



## Book Reviews ● Revue Bibliographique

### ***Law of Trusts in Canada, 2nd Edition, D.W.M. Waters, Toronto: Carswell, 1984. Pp. cxvi, 1240. \$95.00 (cloth).***

Since its first edition published in 1974, Professor Donovan Waters' *Law of Trusts in Canada* of course has been reviewed.<sup>1</sup> Its merits as a text and as a reference work have been evident to this reviewer as a teacher of the law of trusts. It has also commended itself to the Bench,<sup>2</sup> and certainly to use by the practising profession. On the occasion of the appearance of a second edition in 1984 it appears appropriate to comment concerning its latest contents. This is done not with the objective of rephrasing past comments made in relation to the first publication, but rather to consider what has been changed and now appears in the later edition.

As the author points out in a preface, changes in the law of constructive trusts and in the taxation of trusts have called for attention. Marital property legislation has resulted in new emphases being placed on the law of resulting trusts. New uses of the trust in business and in commerce have emerged. On a more technical level, the author mentions that case law, texts and journal articles, dealing with trusts in other common law jurisdictions, have been expanded in the second edition. The comments to follow will accordingly be limited largely to certain perceived changes in this substantial work.

Some specific changes are mentioned. In Chapter 2, a new heading has been added, "Trust and Governmental Obligation". In Chapter 8, under title 2, a new subtitle (6) is added: "Repeal and replacement of the Bankruptcy Act." Chapter 10 which deals with resulting trusts has had topic headings dealing with marital property situations reworked under heading 2. A new subheading (3) has been added there: "The disposition of matrimonial and cohabitation property disputes", which expands the material on this topic by some 23 pages. In Chapter 11, "The Constructive Trust", a new subheading (2)(b)(ii)E has been added: "The role of the trust which enforces the agreement". Omitted in this chapter from the second edition is a subheading, "3.

<sup>1</sup>Vide P.W. Hogg, "Book Review" (1975), *Can. Bar. Rev.* 424. That reviewer describes the book in these words: "It is original, both in its organization and in its treatment of particular topics; it is Canadian in its scrupulous citation and discussion of Canadian cases and statutes; and it is written in an easy style..."

<sup>2</sup>See for example the use of the text made by the Court in *Guerin et al. v. Government of Canada*, (1983) 45 N.R. 181 (F.C.A.) per LeDain J. at 218, 235.

### Constructive Trust and the Tracing of Property".

Other substantial changes include expansion of materials in Chapter 12 dealing with Personal and Business Trusts (66 pages v. 48 pages); the addition of two subtitles to Chapter 14 on Charitable Trusts — "Trusts for social and recreational purposes" and "Trusts for the promotion of sport", and the addition to Chapter 19 of seven new subtitles: "Depreciation reserves and income tax allowances"; "Depreciation reserves"; "Capital cost and depletion allowances"; "The trustees as majority shareholders or corporate directors"; "Power of encroachment upon capital"; "Discretionary allocation power", and "The unitrust (or percentage trust)".

Regrettably, largely because of the inclusion of the additional materials just mentioned, the size of the second edition has increased to 1,240 pages from 1,070 pages in the earlier text. However, given the nature of the text as both an authoritative statement of the law of trusts in this country and as a reference work, this may be a small price to pay. Helpfully, the expansion of material has not been at the expense of chapter dislocation from the first edition. Rather, there has been a reasonably skillful blending with existing subject headings of the new materials.

One need only choose one or two areas from amongst the several altered portions of Professor Waters' work in order to illustratively comment upon the additional materials now supplied in its second edition. The first area so chosen, one specifically mentioned by the author in the preface, is that part of Chapter 10 under the heading "The disposition of matrimonial and cohabitation property disputes." The author states that because of what he terms "a dramatic legislative change"<sup>3</sup> which has taken place since 1978 in the post-marriage allocation between husband and wife of assets owned by them, disputing married couples have had far less need to invoke the common law to resolve their problems.

The author remarks that before this surge of legislation enacted by the nine common law provinces and the two territories, a trilogy of matrimonial and cohabitation property dispute cases culminated in *Pettkus v. Becker*,<sup>4</sup> which he indicates is surely as dramatic a case development as was the new legislation when it came into force. In light of the existence of the new matrimonial property legislation, Professor Waters asks whether case law need never now be invoked in property disputes arising between married persons or those living together as husband and wife. His answer is, no. First, he reasons, the new legislation usually concerns itself only with disputes involving those who are married. Those who are merely cohabiting will still be required to have recourse to the common law, which he feels is now firmly set on the road of constructive trust rather than on that of resulting trust. Second, he is of the opinion that legislation is concerned mainly with the disposition of marital assets and not with assets owned by one of the parties solely. Again, the doctrine of constructive trust based upon fairness would fall to be invoked. This

<sup>3</sup>D. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) 340.

<sup>4</sup>[1980] 2 S.C.R. 834. The other two cases are *Murdoch v. Murdoch*, [1975] S.C.R. 423; and *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

reviewer wonders for how long the marital property legislation will remain in its present form of basically limiting its application to property of the cohabitation. Time and legislative intention (or lack of it) will answer this question.

Two more reasons for the author's espousal of continuing case law application in marital and cohabitation property allocations are mentioned.<sup>5</sup> The first is that the resulting or constructive trust may be brought at any time by one spouse against the other — one does not have to await a marriage breakdown in order to invoke them. Second, in a number of Canadian jurisdictions the application of the new marital property legislation is not triggered by the death of a spouse. This condition, of necessity, may in some circumstances require the surviving spouse to have recourse to existing case law and the principles upon which it rests.

The author then goes on under this same heading to consider the presumption of resulting trust as it applies between married and merely cohabiting persons, with strong emphasis on intention and its discovery. An interesting historical perspective of the resulting trust is provided in this portion. The presumption of advancement in relation to married persons is also discussed. As the last part of this topic, a fairly lengthy analysis is made of the three decisions of the Supreme Court of Canada which distinguish resulting and constructive trusts. The tracks of reasoning of the major judgments rendered in each case are indicated.<sup>6</sup>

To this reviewer the inclusion of the foregoing materials on matrimonial and cohabitation property dispute resolutions is both timely and required. A text of this size would be incomplete without reference to the very substantial changes made in this area of law which have come about in large part since the preparation of the first edition. To the time-conscious practitioner in every province, the detailed study made of the reasoning of the Supreme Court of Canada in the three major cases discussed may seem an excess, but its examination can only yield helpful understanding in any careful preparation of a brief or an opinion. For the Bench it is felt that such an examination can again only be of assistance, for lines of reasoning are presented and applications thereof are made in a practical manner.

While not voiced as a negative criticism, one should be aware that in its added portions, such as this one, the new text does not usually give a complete factual picture of each case referred to. This is true of even those discussed in some detail, such as the *Pettkus v. Becker* decision. The reader is accordingly obliged to become familiar with the case by an outside reading of it — a valid practice in any event when approaching a question which may involve it.

The second area chosen for comment, this time one not particularly mentioned by the author in his preface, is the addition to Chapter 19 under the several new subtitles: "Power of encroachment upon capital", "Discretionary allocation power" and "The unitrust (or percentage trust)". These new headings are preceded by a short but pointed discussion on the practical duties

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<sup>5</sup>*Supra*, note 3, at 342.

<sup>6</sup>*Ibid.*, at 349 et seq.

of a trust's draftsman when considering the best course for dealing impartially amongst the beneficiaries. The author makes the point that much of the flexibility as to even hand exists not because courts have by design left certain matters to the trustees' discretion, but rather because the law as to even hand has not been developed systematically by the courts. This leads Professor Waters to conclude that as a practical matter, a settlor should make his intentions respecting even hand dealing very plain indeed in the trust document.

A number of the options available to the settlor through the draftsman in connection with even hand dealing include those described in the new subtitles just mentioned. A power of encroachment upon capital in favour of the income beneficiary — for whom experience has shown more concern — is one such available option. So is a discretionary allocation power, by which "(t)he trust instrument delegates to the trustees the decision as to how receipts should be allocated between the income and capital accounts, and whether any receipt should be divided between the accounts."<sup>8</sup> Basically the author suggests that the result of the exercise of such a discretion is to give the trustees, rather than legal rules, the decision as to how a fair allocation should be made.

A third option respecting the even hand dealing is discussed under the new subtitle involving the unitrust or percentage trust.<sup>9</sup> From an idea originating in the U.S., such a trust dispenses with the traditional concept of income and capital, and guarantees to the "income" beneficiary a regular return of a fixed percentage on the value of the trust property. In lean income years this alternative is obviously to the benefit of such a cestui que trust, but at the expense of capital. In fat income years any surplus not paid to that beneficiary is added to the subject-matter capital. Benefits as well as shortcomings, the latter including some *Income Tax Act* considerations, are discussed by the author in connection with the percentage trust concept.

By inclusion of these subtitles, one would have to credit the author once more with keeping abreast of available approaches and options adaptable to the practicalities of administering a trust. Particularly in the matter of the percentage trust concept — an idea even now apparently in the stream of consciousness of the federal tax department<sup>10</sup> — Professor Waters has made Canadian lawyers aware of the possibilities which are inherent in the preparation of a flexible trust arrangement. One can only serve one's clientele that much better when one is aware of what is available for use.

Using the author's own criteria as stated in the preface to this edition, it may be stated with definition that this new text accomplishes its objectives. Not only has the author updated older materials and reported newer approaches, but he also has raised questions about possible future trends in trust law, the percentage trust idea being an example.

These few comments on Professor Waters' latest text offering cannot be

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<sup>7</sup> *Ibid.*, at 862.

<sup>8</sup> *Ibid.*, at 864-5.

<sup>9</sup> *Ibid.*, at 867.

<sup>10</sup> *Ibid.*, at 870, footnote 91.

concluded without noting its present and anticipated future worth to all phases of the legal profession in Canada. As noted earlier, the Bar, the Bench and the academic community have all been the beneficiaries of the first edition of this work. There is little doubt that such earlier benefits will be continued and even surpassed in the updated and expanded version. Any person doing legal research on a topic involving the law of trusts in this country should have early recourse to what is said in this text.

One may have been pleased to note the high legal and scholastic quality of the first text on trusts from this author. One is now pleased to note the continuation of that quality in the second.

BEVERLEY G. SMITH\*

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\*B.C.L. (UNB), Professor, Faculty of Law, University of New Brunswick.