TUCKER V. *ROYAL TRUST CO.* THROUGH COMMON LAW EYES

by A.J. McCLEAN*

INTRODUCTION

On March 13, 1953, a settlor, acting pursuant to Article 981a *et seq*. of the Civil Code of Quebec, entered into a deed of donation and trust with the Royal Trust Company. In summary, the trustee was to hold the trust property upon the following trusts:

(1) during the lifetime of the settlor to pay to the settlor
   (i) the income, and
   (ii) so much of the capital as the trustee deemed advisable to enable the settlor to cope with any personal emergency;

(2) on the death of the settlor to pay the trust property to such of the settlor's children or grandchildren as the settlor might by will direct;

(3) in default of any testamentary directions, to pay the capital in equal shares to the settlor's children on their respectively attaining the age of 25, with gifts over to the issue of children who predeceased the settlor, or, who surviving her, did not attain the age of 25, in all cases payable on the issue themselves reaching the age of 25;

(4) if all the descendants of the settlor predeceased her, or, surviving her, died before the age of 25, the property was to be distributed in the manner specified in the trust to her father, her brothers and sisters and their issue;

(5) finally, in default of any other beneficiary, the trust property was to be distributed as if the settlor had died intestate.

At the date the trust was created the settlor was unmarried. In 1974 she commenced proceedings against the trustee, claiming the trust was void, and that all of the trust properties should be retransferred to her. At that date she was married and had four minor children.

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The Superior Court of Quebec dismissed her action.[1] The Quebec Court of Appeal reversed the trial judge.[2] The Supreme Court of Canada restored the judgment at trial.[3] Beetz J., speaking for the court, dealt with two principal questions:

(1) the nature of the Quebec trust, and in particular the question of the location of the ownership of the trust property; and

(2) the effect on the validity of the trust of the fact that "the primary beneficiaries" were not born at the date of the creation of the trust.

Neither of these issues would have caused a common lawyer[4] any concern. However, some of the dispositions in the trust may well have run into difficulties because of the application of the rule against perpetuities. I propose therefore, in looking at the case through common law eyes, to consider:

I The Nature of a Trust;
II Who may be Beneficiaries;
III The Rule against Perpetuities.

I — THE NATURE OF A TRUST

Much has been written about the nature of the Quebec trust.[5] In large measure, the debate has centred on the location of the ownership of the trust property, and in particular on the question of whether, given the nature of the civil law concept of ownership, it is possible to accept that a trustee, his rights limited as they are by the trust, can indeed be an owner.

The common law has long since made up its mind about the nature of a trust, though from time to time there is some revisionist thinking.[6] I will however state what may be called the classic common

1. *Tucker* v. *Royal Trust Co.*, [1976] C.S. 895.
2. [1979] C.A. 308.
3. [1982] 1 S.C.R. 250.
4. In this article, "Common Law" is used in two senses, first, in contrast to civil law, and second, within a system of law based on English law, in contrast to equity. The meaning intended should in general be clear from the context.
5. See the extensive reference to the literature in Beetz J.'s judgment. There is a list of these references in (1982) 40 N.R. 361, 363-364.
6. Inspired often by the impact of the law of taxation: see D.W.M. WATERS, "Trusts Law and Tax Law: A Growing Conflict", (1981) 19 *U.W.O.L. Rev.* 111.

law view. The trustee is the owner of the trust property. The Lord Chancellor, in intervening to protect the beneficiary, did not assert direct control over the trust property or over its ownership. Rather, he accepted that the trustee was the owner of the property, and asserted control over the trustee, requiring him to exercise his rights of ownership for the ultimate benefit of the beneficiaries. Thus, in a leading textbook, a trust is defined in terms of obligation,[7] and to use a familiar, though not necessarily uncontroversial and not necessarily accurate phrase, the rights of a beneficiary are *in personam*, not *in rem*.

The common lawyer ought perhaps to have turned his mind to some of the matters that are of concern to the civilian. Take, for example, the case of a trust where the trustee holds a fee simple interest in real property. In at least three respects the questions that a civil lawyer would raise about the ownership of a trustee in the civil law may also be raised about the effects of the trust on the generally understood nature of a fee simple interest. First, the trustee has no longer the right to use, or to abuse, the property subject to the fee simple as he sees fit; does not that suggest that the existence of the trust has modified the nature of the fee simple? To that question, the common lawyer might well respond that, bearing in mind the *in personam* nature of the beneficiary's right, the trustee is in no different position from a fee simple owner who has contracted to use his rights in a particular way. Neither the *in personam* obligation of the trustee, nor the obligations created by the contract, affect the basic nature of the fee simple. Second, if a trustee transfers the fee simple, the trust will continue to be binding on all transferees except those who take the legal title *bona fide* for value and without notice of any breach of trust. It would appear, therefore, that the existence of the trust has limited the rights of the trustee to dispose freely of the fee simple interest. Under the classic analysis of a trust, a transferee who is not a *bona fide* purchaser for value without notice is bound by the trust, not because of any defect in the title which is transferred to him, but by a defect in his conscience. He takes a perfectly good title; however, if he is not a *bona fide* purchaser, he ought in all good conscience to recognize an obligation in favour of the beneficiary. Third, in the case of the private trust at least, the time will eventually come when the trustee may be compelled to transfer legal title to one or more of the beneficiaries. It is well established that in order for an estate to qualify as a fee simple it must at least have the capacity to

7. Sir Arthur UNDERHILL, *The Law relating to Trusts and Trustees*, 13th ed., 1979 (D. Hayton), 1.

last indefinitely.[8] If it is inevitable that a trustee at some future date must surrender his title, can it properly be regarded as a fee simple? Again, the common lawyer might reply that the trustee is in no different position from the vendor who has agreed to sell; the fact that the vendor may be obliged to the purchaser to make a transfer to him does not mean that he is, with regard to the rest of the world, anything other than a fee simple owner.

The common lawyer's response to these and similar questions may or may not be totally convincing. As a matter of practice, however, the questions would never be raised. It is assumed that the ownership of the trust property is vested in the trustee. If, on a close analysis, it had to be conceded that the nature of the trust relationship required some modification of the traditional views of ownership, the common lawyer would regard that as a price that had to be paid for the existence of the trust.

II — WHO MAY BE A BENEFICIARY?

A. INTRODUCTION

Article 981a of the Civil Code provides that a trust may be created in favour of those persons to whom gifts or legacies may be made. A gift or legacy may not be made in favour of persons not conceived at the time the gift or legacy becomes effective in their favour.[9] It was therefore argued in *Tucker* that as a gift could not have been made to the unborn children of the settlor, so also a trust could not be created for their benefit. The Supreme Court of Canada rejected that argument. It decided that only those prohibitions on the making of direct gifts or legacies which were based on mandatory principles of public policy applied to trusts. The very nature of a gift or legacy excluded the possibility of a gift or legacy operating directly in favour of someone who was not yet born. There was, however, nothing inherent in the nature of the trust that made a disposition in favour of the unborn technically impossible, and such a trust was not contrary to any dictate of mandatory public policy.

There is an interesting parallel between the reasoning of the Supreme Court on this point, and the relationship, in the case of dispositions in favour of the unborn, between the rules of the

8. Thus, for example, the rule that in a determinable fee simple the determining event cannot be one which will inevitably happen.

9. Articles 608 and 765 Civ. C.

common law courts on the making of gifts and the rules of the Court of Chancery on the creation of trusts. A consideration of these issues gives rise to questions in the law of future interests, that most complex area of the law, and can best be considered by examining various specific types of dispositions. In analysing these dispositions, I will in general ignore three fundamental matters, and I will make certain assumptions about the nature of equitable interests. It may therefore be desirable at the outset to indicate briefly the three matters that are being ignored, and the assumptions that are being made.

First, in the common law there are three types of future interest: (1) common law interests, being legal interests; (2) executory interests, also legal interests, and arising in transfers *inter vivos* under the operation of the *Statute of Uses*, or in a will without the necessity of any disposition to uses; and (3) equitable interests, created, of course, behind the legal title of a trustee. In general, nothing will be said about executory interests in what follows. Dealing with them would not add much to the discussion, and would cause unnecessary confusion. Specifically, it should be assumed that all the dispositions that are being discussed are made in a transfer *inter vivos* and not by will. On some occasions there would in fact be no differences between *inter vivos* and testamentary dispositions; on others they operate in different ways, but in the compass of this comment it would not make sense to pursue those differences in detail.

Second, gifts may be made either to individuals or to classes. The common law on class gifts is exceedingly difficult, and for the sake of simplicity all the illustrative dispositions will be couched in terms of gifts to individuals.

Third, the common law developed its concept of the estate and the law of future interests with respect to land. For many years it was the received wisdom that legal estates could not be created in personal property, which could be the subject of only absolute ownership. That is certainly true of personalty which is consumed in use. It would seem, however, no longer to be so with respect to personal property that is not consumed in use, though there is no agreement on the theoretical basis on which legal estates arise in such property.[10] However, it has always been accepted that it is possible to created equitable interests in personalty, behind the absolute title of a trustee. Whatever problems that may persist about the creation of

10. See *Re Fraser*, (1974) 46 D.L.R. (3d) 358 (B.C.C.A.).

estates and future interests in personalty need not therefore be considered further.

Fourth, a number of assumptions, all it is thought perfectly valid, will be made about equitable interests. The Lord Chancellor could not change the rules about the creation and transfer of legal title. So far, therefore, as equitable interests arise behind the legal title of a trustee, it must be a legal title which has been validly created according to common law rules. The Court of Chancery then imposed an obligation on the holder of the legal title, because the Court thought that in all good conscience that obligation ought to be imposed. The dictates of good conscience found their origin either in the expressed or presumed intention of the parties, or, in the absence of intent, because it was thought that the circumstances were such that the trustees ought to have an obligation imposed upon them. So far as was desirable, and legally possible, the equitable interests that were created behind the legal title of the trustee were modelled on the pattern of existing common law interests. Thus, one could, for example, create an equitable fee simple or an equitable life estate. Moreover, these interests had many of the characteristics of common law interests; they could be assigned *inter vivos* or could pass on death by will or on intestacy. There were, however, inevitable limitations on how far they could parallel common law estates. The holder of an equitable interest could not claim possession as of right for that was an attribute of legal title. And there were various aspects of legal estates which the Court of Chancery saw no point in applying to equitable interests, often because, in the eyes of the court, those rules served no good purpose, and would operate simply to defeat the intention of a settlor. That consideration explains many of the differences that arise, in making dispositions in favour of the unborn, between the attitude of the common law courts to the making of gifts, and the attitude of the Court of Chancery on the creation of trusts.

B. DISPOSITIONS TO ONE'S SELF

At common law a person could not transfer a legal interest to himself. That was regarded as conceptually impossible, whether title was transferred by delivery of possession or by the documentary transfer of legal rights.[11] The same prohibition exists in the civil law; a person can not enter into a contract of gift with himself.

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11. The prohibition could be avoided by the use of executory interests. In some jurisdiction the rule has been nullified by statute: see *Law of Property Act*, R.S.B.C. 1979, c. 340, s. 18; *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90, s. 41.

The Court of Chancery saw no difficulty in a settlor being a beneficiary. The requirements of the common law were satisfied by the transfer of legal title to the trustee. In this instance, the court saw no reason to impose on the creation of equitable interests a restriction comparable to that which prevented an owner making a transfer to himself of legal title. Permitting the settlor to be a beneficiary gave effect to intention, and did not contravene any mandatory provision of public policy. Conceptually, the position could be easily explained. Where an owner of property transferred property to a trustee, he transferred an existing legal interest but not an existing equitable interest, for none existed until the trust was created. There was therefore no conceptual difficulty imposed by a person attempting to transfer an existing title to himself. The equitable interest represented the creation for the first time of a personal, bilateral obligation operating between trustee and beneficiary.[12]

It was accepted in *Tucker* that if the unborn beneficiaries had been the secondary or tertiary, rather than the primary beneficiaries, the trust in their favour would, at the outset at least, have been valid.[13] It was assumed that the settlor herself, who had, it will be remembered, a right to income, was not a primary beneficiary. The existence of her interest could not therefore be used to save the interests of her unborn children. Presumably a trust in favour of a settlor would *prima facie* be open to the same objection as a trust for primary beneficiaries who are unborn. A donor may not make a gift to himself; therefore, on a literal reading of article 981a, he could not create a trust in his own favour. However, following the reasoning of the Supreme Court, it may be argued that a donor could not make a gift to himself because a person can not make a contract with himself. If it is accepted that the settlor has made a transfer to a trustee, surely the trustee could be taken to have agreed to recognize a right operating in favour of the settlor. If the settlor was then a primary beneficiary, the gift in favour of the unborn children would not have been invalid, at least *ab initio*.

12. Arguably, there is some difficulty with a personal declaration of trust. If A declares himself trustee for himself for life, with a remainder to B, it is difficult to see on what basis A may have obligation to himself. The issue could not of course arise in Quebec because it is not possible to create a trust by a personal declaration.

13. *Supra*, note 3, at p. 257.

C. CONTINGENT INTERESTS NOT PRECEDED BY A PRIOR ESTATE

At common law a donor could not, in the absence of some prior freehold interest, create a contingent interest in favour of a donee. He could not therefore make a gift in favour of an unborn child. That was obviously impossible if a gift was being made by physical delivery. It was regarded as equally impossible if a documentary transfer was made. If title did not immediately vest in the intended donee, it must, it was thought, still be with the donor, and thus the intended transfer was a nullity. In substance the civil law has a similar prohibition against the making of gifts to the unborn; it is impossible for a donor to enter into a valid contract with a person as yet unascertained.[14]

In Equity it was possible to avoid the common law rule. If title was transferred to a trustee to hold for the benefit of an unborn person, the vesting of title in the trustee satisfied the requirements of the common law courts. The Court of Chancery was as usual prepared to give effect to the intention of the settlor, and saw no reason in terms of public policy to deny the validity of the contingent equitable interest. There was, however, one question to be answered. In the absence of any express provision, who took the benefit arising from the trust property before the birth of the unborn beneficiary? The Court of Chancery filled in that gap by presuming a resulting trust in favour of the settlor. It was presumed that so far as the express terms of the trust had not fully exhausted the beneficial interest, the settlor must have intended that the trust would operate in his favour.

In *Tucker*, ignoring the express provision in favour of the settlor for the payment of income to her, the Supreme Court in effect adopted the same analysis as that adopted by the Court of Chancery. Just as that court thought that the common law rules need not control the creation of equitable interest, so also the Supreme Court thought that the rules of the Civil Code on the making of gifts ought not necessarily to control completely who may be beneficiaries under a Quebec trust.

D. CONTINGENT REMAINDERS

At common law a contingent interest could be validly created if it was, in the conventional phrase, supported by a valid prior estate of

14. Article 759 Civ. C.

freehold. Thus, in a disposition "to my wife for life, remainder to her firstborn grandchild," the gift to the grandchild is, in the first instance, perfectly valid, even if at the date the trust is created no grandchild has yet been born. There is, however, an objection to the validity of the interest. If the title has not yet vested in the grandchild because of the contingency, does it still not rest with the donor, thus destroying the validity of the remainder? To that question the common law never gave a satisfactory answer, but nonetheless accepted that a contingent remainder was in its creation at least perfectly valid.[15] However, even if initially valid, a remainder would become invalid if the contingency attached to it was not satisfied by the date of the termination of the prior estate, for the common law would not tolerate a break in the chain of legal title. In the example given above, if a grandchild was not born before the termination of the prior life estate, the remainder then became invalid.[16]

In the civil law, the validity of such a disposition would turn in the first instance on whether a usufruct or a substitution was created. If it was intended to confer ownership on the grandchild, with the wife taking a usufruct, then on the general principles discussed earlier, the gift to the child would be invalid. On the other hand if a valid substitution were created, the interest of the grandchild would be *prima facie* valid. However, if a grandchild was not born, or at least not conceived, by the death of the wife, then that interest too would fail.[17] There is, therefore, in this respect a considerable parallel between the common law contingent remainder and the civil law substitution.

Once again, the common lawyers resorted to the trust to avoid the limitations imposed by the common law courts. A disposition to trustees to hold on a trust for "my wife for life, remainder to her firstborn grandchild", created a perfectly valid equitable contingent remainder. Moreover, the remainder was not destroyed if the life estate came to an end before the birth of a grandchild. The legal title of the trustees was ample protection against any break in the chain of

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15. See Sir Robert MEGARRY and H. WADE, *The Law of Real Property*, 4th ed., 1975, pp. 182-183.

16. That rule was originally based on the feudal rule that there could not be a gap in seisin. It may be explained on conceptual grounds by saying that once a life estate terminates, title to the remainder must vest in someone. If title cannot vest in the unidentified donee it must then vest in (or indeed may never have left) the donor, who has therefore never made any gift at all.

17. Articles 929 and 962 Civ. C.

legal title. The Lord Chancellor saw no reason to invalidate the gift to the grandchild simply because it did not take effect immediately in possession on the termination of the prior equitable interest. To have invalidated the interest would have defeated the intention of the settlor, and served no useful public interest. There was, however, still the question of the entitlement to the benefits arising from the trust between the termination of the life estate and the birth of a grandchild. As in the case of the creation of equitable interest to an unborn person without any proceeding estate,[18] the Court of Chancery, in the absence of any provision in the trust to the contrary, presumed that the property was held on resulting trust for the settlor.

If a common lawyer can avoid the restrictions imposed by common law rules on the creation of what he would call contingent remainders, it may be that the civil lawyer in Quebec can not use the trust to create interests that will operate in favour of beneficiaries who are not at least conceived by the date of the termination of prior interests under the trust. In *Tucker Royal Trust Co.*[19] Beetz J. stated:

> It is important to distinguish between a deed of donation and trust, in which the primary beneficiaries do not exist, and those made for unborn children when the latter are secondary or tertiary beneficiaries and there are primary beneficiaries in existence. In these latter cases, the stipulations made in favour of unborn children are valid and effective provided that the children are conceived at the time the benefit stipulated in their favour takes effect, and are subsequently born viable.

This *dictum* suggests that the gift would not take effect in favour of the beneficiaries not conceived by at the latest the termination of the prior interest.

E. INTERESTS VESTED SUBJECT TO DIVESTING

On occasion a transferor may wish to transfer title to a transferee, but to add a condition subsequent by virtue of which that title may be divested in favour of someone else. In *Tucker* the gift to the children might have been so interpreted; the interest of a child would have vested on birth, subject to a partial divestiture in favour of any subsequently born child, and to a possible total divestiture if the settlor made a will, or if a child died under the age of 25.

At common law a condition subsequent operating to divest title could operate only in favour of the transferor; it could not be made to operate in favour of any other person. That restriction was founded

18. UNDERHILL, *op. cit.*, note 7, at p. 11.

19. *Supra*, note 3, at p. 257.

in considerations arising out of the feudal system, and, not surprisingly, did not commend itself to the Court of Chancery. It was accepted by the Lord Chancellor that an equitable interest could be divested, either in favour of the settlor or in favour of third parties. That gave effects to the intention of the settlor, and in general did not offend any mandatory principle of public policy. There were, however, limits on the types of conditions which were acceptable. They could not be repugnant to the nature of the interest to which they were attached; and they might be held to be void because they contravened some specific head of public policy. A condition operating by way of the total restraint on alienation violated the first of these rules, and a condition composing an absolute ban on marriage the second. Often, however, these restrictions could be avoided by creating determinable interests, rather than absolute interests made subject to a condition subsequent.

The civil law does not contain the same restrictions as the common law on the making of gifts subject to resolutive conditions. Such conditions may be imposed in favour of the donor or third parties, but there are a number of limitations on the types of conditions that are valid.[20] Presumably, the same principles will apply when a disposition is made by way of trust. In this case, therefore, the trust in the civil law was not needed in the same way as the trust was needed in the common law in order to avoid basic common law principles.

III — THE RULE AGAINST PERPETUITIES

If in *Tucker* the common lawyer would not have had any difficulty with the validity of the gifts to the unborn beneficiaries as such, he would have had to worry about the application of the rule against perpetuities to all of the gifts except that in favour of the settlor herself. Indeed, the trust in *Tucker* illustrated in some measure the reason why the rule against perpetuities was needed. The various restrictions which surrounded the creation of common law interests made it difficult to create a series of interests running for any excessive length of time into the future. As we have seen the Court of Chancery, as a general rule, refused to apply those restrictions to equitable interests and proceeded on the basis that effect should be given to intent. As a result it was *prima facie* open to a settlor, using contingent interests and interests subject to divesting, to string out a

20. Article 760 Civ. C.

series of interests almost indefinitely. That, the Court of Chancery recognized, could have created undesirable "perpetuities", and so the rule against perpetuities was invented to control the creation of equitable future interests.[21]

Today, in many common law jurisdictions, the application of the rule against perpetuities would first involve the application of the rule in its common law form, and second, if need be, the application of remedial legislation which has been passed to temper the rigours of the common law.[22] The rule, in its common law form, requires that it must be certain from the date of the creation of a contingent interest that if that interest should ever vest in interest it can never do so more than twenty-one years after the death of some person who was alive at the date the document creating the interest took effect. At common law, an interest was valid if it was clear at the outset that it could never vest outside the period, but was void *ab initio* if it could only vest outside the period, or if it was unclear whether it would vest within or without the period. In the latter case, the remedial legislation saves the gift in the first instance by allowing one to wait and see, by reference to a period determined by the statute, whether or not the vesting actually takes place within or without the period. Only if the vesting in fact takes place outside the period does the gift become invalid.

In order to apply the rule, both in its common law form and as modified by legislation, it is first necessary to interpret the document in question to decide the exact nature of each interest whose validity may be in question. In *Tucker* that would have been a complex process, and it does not seem profitable to pursue it in detail here. Three points may however be made. First, although this is unlikely, if the interest of the children of the settlor were treated as being contingent on their reaching the age of 25, at common law their interest would have been void. Second, as is more likely, if the interests were treated as vesting as each child was born, but subject to being divested in favour of issue if the children died under the age of 25, the gift to the issue would have been void, and the interests of the children would have become absolute. Third, if the interests of the children or the issue had contravened the rule, then all subsequent interests which could have been regarded as being dependant upon them might also have been held to have been invalid. In all jurisdictions with remedial legislation the interests, so far as they

21. And to control legal executory interests. The rule was eventually applied to virtually all types of contingent interests.

might have been invalid at common law, would in all probability be saved.[22]

CONCLUSION

The early common law imposed on the transfer and creation of interests a number of restrictions. These may at a time have served a sensible public policy, but eventually they ceased to do so, and they generally operated to defeat the intention of a transferor. The Court of Chancery saw no need to apply to equitable interests rules based on what were often outmoded considerations of public policy. Instead, it preferred to give effect to the transferor's intent, even though it too had to restrain unbridled intent by the invention of some restrictive rules, such as the rule against perpetuities. *Tucker* shows Quebec law going through similar developments. Should the provisions of the Civil Code on gifts and legacies apply to the creation of trusts, or should the trust be used to throw off some, at least, of the restraints the Code might impose, and instead give effects to intent. The decision in *Tucker* seems to be a step in the latter direction. The enactment of the *Draft Civil Code* prepared by the Civil Code Revision Office[23] would accelerate that development. Even then, it may well be that Quebec law would not have finally settled the relationship between the civil law of property and the trust.

22. For a list of the Canadian legislation see R. MAUDSELEY, *The Modern Law of Perpetuities*, 1979, Appendix D, 247. To the list of statutes to be found there should be added that of the Northwest Territories: *Perpetuities Ordinance*, R.O.N.W.T. 1974, c. P-3. For a discussion of the *Ontario Act* see R. GOSSE, *Ontario's Perpetuities Legislation*, 1967. Manitoba has taken the bold step of abolishing the rule: *The Perpetuities and Accumulations Act*, S.M. 1982-83, c. 43-P32-5. See A.J. McCLEAN, "The Rule Against Perpetuities, *Saunders v. Vautier*, and Legal Future Interests Abolished", (1983) 13 *Man. L.J.* 245.

23. *Report on the Quebec Civil Code, "Draft Civil Code"*, Civil Code Revision Office, 1977. For the proposals on the law of trusts, see Book IV, Title 7. See also Bill 58, *An Act to add the Reformed Law of Property to the Civil Code of Quebec* (1st reading), 4th sess., 32nd Legislature, articles 1288, 1329.