary to Wilson JA and Mackay J before her, Laskin CJ held that the statutory scheme foreclosed any role for the doctrine of public policy in the matter at hand. The Chief Justice then turned to Wilson JA's reliance on *Wren*:

> I do not myself quarrel with the approach taken in *Re Drummond Wren*, but it is necessary to point out that a different view on public policy was taken by the Ontario Court of Appeal in *Re Noble and Wolf*, a case not mentioned by Wilson J.A. Moreover, when this last-mentioned case came to this Court as *Noble and Wolf v. Alley*, the obnoxious covenant in that case, similar to the one in *Re Drummond Wren*, was held unenforceable for uncertainty and as a restraint on alienation, property law grounds, and the Court made no pronouncement on public policy, although the Court of Appeal had done so, disagreeing therein with *Re Drummond Wren*.[167]

The exact point Laskin CJ wished to make in this passage is unclear. While indicating lukewarm approval of Justice Mackay's reasoning in *Wren* ("I do not myself quarrel with [it]"), he also drew attention to the Ontario Court of Appeal's rejection of those same reasons in *Noble* and the Supreme Court of Canada's avoidance of the issue altogether. He then followed suit by failing to say anything more about whether discrimination offended against public policy.

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[164] *Bhadauria* SCC, *supra* note 8 at 193.

[165] *Ibid* at 192.

[166] RSO 1990, c H 19.

[167] *Bhadauria* SCC, *supra* note 8 at 192.

However, what is clear is the irony of this judgment, given the previous position Laskin CJ had publicly taken on these specific cases.[168] Prior to and during his time as law professor at the University of Toronto, Laskin CJ was heavily involved in legal activism in the areas of organized labour and human rights.[169] While not a lawyer on record for either case, Professor Laskin (as he then was) was a key member of the legal team for both Drummond Wren and Bernard Wolf. He wrote the brief that inspired and informed Justice Mackay's reasons in *Wren* on why the discrimination at issue offended public policy.[170] He also chaired the committee struck by the Canadian Jewish Congress to craft the appellate arguments in *Noble*.[171] Much like the approach taken by Fred Christie's lawyers, the core argument in both of those cases was that the discrimination at issue contravened public policy.[172] And yet here was Bora Laskin, now Chief Justice of Canada, tacitly endorsing the Court's refusal to express in writing the condemnation that its majority conveyed during oral arguments of the overt discrimination towards Jewish Canadians.

Equally puzzling to those aware of this history is how, in that same judgment, Laskin CJ declined to condemn or even address the Court's decision in *Christie*.[173] Recall that Laskin had published a highly critical academic paper on the *Christie* decision when it was released.[174] But in his later role as Chief Justice of the Supreme Court of Canada, when given an opportunity to redress the decision, Laskin CJ said nothing about *Christie* except that it was irrelevant to the argument at bar given that it did not relate "to a refusal to recruit or to employ."[175]

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[168] See Girard, *supra* note 125 at 249; Bob Aaron, "Honouring the end of real-estate racism in Canada", *Toronto Sta*r (20 April 2015), online: <www.thestar.com/life/homes/2015/04/17/honouring-the-end-of-real-estate-racism-in-canada.html> [perma.cc/NQ2Y-JVFK].

[169] For a detailed account of Bora Laskin's activism and early career see Girard, *supra* note 125.

[170] *Ibid* at 250.

[171] Walker, *supra* note 44 at 213–14.

[172] Girard, *supra* note 125 at 249–57.

[173] Quoting from an interview with the Hon Mr Justice Allen Linden in her biography of Justice Wilson, Ellen Anderson writes that the Chief Justice's approach in *Bhadauria* might be explained by Laskin CJ's belief that administrative tribunals such as the Ontario Human Rights Commission were best placed to protect civil liberties and human rights. Laskin CJ was "no great friend of the common law of torts" but felt, rather, that the court "had a duty to see that statutes if at all possible are given an operative effect": Ellen Anderson, *Judging Bertha Wilson: Law As Large As Life*, 2nd ed (Toronto: University of Toronto Press, 2002) at 124. See also Walker, *supra* note 44 at 240.

[174] Laskin, "Tavern Refusing", *supra* note 60.

[175] *Bhadauria* SCC, *supra* note 8 at 190. This can be contrasted with Wilson JA's treatment of *Christie* in her judgment below, which she considered in her decision to affirm the existence of the tort of discrimination, her disdain at the attitudes of the presiding judges in *Christie* only thinly veiled: *Bhadauria* CA, *supra* note 59 at para 8.

The Harms of the Era of Avoidance

Chief Justice Laskin was correct to find that Ontario's human rights legislation addressed the harm at issue in *Bhadauria*; however, this fact should not have barred the recognition of additional actions and remedies for rights-seeking litigants facing discrimination.[176] Public policy actions can exist in tandem with statute-based discrimination claims. A chief example is discriminatory bursaries and scholarships, an issue addressed by the Ontario Court of Appeal ten years after its decision in *Bhadauria* when it finally adopted Justice Mackay's findings in *Wren* and, unlike the Supreme Court of Canada, reversed its earlier stance on the doctrine of public policy taken in *Noble*.[177] Indeed, at no point in *Bhadauria* did Laskin CJ acknowledge those areas of the private law that lie outside the ambit of human rights legislation, such as wills, private trusts, and certain contracts, leaving the question of whether discrimination in those instances could contravene public policy unanswered.[178] As we will see in the final "era" outlined in this paper, this is precisely where the doctrine of public policy is still called upon to provide redress for discrimination and to ensure that certain areas of the private law do not become breeding grounds for harmful discrimination in Canadian law.

On top of the material failures of *Noble* and *Bhadauria* to address the proper scope of public policy, the tactic of avoidance in these cases also carries the risk of expressive harm. As noted earlier in this paper, the existence of expressive harm does not depend on the realization of particular adverse consequences.[179] The harmful message expressed by state action can land immediately, without the necessary occurrence of consequent material or tangible harms. This distinction is important. The fact that the outcome in *Noble* was favourable to the plaintiffs, with the offending

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[176] For a fulsome discussion on this point see Harry Kopyto, "The Bhadauria Case: The Denial of the Right to Sue for Discrimination" (1981) 7:1 Queen's LJ 144.

[177] *Canada Trust Co*, *supra* note 24. In that case the Ontario Court of Appeal declined to determine whether or not the scholarship at issue was subject to Ontario's human rights scheme. Instead, it held that the Superior Court was the preferred venue for hearing such matters because of its inherent jurisdiction and access to the cy-près doctrine (*ibid* at para 74). We discuss the Ontario Court of Appeal decision in *Canada Trust Co* in greater detail in the final part of this paper. Notably, the Ontario Human Rights Commission released a comprehensive memo in 1997 explaining how the province's *Human Rights Code* applied to discriminatory scholarships: Ontario, Human Rights Commission, *Policy on Scholarships and Awards*, December 2009 update (Toronto: Ontario Human Rights Commission, 1997), online: <www.ohrc.on.ca/en/policy-scholarships-and-awards> [perma.cc/64WM-SY85]. Despite this, as recently as 2016 the Ontario Superior Court held that a scholarship that discriminated on the grounds of sex, sexual orientation, race and other characteristics was contrary to public policy: *Royal Trust Corp of Canada v University of Western Ontario*, 2016 ONSC 1143. See also *Peach Estate (Re)*, 2009 NSSC 383 [*Peach Estate*] (in this decision a condition in a private will was struck down on the basis of public policy before it could cause a contravention of the province's human rights legislation).

[178] For similar observations see: Tamar Witelson, "Retort: Revisiting *Bhadauria* and the Supreme Court's Rejection of a Tort of Discrimination" (1999) 10 NJCL 149 at 156.

[179] Anderson & Pildes, *supra* note 5 at 1530–31. Simon Blackburn usefully writes of Anderson and Pildes' deontological approach: "we might say that the harm occurs at the time and place of the expressive act, not in virtue of anything that happens at later times or places," in Simon Blackburn, "Group Minds and Expressive Harm" (2001) 60:3 Md L Rev 467 at 470.

covenant struck down by the Court, does not obviate the expressive harm. By failing to find the provision contrary to public policy, the Supreme Court in *Noble* created ambiguity around the wrongfulness of race discrimination and signalled that Canadian society was not yet ready to eradicate discrimination of this kind, an observation shared by legal commentators at the time of its release.[180] Over thirty years later, the Court had the chance to right this wrong in *Bhadauria* but it failed to do so. Rather, *Bhadauria* has been described by some scholars as representing an implicit affirmation of *Christie*[181] and "a sharp break from, if not a full repudiation of"[182] the progressive, antiracist approach to private law discrimination in *Wren*.

One might retort that the Court in *Bhadauria* was simply showing deference to administrative tribunals as the appropriate bodies to determine human rights claims, and that its decision to do so cannot implicate the Court in any harmful messaging around discrimination. But the fact that Chief Justice Laskin may have had a benign reason for failing to break with *Noble* does not mean his judgment cannot be a source of expressive harm. A speaker's intention does not necessarily determine the meaning of their expressive acts.[183] Further, deference of this sort has historically been used as a means of preserving the *status quo* and blocking attempts to make the law more just and more responsive to racism and xenophobia. It is important to look behind claims of deference and to examine not only the practical effects of deference but also its expressive effect. The point is that by affirming its own troubling position in *Noble,* the Court in *Bhadauria* signalled a problematic ambivalence around the role of law in remedying discrimination and an indifference to the lasting legacy of the Court's prior pronouncement on public policy in *Christie*.

5. The Era of Silence: *McCorkill v McCorkill Estate* & *Spence v BMO Trust Corp*

A year after the Supreme Court's decision in *Bhadauria*, Canada repatriated its Constitution and formally adopted the *Charter of Rights and Freedoms*,[184] cementing the notion of equality and anti-discrimination in actions between citizens and the state. This development, along with the prior introduction of human rights legislation in all the provinces, ushered in a new era of anti-discrimination law in the public sphere. It also heavily influenced the evolution of the public policy doctrine's application to discrimination in the private law.[185] In particular, as noted above, the Ontario Court of

[180] See Allan Goldstein, "Racial Restrictive Covenants" (1951) 9 UT Fac L Rev 30; Smout, *supra* note 124 at 877, 880; Walker, *supra* note 44 at 231–33.

[181] See Walker, *supra* note 44 at 238.

[182] Kopyto, *supra* note 176 at 146.

[183] See Anderson & Pildes, *supra* note 5 at 1525; Alan Strudler, "The Power of Expressive Theories of Law" (2001) 60 Md L Rev 492 at 498–502; *cf* Ekins, *supra* note 100 (it is the purpose and intent of state action that determines its meaning).

[184] *The Charter*, supra note 4.

[185] Grattan & Conway, *supra* note 25.

Appeal in *Canada Trust Co v Ontario (Human Rights Commission)*[186] finally reversed its position on public policy and discrimination from *Noble* in favour of Justice Mackay's ruling in *Wren*.

In the 1990 decision of *Canada Trust Co*, the Ontario Court of Appeal voided discriminatory conditions in a bursary.[187] The majority found the terms contrary to public policy, writing: "[t]o say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious."[188] The majority held that notions of white supremacy were "patently at variance" with the pluralistic society of Canada, as evidenced by the rejection of the scholarship *en masse* by universities and its criticism by "human rights bodies, the press, the clergy," and the community in general.[189]

In concurring reasons, Justice Tarnopolsky provided a longer explanation for why the discrimination at issue offended public policy, which he believed was informed by "provincial and federal statutes, official declarations of government policy and the Constitution" and "the anti- discrimination laws of every jurisdiction in Canada."[190] He quoted Justice Mackay's reasons in *Wren* verbatim, writing that he could "think of no better way" to convey the point that "the promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern-day Ontario."[191] *Canada Trust* was not appealed to the Supreme Court of Canada, but at least eight reported lower court decisions followed in which the doctrine of public policy was applied to discriminatory wills, private trusts, and scholarships.[192] The last two of these decisions involved challenges to private wills and were ultimately appealed to the Supreme Court of Canada, giving it yet another opportunity to reverse its holding on public policy from *Christie*.

McCorkill v McCorkill Estate

One such appeal was *McCorkill v McCorkill Estate*,[193] heard in 2014 by the New Brunswick Court of Queen's Bench. The case concerned a challenge to the validity of a testamentary gift left by Harry Robert McCorkill to National Alliance, a white

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[186] *Canada Trust Co, supra* note 24.

[187] These terms limited recipients to students who were "White," "Protestant," and "British or of British parentage." Further, on any given year, no more than 25% of the available income of the trust could be used to fund female recipients of the scholarship: *Canada Trust Co, supra* note 24.

[188] *Ibid* at para 37.

[189] *Ibid*.

[190] *Ibid* at para 92.

[191] *Ibid* at para 89.

[192] Thomson, *supra* note 14.

[193] *McCorkill* QB, *supra* note 22.

supremacist organization based in Virginia, USA.[194] McCorkill's sister applied to have the gift rendered void for reasons of public policy and/or illegality.[195]

The evidence in *McCorkill* overwhelmingly established that the purpose of the National Alliance was to promote racism and violence towards racialized persons.[196] Citing Justice Tarnopolsky's sources that informed the doctrine of public policy in *Canada Trust*, Justice Grant added that it could also be determined by reference to Canada's hate speech laws.[197] He held that the publications of the National Alliance would be considered under Canadian criminal law as hate speech,[198] a form of expression characterized by the Supreme Court as deeply harmful to Canadian society.[199]

Additionally, Justice Grant held that the National Alliance's "communications and activities" contravened the values enshrined in Canada's constitution, human rights legislation, and international commitments. In his opinion, these findings of fact rendered its activities contrary to public policy.

Justice Grant's decision, though in many ways informed by precedent, resulted in a novel finding concerning the doctrine of public policy and private wills. Prior to this decision, only *conditional* testamentary gifts had been voided for contravening the doctrine. McCorkill's gift to the National Alliance was unconditional; it was the nature of the beneficiary itself that Justice Grant believed offended public policy. This, as Professor Bruce Ziff noted, created a new kind of "unworthy heir"—a beneficiary who, by virtue of their nature or something they have done, is deemed ineligible to inherit from the testator.[200] Justice Grant attempted to dampen the significance of this aspect of his decision, reasoning that the gift had been made to the National Alliance as an organization, not to its leader or any individual associated with it. Coupled with this observation was the fact that the organization had "foundational documents" that explained what it stood for, including "anti-semitism, eugenics, discrimination, racism and white supremacy, [which] 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*."[201] For Justice

[194] *Ibid* at para 2.

[195] *Ibid* at para 5.

[196] *Ibid* at paras 48, 54–56.

[197] *Criminal Code*, RSC 1985, c C-46, s 319.

[198] *McCorkill* QB, *supra* note 22 at paras 30, 48, 63.

[199] *Ibid* at para 53.

[200] Ziff, *supra* note 19.

[201] *McCorkill* QB, *supra* note 22 at paras 73–75.

Grant this was akin to placing a condition on the gift, one which required it to be used to advance the purposes of the National Alliance.[202]

Justice Grant's decision in *McCorkill* was affirmed by the New Brunswick Court of Appeal in brief reasons.[203]

Spence v BMO Trust

While the scope of public policy's application to discriminatory wills was expanded in *McCorkill*, it was restricted one year later by the Ontario Court of Appeal in the 2016 decision of *Spence v BMO Trust Co*.[204] In that decision, the Court of Appeal overturned an Ontario Superior Court judge's decision to void an entire will based on a finding that the motivations of the testator contravened public policy.[205] The uncontested evidence indicated that the testator left everything to one daughter and excluded the other from his will entirely because the second daughter had conceived a child with a man of a different race.[206] Notably, the evidence of the testator's motivations for excluding the second daughter from his will was extrinsic in nature, admitted by way of affidavits. The will itself said nothing about the testator's motive, only that he left nothing to his daughter as she "has shown no interest in me as a father."[207]

The Superior Court held that although the will was not discriminatory on its face, the clear evidence that the will was motivated by racism was sufficient to void the will on the grounds that it offended "not only human sensibilities but also public policy."[208] Once the will was void, the resulting intestacy divided the father's estate equally between his two surviving daughters. The Ontario Court of Appeal overturned this finding. Writing for the majority, Justice Cronk held that the clause at issue in this case did not attract public policy scrutiny. Although the provision excluding his daughter from the estate "may reflect the sentiments of a disgruntled or bitter father," it was "not the language of racial discrimination."[209]

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[202] *Ibid* at para 77.

[203] *Canadian Assn for Free Expression v McCorkill Estate*, 2015 NBCA 50.

[204] 2016 ONCA 196 [*Spence* CA].

[205] *Spence v BMO Trust Co*, 2015 ONSC 615.

[206] *Ibid* at paras 44–45.

[207] *Ibid* at para 22.

[208] *Ibid* at para 49.

[209] *Spence* CA, *supra* note 204 at para 53.

This decision could have been reached on long-established rules of evidence that govern estates law.[210] However, Justice Cronk went further in her decision, finding that the type of clause at issue in *Spence* could *never* attract the application of the public policy doctrine.[211] She held that, with the exception of the recent *McCorkill* decision, the doctrine of public policy had only been applied to conditions on testamentary gifts.[212] *Spence* involved a testamentary clause that was unconditional and held no corresponding entitlement or disentitlement. Importantly, Cronk JA held that even if the testator had expressly disinherited his daughter on racist grounds, rendering the will discriminatory on its face, voiding such a clause would constitute "a material and unwarranted expansion of the public policy doctrine in estates law."[213] In her opinion, such an intrusion would unnecessarily compromise testamentary freedom and would run counter to "established judicial restraint" in voiding private property arrangements that violate public policy.[214]

In so finding, Cronk JA recognized that an openly discriminatory, unconditional bequest would thus be immune from review not only under the *Charter* and the provincial *Human Rights Code* but also under the doctrine of public policy.[215] In concurring reasons, Lauwers JA agreed with the judgment of Cronk JA but emphasized the dangers of litigation floodgates, the risk of uncertainty in estates law, and the threat to the separation of powers should the doctrine of public policy be expanded in the manner suggested by the respondents.

Both *McCorkill* and *Spence* were appealed to the Supreme Court of Canada. While leave to appeal in *McCorkill* was sought nearly a year before *Spence*, the leave decisions in both cases were released concurrently.[216] The delay in the leave decision in *McCorkill* suggested that the Court anticipated an appeal of *Spence*, and that the two cases would be heard together as companion cases.[217] Instead, leave was refused in both. The long period of anticipation and the eventual refusal of leave in both of these cases echoes the sense of betrayal from *Christie*, when special leave was granted to the appellants only for the Court to uphold the right of the Tavern to discriminate against prospective Black customers.

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[210] *Ibid* at paras 88–112 (Justice Cronk concluded that the evidentiary rules that pertained to courts of construction also applied to public policy motions. That is, extrinsic evidence admitted to prove the intention of the testator is only admissible in circumstances of latent ambiguity).

[211] *Ibid* at para 75.

[212] *Ibid* at paras 84–85.

[213] *Ibid* at para 85.

[214] *Ibid* at paras 75, 85.

[215] *Ibid* at paras 73–74.

[216] *McCorkill* CA leave, *supra* note 9; *Spence* CA leave, *supra* note 9.

[217] See e.g., *Kerr v Baranow* and *Vanasse v Seguin*, 2011 SCC 10.

The Harms of the Era of Silence

The decision to refuse leave in *McCorkill* and *Spence* had layered consequences. The immediate and most obvious was the Court's failure to account for the different directions in which the NBCA and ONCA pushed the scope of public policy in its application to discriminatory wills. Justice Cronk's reasons in *Spence* treated Justice Grant's approach in *McCorkill* as exceptional and even problematic,[218] leaving the law in this area unclear. These conflicting appellate decisions remain the last time a court at that level has opined on this issue.

Moreover, the refusal of leave ensured that other legal issues concerning public policy and discrimination in wills and trusts remained unresolved. A significant example is the split in *Canada Trust* between the majority judgment and Justice Tarnopolsky's concurring decision concerning the scope of the doctrine. In his reasons, Tarnopolsky JA held that public policy, when applied in the context of discrimination, was only applicable to quasi-public areas of private law, such as public bursaries established through trusts. He expressly held that the doctrine of public policy could not serve to invalidate private trusts or wills.[219] The majority, to the contrary, made no comment on this issue, finding only that the terms of the scholarship in question contravened public policy. While Justice Tarnopolsky's reasoning on this point has largely not been adopted by lower courts,[220] as recently as 2015 a court had cited this specific part of his reasons with approval.[221]

On top of this doctrinal confusion, the decision in *Spence* risks causing harm of an expressive nature. Justice Cronk confirmed that a court must decline to hear a public policy argument with respect to discriminatory unconditional bequests in a will. To be clear, this means that if a court is tasked with adjudicating the validity of a will that explicitly discriminates on the basis of race, religion or another immutable characteristic it may not be open to the court to invalidate it for contravening public policy. By carving out a zone in private law that is immune from the reach of public policy, the Ontario Court of Appeal has effectively sanctioned the perpetuation of discrimination in some quiet corners of the private law. This puts judges in an uncomfortable position. They may be forced to ignore explicit forms of discrimination and to enforce wills that contain discriminatory clauses, in a move that is strikingly inconsistent with the shift to the horizontal application of human rights and anti-

[218] *Spence* CA, *supra* note 204 at paras 64–65.

[219] *Canada Trust Co*, *supra* note 24 at para 107.

[220] Apart from *McCorkill Estate* see *Murley Estate Re* (1995), 130 Nfld & PEIR 271, 405 APR 271 (NL SC); *Fox v Fox Estate* (1996), 28 OR (3d) 496, 10 ETR (2d) 229 (ON CA); *Peach Estate*, *supra* note 177; *Spence* CA, *supra* note 204 at para 55 (the acknowledgement that it can be applied to private wills by Justice Cronk).

[221] *Grams v Babiarz*, 2015 SKQB 374 at para 20.

discrimination norms.[222] Moreover, they would have to refuse to answer the question of whether such discriminatory provisions are inconsistent with public policy, even when asked to do so by parties before the court. This would implicate the court in denying the harms of discrimination and would send a damning message about the legitimacy of discriminatory private property arrangements. By making the court complicit in sanctioning discrimination of this kind, the ruling in *Spence* effectively brings us back full circle to the first era considered in this paper, of judicially sanctioned discrimination.

The expressive harm of the *Spence* decision is compounded by the Supreme Court of Canada's refusal of leave in both cases. Certainly, a refusal to grant leave can be made for any number of reasons and should not be taken as categorical endorsement of a lower court judgment. The message sent by a decision like this is, admittedly, not easy to parse. However, the identification of an act's social meaning is helped by consideration of a community's background norms, history, and shared understandings.[223] We contend that when the Court's refusal to hear these cases is viewed within the specific historical context of public policy and discrimination in Canada that we have outlined in this paper, it can reasonably be understood to situate the Court as ambivalent as to the existence of discrimination in the outer reaches of private law.

The Supreme Court of Canada's decision not to hear the appeals in *Spence* and *McCorkill* represents, once again, a missed opportunity to correct its own precedent on public policy in *Christie* and denounce this shameful chapter in the history of racism in Canadian law.

6. Conclusion

In the Quebec Court of King's Bench judgment in *Christie*, Justice Bond wrote: "I am not called upon to express any opinion upon the abstract philosophical concept that all men are born equal. All I am called upon to decide is, whether there has been a breach of contract on the part of the appellant, or a wrong committed by it under the laws of this Province."[224] The fact that Justice Bond felt the need to state this at all was evidence enough that those involved in the case were looking to the court for precisely such an expression. Bond J's acknowledgement and then rejection of this task was harmful, a harm which was then magnified by the Supreme Court's subsequent treatment of the issue.

This paper has detailed the expressive harm stemming from the Supreme Court of Canada's treatment of the public policy argument in *Christie.* It has also

[222] See e.g. Lorraine E Weinrib & Ernest J Weinrib, "Constitutional Values and Private Law in Canada" in Daniel Friedmann & Daphne Barak-Erez, eds, *Human Rights in Private Law* (Oxford, UK: Hart Publishing, 2003) at 43.

[223] See Lessig, *supra* note 93 at 958; Anderson & Pildes, *supra* note 5 at 1524; Levy, *supra* note 6 at 410.

[224] *Christie* KB, *supra* note 30 at para 42.

explained the harm caused by the Court's subsequent failures to reverse that decision and to address the issue of public policy as applied to discrimination in the private law. The Court's actions in this area send, at best, a message of ambivalence as to the unfettered ability of individuals to use the private law to perpetuate discrimination and, at worst, a message of endorsement.

Some have argued that a "black letter law" approach to highly politicized issues can be a tool for those seeking to advance the rights of marginalized persons. By relying on seemingly apolitical legal doctrine and precedents, progressive, equality-orientated judgments can be insulated from reactionary accusations of judicial activism.[225] Chief Justice Laskin's acknowledgement in *Bhadauria* of the Supreme Court's approach in *Noble* may well have been a reflection of this tactic, as it seems doubtful that he approved of the Court's silence on the issue of antisemitism in that decision.[226]

However, we maintain that such an approach comes at a tremendous cost. Muting the harms of discrimination and racism or transfiguring them into technical, legal questions perpetuates a false sense of colour-blindness and entrenches the "pervasive mythology of Canadian 'racelessness'."[227] It expresses a harmful ambivalence about race discrimination that is inappropriate for our highest Court. Indeed, the silencing of race in legal discourse *writ large* is endemic; it occurs across all areas of law and serves to prop up and justify existing structures of white supremacy.[228]

Contrary to Justice Bond's assertion in *Christie*, we suggest that the Court *was* "called upon" to address the question of racial equality then, just as it is called upon now to explicitly condemn its reasoning in that case and to confirm that the discrimination at issue in *Christie* is and was contrary to public policy.

To be clear, an acknowledgement by the Supreme Court of Canada that the discrimination at issue in *Christie* contravened public policy and should have been voided under Quebec law at the time does not mean that every instance of discrimination in a will, private trust, scholarship, or contract will henceforth attract a successful application of the doctrine. Much like the *Charter* or human rights laws which contain a system for balancing competing interests, the application of public

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[225] See Christopher Essert, "The Office of Ownership" (2013) 63:3 UTLJ 418; Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992) at 307–10.

[226] See Walker, *supra* note 44 at 230. See also Girard, *supra* note 125 at 248 (Girard describes Laskin's participation in these cases as "a brief and unsatisfactory experience").

[227] Backhouse, *supra* note 28 at 281.

[228] Margaret E Montoya, "Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse" (2000) 33:3 Mich J Race & L 847 at 892. On the elision of race in *Christie*, see Walker, *supra* note 44 at 310–12; on its erasure in Viola Desmond's case see Backhouse, *supra* note 28 at 267.

policy to discriminatory private law arrangements will not always result in a voided condition or clause.[229] A court may ultimately decide that the offending clause does not violate public policy; what is vital is that the court engage with the issue to start with. The Court has a responsibility to address hard questions of this nature and uphold the values of what McLachlin CJ called the era of substantive equality, in the spheres of both public and private Canadian law. There is still work to be done by our highest court in undoing the legacy of *Christie* and it is our hope that the next time such an opportunity is presented, it is taken.

[229] *Thomson*, *supra* note 14. See also *Canada Trust Co*, *supra* note 24; *Lysaght, Re*, [1966] Ch 191, [1965] 2 All ER 888; *Ramsden Estate (Re)* (1995), 145 Nfld & PEIR 156, 139 DLR (4th) 746 (PE SC); *Estate of F.G. McConnell*, 2000 BCSC 445.