L'AFFAIRE "TUCKER" SOUS LES FEUX DU DROIT COMPARÉ

Le 11 novembre 1983, à l'occasion de son assemblée annuelle, l'Association québécoise pour l'étude comparative du droit organisait conjointement avec le Centre de recherches en droit privé et comparé du Québec un colloque sur l'arrêt de la Cour suprême dans *The Royal Trust Company* v. *Tucker.**

La Revue de Droit de l'Université de Sherbrooke est heureuse de publier les quatre communications présentées à cette occasion.

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* [1982] 1 R.C.S. 250.

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INTRODUCTION

by J.E.C. BRIERLEY**

Quebec is no stranger to the problems created within its legal system by reason of the adoption of institutions, concepts and vocabulary taken from another legal order. The provisions of the Civil Code on the subject of trusts created by gift *inter vivos* or by will, originally enacted in 1879 as a distinct statute and then added to the Code itself in 1888 as articles 981a C.C. *et seq.*, are not the least among those that have raised fundamental questions about the interaction of the working principles of Quebec law and the real thrust of the imported institutions.

The decision of the Supreme Court of Canada in 1982 in *The Royal Trust Company* v. *Tucker*[1], in view of the opposing theses represented by the decisions at first instance[2] and in appeal[3], was one eagerly awaited by members of the legal professions. The litigation was, after all, the first major opportunity in almost fifty years for the Court to address once again one of the more central issues in the Quebec law of trusts[4]. The decision in *Curran* v. *Davis*[5] had, no doubt, been a milestone, but the language of Rinfret J. on the matter of principle in question was not free from ambiguity and has been troublesome to lawyers ever since. The judgment of the Supreme Court in *Tucker*, as framed in the notes of Beetz J. writing the unanimous opinion for the court of seven judges, is free of the

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* 4e Colloque de droit comparé organisé par l'Association québécoise pour l'étude du droit comparé et le Centre de recherche en droit privé et comparé du Québec, vendredi le 11 novembre 1983, Faculty Club, McGill University, Montreal.

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1. [1982] 1 S.C.R. 250.
2. [1976] C.S. 895.
3. [1979] C.A. 308.
4. In *Crown Trust Company* v. *Higher*, [1977] 1 S.C.R. 418, the Supreme Court held that it was impossible in Quebec law to make a trust outside the scope of arts. 981a *et seq.* and did not address the matter of the juridical mechanism of the trust within those provisions.
5. [1933] S.C.R. 283

linguistic difficulties of the earlier decision but, because of its general alignment with the reasoning in *Curran*, it resolves little of the ambiguity reigning at the textual level of the Quebec legal concepts brought into play.

The issue in *Tucker* was the validity of a deed of gift creating a trust for the benefit of the unborn children of the donor as primary beneficiaries. The donor brought action in 1974 against the trustee to set aside the deed of gift and trust and to be declared owner of the trust property, on the argument that Quebec law does not admit by way of gift (apart from that in a marriage contract or by way of gift or will with substitution) the conferring of benefits upon future persons, i.e. those not in existence at the time of transfer to the trustee. The essential question, therefore, was whether acceptance by the trustee alone was sufficient to constitute the trust and render it perfect and irrevocable in view of the fact that, at the time, the primary beneficiaries were neither born nor even conceived. These facts took the case a step beyond the question in *Curran* where the issue was whether the acceptance by the trustee was sufficient in the absence of an acceptance by an existing primary beneficiary.

But the issue so put, on either situation of fact, is too narrow and disguises the real thrust of the matter. If one affirms that the acceptance by the trustee is sufficient, one is constrained in the logical coherence of Quebec property law principles to conclude also in favour of recognizing some proprietary title in the trustee. One cannot conclude, in other words, that ownership which on principle abhors a vacuum resides in some future or unconceived person.

In maintaining the deed, Mr. Justice Beetz endorses the conclusion, as Mr. Justice Rinfret did also in *Curran*, that the trustee is an owner. He concluded, expressly, in effect, that the trustee has a "*sui generis* property right which the legislature implicitly but necessarily intended to create". As argued with force in a following paper, it is neither a necessary nor an inevitable reading of Quebec law to come to such a conclusion in order to attribute to the Quebec trust some operational scope. It cannot be denied, on the other hand, that a strict reading of the provisions of the Code, which amounts to denying any title in the trustee and so preserves the coherence of Quebec property principles, nonetheless reduces the practical usefulness of the institution itself.

The decision of the Supreme Court in *Tucker* therefore represents, one may say, a will to make the trust do in Quebec at least some of the same work that it has been historically shaped to do in the system from which it derives. Many will no doubt agree that this

is an appropriate goal and will see the decision as a welcome extension to the very limited role apparently assigned to it by the Quebec legislature. Does it also perhaps signal the beginning of the end of the historical tendency in Quebec to favour a restrictive interpretation in the matter of liberalities in general? One may argue, on the basis of *Tucker*, that a step has been taken toward recognizing the trust as an autonomous mode of disposing of property gratuitously, — in other words, that there are gifts, wills *and* trusts, — in so far as Beetz J., in his reasons, characterizes the purpose of the trust legislation as one *intended* to remove constraints present in the simple will or gift. The trust in such a philosophy is thus no longer merely a modality of gifts and wills and becomes an institution in its own right. That indeed would be an important new departure.

One may, therefore, either adopt the more limited view which restrains the operation of the trust within the clearly enunciated policy of our present law of gifts and wills, which view in denying the trustee any species of ownership preserves the integrity of fundamental property law principles; or, one can adopt the more expansive view which allows for an open vision of the trust at the expense of a dislocation of traditional property law concepts. The choice in the matter is no doubt, in some measure, conditioned by one's own over-reaching views on the respective roles of the legislature and the courts. What surprises in this case is that a court should have so frankly affirmed the existence of a new species of ownership about which the legislature has been much less than specific. One's "acceptance" or "rejection" of the view of the Supreme Court of Canada ultimately turns therefore upon one's willingness to accept that our highest court is properly called upon to mould a creative jurisprudence when the legislature itself has remained so long silent on the matter.

On the other hand, and as a final remark, the wider and, one may say, more progressive view of the place of the trust in Quebec is not made any easier to accept when it is supported by the argument that because of its apparent English inspiration (at least at the level of linguistic expression), it is therefore legitimate, as a matter of technique of interpretation, to refer to English law as a source in so far as it is "compatible" with the provisions of Quebec law. Here indeed the decision presents an intriguing ambiguity about the theory of the sources of Quebec law but it is one which, if pursued by the courts in the future development of the Quebec trust, will provide a highly flexible approach to the solving of new problems. The value of a comparative study of the institution of the trust is thus vindicated once again.