# *LAW OF TRUSTS IN CANADA*
Second Edition
By D.W.M. Waters

Toronto: The Carswell Company Ltd., 1984
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Sad to say, seldom can a Canadian law book be ranked alongside the leading British textbook on the same subject. Professor Waters's *Law of Trusts in Canada* is, however, a book to which Canadian lawyers can turn with confidence and one too that deserves a place next to *Underhill*[1] and *Lewin*[2] on the bookshelves of equity lawyers. The appearance of the second edition is a major publishing event in the Canadian law of trusts.[3] A book of monumental proportions, perhaps more than any other title published in Carswell's Canadian Legal Classic Series, this text is something of a classic in its field.

While this may seem like high praise for a book under review, if these remarks appear uncriticial it is only because of the author's high standard of scholarship and the all-encompassing analysis he has prepared. While few would maintain that trusts law embraces much high adventure, Waters' book shows at least that the law of trusts is undeserving of its reputation as dull and drearisome. The law of trusts is not lacking movement, development or vitality, and the interested reader will not be left in a state of ennui.

Waters reveals in his preface that he has endeavoured to provide a "readable book for students in all situations, and a reliable work of reference for the courts and practitioners."[4] He has undoubtedly succeeded in the second of these aims: his discussion of the law is both comprehensive and detailed. It is the very exhaustiveness of his book that allows me to recommend it with enthusiasm to the bench and bar. However, that same depth of analysis may make the student tire or recoil. Many students will not need, or want, for example, an explication of charitable trusts that spans nearly one hundred and fifty pages[5] or a discussion of duties of trustees that runs to over one hundred and eighty pages.[6] Now judges, academics and practicing lawyers may think this splendid, but a student wishing to learn the law of trusts at first instance may find some chapters inappropriately abundant.[7] So the thorough nature of this book may have removed it from the student market. One might think that Waters' twofold aim was overly ambitious, but other leading texts are works of dual utility and have

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1. *Underhill's Law Relating to Trusts and Trustees* (13th ed. D.J. Hayton 1979).
2. *Lewin on Trusts* (16th ed. J. Mowbray 1964, 17th ed. J. Mowbray, in preparation, 1984).
3. The only other current text on the subject is the short book by B.G. Smith, *Introduction to the Canadian Law of Trusts* (1979).
4. D.W.M. Waters, *Law of Trusts in Canada* (2nd ed. 1984) at vii.
5. *Ibid.*, at Chapter 14.
6. *Ibid.*, at Chapters 18 and 19.
7. Such a student might consider investing in the short introductory work by J.G. Riddall, *The Law of Trusts* (2nd ed. 1982), or P.H. Pettit's longer *Equity and the Law of Trusts* (5th ed. 1984).

cut a good figure with student and practitioner alike.[8] In any event, *Law of Trusts in Canada* can be commended to the enduring student as a book he will not quickly outgrow.

If trusts law has its share of problems and discomposure, the careful analysis the author brings to bear upon it reduces them. At page 377, for example, Waters provides a brief passage that goes a long way towards removing the ambiguity and confusion surrounding the terms 'implied', 'resulting' and 'constructive' trusts. Many writers have little to say in this regard, leaving it to the student to disentangle the often unprincipled use of these terms in the reports.[9] The explanation of the constructive trust that follows is especially good. Indeed, here we see Waters excel where British books must lag behind: as the text points out,[10] British courts refuse to recognize the 'new model constructive trust' as part of English law. Of course since the benchmark decision of the Supreme Court of Canada in *Pettkus* v. *Becker*,[11] the constructive trust has been firmly established as a remedial instrument that can be pressed into force by our courts when required to prevent an unjust enrichment. But in England, Lord Denning M.R.'s judgement in *Hussey* v. *Palmer*[12] has been given a cool reception and has been largely ignored or condemned.[13] And so Canadian courts are in the vanguard; in this area, then, readers should turn first to Waters.[14]

The title of the book suggests one that is national in breadth and coverage. This is borne out by the text. Refreshingly, Waters holds a relatively even hand among the provinces: legislation and case law from all the common law provinces are discussed at some length. So unlike other texts (whose authors typically write out of Ontario), this book does not expose the reader exclusively to the legislation of a single province and simply cite like provisions from the acts of a few other provinces. Ontario lawyers will not be disappointed, for their laws still receive the lion's share of attention, but readers from Manitoba may be pleasantly surprised to discover that legislation from their own province is at one point set out as a model.[15] Another feature of the book makes it additionally appealing to a national audience: two of the appendices allow the reader to locate quickly key sections of the Trustee Acts in force in the common law provinces and territories.

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8. I have in mind works like R.E. Megarry and H.W.R. Wade's *The Law of Real Property* (5th ed. 1984). Indeed, occasionally such works eclipse books aimed primarily at the practitioner, as does, for example, R. Cross, *Evidence* (5th ed. 1979).

9. The House of Lords itself in *Pettit* v. *Pettit*, [1970] A.C. 777, [1969] 2 W.L.R. 966, [1969] 2 All E.R. 385, and a year later in *Gissing* v. *Gissing*, [1971] A.C. 886, [1970] 3 W.L.R. 255, [1970] 2 All E.R. 780 made no attempt to distinguish among the three terms, choosing instead to lump them together. For Waters' comments on these cases, see *supra* n. 4, at 348, and his case comment on *Fiedler* v. *Fiedler*, (1975), 53 Can. Bar Rev. 366.

10. *Supra* n. 4, at 382.

11. [1980] 2 S.C.R. 834, 34 N.R. 384, 117 D.L.R. (3d) 257, 19 R.F.L. (2d) 165, 8 E.T.R. 143, and see A.H. Oosterhoff, Case Comment (*Becker* v. *Pettkus*) (1979), 57 Can. Bar Rev. 356 at 360, where the Ontario Court of Appeal decision is commented on.

12. [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (C.A.). This case is quite popular with Canada's judiciary and was recently applied in *Kimwood Enterprises Ltd. v. RoyNat Inc. and C.I.B.C.*, [1985] 3 W.W.R. 67 at 73, 31 Man. R. (2d) 105 at 108 (C.A.).

13. See generally A.J. Oakley, *Constructive Trusts* (1978).

14. As an indication of the rapid development of the law in this area, it should be noted that Waters' separate monograph, *The Constructive Trust* (1964), is now seriously out of date.

15. *Supra* n. 4, at 703-704, where subsection 37(1) of *The Trustee Act*, R.S.M. 1970, c. T160, is quoted and discussed.

I might say a word about Waters' "relaxed style of expression",[16] which may be said to account in part for the length of the text. "Relaxed" is not an apt term to describe his style. "Lucid" is more accurate, but, understandably, the author does not use it. Waters has sacrificed conciseness in order to avoid being prolix or cryptic. But while he may not have diligently applied Occam's razor, he has avoided protractedness as well. The book is written in correct and unadorned English, reminiscent of Received Standard, as one might expect from an Oxbridge lawyer like Professor Waters.

Far and away, most textbooks on a standard subject canvass substantially the same topics, if only out of deference to tradition, though the arrangement will usually vary from one writer to the next. Further, in the context of a short book review, a rambling description of contents is often a barren exercise that serves little purpose other than to lengthen a wanting review. Having already said then that *Law of Trusts in Canada* is exhaustive and involved, I need not embark on a vacant, almost pedantic, description of its contents. The discussion is full; those who need to know more I refer to the Table of Contents.

The book's four tables (of contents, cases, statutes and of reports and working papers) and its index are of a uniformly sterling quality, again both detailed and comprehensive. For this Waters owes a debt of gratitude, which he acknowledges, to his publisher, who has produced all parts of the book to a very high standard of presentation.

In short, *Law of Trusts in Canada* will permit students, bench and bar to delve as far into the subject as their needs or curiosity take them. The book is not without imperfections,[17] but overall Waters has produced a real *tour de force*. The profession will be well served by this edition as a reference work, and the students for whom Trusts lies ahead as a subject likened to "sawdust without butter"[18] would do well to read out of this book.

16. *Supra* n. 4, at vii.

17. A slip can be found at *supra* n. 4, at 876, where Waters refers to Manitoba's Surrogate Courts, which of course no longer exist, having been formally abolished by S.M. 1982-83-84, c. 82, s. 25(k).

18. The quote is attributed to Oliver Wendell Holmes, who discouraged his son, the Great American jurist Oliver Wendell Holmes, Jr., from the study of law. See A.T. Vanderbilt, II, *Law School: Briefing for a Legal Education* (1981) at 9.