

Book Review: Law of Trusts in Canada, by D. W. M. Waters

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Book Review

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LAW OF TRUSTS IN CANADA By D. W. M. WATERS, TORONTO
The Carswell Company Limited. 1974. pp. 1070 (Hardbound: \$80.00)

The author in his preface informs us that this book was conceived in 1965-66 when he was invited from England to teach a course in Trusts at the University of Saskatchewan. At that time, he recognized the need for a Canadian text on the law of trusts. The Canadian legal community is indeed fortunate that in 1967, he was once again lured back to Canada — this time by McGill University. Nine years after the book was conceived, we have been presented with a monumental work of scholarship, the *Law of Trusts in Canada*. The author's progeny weighs in at 4 pounds 10 ounces, or perhaps to be more progressive we should say 2.1 kilograms. In addition to 983 pages of text, it also has a 64 page Table of Cases and Table of Statutes, a 13 page appendix and a 70 page index. Both the author and the publisher can take justifiable pride in the appearance of the offspring. It is handsomely bound, attractively printed and is unmarred by any birth defects such as serious typographical errors.

The publication of the *Law of Trusts in Canada* is a signal event. Because of its importance, one feels compelled to compare it with other Canadian legal treatises which are regarded as classics. For instance, when Professor Austin W. Scott published his four volume treatise on *The Law of Trusts*, the American treatises which reviewers considered that it would rank with were Wigmore on Evidence and Williston on Contracts. The sad realization strikes the Canadian reviewer that there are so few Canadian legal treatises and fewer still which can be regarded as classics. Except for John D. Falconbridge's, *The Law of Mortgages of Real Estate* and perhaps Franklin W. Wegenast's, *The Law of Canadian Companies*, there is unlikely to be any consensus as to a comprehensive Canadian legal treatise which would be regarded as constituting an outstanding scholarly contribution. The sad realization about the dearth of Canadian legal treatises is made even more poignant when one considers that the first edition of Falconbridge's book on Mortgages was published in 1919 and Wegenast's book on Canadian Companies was published in 1931. Measured against this background, practitioners, law students and teachers should be even more appreciative of the prodigious effort and the careful scholarship which Professor Waters has combined to give us the first Canadian treatise on Trusts.

The author states that in writing the book one of his primary objectives was to focus on Canadian materials and as a result he has employed English authorities only where they are of leading importance or Canadian law is silent on the issue. As a very crude test of the Canadian focus of the book, the reviewer has determined that of the 1,777 cases cited in the book, 1,182 cases or approximately 66 per cent are Canadian. The Canadian cases include 12 Privy Council decisions. The Privy Council was not very active in the direct development of the Canadian law of trusts, thus whether one subscribes to the fiction that the Privy council when it sat on appeal from a Canadian jurisdiction sat as a Canadian court or not, the percentage of Canadian cases is not materially influenced.

Unlike Professor Austin W. Scott's treatise on Trusts, one of the few criticisms of which was its failure to provide ready access to the relevant statutes, Professor Waters has given due attention to legislation. For instance with regard to Ontario, the author refers to 58 different statutes and in relation to the Trustee Act alone, he makes 42 references to sections or subsections of the Act. It should, I believe, be recognized that it is a much more onerous task to write a Canadian book on Trusts than an English book on Trusts in that one is confronted with legislation by twelve law jurisdictions, which directly affects trusts, and in addition federal legislation which often has a significant impact on trusts. Writing about the American law of trust is even more onerous and this perhaps accounts for the fact that, for instance, Bogert, *The Law of Trusts and Trustees* is substantially larger than Professor Waters' book.

Although the author states that he has adopted in large measure the traditional subject breakdown, I believe that his division of the book into seven parts consisting of a total of thirty chapters is a distinct improvement over the breakdown in the English texts with which the reviewer is familiar. The author indicates that his book is intended to be not only a reference work for practioners but also to assist students "to learn the subject as it exists in Canada." Both practioner and students will be pleased to find that this is not simply an arid and technical treatise about what the law is. It is often an interesting account of why and how the law has developed the way it has, which the author accompanies with thoughtful suggestions for reform. There is a good balance between discussion of principles and a description of the cases and statutes.

In the introductory chapter of the book, the author arouses the interest of the reader by taking examples of diverse situations occurring in different cities across Canada which give rise to the application of trust law. Although in a book of approximately 1,000 pages it is difficult to sustain the momentum, the excellent style of the author which is almost conversational in tone contributes greatly to making it a very readable book. The book is also notable for its clarity of expression and exposition. There is no attempt to side-step difficult issues and in cases where there is doubt about the resolution of the issue, it is forthrightly admitted by the author.

The author notes that for the continuous reader he has provided a focus in Part IV of the book, entitled "Modern Uses of the Trust". This part consists of three chapters. Chapter 12, "Personal and Business Trusts", and Chapter 13, "Trusts and Estate Planning", are likely to be of considerable interest to most readers. The much longer Chapter 14, "Charitable Trusts", is unlikely to excite many readers and fewer still will regard it as part of the focus of the book. It is, I believe, regrettable that the author did not elaborate on Chapter 12 in which he has introduced a functional classification of trusts. The major classification is between personal and business trusts. Business trusts are then further divided among: 1) business trusts in furtherance of personal purposes, for example, trusts arising out of employment pension plans, profit sharing trusts and registered retirement savings plans administered by trust companies; 2) business trusts in furtherance of personal business or small business arrangements, for example, the trust as a holding device arising out

of a buy-sell agreement, stock purchase agreements, a stock voting trust and business sale trusts; and 3) business trusts in furtherance of commerce at large, for example, trusts employed as a substitute for incorporation, trusts as a vehicle for pre-incorporation financial holding, trusts as a security device and trusts as a vehicle for investment. The manifold business functions of the trust are unfortunately compressed into less than nine pages. Since English texts do not even provide this overview and since Waters has decided to adhere to Scott's position that the business application of the trust is best considered in works on commercial law, it is perhaps unfair not to be thankful for the perceptive outline of the business functions of the trust. We can perhaps hope that in a future book the author will develop the modern business application of the trust.

I believe the author was correct to include chapter 13, "Trust and Tax Planning" in Part IV, "Modern Uses of the Trust", to provide a focus for the continuous reader. I believe that, by isolating estate or tax planning in a separate course and the business functions of the trust in a course on Company or Commercial law, often the material left in the Trust course appears rather sterile and students have considerable difficulty in relating to it because of the lack of a modern context. This dilemma, arising from too narrow a classification of a subject matter, the author has fortunately avoided. The avoidance of this dilemma, however, carries with it a price and that price is rapid obsolescence of such a chapter. As noted in his addendum, Nova Scotia and Newfoundland have joined the other Atlantic provinces in repealing their Succession Duty and Gift Tax Act. The Ontario budget brought down on April 7, 1975, also necessitates considerable modification of this chapter with the basic succession duty exemption going from \$150,000 to \$250,000 and the annual gift tax exemption per donee being increased from \$2,000 to \$5,000 and the aggregate annual exemption increased from \$10,000 to \$25,000.¹

Chapter 11, "The Constructive Trust", is perhaps the chapter in which the author might have been expected to make his most significant contribution. The author's earlier book, *The Constructive Trust* with the subtitle, *The Case for a New Approach in English Law*, was described by a reviewer as "The most searching and thought provoking criticism of the constructive trust in English law to date."² In that previous book, the author stated: "The constructive trust needs a totally new look, . . . Within the precedents that English

¹ Waters states that Ontario and Quebec have reversed their original reaction to the estate tax field by the federal government by recently reducing their rates of succession duty. It is not accurate to say that Ontario reversed its original reaction. After the precipitous withdrawal by the federal government from the estate tax field, the Treasurer of Ontario, Mr. McKeogh, introduced an interim measure to protect provincial revenue on December 13, 1971. He stated that, "Our tax effort in this area would be judged in future years against the effectiveness of the taxation of capital gains. In other words, as the tax on capital gains gradually matures, our succession duties can be phased down. In the end there may no longer be any need for us to levy succession duties on death." The reduction in succession duty is not a reversal. If there has been a reversal, it is perhaps in dropping any reference to eventual withdrawal. In the 1974 budget, the Treasurer of Ontario, Mr. White, stated "Let me reiterate the Government's policy on succession duties. We intend to continue to tax large accumulations of wealth . . .".

² W. H. Angus (1965), 30 Sask. Bar. Rev. 256 at 259.

law has . . . the seed lies for the development of this new restitution remedy. But it is certain that it will be a very long time coming, unless we can commence to teach the constructive trust with our eye on that seed."³ The Canadian seed for this development is more numerous and hardy and therefore it is disappointing that the author has not attempted to nurture and encourage this Canadian seed to a greater extent. In the text of the chapter on "The Constructive Trust" neither *Degelman v. Guarantee Trust Company*⁴ nor *Pahara v. Pahara*⁵ are discussed. On page 334, the author simply states that "In recent years others have gone further, and said that the obligation is based on the principle of unjust enrichment." In the footnote, the decision of Mr. Justice Stark in *Jirna Ltd. v. Mister Donut of Canada Ltd.* is mentioned but the author does not quote the judge's words that "A constructive trust therefore arises and is imposed in order to prevent unjust enrichment."⁶ Also mentioned in the footnote is Mr. Justice Laskin's dissent in *Murdoch v. Murdoch*⁷ and the author then states, referring to the principle of unjust enrichment, that "even if it can be said that principle has now been accepted as a head of liability (Restitution) in common law Canada (see (1964), 42 Can. Bar Rev. 529), it has not yet had an impact upon the rationalization of the constructive trust, save for Laskin, J.'s recent dissent." It must, however, be noted that the author did discuss Mr. Justice Laskin's dissent more fully in the prior chapter entitled, "The Reading Trust". Nevertheless, the author has perhaps maintained too staunchly that the constructive trust remains largely an institution like the express trust instead of giving more credence to lines of authority which stress the constructive trust as "a remedial vehicle for restitution because of unjust enrichment."⁸

In a treatise of this size, there are obviously some interpretations of the law with which one might take issue but to carp at length about isolated points

³ D. W. N. Waters, *The Constructive Trust* (London: The Athlone Press, 1964) at 73.

⁴ [1954] S.C.R. 725; [1954] 3 D.L.R. 785.

⁵ [1946] S.C.R. 89; [1946] 1 D.L.R. 433.

⁶ [1970] 3 O.R. 629 at 641; 13 D.L.R. (3d) 645 at 657, *reversed on other grounds*, [1972] 1 O.R. 251; 22 D.L.R. (3d) 639, *affirmed* (1973) 40 D.L.R. (3d) 303 (Can.).

⁷ [1974] 1 W.W.R. 361; 41 D.L.R. (3d) 367; 13 R.F.L. 185 (S.C.C.).

⁸ Text, page 339. An important case, decided subsequently to the publication of Professor Water's book, which emphasizes that unjust enrichment is a basis of the constructive trust is *Re Spears and Levy* (1975), 52 D.L.R. (3d) 146 (N.S.S.C. Appeal Div.). In this case, a man and a woman went through a marriage ceremony and lived together believing themselves to be married. However, the woman had been previously married and although she thought she had obtained a divorce, no divorce had been granted. The man died intestate. The Probate Court awarded the woman \$24,600 on the basis of *quantum meruit*. On appeal, it was held that the woman, although not validly married to the deceased, was entitled to the intestate share of a widow of \$25,000, on the basis of a constructive trust. MacKeigan C.J.N.S. stated at p. 154, "I believe that the solution of the problem rests in the law of trusts, that versatile handmaiden of equity, without using any fictions, stretching any facts or distorting any principles of law or equity. The heirs at law on Mr. Spears' death received legal title to his lands and goods, but did so subject to the equitable rights of Mrs. Spears. Those rights give rise to a constructive trust requiring the heirs to deliver his lands and goods up to her. The constructive trust is invoked to prevent unjust enrichment of the heirs, to ensure they do not get what they have no right to get."

of doubt and difference would detract unfairly from the author's very substantial achievement. However, there are a few minor errors which should be mentioned. On page 443, the author states that the U.K. Accumulations Act of 1800 "became operative in each of the common law provinces of Canada, and the territories, as part of the adoption of English law, and it still applies today, except in Prince Edward Island, British Columbia, Ontario and Alberta." English law was received into the colonies of Nova Scotia,⁹ New Brunswick, Prince Edward Island and Upper Canada¹⁰ before the Accumulations Act, 1800 was passed. Thus the U.K. Accumulations Act of 1800 has never applied in Nova Scotia, New Brunswick, Ontario or Prince Edward Island. New Brunswick, like Ontario, passed an Act largely based on the U.K. model and it is now sections 1 to 3 of the Property Act.¹¹ However, Nova Scotia has never passed an Accumulations Act and thus the only limitation on an accumulating trust is that imposed by the rule against perpetuities. As the author notes the Accumulations Act of 1800 has been abolished in Alberta.¹² Thus Nova Scotia and Alberta lack any special restriction upon accumulating trusts but the difference is that in Nova Scotia no restriction has ever existed but in the territory which became Alberta the Accumulations Act of 1800 applied from the date of reception of English law, 1870, until 1972.

Another minor error occurs in Chapter 29, "Trusts and the Conflict of Laws" at page 962 where the author states "a testamentary instrument purporting to devise lands will be formally valid if the law of the testator's last domicile would admit such validity." This is true in regard to the Wills Act, 1963 of the U.K., but it is incorrect in every common law jurisdiction in Canada. The archaic rule still exists in common law in Canada that the formal validity of a will of immovables is determined solely by the law of the situs. This is a particularly unfortunate rule in Canada because eight law jurisdictions permit the holograph form while it is not accepted by the internal law of British Columbia, Nova Scotia, Ontario and Prince Edward Island. It is to be hoped that a more liberal conflict rule in regard to the formal validity of wills of immovables will soon be enacted. The Wills Act, 1963 of the U.K. which implemented the Hague Convention on the conflict of laws relating to the form of testamentary dispositions concluded on October 5, 1961 would serve as a model. A will, whether it disposes of movables or immovables, is formally valid if it complies with the internal law in force — where it was executed, where the testator had his habitual residence, was domiciled or was a national, either at the time of its execution or at the time of his death. All these additional connecting factors can be utilized to uphold the formal validity of a will disposing of land under the U.K. Act, supplementing

⁹ *Uniacke v. Dickson* (1848), 2 N.S.R. 287 is generally regarded as having established the proposition that English law was received as of 1758 into what are now the provinces of Nova Scotia, New Brunswick and Prince Edward Island.

¹⁰ Oct. 15, 1792 is the date of reception of English law in Upper Canada 32 Geo. III, c. 1. This date is affirmed by *The Property and Civil Rights Act*, R.S.O. 1970, c. 367.

¹¹ R.S.N.B. 1973, c. P-19.

¹² *The Perpetuities Act*, S.A. 1972, c. 121, s. 24(1).

the one rule which exists in common law Canada that a will of land must comply with the law of the situs.¹³

The author in his preface emphasized his objective of bringing Canadian material to light. It therefore seems pertinent to consider whether Canadian decisions and statutes have wrought any significant change in the contours of the English law of trusts. The author does indicate a few differences. For instance, he points out that Canadian courts did not enter an age of religious intolerance and never adopted the old English doctrine of superstitious uses. The author also notes that a more liberal attitude has been adopted by some Canadian courts with regard to trusts involving political purposes. In *Farewell v. Farewell*,¹⁴ Boyd, C. in 1892 held that a fund which trustees were to use to promote the adoption by the Dominion Parliament of legislation prohibiting the sale of intoxicating liquor was a valid charitable gift. More than fifty years later in the *National Anti-Trust Vivisection Society v. I.R.C.*,¹⁵ the House of Lords adopted a rigid and narrow proposition that activities directed toward legislative change were political and were consequently excluded from the category of charities. Ontario courts have also launched out on their own by applying the equitable doctrine of conversion and apportionment of residuary estates, based on *Howe v. Dartmouth*¹⁶ and *Re Earl of Chesterfield's Trusts*,¹⁷ to land in addition to personality. The book mentions other differences but they are of an equally minor nature. Subsequently, the author has likened the development of the law of trusts to the movement of a glacier as compared with other fields such as consumer protection and labour law.¹⁸ This seems to be a good analogy as little that is distinctively Canadian emerges from the case law.

With regard to statutes, probably the two most significant changes are the adoption of the "prudent man" rule in New Brunswick¹⁹ and the Northwest Territories²⁰ in place of the old "legal list" found in Trustee Acts enumerating the assets which qualify as trustee investments, and the abolition

¹³ A very minor error occurs on pages 83 and 84 when the author states that "In the Canadian common law provinces, as in English law, no infant can make a valid will, unless he is a member of the armed forces, or a marine or seaman at sea or on voyage." This is a correct statement for every common law jurisdiction with the exception of Newfoundland. In Newfoundland, although the age of majority is nineteen, the *Wills Act*, R.S.N. 1970, c. 401, s. 3 provides that a person may make a valid will on attaining the age of seventeen. Another extremely minor error occurs on page 202 in footnote 48, where the author states that "the witnesses and the testator must all be present together when each witness signs." It is necessary that a testator sign or acknowledge his signature in the presence of two witnesses before either witness signs but after witness one signs it is permissible for witness one to leave before witness two signs — *Re Brown*, [1954] O.W.N. 301 at 302.

¹⁴ (1892), 22 O.R. 573.

¹⁵ [1948] A.C. 31; [1947] 2 All. E.R. 217.

¹⁶ (1802), 7 Ves. J. 137; 32 E.R. 56.

¹⁷ (1883), 24 Ch. D. 643.

¹⁸ Law of Trusts, Four O'clock Series, The Canadian Bar Association (1975) 1.

¹⁹ S.N.B. 1971, c. 73, s. 2.

²⁰ O.N.W.T. 1971, (2nd Sess.) c. 20, s. 1.

in Alberta²¹ of the rule in *Saunders v. Vautier*²² which often defeated the intention of the settlor. The adoption of the "prudent man" rule appears to be largely the work of the Uniformity Commissioners in Canada, but it cannot be regarded as distinctively Canadian as it has been imported from Massachusetts, or perhaps it is more accurate to say that it is a return to the prudent man rule of equity. The author provides a very interesting account of the historical development which led to the adoption of the "legal list." It appears to be the result of the South Sea bubble reinforced by bankruptcies falling in the wake of the Napoleonic Wars. The "legal list" emphasized fixed interest securities and the conservation of wealth in terms of its dollar value. Rampant inflation is finally bringing about the realization that beneficiaries cannot be protected by inflexible rules. The abolition of the rule in *Saunders v. Vautier* in Alberta is a distinctive Canadian contribution. It is not merely the adoption of the general American doctrine²³ that a court will not terminate a trust if the material purpose for which the settlor established the trust has not yet been fulfilled. Instead it is a good compromise between the interest of the beneficiary in terminating the trust and having the corpus transferred to him and the wishes of the settlor that the trust should continue for the intended duration. The compromise effected is to permit termination only with the consent of the court and, following the principle established in variation of trusts legislation, the court has a discretion to vary or revoke the trust so that the court may uphold the wishes of the settlor or the beneficiary or approve a variation lying between these two extremes. This legislation is the result of the work of the Institute of Law Research and Reform of Alberta which acknowledged the great assistance received from Professor Waters.²⁴

A book review of a comprehensive treatise cannot even attempt to sketch the basic themes of the author. However, it can, I believe, be said that the author has painted the trust on a broad canvas with skill, perspective and fondness.²⁵ It is a book which can be compared favourably with any of the English treatises on trusts. It deserves and doubtlessly will come to be recog-

²¹ S.A. 1973, c. 13, s. 12.

²² (1841), 4 Beav. 115, *affirmed* Cr. & Ph. 240; 41 E.R. 482.

²³ *Clafin v. Clafin* (1889), 149 Mass. 19.

²⁴ Institute of Law Research and Reform, University of Alberta, Report 9 (The Rule in *Saunders v. Vautier*), (1972) at 26.

²⁵ The author's fondness for the trust has prompted him to argue for more favourable income tax treatment of trusts. This is a view which the reviewer cannot share. In my view, trusts are predominantly utilized for their tax avoidance potential. The ill advised abandonment of the death duty field by the federal government at the end of 1971, for which the deemed disposition of capital property on death is no adequate substitute, the absence of succession duty and gift tax in the Atlantic provinces and Alberta, the defective succession duty legislation in Ontario and Quebec are factors which militate in favour of stringent tax treatment for trusts. Succession is one of the most potent forces preserving the large wealth inequality which exists in Canada and trusts are a mode of transmitting wealth to other generations. Under existing circumstances more favourable tax treatment does not appear warranted. My disagreement with the author stems from a divergent view about the kind of society which should prevail in Canada. I would like to see greater equality of condition in Canada because in its absence equality of opportunity will remain largely a hollow slogan. Professor Waters' fondness for the trust is, I believe, firmly rooted in an acceptance of the *status quo*.

nized as an authoritative book. Practitioners will find it an indispensable guide to Canadian decisions and statutes. Practitioners, even if they cannot deduct the cost of eighty dollars as an expense for income tax purposes, will be able to charge capital cost allowance of twenty per cent as a class 8 capital asset. Unfortunately there will be few students sufficiently affluent to afford the book. However, I anticipate that there will be a heavy student demand for the book in law school libraries in Canada.

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