

REVIEW

The Law of Trusts

THE HON. MR. JUSTICE CHARLES R. HUBAND*

The Law of Trusts, by Eileen E. Gillese.
Concord, Ontario: Irwin Law, 1996, xiv + 184 pp.

THIS IS A GEM OF A BOOK. It is a small gem, only 184 pages in length, but it has plenty of sparkle.

It is not a replacement for Waters' *Law of Trusts in Canada*.¹ When a lawyer takes on a significant trust problem on behalf of a client he or she will still find the pages of Waters a rewarding starting place to begin research. This book does not claim that territory. It is meant for the practitioner who is in need of quick reference when a client asks a question about an estate matter, or the like. It is for the law lecturer who stumbles into the area of trust law, collateral to his or her lectures in another discipline of the law, and who requires a 20-minute refresher course in a particular area of trust law. But mainly, it is a book for the law student who wants an interesting and accurate overview of trust law that may not be gained from attending the normal series of lectures by instructors like myself.

The format of the text is traditional, but it is made interesting by the use of examples that are liberally interspersed throughout the text; examples that in a few brief phrases capsulize and clarify a particular area of the subject. Almost without exception, her examples are well chosen and accurately reflect the law.

The only real weakness in the book is also its major strength, namely its brevity. In a text of this limited size, it is inevitable that certain important areas of trust law will be given scant treatment. When dealing with the required formalities for testamentary documents, the subject of secret and half-secret trusts is accorded only five short sentences. And there is no mention of statutory provisions which exist in some jurisdictions, including Manitoba, which permit any document which embodies the testamentary intentions of the deceased to be admitted to probate without regard to the formalities of execution.

* Justice of the Manitoba Court of Appeal and Lecturer, University of Manitoba, Faculty of Law.

¹ D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984).

Similarly, the rebuttable presumption of advancement when property is transferred without consideration to a spouse or a child, and the circumstances when a court of equity will permit evidence of illegal intention to rebut the presumption, is given all too little space.

But the pluses outweigh the minuses by far. There are refreshing reminders that the author is an acknowledged expert in the field of pension law, and she is not hesitant in raising questions about recent cases dealing with pension trusts. The decision in *Joy Technologies Canada Inc. v. Montreal Trust Co. of Canada*² is called into question, and rightly so. Dean Gillese acknowledges that a trust can be brought to an end by a full distribution of the trust property. In the *Joy Technologies* case, three separate pension trusts, in which the employees were the exclusive beneficiaries, were merged, and the trust assets transferred to a new pension trust. But the new scheme purported to allow surplus funds to be returned to the employer upon termination of the plan. That is what happened. I am as mystified as Dean Gillese as to how the beneficiary employees could have lost their exclusive interest by virtue of the merger of plans into the new scheme. I do not share the author's concern that the *Joy Technologies* case will be a lasting precedent. One would hope and expect that in a like case, the court would declare any provisions in the merged pension trust which purported to negate the earlier trust arrangements to be invalid.

Dean Gillese returns to a pension case to illustrate the trustee's duty to act with impartiality between beneficiaries. The duty goes further than exercising fairness in the distribution of income and expenses and in making investments as between beneficiaries with successive interests. In *Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co.*,³ the courts allowed the administrator of a pension trust to "sweeten the pot" in order to encourage early retirement of selected employees by making an additional payment to them out of surplus pension funds. That would seem to be entirely contrary to the trustee's duty to be even-handed with respect to all beneficiaries.

If there is anything new to be gleaned from this treatise it is that the courts have yet to demonstrate an understanding that even though there may be collateral contractual issues, a pension trust is in fact a trust and that trust laws must be applied to them in determining employee rights.

But the purpose of the book is not to explore what is new or what may develop in the future. This is basically a review of the law as it stands. With the self-imposed limitations of size and scope, it is a first-rate review at that. I will commend it to the students in my trusts class.

² (1995), 7 E.T.R. (2d) 243 (Ont. Gen. Div.)

³ (1994), 121 D.L.R. (4th) 162 (Ont. Gen. Div.)