BOOK REVIEWS

LAW OF TRUSTS IN CANADA, by D.W.M. Waters, Carswell, Toronto, 1984, pp. cxvi and 1240.

The appearance of the second edition of Professor Waters' *Law of Trusts in Canada* is indeed welcome. Comprehensive though the first edition was, significant changes in many areas of trust law since 1974 had rendered it in some important respects obsolete, and the updating has much enhanced the already considerable value of this standard work.

The second edition retains many of the characteristics and qualities of the first. The format is, for example, the same: chapter titles and sequence are unchanged; the extensive index (nearly 80 pages) facilitates detailed reference to the text. Much of the text of the first edition, still very relevant, is simply reproduced here. Again, Waters has produced an extensive and thorough treatment of trust law, featuring what seems to be exhaustive reference to relevant statutes and case law. Again, in presenting the law, he has applied close intellectual analysis to the issues raised: his method can therefore be said to be not merely descriptive or presentational, but genuinely critical. His analytical acuity is complemented by a sense of history, a sensitivity to policy considerations, and an awareness of contemporary applications of the trust. Frequently he indicates the direction the law should take, and suggests reforms, particularly where he sees the law burdened by rules whose genesis was in social or economic circumstances which are no longer relevant.

While the essential character of *Law of Trusts in Canada* has remained unaltered, there have been many changes in content — some of which may be mentioned by way of illustration. The most obvious is simply the updating of the law and commentary on the law — locating and citing judicial decisions, new legislation, and secondary materials for the period 1974-1984. This by itself, in relation to a book of this scope, is a formidable task. But, in some areas, much more is involved than merely citing the most recent cases or statutes. In some areas, "landmark" decisions or radical statutory changes have necessitated virtual rewriting of the book.

Thus, for example, the matrimonial property statutes of the 1970's have required a fundamental reconsideration of one of the most important areas of application of the resulting trust. Waters offers a detailed discussion of the changes wrought by this legislation, but is careful to indicate those situations in which the "traditional" law of resulting trusts is still applicable. Similarly, the development of the notion of "unjust enrichment," culminating in the decision in *Pettkus* v. *Becker*,[1] has radically affected the concept of the constructive trust in Canada. Waters devotes much space to these developments, and urges the elaboration of the "remedial" constructive trust based on unjust enrichment as an alternative to the "institutional" constructive trust. Another area of significant change is the taxation of trusts. In the second edition, Waters places his discussion of taxation much more in a context of policy than he did in

1. [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 34 N.R. 384.

the first, where he jumped rather more directly into details. The approach in the second edition is, I think, preferable: rather than stating primarily *what* the *Income Tax Act* does in relation to trusts, it explains *why*. I have been discussing almost exclusively additions Waters has made to his book. The tax context provides one of the rare instances of a subtraction: the disappearance of succession duties and gift taxes from all provinces but Quebec has permitted him to abbreviate somewhat his treatment of these subjects.

These are some examples of major changes in the substance of *Law of Trusts in Canada*. But throughout the book, Waters has had to make substantive adjustments to accommodate new developments. Thus, to name only a handful of examples, he has expanded his discussion of trusts in the business context, has augmented his treatment of aspects of charitable and non-charitable purpose trusts in the light of new case law, and has had to incorporate discussions of such Supreme Court decisions as *Fales* v. *Canada Permanent Trust Co.*[2] and *Re Stekl*[3] and *Lottman* v. *Stanford*[4] into his treatments of the trustee's duty of care and the trustee's duty to act impartially, respectively. In at least one instance — his discussion of the Federal Court of Appeal's judgment in *R.* v. *Guerin*[5] — Waters' updating has already been superseded by the Supreme Court decision.[6]

If the second edition preserves the positive qualities of the first, however, it also manages to retain some of the negative ones. I should say at the outset that these are seldom shortcomings of "learning"; usually, they are problems of "lucidity."

In spite of Waters' assertion in his preface that he has attempted, in his second edition, "to maintain a more relaxed style of expression," the reader, at least, dares not relax. This is not an easy book. Indeed, no one could credibly maintain that it should be easy: the subject matter is often highly convoluted, and, as Waters says more than once, lends itself to "extremely nice distinctions". As we have already seen, he displays great acuity in dealing with these distinctions, and, indeed, this is one of the impressive features of the book. At the same time, one can identify characteristics of his presentation that tend to make inherently difficult material somewhat more difficult.

Some of these characteristics occur at the level of expression. Thus, for example, to take a sentence simply reproduced from the first edition, Waters writes:

> But any draftsman of a family provision trust who has been practicing since the 1950s has never known a time when not to be aware of the impact of the tax implications upon the trust he is drawing, or recommending to his client, is to ignore a factor which unattended to may well be the undoing of the settlor's very purpose. [p. 457]

A feature of this sentence is a proliferation of negatives ("never,", "not," "*ig*nore," "*un*attended," "*un*doing"). As I read the sentence,

2. [1977] 2 S.C.R. 302, [1976] 6 W.W.R. 10, 11 N.R. 487, 70 D.L.R. (3d) 257.
3. [1976] 1 S.C.R. 781, [1976] 2 W.W.R. 382, 54 D.L.R. (3d) 159, 16 N.R. 559.
4. [1980] 1 S.C.R. 1065, 6 E.T.R. 34, 107 D.L.R. (3d) 28, 31 N.R. 1.
5. 45 N.R. 181, [1983] 1 C.L.N.R. 20, [1983] 2 W.W.R. 686, 13 E.T.R. 245, 143 D.L.R. (3d) 416.
6. *Guerin* v. *The Queen* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, 55 N.R. 161.

there is either one negative too many or one too few — with the result that Waters says the opposite of what (I think) he wants to say. To take another example, again simply reprinted from the first edition, this time relating to the problem in *McPhail* v. *Doulton*:[7]

> For instance, it has been argued that, if the first question requires of trustees that they be able to say whether a person is or is not within the class description, they must not only be able to say of *every* person whether he is within it, but of *any* person whether he is not within it. [p. 81; emphasis added.]

The distinction that he is making here remains (for me, at least) obscure. It seems to me that to be able to say something of "every" person is to require more than to say it of "any" person, and I am not sure how the "within it"/"not within it" formula makes any difference. Again this reads to me rather like the opposite of what it is supposed to say.

Another feature of Waters' writing that increases the difficulty of the book is his occasional failure to convey his position on an issue clearly to the reader. An example is his discussion of the distinction between personal representatives and trustees: having observed that "there are several situations where the offices could reasonably be governed by different considerations" (p. 41) and "the differences that may still exist are not inconsequential" (p. 42), he then seems to argue that no distinction should be made. Another example occurs in his discussion of the writing requirement under the *Statute of Frauds*. At one point, he seems to favour abolishing the requirement entirely: "Once the position is taken that any disposition at all requires writing, the inexorable logic, unless there are really persuasive reasons to the contrary, is that all dispositions require writing"; he acknowledges that differential treatment of different kinds of dispositions might lead to "a jumble of 'statutory' solutions" (p. 215). But earlier, under a different sub-heading, in a footnote, and without giving the "really persuasive reasons," he had advocated such differential treatment (p. 213).

Perhaps another symptom of this tendency is his attempt to distinguish between "implied," "resulting" and "constructive" trusts:

> "Implied" is sometimes used to mean implied intention, occasionally to mean a trust implied or imposed by law. "Resulting" describes what happens to the property subject to such a trust; it goes back to the original owner or the person with the best claim to it. It sometimes arises from intention, at other times from imposition of law. A constructive trust is constructed or imposed by law; it never means anything else (p. 377).

The problem is admittedly intractable, but I am doubtful that Water's explanation alleviates the confusion, as he says it does. Under what circumstances, for example, does the property subject to an implied trust become subject to a resulting trust? From this it sounds as if it always does. Again, a position is not clearly enough taken, or at least elaborated.

A further characteristic of the book that amounts to a shortcoming is once again the other side of a coin whose obverse is a virtue in the work. Waters' attention to detail sometimes leads him to examine in too much detail matters of small consequence. Thus, for example, his discussion of executory trusts in relation to the rule in *Shelley's Case* seems rather arcane: he himself admits that the executory "trust will not often occur"

7. [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.).

and that it is of "limited" importance in connection with the rule in *Shelley's Case* (pp. 21-23). I wonder whether this might not have been relegated to a footnote. Similar observations might be made about his detailed discussion of the issues in *Occleston* v. *Fullalove*,[8] which, particularly after his immediately preceding discussion of changed social mores, seems rather anachronistic.

A further criticism that I would make specifically of the second edition is that Waters does not always integrate new material with the old as happily as he might have.

Sometimes, but not often, the problem takes the form of a failure adequately to elaborate the new material. One example that struck me is his apparent failure to take advantage, in the context of *McPhail* v. *Doulton*, of the kind of analysis provided by C.T. Emery in his article *The Most Hallowed Principle — Certainty of Beneficiaries of Trusts and Powers of Appointment*.[9] Another is what appears to be his misapplication of Megarry J.'s distinction drawn between "presumed resulting trusts" and "automatic resulting trusts" in *Re Vandervell's Trusts (No. 2)*.[10] In discussing the decision in *Re Bank of Western Canada*,[11] he writes: "The appellants could only succeed under a resulting trust if they could show that the bankrupt respondent company held certain assets . . . on express trust for the appellants, and that that trust had failed. This is the 'presumed resulting trust'" (p. 375). Surely, if the issue was to find an express trust which failed, this would be an "automatic resulting trust".

More often the problem of awkward integration of new matter simply takes the form of a failure to mesh the new with the old. A small example of this is the footnote, 71A, on page 313, which essentially duplicates footnote 68 (itself, incidentally, incorrectly placed on page 312). A more serious instance is the discussion of the resulting trust in relation to joint bank accounts on page 339; the situation is significantly changed by, for example, s. 11 of the Ontario *Family Law Reform Act*. But Waters does not discuss this until page 362; a footnote to the earlier discussion might have alerted the reader to the new context.

Perhaps a more problematical example occurs in relation to the constructive trust. Having explained the emergence of the remedial or "restitutionary" resulting trust based on unjust enrichment, Waters suggests that, aside from one or two situations, "the established circumstances [of the constructive trust] can indeed and realistically be brought within the principle [of unjust enrichment]" (p. 396). But is this true? Certainly, in *Pettkus* v. *Becker*, Dickson J. (as he then was) saw one of the elements in unjust enrichment as "deprivation" of one of the parties. Waters himself speaks of one person as being "unjustly enriched at the expense of the deprived claimant" (p. 396). But, as *Boardman* v. *Phipps*[12] and *Canaero*[13] attest, in the "institutional" constructive trust,

8. (1874) 9 Ch. App. 147.

9. (1982) 98 L.Q.R. 551.

10. [1974] Ch. 269 at 294, [1974] 1 All E.R. 47.

11. [1970] 1 O.R. 427, 8 D.L.R. (3d) 593 (C.A.).

12. [1967] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.).

13. *Canadian Aero Service Ltd.* v. *O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371.

with its emphasis on the duty of loyalty arising from the fiduciary relationship, deprivation is not a determinative factor. Indeed, later in the book, Waters notes that Laskin J. in the latter case said that it was "irrelevant" "whether the beneficiary of the fiduciary relationship suffered any loss" (p. 741). It is not clear that the traditional constructive trust may be assimilated to the restitutionary concept as readily as Waters suggests.

Part of the difficulty is organizational. In several places in the book, Waters wants to describe the new dispensation; at the same time, he wants to reiterate his detailed account of the old. Perhaps inevitably, some inconsistencies will occur. This is perhaps particularly so where, as in his treatment of the constructive trust, Waters discusses the new first, and then inserts his previous description of the old.

In making these criticisms of the second edition of *Law of Trusts in Canada*, I do not wish to detract from its impressiveness. In saying that it is flawed, I do not say that it is not valuable. Indeed, it is indispensable to anyone who wants to know about the Canadian law of trusts. In describing the text as "a readable book for students in all situations" ("Preface"), however, Professor Waters underestimates the difficulty of his work. My experience of students' reactions to it is that they would agree that it is a book not to relax with, but to wrestle with. Anyone looking into *Law of Trusts in Canada* will find a comprehensive treatment of the subject, a wealth of sources to explore, and a sophisticated, not to say subtle, exposition of issues. The book repays the careful reading that it demands.

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