PART VII

TRUSTS IN QUEBEC

CHAPTER SEVENTEEN

TRUSTS IN QUEBEC

I. INTRODUCTION

The use of the trust is a relatively new phenomenon in Quebec. Although some form of a trust was provided for in the 19th century, this civil law version was extremely limited in its operation and posed a number of significant theoretical problems that were never clearly resolved. Foremost among these was the fact that the common law's distinction between equitable and legal ownership did not sit well with the civil law notion of absolute ownership. The modern *Code civil du Québec*[1] (CcQ) altered this situation with a dramatic reconfiguring of the law of trusts by creating a civil law version of the trust that not only addressed the theoretical problems but provided for a more versatile form of trust better suited to modern commercial and property law principles.

II. HISTORICAL ORIGINS OF THE QUEBEC TRUST

As a civil law jurisdiction, Quebec had no specific provision for the creation of anything resembling a common law trust. This is because the province's civil code, the *Civil Code of Lower Canada* (CCLC),[2] was based on the *Coutume de Paris*, a compilation of written rules regulating private transactions in force in the northern part of France in the early 16th century.[3] Two provisions in the 1866 CCLC did provide for trust-like devices, however. The first, art 869, allowed a testator to leave property to a fiduciary or trustee for charitable or religious purposes.[4] The second was contained in art 964, and provided that where a bequest made for a specific person appeared to give title to a fiduciary, the fiduciary had an obligation to return the property to the estate of the grantor whenever the intended beneficiary was unable to receive the gift. The English version of the 1866 CCLC used the word "trustee," but it seems

1 CQLR c C-1991 [CcQ].

2 (1857-1866) [CCLC].

3 Jean-Louis Baudouin, "The Reform of the Civil Code of Québec: Objectives, Methodology and Implementation" (1983) 52:2 Rev jur UPR 149.

4 CCLC (1866), art 869a: "A testator may name legatees who shall be merely fiduciary or simply trustees for charitable or other lawful purposes within the limits permitted by law; he may also deliver over his property for the same objects to his testamentary executors, or effect such purposes by means of charges imposed upon his heirs or legatees."

clear that the term was not meant to incorporate common law concepts of trust into the CCLC. Instead, it was apparent that the transaction at issue was more akin to testamentary execution than any trust relationship.[5]

By 1879, however, pressure from influential lawyers in the province resulted in the passage of *An Act Concerning the Trust*,[6] which contained certain provisions that appeared, on their face at least, to permit the creation of trusts that vaguely resembled those existing under English law. This statute was eventually incorporated into the *Civil Code* in 1888, but its provisions created a great deal of confusion and conflict. One reason for this was that the implications of this new Quebec trust were difficult to reconcile with the traditions of the civil law. Lawyers, judges, and legal scholars differed widely on its theoretical implications as well as the proper mode of interpreting its provisions. Some asserted that the trust created by the *Civil Code* was merely an extension of the various devices already known to the civil law, while others contended for a more vigorous interpretation, arguing that the 1879 legislation intended to create a trust in the English law tradition.

Most courts concluded that while the Quebec trust might operate to some extent like its common law cousin, it would not be governed by English law precedents.[7] This meant that the Quebec trust functioned like its English counterpart in many cases, although the full scope and breadth of English trust law did not take hold. The result was that the Quebec trust remained a stunted version of the trust compared to the common law version.

The problem with the 1879 legislation was that, although it created a mechanism called a "trust," the institution was quite limited in its usefulness. Under the terms of art 981a, the use of the old trust was confined to donative transfers by gift or will. This limitation made the trust far less useful than the common law version because it prevented the creation of commercial trusts as well as a wide range of trusts based on contract, such as asset protection trusts or trusts for co-ownership. The old *Civil Code* also prevented the use of a declaration of trust (a trust whereby the settlor declares himself to be trustee of property in his hands for the benefit of another) with the result that the sort of trust created in *Paul v Constance*[8] could not arise.[9] It also prohibited the creation of unit trusts, such as mutual fund trusts or real estate investment trusts.[10] Moreover, although the *Civil Code* provided for a form of charitable trust, such trusts were limited to those created by will. One could not create an *inter vivos* charitable trust.[11] In addition, the definition of charitable purpose was more limited than that prevailing in common law, so that the civil law charitable trust was confined to a relatively narrow range of charitable activity.

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5 CCLC (1866), art 964: "The legatee who is charged as a mere trustee, to administer the property and to employ it or deliver it over in accordance to the will, even though the terms used appear really to give him the quality of a proprietor subject to deliver over, rather than that of a mere executor or administrator, does not retain the property in the event of the lapse of the ulterior disposition, or of the impossibility of applying such property to the purposes intended, unless the testator has manifested his intention to that effect. The property in such cases passes to the heir or the legatee who receives the succession."

6 SQ 1879, c 29.

7 See e.g. *Curran v Davis*, [1933] SCR 283, [1933] RCS 283; *Laliberté v Larue*, [1931] SCR 7, [1931] RCS 7; *Laverdure v du Tremblay*, [1937] CCS No 537, [1937] 2 DLR 561 (PC).

8 [1976] EWCA Civ 2, [1977] 1 WLR 527 (discussed in Chapter 4).

9 *O'Meara v Bennett*, [1921] CCS No 157, 61 DLR 241 (PC) (holding that a settlor's declaration that shares in her hands were now held for the benefit of another was invalid under Quebec law).

10 See e.g. *Crown Trust Co v Higher*, [1977] 1 SCR 418, [1977] 1 RCS 418 (invalidating an attempt to create a real estate investment trust [REIT] on the grounds that Quebec law permits only trusts created by gift or will).

11 See CCLC, *supra* note 4 (limiting the creation of charitable trusts to "testators").

Without doubt, however, the most significant problem with the 1879 trust was the absence of any general framework to explain its nature and operation.[12] That is to say, although the old *Civil Code* created an instrument that could function like a common law trust in many ways, some of the most important theoretical issues were unresolved by the statutory provisions. The result was a great deal of uncertainty about the scope and operation of the Quebec trust in ways that inhibited its growth and development, and, thus, its ultimate effectiveness as a device for the transfer and management of property.

One of the most important elements of this problem was where title to the trust property would lie. Because the civil law rejects the common law distinction between legal and beneficial ownership, courts and commentators differed on the nature of the rights of the trustee and beneficiary with respect to the corpus of the trust. On its face, art 981a provided that a settlor may "convey" property to trustees. Yet there remained a great deal of ambiguity in the clause. What was the legal effect of such a conveyance? Did it contemplate mere physical transfer with the right of management; or was a transfer of legal title envisioned? If the former, then who had the legal title? If the trustee was vested with title, then how could a beneficiary have any right to force a trustee to comply with the terms of the trust instrument in the absence of any concept of beneficial ownership? The result was a great deal of academic gymnastics in an effort to find some theoretical basis for allocating rights between the various parties to the transaction. The Supreme Court attempted to clarify some of these questions in *Royal Trust Co v Tucker*,[13] in which it held that the trustee held a "*sui generis* property right" in the trust assets, although not of a kind otherwise understood in either the civil or common law. The fact that this case arose in 1982 was an indication that, even after almost 100 years, the basic principles of the Quebec trust were still not well defined. As a result, following *Tucker*, calls for action to clarify and expand the role of the trust began to get louder. In time, the difficulties in precisely defining the nature of the institution of the Quebec trust, combined with the limitations on its use of the trust, convinced the National Assembly to undertake a revision of the trust in the context of the 1994 reform of the *Civil Code*.

The new *Code civil du Québec*, which came into force on January 1, 1994, introduced a concept of trust designed to create a more flexible vehicle than existed under the 1866 CCLC. It also provided a more coherent theoretical foundation for a trust in the civil law tradition. In effect, the drafters of the 1994 CcQ attempted to achieve three objectives. These included:

1. defining the institution of the trust more clearly;
2. resolving interpretation problems raised by the *Civil Code of Lower Canada* (1866); and
3. broadening the scope of trusts to provide a more useful vehicle for private, commercial, and public purposes.[14]

III. THE CONCEPT OF THE TRUST IN QUEBEC LAW

The new CcQ attempted to solve the first two problems by finding a juridical device that would mimic the tripartite relationship of the common law trust, but which would fit more comfortably within the basic principles of the civil law. It set out a general trust regime in 38 articles within Book Four (Property) that provided a more explicit textual basis for the creation

12 Jacques Beaulne, "The Law of Trusts" in Aline Grenon & Louise Belanger-Hardy, eds, *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Carswell, 2008) 169.

13 [1982] 1 SCR 250, 12 ETR 257.

14 Beaulne, *supra* note 12 at 175.

and administration of trusts.[15] The placement of the trust provisions in the property section of the CcQ had the effect of removing the trust from the constraints placed on it as a result of its former location in the part of the Code that dealt with wills. The trust is thus implicitly and explicitly not limited to situations of gifts and estate planning, but is to be available in a wider range of property transactions.

The CcQ also created a new legal regime for the administration of the property of others that codified for the first time standards for the conduct of administrators in handling property.[16] In so doing, the new CcQ resolved many of the theoretical and interpretive problems resulting from the rather bare-bones structure of the old Code. The new provisions were drafted in very general terms in order to provide more flexibility in their application and use. They are, in effect, default rules that leave parties free to define and implement trust relationships as they see fit. In addition, there are very few mandatory terms and few limitations arising from concerns of public order. Instead, the CcQ's trust rules are "endowed with extraordinary elasticity so that they may be applied as the norms of society evolve and change and thus be responsive to the demands of modern society and commerce."[17]

The 1994 CcQ's most important feature was its development of a coherent theoretical framework for the law of trusts in the context of Quebec's civil law tradition. The trust created under the 1866 CCLC did not fit well in Quebec law because the civil law lacks any real concept of legal and equitable ownership. Ownership of property in Quebec is absolute and indivisible. As a result, granting the trustee and the beneficiary distinct rights of ownership in the same property created a theoretical impossibility. The drafters of the 1994 CcQ solved this dilemma by adapting the civil law's concept of "patrimony" (*le patrimoine*).

A. PATRIMONY

The principle of patrimony is unknown to the common law. It is generally defined as the whole of a person's rights and obligations having a monetary value. Put another way, patrimony is "the total mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs."[18] The concept of patrimony is derived from Roman law, although it did not exist in French customary law prior to the 19th century. Its resurgence was largely due to the work of the continental jurists Charles Aubry and Frédéric Charles Rau, whose influential treatise, *Cours de droit civil français* (1839-46), inspired a reconsideration of the foundations of the civil law, especially with respect to the law of property.

According to Aubry and Rau, patrimony is inextricably connected to personality, and can be summed up in three rules:

1. every natural person has a patrimony;
2. every person has only one patrimony; and
3. every patrimony belongs to a person.

This connection between patrimony and personality is reflected in art 2 of the CcQ, which declares that "[e]very person is the holder of a patrimony."

In essence, the classical theory of patrimony states that every person has a patrimony that includes all of his economic rights and obligations. To be sure, the patrimony may be large or small, depending on one's own economic circumstances. A child, a millionaire, and a pauper all

15 CcQ, arts 1260-1298. See Marilyn Piccini Roy, "Trusts in Québec" in Alon Kaplan, ed, *Trusts in Prime Jurisdictions* (London: Globe Law Business, 2010) 343 at 344-45 [Roy].

16 CcQ, arts 1299-1370.

17 Roy, *supra* note 15 at 345.

18 *Creech v Capitol Mack, Inc*, 287 So 2d 497 at 504 (La Sup Ct 1974).

have a patrimony. The only question is what assets and obligations are comprised within it. In the case of a child, the answer is likely very little, while that of the millionaire will be extensive. Article 302 also notes that a person has "extra-patrimonial rights," such as political or dignity rights—for example, the right to vote or the right to be free from unlawful discrimination—that are not encompassed within the patrimony itself. Further, a patrimony is indivisible; it cannot be separated from its holder, although a person may transfer certain rights and obligations to others. Finally, it is a fundamental rule that where there is no person, there is no patrimony. That is to say, a patrimony cannot exist independent of a connection to a natural person.

It is this theory of patrimony that has made the common law concept of trust problematic for civil law theorists. The dichotomy between equitable and legal ownership permitted in English law violates the fundamental principle that patrimony cannot exist independently of a natural person. The drafters of Quebec's CcQ resolved the conceptual difficulties generated by the strict theory of patrimony by creating multiple forms of patrimony, which do not involve absolute ownership by an individual:

> 302. Every legal person has a patrimony which may, to the extent provided by law, be divided or appropriated to a purpose. It also has the extra-patrimonial rights and obligations flowing from its nature.

The ability to "divide" or "appropriate" a patrimony results in the creation of three different kinds of patrimony in Quebec. These might be termed the *general patrimony*, the *patrimony of division*, and the *patrimony by appropriation*. The general patrimony is largely akin to that of the classical theory of patrimony, and includes the patrimony of natural persons.[19] A patrimony of division is seen in the context of a family patrimony, where married persons share ownership of marital assets.[20] The patrimony by appropriation allows for the creation of a patrimony that is appropriated to a specific purpose without being attached to any particular natural person. The result is that Quebec law has moved rather substantially away from Aubry and Rau's classical theory of "no patrimony without a person" to one that recognizes the possibility that not all patrimonies may be attached to a person. As it stands now, then, although every person has a patrimony, not every patrimony is attached to a person.

B. PATRIMONY BY APPROPRIATION

The patrimony by appropriation (*le patrimoine d'affectation*) is the foundation of the Quebec trust. It is derived from the work of the French jurist Pierre Le Paulle, who was fascinated by the workings of the common law trust and sought some way of incorporating the trust into civil law theory. He argued for an "obligation model" of trust that focused on the trust as an obligation imposed on the trustee to manage the property of a third party. This obligation is a personal one between the settlor and the trustee. This formulation avoided the difficulties inherent in trying to graft the equitable dichotomy of ownership into the civil law. It also avoided having to consider the trust as a separate legal person, a solution that would do damage to the fundamental concept of patrimony. In 2014, the Court said in *Yarod v Yarod* that the concept of a patrimony without a holder was thus introduced "in an effort to adapt the common law trust to the framework of civil law."[21]

The key to understanding the patrimony by appropriation is to remember that a Quebec trust is not a legal person or separate entity.[22] Neither is it property held by the trustee. Instead,

19 CcQ, art 2.

20 CcQ, arts 414-417.

21 *Yarod v Yarod*, 2019 SCC 62, 440 DLR (4th) 197 at para. 17.

22 It should be noted that, although the common law trust is not based on the Quebec trust concept of patrimony by appropriation, the trustee in a common law trust is a legal person but the trust itself is not a separate legal entity.

the CcQ envisions the trust property as "an autonomous patrimony distinct from all the actors—the settlor, the trustee, and the beneficiary—and in which none of them have a real right, in the sense of a right in the property itself."[23] Unlike the common law trustee, the trustee of a Quebec trust has no right of ownership. Instead, the relationship between the trust patrimony and the trustee is one of powers. The trustee has power to administer the property on behalf of the settlor,[24] but neither the trustee nor the settlor has legal title. The settlor's ownership rights cease the moment the property is appropriated, and the trustee's obligations begin the moment he takes custody. Moreover, because no one has legal title, the trustee, as administrator of the appropriated property, has the exclusive right to control and administer it.[25]

Because the theory of the Quebec trust does not depend on legal or equitable ownership, there is no requirement that the settlor actually convey the property to the trustee. Instead, the settlor appropriates the property to the patrimony.[26] The trust is made effective when the trustee accepts the powers and obligations.[27] The consequence of this is that the foundations of Quebec trust law are on a different footing than the common law trust. Because the law governing the Quebec trust is primarily concerned with the respective powers and obligations of the trustee, trust law is less the law of property and more the law of obligations.

Undoubtedly, the concept of a patrimony by appropriation is a difficult concept for common lawyers to understand, but its advantage is that it fits far more neatly into the structure of civil law theory. One commentator has attempted to justify the divergence in theory by noting that the concept of patrimony is "no less a *magnum mysterium* for the common lawyer than is the duality of legal and equitable title for the civil lawyer."[28] Nonetheless, although common lawyers may be somewhat wary of the nuances of patrimony by appropriation, the Quebec trust evidences most of the essential features of the common law trust. These include:

1. a triangular relationship between settlor, trustee, and beneficiary;[29]
2. a trustee to administer the trust assets;
3. dedication of the assets to a particular purpose (either personal or public); and
4. supervision of the trustee by the courts to ensure the performance of obligations.

As a result, although the Quebec trust rests on a fundamentally different legal theory, it has largely achieved a functional equivalence with the common law trust. In addition, in certain important respects described below, such as the case of the non-charitable purpose trust, the Quebec trust may actually be a more effective vehicle for achieving certain purposes.

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23 Roy, *supra* note 15 at 346.

24 In contrast, the trustee of a common law trust administers the property subject to the trust according to the terms of the trust for the benefit of the beneficiaries or to pursue the purposes of the trust. The common law trustee does not manage the property on behalf of the settlor. The reason for the different approach in the Quebec trust is expanded on in Section VI below.

25 *Yared v Yared*, *supra* note 21 at para 17.

26 CcQ, art 1260.

27 CcQ, art 1261.

28 John EC Brierley, "The New Québec Law of Trusts: The Adaptation of Common Law Thought to Civil Law Concepts" in H Patrick Glenn, ed, *Droit Québécois et droit français: communauté, autonomie, concordance* (Cowansville, Que: Yvon Blais, 1993) 383 at 392.

29 The nature of this tripartite relationship in the context of the Quebec trust is explained more fully in Section VI.A below. In a common law trust created by the transfer of property to another as trustee, unless the settlor has reserved rights or powers, the settlor no longer has rights or powers with respect to the property. Such a common law trust settlor is part of a tripartite relationship only to the extent that the settlor creates the trust and thereby creates the trust relationship between the trustee and beneficiaries.

IV. FORMATION OF THE TRUST

It should be clear that the institution of the trust in Quebec law is exclusively a matter of statute. As a result, the rules for creation, administration, and termination of a trust are set forth in the CcQ, which provides for all its essential elements.

With respect to formation, art 1260 provides the fundamental rule for the creation of a Quebec trust:

> 1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

Article 1260 provides that the formation of a valid trust requires four factors. There must be (1) an act whereby a settlor, (2) transfers property from his patrimony to another patrimony constituted by him, (3) which he appropriates to a particular purpose, and (4) which a trustee undertakes, by his acceptance, to hold and administer. Without these four elements, there can be no trust.[30]

It is important to note that art 1260 does not say that a trust is "created." Instead, it says that a trust "results" (*résulte*) when these four elements are satisfied. Thus, a settlor does not necessarily have to formally desire the creation of a trust. On the contrary, a trust may arise simply because the settlor has acted in a particular way. Although courts and practitioners will frequently use the English word "create," the CcQ seems to deliberately avoid using the term. This is because the civil law trust is not to be considered a thing (*une chose*) or an entity that is created by a single event. Rather, it is more properly viewed as a relationship involving three parties. It is in fact "rather like a marriage, a domicile, or a filiation, all of which also *result*, but which are not *created* or *creations*."[31]

A. AN "ACT"

Article 1260 does not define the "act" necessary for the formation of a trust. Instead, that work is done by art 1262:

> 1262. A trust is established by contract, whether by onerous or gratuitous title, by will or, in certain cases, by law. Where authorized by law, it may also be established by judgment.

This article makes it clear that there are, in general, four "acts" that satisfy the first requirement of art 1260, and which may result in the formation of a trust. These include (1) a contract, (2) a will, (3) a judgment, or (4) a statute.

1. A Contract

The CcQ defines a contract as simply "an agreement of wills, by which one or several persons obligate themselves to one or several other persons."[32] The type of contract envisaged in the trust context is one that is either "onerous or gratuitous," which in common law terms might

30 Jacques Beaulne asserts that, in effect, CcQ art 1260 requires all trusts, no matter how they are constituted, to have four key elements, namely: the constitution of a patrimony, the transfer of property to this distinct patrimony by the settlor, the acceptance and administration of this property by the trustee, and, finally, the appropriation of this transferred patrimony for a particular purpose permitted by law. Jacques Beaulne, "Les éléments constitutifs de la fiducie" in *Droit des fiducies*, 3rd ed (Chambly, Que: Wilson & Lafleur, 2015) at 1-12.

31 John B Claxton, *Studies on the Quebec Law of Trust* (Toronto: Carswell, 2005) at 56.

32 CcQ, art 1378.

be defined as a contract with or without consideration. An onerous contract is probably the most common means of establishing a trust apart from a will. This is because most *inter vivos* transfers of property to trustees are done by means of an onerous contract. The CcQ defines an onerous contract as one wherein "each party obtains an advantage in return for his obligation."[33] The onerous nature of the agreement basically centres on the economic advantage gained by each of the parties. On the one hand, the settlor will gain the management and administration of the property by someone else. The trustee, on the other hand, will usually obtain some form of remuneration for services. Common examples of such exchanges can be found in the investment trust or the real estate investment trust.

The CcQ defines a gratuitous contract as one wherein "one party obligates himself to the other for the benefit of the latter without obtaining any advantage in return."[34] As noted above, the question of whether a contract is onerous or gratuitous depends on the extent to which economic advantages flow between the parties. In the context of the Quebec trust, a gratuitous contract is one in which the trustee agrees to perform services on behalf of the settlor without receiving any remuneration or other benefit. There is often some confusion about this point. As will be seen below, one classification of the Quebec trust is a "personal trust" which is "constituted gratuitously for the purpose of securing a benefit" to an individual.[35] On occasion, some have asserted that this gratuitous trust must be the result of a gratuitous contract. That is not the case, however. The contract described in art 1262 is that which exists *between the settlor and the trustee*, and has nothing to do with whether the beneficiary receives a gratuitous benefit. Thus, a so-called gratuitous trust may be formed as the result of an onerous contract, as where a trust company is paid to administer a private trust on behalf of the settlor, or by a gratuitous contract, wherein a family member undertakes to perform the role of trustee for the benefit of the settlor's minor children. Put another way, a gratuitous trust may be the result of either an onerous or gratuitous contract.

The precise form of the contract required for the establishment of a trust is not set out in the CcQ, and thus no particular formalities are required. So, for example, in the case of a private trust, which would include most commercial trusts, the contract need not even be in writing. Moreover, subject to the rules of evidence, a contract might even be implied by the conduct of the parties. As is the case with common law trusts, however, certain formalities may be required where particular property, such as land or "immovables," are concerned.[36]

2. A Will

As was true of the 1866 CCLC, the CcQ continues the practice of allowing the formation of trusts by will. The form of the will must comply with the provisions of arts 712-730.1. Failure to do so results in the will, and any trust constituted under it, being declared a "nullity."[37] Quebec permits three different forms of wills. These include the "notarial will" (a will executed by a notary *en minute*), the holograph will, and the will executed by the testator in the presence of witnesses.[38] The notarial will does not exist in the common law jurisdictions, although both the holograph will and the will executed by the testator are well-known features of the law of successions and estates in the common law provinces.

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33 CcQ, art 1381.

34 *Ibid*.

35 CcQ, art 1267.

36 See e.g. CcQ, art 2938 (requiring "publication" of the "acquisition, creation, recognition, modification, transmission or extinction of an immovable real right").

37 CcQ, art 713.

38 CcQ, arts 712, 716, 726, 727.

3. A Judgment

Article 1262 states that a trust may be established by judgment "where authorized by law." It seems clear that this article refers primarily to statutory trusts, and not to constructive or resulting trusts. It is generally agreed that the part of the article permitting trusts to be "established by judgment" is dependent on previous "authorization by law"—which is to say, authorized by a specific statute. Consequently, courts have the power to create a trust only where specifically provided by another article of the CcQ or a separate statute. An example of a trust established "by law" is found in art 591, which authorizes a court in a domestic relations matter to "order the constitution of a trust" to ensure the payment of support to a spouse or minor children. An example of such a trust is found in *T(S) v L(M)*,[39] in which the Court entered a judgment wherein the wife, who owed money to the husband as a result of a property settlement, was declared trustee of the sums owed by her to guarantee payment of the husband's spousal and child support obligations. The order essentially kept the wife's obligation in trust so as to secure the husband's support payments.

4. A Statute

The inclusion of a provision permitting trusts to be established "by law" was done in order to provide a means by which certain funds and arrangements might have the characteristics of trusts even though, in some cases, there is no actual settlor or no express declaration of a trust. An example of statutory trusts is found in the *Supplemental Pension Plans Act*,[40] which provides that a pension fund shall constitute a trust patrimony and that the "pension committee shall act in the capacity of trustee." An example of a statutory trust where there is no settlor is found in the Quebec *Election Act*,[41] which provides that every candidate for election have a registered official agent whose job it is to hold and account for funds received by the campaign, and report their use to the candidate, the chief electoral officer, and the public. Although the Act does not specifically say so, it seems clear that the official agent is a trustee.[42]

B. TRANSFER OF PROPERTY

As with common law trusts, there can be no Quebec trust in the absence of a transfer of property. This transfer must be from the patrimony of the settlor to another patrimony "constituted by him."

1. A Transfer

Article 1260 uses the word, "transfer" (*transfère*) to indicate that the act establishing the trust must result in an alienation of the settlor's rights in the property or of a legally recognized right that is itself considered a property interest, such as a right to payment or an intellectual property right. The transfer of "real" rights—that is, rights in existing things or land—is effective at the moment that the contract is made, regardless of whether there is an actual delivery of the property at the time.[43] A transfer of a "personal" right, which is to say a right to receive payment, the performance of a service, or the use or lease of an object, is also accomplished

39 [1995] JQ No 1570 (QL), [1995] RDF 677 (Sup Ct).

40 CQLR c R-15.1.

41 CQLR c E-3.3.

42 *Ibid*, ss 408 et seq.

43 CcQ, art 1453.

by consent, but the transfer is not effective until the person from whom the obligation is due has received notice of the transfer.[44] Note, however, that third parties with an interest in the property or right will only be bound by a transfer if the formalities of notice and, in some cases, publication or registration are met.[45] Thus, a transfer of land or goods subject to a security interest will require notice to lienholders and publication in the appropriate registry.

The transfer of title envisioned by art 1260 is rather different than that for a common law trust. Rather than a transfer of legal title from settlor to trustee, the Quebec trust does not result in title being vested in the trustee. There is not, in other words, a "translative" transfer of title in which ownership passes from settlor to trustee. Instead, there is a transfer from the general patrimony of the settlor to another patrimony established by him. The patrimony of the trust is independent of both settlor and trustee so that there is no actual ownership by the trustee. Upon acceptance, the trustee assumes duties and powers with respect to the trust property, but the trustee is not the owner.

2. Of Property

As with the common law trust, almost any kind of property may be transferred to a Quebec trust. This includes property that is movable, immovable, corporeal, or incorporeal, including rights that are vested but not yet possessory. In addition, any right that may be considered a form of property may also be transferred.

The civil law recognizes the term "property" (*biens*) to comprise both goods (*meubles*) and land (*immeubles*). Within the category of movable goods are things (*choses*) and rights (*droits*) that have economic value. The use of the word "things" is restricted to tangible objects, while the term "rights" is used to refer to intangibles. In civil law terms, a right is anything that gives a cause of action in law that may result in economic gain. A right is derived from a thing, but it is not a right to the thing itself. Thus, the term "property" encompasses all forms of property—real, chattel, and intangible.

The civil law divides property rights into two general categories: real rights and personal rights.

Real rights include property interests in an object or thing. The right is an *avoir*, a thing that may be acquired from another. The common law traditionally referred to such rights as rights *in rem*. Real rights may only attach to things that are certain and in existence. Where the property may be in existence but not yet identified, there is no real right. Thus, a contract for "100 tonnes of coal" conveys no real right in the coal until it is actually set aside and identified to the contract. Until then, the right is merely a personal right against the other party.

Personal rights are those that involve the payment of a debt or performance of a service. These rights are not claims against a thing—that is, rights *in rem*—but rather rights against a debtor, a *créance*. At the same time, however, a personal right, or *créance*, may be acquired or transferred and so may also be considered an *avoir*. Thus, the right to receive a payment of money on a debt is a *créance* that may form the corpus of a trust.

Intellectual property rights were not originally considered to be a form of property, an *avoir*, because they were neither things, rights in things, nor rights against a person. Instead, an intellectual property right was thought to be a creation, an *être*. The modern view, however, is that such rights are forms of property, perhaps falling into the category of incorporeal movables.

In sum, as with the common law, the CcQ recognizes a wide variety of objects that might become property of a trust. The main difficulty lies in the civil law's rather obscure and non-obvious (at least for common lawyers) use of terms to describe the different categories

44 CcQ, arts 1637, 1641.

45 CcQ, art 1642.

of property. These include "corporeal immovables" ("land, and any constructions and works of a permanent nature located thereon");[46] "incorporeal immovables" (rights in immovables, such as the right of possession, or uses and servitudes);[47] "corporeal movables" (things which can be moved, as well as any property not specifically categorized by the CcQ);[48] and "incorporeal movables" (for example, shares of stock, payment on a debt, or intellectual property rights)[49]—all terms that describe rights known to the common law, but which are alien to the common law lexicon.

3. From His Patrimony to Another Patrimony

The strict wording of art 1260 implies that a trust exists only where a settlor transfers property "from his patrimony." On the face of it, this wording would mean that no trust could arise unless the settlor transfers some property of his own to the trust. However, scholars who have considered this question have concluded that this strict reading could not have been intended by the legislature. There are many examples where such a reading would work a nonsense. Imagine, for example, a case wherein an organization established a fund to accomplish a particular purpose and authorized the treasurer to receive funds for that purpose. The treasurer might open a trust account and receive contributions from members. Yet if the organization itself failed to make its own contribution, could it really be the case that there was no trust and that the moneys received would not be held in trust? Or consider the case wherein an investment manager creates an investment fund and solicits investments. If the manager himself does not put any money in, can it really be that there is no commercial trust? It seems the answers must be in the negative because it cannot be that the legislature intended to "impose a formalism that would frustrate" basic forms of the trust.[50] Therefore, the words "from his patrimony" in art 1260 must be taken to mean "from his patrimony or the patrimony of another."

C. WHICH HE APPROPRIATES TO A PARTICULAR PURPOSE

The term "appropriation" may have several meanings in English. However, as used in the CcQ, the French version of the term, "*affecté*," may be best translated as "assigned." Thus the term "appropriate" implies the "dedication of property to a particular end or purpose" (*determination d'une finalité particulière en vue de laquelle un bien sera utilisé*).[51]

Obviously, an express dedication of the property serves the purpose of art 1260. However, particular words or forms are not required. Instead, it is enough that there be some expression of an intention to create a separate patrimony and to transfer property to it. It also seems clear that a trust may be implied by the circumstances. Although it is always preferable for a settlor to use words such as "in trust for" or "upon a trust" or "which I appropriate," the exact wording is not determinative. In cases where trusts are established by onerous or gratuitous contract, the general rules of contract interpretation apply. Similarly, the rules for interpreting a testator's intent apply where a trust is established by will.[52] In any event, the intention to

46 CcQ, art 900.

47 CcQ, arts 904, 1119.

48 CcQ, arts 905, 907.

49 CcQ, art 909.

50 Claxton, *supra* note 31 at 60.

51 Gérard Cornu, *Vocabulaire juridique* (Paris: Presses universitaires de France, 1987) *sub verbo* "affecté."

52 See e.g. *Trust Général du Canada v Poitras*, [1998] JQ No 3321 (QL), JE 99-30 (Sup Ct) (holding that a will established a trust even though the word "trust" was not used because there was a clear intention to establish a separate patrimony); *Roy, succession (Re)*, [1995] JQ No 2266 (QL), JE 95-1856 (Sup Ct) (a bequest of 10 percent of an estate to "*les oeuvres de charité*" was effective to establish a trust).

establish a separate patrimony must be clear from the words and circumstances. Where there is ambiguity, there can be no trust.

To what may the patrimony be appropriated? The CcQ provides for three classes of trust. These include trusts for (1) personal, (2) private, or (3) social purposes. The next section considers each of these purposes in turn. For the present, however, it is important to note that whatever form the trust takes, it must have a beneficiary. In that regard, the term "beneficiary" does not necessarily mean a particular person. A trust may be constituted for a purpose or a benefit, although the beneficiary is not a party to the trust itself. Instead, a beneficiary may be a person determined or capable of being determined. Moreover, the object of the trust must be clearly defined. The objects may be wide or narrow, but it is essential that the purpose of the trust be set forth in the instrument establishing it. There are two reasons for this. First, the definition of the purpose will dictate the classification of the trust and how it will be treated under the CcQ. Second, Quebec law does not generally permit the modification of trusts except in very limited circumstances. As a result, although a form of the doctrine of *cy près* may be applicable to social trusts in Quebec, the power to modify personal or private trusts is severely limited. This aspect of the Quebec trust is examined below in Section V.

D. WHICH A TRUSTEE UNDERTAKES, BY HIS ACCEPTANCE, TO HOLD AND ADMINISTER

The final step in establishing a trust is acceptance by the trustee. This means that there must be a trustee who accepts the property before the trust can come into existence.[53] The trustee may be either a natural person with full legal capacity or a qualified trust company.[54] Acceptance by the trustee means acceptance of the office, not necessarily the property or ownership of it.

The CcQ does not specify the precise form of acceptance. In some situations, the trustee may be a party to the act establishing the trust, but this is not a requirement. For example, the trustee is never a party to a will. Similarly, a trust established as part of a divorce settlement is frequently created by means of an onerous contract between the parties to the marriage. The contract will provide a means for nominating a trustee and delivering the property, but an actual trustee may not be named. On the other hand, a trustee may be part of an onerous contract establishing a commercial trust. Frequently, the trustee's acceptance may be inferred by certain acts taken in respect of the management of the property that is the subject of the trust.

Article 1265 provides a further explanation of the process by which a trust is established. It declares:

> 1265. Acceptance of the trust divests the settlor of the property, charges the trustee with seeing to the appropriation of the property and the administration of the trust patrimony and is sufficient to establish the right of the beneficiary with certainty.

Acceptance by the trustee thus has three significant consequences: (1) it divests the settlor of the property, (2) it charges the trustee with the obligation to manage the estate, and (3) it establishes the right of the beneficiary.

1. Acceptance of the Trust Divests the Settlor of the Property

Upon acceptance of the trust by the trustee, the settlor is divested of the property and title passes. Yet it is important to note that title does not pass to the patrimony because, as noted

53 CcQ, art 1264.

54 CcQ, arts 1274, 304. See also *An Act Respecting Trust Companies and Savings Companies*, CQLR c S-29.01.

above, the patrimony is not a legal person. Nor is title vested in the trustee, because he has no real right in the property. Instead, as art 1278 makes clear, the title is made out in the trustee's name, but only so that the trustee may exercise powers of administration and management.

> 1278. A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation.

2. Acceptance of the Trust Charges the Trustee with Appropriation and Administration

Acceptance by the trustee vests the trustee with the obligation to both appropriate the property and then manage it. In general terms, this means that the trustee is now charged with the duty to obtain delivery of the property, although physical delivery is not always possible or desirable. In some cases, the trustee may only be able to take legal title, while physical possession remains elsewhere.

In addition, once there has been a physical or constructive delivery, the trustee is obligated to preserve and manage the property in accordance with the terms of the trust. This is where the provisions of Title Seven of Book Four come into play. As discussed earlier, the theory of the civil law trust is that the trustee is not the owner, as is the case in common law, but is, rather, charged with the obligation to manage property belonging to others. The trustee's duties are therefore similar to those of any person or entity responsible for holding the property of third parties. Thus, the innovation of the CcQ over the former CCLC is that it solves the theoretical problem posed by the civil law's rejection of the law and equity dichotomy by means of the patrimony by affectation (*patrimoine affecté*) found in Title Six of Book Four and the rules for administering the property of others in Title Seven. The trustee's duties arise as a result of this second aspect of the trust. Title Seven provides an extensive set of rules for determining how property is to be managed, the obligations of the administrator toward beneficiaries and third parties, the duty to provide accounts, and the procedures required for termination of the relationship.

3. Acceptance of the Trust Establishes the Right of the Beneficiary

Acceptance by the trustee also triggers certain rights and obligations with respect to the beneficiary. In the first place, the trustee's acceptance imposes on him the duty to act in accordance of the terms of the trust. In addition, acceptance "establish[es] the right of the beneficiary with certainty."[55] This means that the beneficiary is now empowered to enforce the trustee's obligations and duties.[56] It also means that the trust has become irrevocable.

V. CLASSIFICATIONS OF THE QUEBEC TRUST

As noted above, the CCLC recognized a limited variety of trusts relative to the common law. Trusts for persons could be created only by will or donation, which meant that it was largely impossible to create a commercial trust. And while something in the nature of a charitable trust might be created, the Quebec form had little similarity to the common law charitable

55 CcQ, art 1265.

56 CcQ, art 1284.

trust, so much so that it was *sui generis*.[57] Moreover, it could be created only by will, a fact that severely limited its usefulness for modern purposes.[58]

The CcQ creates a threefold classification of trusts, although there remains a great deal of difficulty in determining into which category a particular trust will fall. This is because the Code classifies trusts based on three factors: (1) the way in which a trust is created—that is, by will or by contract; (2) the legal source of creation—that is, whether by contract, will, statute or judgment; and (3) the purpose for which a trust is established. The first two methods of categorization are of limited interest on a practical level, although legal theorists find discussion of these categories useful. The most practical and logical method of categorization centres on the third category—purpose.

In Quebec, trusts fall into three main categories based on their purpose: (1) personal, (2) private, and (3) social.[59] It is somewhat strange that the CcQ does not actually provide a definition of each of the trust forms; it merely gives examples of each. This is perhaps to provide some flexibility as to form. Settlors are given the freedom to structure the terms of the trust as long as the final product complies with the type of trust envisioned by the Code.

A. PERSONAL TRUSTS

Article 1267 provides that a personal trust "is constituted gratuitously for the purpose of securing a benefit for a determinate or determinable person." The closest analogue at common law is what is familiarly known as a "family trust," which is to say a trust designed to provide income or support to family members. A personal trust is, not surprisingly, a trust designed for personal purposes. The personal trust can be created by will or by an *inter vivos* transfer. Examples include testamentary trusts, wherein the deceased might transfer capital to a trust, with the income to be used to support a surviving spouse; upon the death of the spouse, the capital would be distributed to the children or grandchildren. Another example might be a trust, established by either will or contract, whereby a fund is established by the settlor to provide care for a minor child or an aging relative. Still another example might be an *inter vivos* trust in which a settlor seeks to transfer capital as a gift to take advantage of certain tax deductions or exclusions.

1. Method of Creation

A personal trust is established to provide a gratuitous benefit. It is, in common law terms, a "donative" trust. Bear in mind, however, that it is the benefit that is gratuitous, not necessarily its making. In other words, a personal trust may be established by an onerous contract—that is, a contract involving consideration; the contract establishing the trust may be onerous, as in a contract by which a trust company agrees to manage a fund for a beneficiary and receive payment. There was some early commentary in the academic and legal community to the effect that a gratuitous trust had to be established gratuitously, either by will or by a notarial deed, but that seems to be a minority opinion today. The more modern view is that the personal trust is a new "liberality," or new form of gift specifically provided for in the text of the CcQ.[60]

The beneficiary of a personal trust may be a natural or legal person, including a corporation.

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57 See *Royal Trust Co v Tucker*, *supra* note 13.

58 CCLC, art 869.

59 CcQ, art 1266.

60 See e.g. John EC Brierley, "The Gratuitous Trust: A New Liberality in Québec Law" in *Mélanges Paul-André Crépeau* (Cowansville, Que: Yvon Blais, 1997) 119; Claxton, *supra* note 31 at 78-80.

2. Duration

The personal trust is the only trust that is limited in its duration. It is limited by three factors. First, it may provide for only two "ranks" of income beneficiary before distribution to the capital beneficiary. Second, the rights of the first rank must open within 100 years after the trust is constituted. Third, no person may enjoy the benefits for more than 100 years.

> 1271. A personal trust constituted for the benefit of several persons successively may not include more than two ranks of beneficiaries of the fruits and revenues, in addition to that of the beneficiary of the capital; it is without effect with respect to any subsequent ranks it might contemplate.
>
> 1272. The right of beneficiaries of the first rank opens not later than 100 years after the trust is constituted, even if a longer term is stipulated. The right of beneficiaries of subsequent ranks may open later but solely for the benefit of those beneficiaries who have the required quality to receive at the expiry of 100 years after the constitution of the trust.
>
> In no case may a legal person be a beneficiary for a period exceeding 100 years, even if a longer term is stipulated.

Article 1271 makes clear that only two ranks of beneficiaries may enjoy the fruits of the trust before distribution to the capital beneficiary. If the trust instrument provides for more than two ranks, it is still valid, but it is "without effect" as to the later beneficiaries. The corpus of the trust must be distributed to the next rank.[61]

Article 1272 provides that the right of the first rank must open within 100 years after the trust is constituted. Moreover, the right of subsequent ranks to inherit must be effective by the end of that 100-year period. Thus, within the 100-year period, the first rank must take. The second rank must also be able to take—that is, they must be qualified beneficiaries in existence, but they may not actually be able to take if the first rank has not yet been extinguished.

The use of the word "rank" is meant to apply to levels of beneficiaries, not necessarily to relationship or degree of kinship. For example, a brother might be in the first rank and a sister in the second. They may be of the same degree of kinship, but they are of different rank as beneficiaries of the trust.

Finally, no beneficiary may enjoy the benefits of the trust for more than 100 years. This term is perhaps meant to represent the absolute maximum length of a modern life. It also includes corporations, with the result that a personal trust is prevented from becoming perpetual.

In effect, arts 1271 and 1272 operate as a version of the rule against perpetuities. They are designed to prevent a settlor from tying up property for successive generations. The settlor may encumber property only to the level of his grandchildren before it must be distributed.

B. PRIVATE TRUSTS

Private trusts have a private or community purpose that is not itself designed to provide a personal benefit to an individual. They may be perpetual. Private trusts come in two forms: (1) the private purpose trust and (2) the onerous private trust. In effect, private trusts have either a commercial or non-commercial purpose.

1. Private Purpose (Non-Commercial) Trusts

The private purpose trust is designed to allow for the erection, maintenance, or preservation of a thing or to use property for a specific use or end.

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61 *Amyot (Succession de)*, JE 99-828, REJB 1999-12060 (Que CS), rev'd on other grounds *Amyot (Succession de) c Amyot*, REJB 2001-24796 (Que CA).

> 1268. A private trust has for its object the erection, maintenance or preservation of a thing or the use of property appropriated to a specific use, whether for the indirect benefit of a person or in his memory, or for some other private purpose.

A close reading of this article reveals that there are, in fact, two different kinds of non-commercial trusts. The first involves a trust for erecting, maintaining, or preserving a thing. The second encompasses setting aside a fund or property "appropriated to a specific use."

The most common example of the first sort would be a trust for the erection of a monument, such as a war memorial, or the maintenance of a tomb or burial ground. Other examples might include trusts for the preservation of a heritage site or an historic property. A modern example might be the creation of an environmental trust, whereby funds are set aside to establish a wildlife refuge.[62] These might be akin to the "anomalous trust for purposes" referred to in *Re Endacott*,[63] wherein Lord Evershed countenanced trusts for the care of animals or the erection of tombs and monuments only on the ground that they had been tolerated by earlier cases.[64]

The second type of private non-commercial trust is akin to a Quistclose trust[65] or *Denley's* trust.[66] In discussing the proposed article on non-commercial trusts in the CcQ, the *Commentaires du ministre*, published contemporaneously with the Code revisions in 1993, gave examples of the types of trusts that would be permitted under the new Code. These examples bear a close relation to the anomalous common law non-charitable trusts. Thus the *Commentaires* described "a fund for the purchase of medicines, medical devices, wheelchairs, etc." ("*une somme destinée à l'achat de médicaments, d'appareils medicaux, fauteuil roulant etc.*") for employees of a company or "a property set aside to provide a holiday retreat for a firm's employees" ("*un immeuble destine à server de lieu de villégiature aux salariés d'une entreprise*").[67] Similarly, it appears that a trust to fund youth hockey leagues or maintain recreation grounds for residents of a particular town or employees of an enterprise are examples of permissible non-commercial trusts.

Finally, it is important to distinguish between private purpose trusts and outright gifts. A clause in a will providing for the purchase of an object without further instruction will not be a private trust. For example, a clause in a will providing for a sum of money to buy a new X-ray machine for the local hospital would not be a trust. Instead, it would be a conditional gift because the funds are transferred into the patrimony of the hospital, which is then under an obligation to use them for the stated purpose. To establish a private purpose trust, the donor would have to ensure that the clause provides for a transfer to a patrimony by appropriation.

a. Benefit

It is sometimes difficult to differentiate between personal and private trusts. After all, there is no doubt that private purpose trusts may benefit individuals. The caretaker of a historic site in a private purpose trust as well as the fund manager of a commercial trust certainly benefit from the establishment of the private trust. However, providing an income to either is not the fundamental purpose of the trust. To differentiate between the personal and private trust,

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62 See e.g. Rémi Moreau, *La protection du milieu naturel par les fiducies foncières* (Montreal: Wilson & Lafleur, 1995).

63 [1960] Ch 232.

64 See also *Re Astor's Settlement Trusts*, [1952] 1 Ch 534, 1 All ER 1067.

65 See *Barclays Bank Limited v Quistclose Investments Limited*, [1979] AC 567, [1968] UKHL 4.

66 *Re Denley's Trust Deed*, [1968] 3 All ER 65, [1969] 1 Ch 373 (Ch): see Chapter 5.

67 Quebec, Ministère de la justice, *Commentaires du ministre de la justice*, vol 1 (Quebec: Publications du Québec, 1993) at 754 [*Commentaires du ministre*].

one must focus on the nature of the benefit conferred. In the personal trust, the benefit is intended to be conferred directly. The beneficiary receives funds or property directly from the trust in accordance with its terms. In the private, non-commercial trust, the benefit is conferred indirectly. More important, conferring a benefit on the specific individual is not the primary intent. Put another way, the beneficiary of a personal trust is usually identified, either by name or by some classification, such as family relation—that is, "to my grandchildren." In a private trust, the individuals who benefit do so indirectly as a result of carrying out the larger purpose. Although a concrete rule is difficult to state, it appears that the best formulation focuses on the "end" ("*finalité*") of the trust: "Does the beneficiary 'only benefit from the trust through a realization of the trust purpose' (in which case the trust is private), or does the beneficiary 'himself represent the trust purpose' (in which case it is personal)?"[68]

b. Comparison with Common Law Non-Charitable Purpose Trusts

The civil law's private non-commercial trust includes categories of trusts that the common law would regard as invalid. The common law does not, for the most part, permit non-charitable purpose trusts. The most frequently cited reason for this rule is that "a purpose cannot enforce a trust." In the absence of a specified beneficiary, there is no one "in whose favour the court can decree performance."[69] Exceptions have been made for the "anomalous trust," such as a trust to care for animals or to provide for grave markers.[70]

Of course, at common law, a non-charitable trust whose objects cannot be determined with certainty remains invalid. Thus in *Re Astor's Settlement Trusts* Lady Astor's stated desire to encourage and maintain "good understanding, sympathy and co-operation" of the "English speaking nations" fails both because its purposes cannot be ascertained with certainty and because there is no beneficiary who might enforce it.[71] The same seems to hold true for private non-commercial trusts in Quebec to the extent that they fail to meet the two-pronged characterization of art 1268. That is to say, although the CcQ recognizes non-charitable purpose trusts, it does have limitations on certainty similar to those of the common law. Thus, while art 1268 provides a statutory basis for anomalous trusts, as well as *Quistclose* or *Denley's* trusts, it does not countenance the establishment of non-charitable purpose trusts in general.

One final point is also worth noting. The traditional objection to non-charitable purpose trusts stemming from the lack of a beneficiary is obviated by several provisions of the CcQ. Article 1287 provides that administration of the trust is "subject to the supervision of the settlor or of his heirs, if he has died, and of the beneficiary, even a future beneficiary." In addition, art 1290 authorizes the settlor, beneficiary, or "any other interested person" to take action against the trustee to "compel him to perform his obligations or to perform any act which is necessary in the interest of the trust, to enjoin him to abstain from any action harmful to the trust or to have him removed." Further, art 1291 authorizes a court to allow the settlor, beneficiary, or any other interested person to take legal action in place of the trustee. These provisions go a long way toward overcoming the beneficiary problem of non-charitable purpose trusts

68 Michael Lubetsky, "Categorically Different: Unintended Consequences of Trust Taxonomy" in Lionel Smith, ed, *The Worlds of the Trust* (Cambridge: Cambridge University Press, 2013) 340 at 347.

69 *Morice v The Bishop of Durham* (1804), 9 Ves 399 at 404, 32 ER 656; see also *Re Astor's Settlement Trusts*, *supra* note 64. See also, generally, Chapter 5, Division One, "Non-charitable Purpose Trusts."

70 See e.g. *Re Dean* (1889), 41 Ch D 552, 58 LJ Ch 693 (trust for the maintenance of stables and kennels of the testator's horses and hounds); *Re Hooper,* [1932] 1 Ch 38, 101 LJ Ch 61 (trust for building and maintaining graves and funeral monuments); *Re Thompson*, [1934] Ch 342, 103 LJ Ch 162 (trust to promote fox hunting).

71 *Re Astor's Settlement Trusts*, supra note 64.

at common law, with the result that a wide range of people are given an incentive to monitor the trustee to ensure performance of his duties. Whether these provisions will become the source of intermeddling and unnecessary litigation is yet to be seen.

2. Onerous (Commercial) Trusts

The onerous, or commercial, trust is one of the most important innovations of the trust provisions in the CcQ. It is the basis for the vast array of private investment trusts and pension funds that were long prohibited under the CCLC. Article 1269 sets forth the definition of the commercial trust:

> 1269. A trust constituted by onerous title for the purpose, in particular, of allowing the making of profit by means of investments, providing for retirement or procuring another benefit for the settlor or for the persons he designates or for the members of a partnership, company or association, or for employees or shareholders, is also a private trust.

The first thing to note is that the list of commercial trusts in art 1269 is not exhaustive. On the contrary, the list is intended to be descriptive of a range of possibilities, but is not meant to limit the uses to which commercial trusts may be put. The drafters of the CcQ clearly intended that the commercial trust have as its primary object a profit-making purpose without specifying or limiting how those trusts may be utilized to accomplish that goal.

Two types of commercial trusts are contemplated. The first category includes trusts whose primary purpose is to make a profit. The second includes trusts designed to confer a financial benefit on determinate persons outside the family context. Examples of the first kind include investment trusts, mutual funds, real estate investment trusts, royalty trusts, and shareholder voting trusts. The second type include pension funds, profit-sharing funds, and certain RRSPs. As a result, the list of private commercial trusts can be endless.

3. Method of Creation

Private trusts may be formed by either gratuitous or onerous contract. The private non-commercial purpose trust may be created either by a gratuitous or onerous contract, by will, or by notarial deed. However, the CcQ envisions a private commercial trust being formed primarily by onerous contract.

4. Duration

A significant aspect of the private trust is that it may be of perpetual duration.[72] This is an important distinction from the common law, under which only charitable purpose trusts can be perpetual. This makes the use of a Quebec trust particularly advantageous, especially in commercial settings. Unlike *Denley's* trusts, civil law non-charitable purpose trusts may be of indefinite duration, making them more useful for the social purposes they often seek to accomplish. Most significantly, art 1273 effectively eliminates the rule against perpetuities with regard to Quebec trusts. Although this might be a significant advantage in the realm of personal and private (non-charitable) trusts, its effect may be of limited value in commercial trusts because of the *Income Tax Act* "deemed disposition rule," which requires perpetual commercial trusts to pay capital gains tax on trust property every 21 years.[73]

72 CcQ, art 1273.

73 *Income Tax Act*, RSC 1985, c 1 (5th Supp), ss 104(4)(b), (c). See also Chapter 2.

C. SOCIAL TRUSTS

A social trust is "constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious, or scientific purpose." It may not have the making of profit or the operation of an enterprise as its main object.[74]

The CcQ's version of the social trust is superior to the charitable trust of the old CCLC, which limited such trusts to testamentary dispositions.[75] Generally, the social trust is a gratuitous trust in that it provides benefits gratuitously to a class of beneficiaries, although it need not always be created by a gratuitous act. There are two types of social trusts: the charitable foundation and the general social trust.

1. The Charitable Foundation

A charitable foundation "results from an act whereby a person irrevocably appropriates the whole or part of his property to the durable fulfilment of a socially beneficial purpose."[76] The charitable foundation may be either an incorporated or unincorporated entity. The significant difference between the charitable foundation and other types of charitable trusts is contained in art 1259, which stipulates that "unless otherwise provided in the act constituting the foundation, the initial property of the trust foundation or any property … shall be preserved and allow for the fulfilment of the purpose, either by the distribution only of those revenues that derive therefrom or by a use that does not appreciably alter the substance of the initial property." This means that the capital of the foundation is meant to be permanent. Only the income or revenue from the capital may be dispensed for the purposes of the foundation, although the settlor may alter this general rule in the instrument establishing the trust so that a foundation may be limited in duration.

2. Social Trusts in General

As noted above, private non-commercial purpose trusts may appear, in many respects, to have charitable or socially useful goals. The fundamental distinction between social trusts and private trusts is that the social trust must be one of general interest, distinct from purely private motives. Although it is sometimes difficult to distinguish between a private non-charitable purpose trust and a social trust, the primary difference appears to be that the social trust is characterized by the fact that it is devoted to a class of beneficiaries who, if not anonymous, are identified exclusively by the object of the trust. They are, in other words, innominate.[77]

Three points need to be mentioned. First, the word "purpose" is of great importance in ensuring that there is, in fact, a trust, and not merely a conditional gift. Second, the phrase "general interest" must be considered to ensure that whatever trust is created is considered a social, and not private or personal, trust. Third, the definition of charity in the CcQ seems to be rather broader than that applicable to common law trusts.

a. Intention

To begin with, the settlor must have as his purpose a desire to create a trust. It is not enough for a settlor merely to state an intention to achieve a particular aim. Instead, what is required is that the settlor clearly identify a class of beneficiaries distinct from any general purpose or

74 CcQ, art 1270.

75 CCLC, art 869.

76 CcQ, art 1256.

77 Claxton, *supra* note 31 at 104.

institution. Thus, as was the case with private trusts, the instrument must clearly evidence an intention to create a trust and not merely make a gift. For example, a grant that provides for the creation of a fund for the use of the Faculty of Law at the Université de Montréal would not be a social trust; however, a fund to provide scholarships for students studying law at the university would be. In both cases, the university might be called on to take possession of the money. In the first example, the fund is in the form of a restricted gift, which the university may use at its discretion to fund its law program. In the second example, the university is the trustee of a fund whose beneficiaries are certain innominate students.

b. Public Benefit

The second point is that the social trust must provide a benefit that is of general interest. The use of this phrase in art 1270 is clearly designed to distinguish social trusts from private or personal trusts. In the *Commentaires du ministre*, it is said that the term "general interest" was chosen as a synonym for "public interest."[78] The Code seems to have incorporated some form of the public-benefit test from common law to ensure that social trusts are not used to provide purely private benefits. The general-interest requirement for social trusts appears to serve the same function as the public-benefit test in common law charitable trusts—that is, both the common law and civil law trust must confer a public, rather than private, benefit.[79] Consequently, a trust established to provide scholarships for members of a decedent's family would likely not pass the "public" aspect of the common law public-benefit test.[80] The same would seem to hold true for the general-interest requirement of the social trust in Quebec.[81]

On the other hand, the common law requirement that there be an actual benefit to the public may be less onerous under the CcQ.[82] This is because the use of the phrase "general interest" contained in the CcQ does not seem to require a "benefit," but merely that the activities of the trust be of "interest" to the public. This has led some to suggest that Quebec law might allow for political charities in ways that the Canadian common law does not.[83] Indeed, one commentator has asserted that "almost any interest considered worthy and of benefit to the community, even in an extremely indirect way, will qualify as a general interest" because a "general interest need not be one shared by the entire community."[84]

c. What Is Charity?

The primary aim of a social trust is "for a purpose of general interest" (*un but d'intérêt général*).[85] This phrase seems hopelessly vague to those attuned to the common law debate over the proper scope of the four heads of charity. This description is supplemented

78 *Commentaires du ministre*, *supra* note 67 at 756.

79 See e.g. *Oppenheim v Tobacco Securities Trust Co Ltd*, [1951] AC 297, [1951] 1 All ER 31 (HL).

80 See *Re Compton*, [1945] Ch 123, [1945] 1 All ER 198 (CA).

81 See e.g. Claxton, *supra* note 31 at 98; Lubetsky, *supra* note 68 at 348.

82 See e.g. *Gilmour v Coats*, [1949] AC 426, [1949] 1 All ER 848 (HL); *Re Pinion Westminster Bank Ltd v Pinion*, [1965] Ch 85, [1964] 1 All ER 890 (CA).

83 See e.g. *McGovern v Attorney-General*, [1982] Ch 321, [1981] 3 All ER 493; *Human Life International in Canada Inc v MNR*, [1998] FCJ No 365 (QL), [1998] 3 FC 202 (FCA). There has been a movement away from the political purposes doctrine in some common law jurisdictions: see e.g. *Re Greenpeace of New Zealand Incorporation*, [2014] NZSC 105; and *Aid/Watch v Commissioner of Taxation*, [2010] HCA 42, (2010) 241 CLR 539.

84 Claxton, *supra* note 31 at 104-5.

85 CcQ, art 1270.

by the statement that a general purpose may be defined as "a cultural, educational, philanthropic, religious or scientific purpose."[86] This description replaces the wording in the CCLC that permitted trusts for "charitable or other lawful purposes within the limits permitted by law."[87] This older phrasing seems to have been intended to ensure that the Quebec trust was consistent with traditional common law concepts of charity. The newer definition of CcQ art 1270 appears to reject the limited common law view and anticipates a broader concept of charity than is currently the rule in the common law. This conclusion is supported by the qualifiers in art 1270, which list types of things that might be considered in the public interest. Thus while educational and religious trusts are well known to the common law, the statement that a social trust may be for any "philanthropic" purpose seems to open the door to a wider range of trusts than even the "other purposes beneficial to the community" standard of the common law.

As a result, it appears that the social trust differs significantly from the common law charitable purpose trust in terms of what each considers charity. The broader scope of philanthropy seems to make much of the common law jurisprudence on the definition of "charity" inapplicable to social trusts. Thus it has been suggested that a political charity might qualify as a social trust under Quebec law because such a trust would more easily satisfy a "general-interest" test than a "public-benefit" test.[88] Similarly, the refusal of most common law courts to bring recreational or sporting activities within the ambit of charity, as seen in *AYSA Amateur Youth Soccer Association v Canada (Revenue Agency)*,[89] might not apply in Quebec, where the broader concept of "general interest" might well be seen to encompass trusts established to benefit youth hockey leagues or other socially desirable purposes.

3. Formation

A charitable foundation is established by a gratuitous act either by *inter vivos* gift or by will.[90] A general-purpose social trust may be established either gratuitously or by onerous contract. The act establishing the social trust need not be gratuitous because it may involve a contract with a trust company to manage a social trust for a fee. Put another way, the act establishing the trust may be onerous even though the trust itself is gratuitous.

4. Duration

Although both charitable foundations and social trusts in general may be established in perpetuity, the evidence so far indicates that most foundations are not destined to last indefinitely. This is especially true in the case of the unincorporated foundation.

5. Taxation

Charitable trusts enjoy important advantages under Canadian tax law, the most important of which is a complete exemption from income tax under s 149(1)(f) of the *Income Tax Act*. In

86 *Ibid*.

87 CCLC, art 869.

88 Lubetsky, *supra* note 68 at 348. Arguably, the traditional limits on political activity by charities have been abrogated by the Ontario Superior Court's decision in *Canada Without Poverty v Attorney General Canada*, [2018] ONSC 4147, 142 OR (3d) 754 and the revisions to the Canada Revenue Agency rules imposed by the *Budget Implementation Act, 2018*, No 2, SC 2018, c 27.

89 2007 SCC 42, [2007] 3 SCR 217, 287 DLR (4th) 4.

90 CcQ, art 1258.

order to obtain this benefit a trust must demonstrate that it meets the definition of "charity" as set forth in s 149.1 of that Act.

Traditionally, in applying these provisions, the Canada Revenue Agency has relied on common law precedents relating to the definition of "charity."[91] However, some commentators have advanced the position that the common law rules should not be binding on social trusts in Quebec. The basis for this argument is found in the *Interpretation Act*:[92]

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

Section 8.2 of the *Interpretation Act* provides that when a statute "contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces."

Taking these two sections together, it is asserted that it is improper to apply common law jurisprudence on the definition of "charity" to the social trust. This is because the CcQ contains different terminology than that used in the common law and because the understanding of the term "charity" is intended to be broader in Quebec. Proponents of this view argue that there is nothing in the current text of the *Income Tax Act* that requires the use of common law case law. The Act does not specifically "provide by law" that the common law definition must be used. If proponents of this view are correct, some Quebec social trusts would enjoy tax benefits that would be denied to similar common law trusts. Thus far, however, neither the Canada Revenue Agency nor the federal courts have adopted this position.

D. NO RESULTING OR CONSTRUCTIVE TRUSTS

The 1994 CcQ does not have any provision for either constructive or resulting trusts. Article 1262 of the CcQ provides that trusts may be created "by law" or "established by judgment." However, as noted above, it seems clear that this phrase primarily refers to statutory trusts, and not constructive or resulting trusts. That part of the article permitting trusts to be "established by judgment" appears dependent on previous "authorization by law" and applies only to give courts the power to create a trust where specifically provided by another article of the CcQ.[93] Consequently, it is almost universally agreed that there is no place in Quebec law for constructive or resulting trusts in the absence of a specific legislative authorization.[94] At the same time, there is some confusion about the existence of an "implied trust." To the extent that this phrase is understood as allowing a judge to establish a trust as a remedy in the absence of a settlor's intention to do so, the concept has "no relevance" in Quebec law. This is because "[t]he intention of a settlor to transfer property to a patrimony by appropriation is essential to the constitution of a trust."[95] However, Quebec courts have used the term "implied trust" in cases where the existence of a trust is based on an inference of the parties'

91 See e.g. *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, [1999] SCJ No 5 (QL).

92 RSC 1985, c I-21, s 8.1

93 *Groupe Sutton-Royal Inc (Syndic de)*, 2015 QCCA 1069 at para 90.

94 *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, [2012] RJQ 1063 at paras 185-92 (QCCS).

95 *Groupe Sutton-Royal inc (Syndic de)*, *supra* note 93 at para. 91.

intention to create one. Implied trusts are, in effect, de facto trusts. Consequently, as long as the requirements for the establishment of a trust set forth in CcQ arts 1260 et seq. are satisfied, the fact that the parties did not use express terminology of the trust in their dealings is not, in itself, an impediment to the constitution of a trust.[96] The key consideration is whether the settlor's intention to do so and the trustee's intention to accept are clearly shown as a matter of evidence.[97] The result is that the vast majority of trusts in Quebec are express trusts, with a very few trusts created by statute or judgment authorized by statute.

Categories of the Quebec Trust[a]

Type	*Subcategory*	*Objective*	*Method of Creation*	*Example*
Personal	N/A	To confer a benefit on identified or identifiable persons	Gratuitous or onerous juridical act	Testamentary trust
Private	Commercial	To make a profit	Onerous juridical act	Investment trust
				REIT
	Non-commercial	To preserve property for the indirect benefit of another person or for some other purpose	Onerous or gratuitous juridical act	Protective trust
				Conservation trust
				Monument trust
				Trust for animals
Social	Ordinary	Cultural, educational, philanthropic, religious or scientific	Gratuitous or onerous juridical act	Scholarship trust
				Charitable trust
				Research trust
	Foundation		Gratuitous juridical act	

[a] Based on Beaulne, *supra* note 12 at 190.

96 *Ibid* at para 100.

97 *Ibid*.

VI. ADMINISTRATION, MODIFICATION, AND TERMINATION OF TRUSTS

In discussing the management of the Quebec trust, it is important to remember that the sources of the applicable rules differ from those of the common law. Bear in mind that the solution to the existential problem of trusts in Quebec was solved by two theoretical innovations. First, the existence of the trust itself was given its doctrinal foundation in the recognition of a new patrimony: the patrimony by appropriation. This new patrimony allowed the civil law to avoid the theoretically insurmountable obstacles posed by the common law dichotomy of legal and equitable ownership. Once formed, however, civil law theory denied that the trustee could have any real rights in the property that was the subject of the trust. Indeed, the civil law continues to deny that the trustee is the legal owner of the property. On what basis, then, could the trustee act upon the *res*? The answer was found in the second innovation, which is that the trustee's powers are derived from Title Seven of Book Four of the CcQ. This title sets forth the rules for those who deal with the property of others and encompasses arts 1299-1370. These provisions are something of an innovation as compared with the common law, in that the common law rules for the management of property may differ depending on one's relationship to the property, such as whether one is, for example, a trustee, executor, agent, or bailee. The rules of Title Seven apply to anyone who holds property owned by another. As a result, all administrators of the property of another, whatever their function or relationship to the property, have the same duties and obligations, subject only to whether their administration is "simple" or "full," as discussed below.[98] The Quebec trust therefore exists by virtue of the combination of the theory of the patrimony by appropriation and the rules for administration of the property of others.

Although Title Seven applies to all administrators of property, the responsibilities of an administrator will differ depending on whether the administration is "simple" (*simple*) or "full" (*plein*). For example, the guardian (*tutor*) of a minor has only simple administration of the minor's property, which requires the guardian to preserve property for the minor's benefit. A trustee, on the other hand, has full administration and is charged not only with its preservation but also with the obligation to increase it and make it productive. In general, the guardian of minor children or an executor of an estate ("testamentary liquidator") is charged with simple administration, while a trustee and a liquidator of a bankrupt corporation are given full administration.

The chief characteristic of simple administration involves ensuring the preservation of the patrimony for a reasonable period of time. In addition, the simple administrator has limited powers of management, and may have to obtain a court order or the consent of the beneficiary to alienate property or subject it to a lien or mortgage, unless the property is in danger of deteriorating or depreciating before such authorization may be obtained. Finally, a simple administrator is limited to investing the property in a list of "presumed sound investments," such as bank deposits, certificates of deposit, or certain securities.[99]

Those charged with full administration—for example, trustees—have wider powers and greater responsibilities. Thus, although the trustee has an obligation to do more with the capital than a simple administrator, he also has nearly unlimited powers of management, including the right to alienate property without prior authorization from any party. Moreover, while a trustee is not permitted to alienate property gratuitously, neither is he limited to a list of "presumed sound investments."[100]

98 CcQ, art 1299.

99 CcQ, arts 1301-1305.

100 CcQ, arts 1306-1307.

A. THE RIGHTS AND ROLES OF THE PARTIES

Like the common law trust, the Quebec trust is characterized by a tripartite relationship between a settlor, trustee, and beneficiary. However, as might be expected, the theoretical foundations of the civil law trust mean that the role and rights of the parties frequently differ from those at common law.

1. The Settlor

The settlor's role in the Quebec trust has been described as "paradoxical," in that "as soon as he has 'given life' to the trust, the Civil Code essentially disregards him."[101] This is because, once the settlor has created the trust, he has very little role to play in its administration. One commentator describes the result as follows: "In principle, once the trust is created, it escapes from its creator, and of necessity, from his heirs."[102]

As with the common law, to establish a Quebec trust, a settlor must have full legal capacity to perform the juridical act that creates it. Essentially, this means the settlor must have the power to transfer the property that is to constitute the trust to the patrimony. Once this is done, the settlor's role is largely a passive one. The property ceases to be part of the settlor's patrimony and comes under the exclusive control of the trustee.[103] In this regard, the settlor's relationship to the property has been described as akin to that of a seller after a sale. Upon the act transferring the title, the settlor's relationship to the corpus has ended, and he no longer has any direct connection to the property.

However, this statement expresses the default rule. If the settlor establishes a trust without reserving any continuing role to himself, the trustee will take control of the property and administer it without regard to the settlor's existence or desires. In many cases, however, the settlor is not completely out of the picture. As with any sale, the terms of the contract may stipulate how property may be used, who may use it, or what happens when certain conditions are, or are not, met. The same holds true with respect to the trust. The CcQ permits a settlor to reserve a number of continuing rights or roles. In general, they are of five kinds:

1. The settlor need not transfer the entire bundle of rights in a certain property to the trust patrimony. Instead, he may reserve some property rights, such as the right to use part of the property or the income from certain rents or revenues. In such a case, the trustee takes control of only those rights that are transferred, while the reserved rights continue in the settlor.[104]
2. The settlor may also name himself as a beneficiary. This differs from a reservation of rights in that the whole of the property is transferred to the trust patrimony, and thus the whole of the property comes under the control of the trustee. The settlor receives benefits from the trust as a result of the trustee performing his duties.[105]
3. The settlor may name himself co-trustee; however, the settlor can never be the sole trustee. Article 1275 provides that there must always be a trustee who is neither a settlor nor beneficiary in order for there to be a validly constituted trust.

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101 Beaulne, *supra* note 12 at 208.

102 John EC Brierley, "De certains patrimoines d'affectation: Les article 1256-1298" in *La réforme du Code civil: Textes réunis par le Barreaus du Québec et la Chambre des notaires du Québec* (Sainte-Foy, Que: Presses de l'Université Laval, 1993) 735 at 771 ("En principe, un fois la fiducie créé, elle échappe à son créateur et, a fortiori, à ses héritiers").

103 CcQ, art 1265.

104 CcQ, art 1281.

105 *Ibid*.

4. In some unusual cases, a trust instrument may provide that the settlor be employed by the trust in some capacity—for example, as a consultant, a mandatary, a lessee, or an employee.
5. Finally, a settlor may reserve other rights or roles—for example, the right to name beneficiaries,[106] the right to make additions to the trust patrimony,[107] and the right to name successor trustees.[108]

Without doubt, however, one of the most important rights is the settlor's power to supervise the administration of the trust. Article 1287 provides that "the administration of a trust is subject to the supervision of the settlor or of his heirs, if he has died, and of the beneficiary, even a future beneficiary." In English, the word "supervision" normally indicates a power to direct, but that is not the sense in which the CcQ uses the term. The French version of the Code makes this clear in its use of the word "*surveillance*." Otherwise, permitting a settlor to supervise a trustee would be inconsistent with the independent nature of the patrimony by appropriation as well as the principle that the trustee has control of the trust property. Instead, it appears that the intent of art 1287 of the Code is to give the settlor and the beneficiaries the right to consult with the trustee with respect to the administration of the trust. In cases where there is disagreement about the trustee's fidelity to the terms of the trust, art 1290 creates a specific cause of action empowering a settlor, beneficiary, or "other interested person" to compel compliance by the trustee:

> 1290. The settlor, the beneficiary or any other interested person may, notwithstanding any stipulation to the contrary, take action against the trustee to compel him to perform his obligations or to perform any act which is necessary in the interest of the trust, to enjoin him to abstain from any action harmful to the trust or to have him removed.
>
> He may also impugn any acts performed by the trustee in fraud of the trust patrimony or the rights of the beneficiary.

2. The Trustee

The CcQ provides that a trustee must be a "natural person having full exercise of his civil rights" or a "legal person authorized by law."[109] In addition, a fully emancipated minor would also be qualified.[110] The obvious purpose of these restrictions is to ensure that the trustee has the legal capacity to deal with the property that is the subject of the trust. In the case of a corporation, the Code implies that only a company licensed to act as a Quebec trust company is qualified to be a trustee.[111]

a. Powers

As noted above in Section IV.D, the trustee is essential to the Quebec trust. The trust is only "constituted" or given its legal existence upon acceptance by the trustee. Until that happens, there is no trust. However, upon acceptance, the trustee is vested with full powers of administration and management of the trust patrimony. He alone is responsible for implementing

106 CcQ, art 1280.

107 CcQ, art 1293.

108 CcQ, art 1276.

109 CcQ, art 1274.

110 CcQ, art 176.

111 See *An Act Respecting Trust Companies and Savings Companies*, CQLR c S-29.01.

the terms of the trust because the trustee alone is vested with control over the property. Absent the reservation of rights or roles in the settlor, as discussed above, the trustee has the sole power to make decisions concerning the management of the property, investments, and disbursements.

Having full powers of administration, the trustee is required not only to preserve the capital but also to take steps to increase its value and make it productive. The trustee also has broad powers to dispose of the trust property, and is not required to seek approval from either a court or other parties. The only exception to this rule is that the trustee may not alienate property gratuitously, unless the distribution is of limited value and is done for the benefit of the beneficiary or is otherwise in the interests of the trust. In addition, a trustee may encumber the trust property or subject it to a security interest as long as there is a fair exchange of value. Finally, a trustee is free to make any investment that is reasonable under the circumstances and consistent with a trustee's duty to use reasonable care in the management of property of another. This rule is significant in that the trustee is not subject to the rules applicable to "presumed sound investments" required of other administrators of property. The CcQ contains a list of "presumed sound investments" akin to the "legal list" of some common law jurisdictions.[112] This list is obligatory for administrators of property who have only simple administration—for example, a conservator of a minor's property. Those with powers of full administration—for example, a trustee—are not bound by the list unless the settlor specifically provides otherwise in the instrument establishing the trust.

b. Duties

The trustee is obligated to act in the best interests of the beneficiary consistent with the terms of the trust instrument. The specific duties are set out in Title Seven's rules for administrators of the property of others and apply to all persons who have control over someone else's property. In the trust context, many of the duties described in the CcQ have their analogue in common law fiduciary duties.

i. Act in Accordance with the Trust Terms

The trustee's first duty, of course, is to act in accordance with the terms of the trust instrument:

> 1308. The administrator of the property of others shall, in carrying out his duties, comply with the obligations imposed on him by law or by the constituting act. He shall act within the powers conferred on him.

Failure to comply with the terms of the trust provisions will make the trustee liable to an action by the settlor or beneficiary in accordance with the provisions of art 1290.

ii. Prudence

Second, the trustee is obligated to act with prudence and diligence.[113] The terms of this obligation obviously differ depending on the purpose of the trust, the nature of the property that forms the corpus, and the experience of the trustee. This latter factor seems to make the trustee's obligations dependent on the experience or professional qualifications of the trustee, with the result that a trust company or other professional might be held to a higher standard than someone lacking experience or professional qualifications. One commentator has phrased the duty this way:

112 CcQ, art 1339.

113 CcQ, art 1309.

> Assessment of an administrator's conduct and decisions must be in accordance with an objective standard, that of the reasonable person administering another's property and placed in the same circumstances. If the administrator also has special skills in the management of another's property or assets, the standard of reference will be that of a professional manager of another's property.[114]

This differential standard would seem to conflict, at least on its face, with the Supreme Court's holding in *Fales v Canada Permanent Trust Co*.[115]

iii. Loyalty

The Quebec trustee also owes the beneficiaries a duty of loyalty. Article 1309 states that the trustee must act "honestly and faithfully in the best interest of the beneficiary or of the object pursued." The requirement of "faithfulness" means that the trustee should act exclusively in the interests of the beneficiary and put aside his own or anyone else's interests:

> 1310. No administrator may exercise his powers in his own interest or that of a third person or place himself in a position where his personal interest is in conflict with his obligations as administrator.
>
> If the administrator himself is a beneficiary, he shall exercise his powers in the common interest, giving the same consideration to his own interest as to that of the other beneficiaries.

The duty of loyalty may not be avoided by an exculpatory clause. Thus, in *Després c Théberge*,[116] the trustees were held liable for loss when they invested trust funds in a business of which they were primary shareholders and that eventually went bankrupt. The Court held that the fact that the will establishing the trust contained a clause giving the trustees complete discretion in making investments, as well as an exculpatory clause, did not relieve them from the obligation to conduct themselves as a "*bon père de famille*."[117]

Included within the duty of loyalty is the obligation to refrain from using trust property or information obtained during the course of administration of the trust for personal gain. In addition, a trustee has a duty to notify the beneficiary of a business interest that might place him in a position of conflict with respect to the trust as well as any right the trustee might have that could be exercised contrary to the trust or the beneficiary's interest.[118]

iv. Impartiality

The trustee also has a duty of impartiality with respect to different beneficiaries as well as different classes of beneficiaries:

> 1317. If there are several beneficiaries of the administration, concurrently or successively, the administrator is bound to act impartially in their regard, taking account of their respective rights.

The duty imposed by the CcQ is largely akin to that at common law, which states that a trustee must maintain "an even hand" between different classes of beneficiaries.[119] As a result,

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114 Lise I Beaudoin, "Les conventions relatives à l'administration du bien d'autrui" in Denys-Claude Lamontagne, ed, *Droit spécialisé des contrats: Les contrats rélatifs à l'entreprise*, vol 3 (Cowansville, Que: Yvon Blais, 2001) 317 at para 44.

115 [1977] 2 SCR 302, [1976] SCJ No 72 (QL).

116 [1998] JQ no 5003 (QL), REJB 1998-05733 (Sup Ct).

117 Ibid at para 32, citing CCLC, art 981k.

118 CcQ, art 1311; see also *Alcar Holdings Inc c Naimer*, [2000] JQ No 3307 (QL), REJB 2000-20406 (CA).

119 See e.g. *Re Smith* (1971), 16 DLR (3d) 130, [1971] 1 OR 584 (H Ct), aff'd (1971), 18 DLR (3d) 405, [1971] 2 OR 541 (CA).

the trustee must treat all beneficiaries in the same class fairly. He must also be impartial as between the interests of successive classes.[120] However, there is nothing in the law that prevents a settlor from specifically providing for unequal treatment.[121] In addition, some have suggested that the more detailed provisions of the CcQ make some of the common law jurisprudence with respect to impartiality inapplicable.[122]

v. Delegation

The Quebec trustee arguably has greater powers to delegate than the common law trustee:

> 1337. An administrator may delegate his duties or be represented by a third person for specific acts; however, he may not delegate generally the conduct of the administration or the exercise of a discretionary power, except to his co-administrators.
>
> He is accountable for the person selected by him if, among other things, he was not authorized to make the selection. If he was so authorized, he is accountable only for the care with which he selected the person and gave him instructions.

This provision is consistent with the common law rule that a trustee may not delegate discretionary functions. He may employ agents to perform certain managerial functions and is not liable for their misconduct provided that he used due care in their selection. A beneficiary who is injured by the acts of a delegate may "repudiate" the actions of the delegate "if they were done contrary to the constituting act or to usage." A beneficiary may also have an action directly against the mandatary for negligent or wrongful acts, "even where the administrator was duly empowered to give the mandate."[123]

vi. Removal

A trustee is subject to removal (*destitution*) in two ways. The first is by order of the court, and the second is where a provision of the trust instrument specifically provides for it. The latter method is frequently utilized in commercial trusts, where the contract establishing the trust, such as a mutual fund or other investment trust, might provide for the removal of a fund manager by the settlor or the beneficiaries, acting individually or in concert with each other. Removal by a court order occurs upon a motion by the settlor, the beneficiary, or "any other interested person."[124]

The CcQ does not set forth the specific reasons for which a trustee may be replaced. However, the Quebec Court of Appeal has said the following:

> [TRANSLATION] In short, the reasons for the removal of a trustee—as for a liquidator—must be serious, and not merely theoretical, but actually affect the responsibilities of the executor or the trustee in the sense that there will be harm to the interests of the estate.[125]

Article 791 of the CcQ lists reasons for removing the executor of an estate, and these have frequently been assumed to apply to a trustee as well. These include situations where the trustee is "unable to assume the responsibilities of his office," "neglects his duties," or

120 *Association provinciale des retraités d'Hydro-Québec c Hydro-Québec*, 2005 QCCA 304, [2005] RJQ 927.

121 *St-Louis (liquidatrice de) c St-Louis*, [1997] JQ no 423 (QL), [1997] RJQ 1099 (Sup Ct).

122 Beaulne, *supra* note 12 at 216 (suggesting that the CcQ's provisions on investments would provide greater leeway to a trustee to treat income and capital beneficiaries differently).

123 CcQ, art 1338.

124 CcQ, art 1290.

125 *Brodie (Succession) c Cie Trust Royal*, 25 QAC 22, [1989] JQ No 1082 (QL) at para 7 (QAC).

"does not fulfil his obligations." Over the years, therefore, Quebec courts have ordered the removal of a trustee in a variety of circumstances, including loaning funds without interest where there was a conflict of interest,[126] failure to produce accounts and a refusal to act with diligence,[127] failure to sell property at fair market value and to effect partition in a timely manner,[128] and investing money in a private company whose shareholders were the trustees themselves.[129] At the same time, courts have rejected claims for removal where the complaint was merely that the trustees could not agree on a course of action,[130] where there was a lack of transparency in the absence of malice,[131] and where the fees of the corporate trustee were alleged to be too high.[132]

Once a trustee is removed, a court may appoint a replacement in the absence of any provision in the trust providing for another mechanism.[133]

3. The Beneficiary

The CcQ does not confine the use of the term "beneficiary" to a natural or legal person. Instead, a beneficiary may be a person or a purpose. In addition, the beneficiary may be determined, determinable, or abstract. In effect, a beneficiary may be determined in three ways:

1. the beneficiary may directly by the instrument establishing the trust—that is, specifically named in the constituting act;
2. the beneficiary may determinable by some formula or clause that permits the settlor, trustee, or some third party to designate beneficiaries;[134] or
3. the beneficiary may be an abstract cause or purpose, as in a private non-commercial or social trust.

a. Who May Be a Beneficiary?

In the case of a gratuitous trust, the CcQ provides that "[o]nly a person having the qualities to receive by gift or by will at the time his right opens may be the beneficiary of a trust constituted gratuitously."[135] In the case of a private commercial trust, the beneficiaries will be those set forth in the contract establishing the trust. No matter the situation, however, the beneficiary of a trust must meet all the conditions required by the constituting act in order to receive.[136]

The beneficiary is not typically a party to the trust, although he might be in some cases—for example, in a mutual fund or other investment trust. Moreover, the beneficiary is not required to accept the benefit for the trust to be constituted. Instead, as noted above, the trust comes

126 See *Leclerc c Leclerc*, [1975] CA 792.

127 *Fondation des maladies du coeur du Québec c Morency succession*, [1996] JQ No 985 (QL), JE 96-1095 (Sup Ct).

128 *Vetter c Vetter Estate*, [1995] JQ No 1911 (QL), No 500-05-005418-940 (Sup Ct).

129 *Després c Théberge*, *supra* note 116.

130 *Côté (Succession de)*, [1999] JQ No 4386 (QL), JE 99-1875 (CA).

131 *Marchand c Vaillancourt*, [1999] JQ No 1887 (QL), REJB 1999-13026 (Sup Ct).

132 *Marmet (Succession de)*, [1999] JQ No 511 (QL), JE 99-625 (Sup Ct).

133 CcQ, art 1277.

134 CcQ, art 1282.

135 CcQ, art 1279.

136 CcQ, art 1280.

into force upon acceptance by the trustee of the office, regardless of whether the beneficiaries have been determined. Finally, in the case of a gratuitous trust, the beneficiaries are assumed to accept the benefit unless they explicitly reject it.[137] If a beneficiary rejects the benefits of the trust, they will pass to the next class. If no beneficiaries are left to take, the assets will be distributed to the capital beneficiary in accordance with the terms of the instrument.[138]

b. Rights of the Beneficiary

Article 1284 of the CcQ declares that a beneficiary has "the right to require either the provision of a benefit granted to him, or the payment of the fruits and revenues and of the capital or the payment of one or the other." This provision essentially means that the beneficiary is entitled to demand whatever rights are given him by the terms of the trust instrument. In some cases, this will mean payment of a sum of money, as either an income or a capital beneficiary, or the use of some service or facility, such as where a private non-commercial trust provides for the maintenance of a sports ground.

Article 1261 provides that the trust patrimony is "autonomous and distinct from that of the settlor, trustee or beneficiary." As a result, the beneficiary's right is personal, rather than real, or *in rem*. This is a significant departure from the common law theory that recognizes the beneficiary as having a form of equitable ownership right in the trust property. Consequently, the beneficiary lacks rights that exist at common law against the property, such as the right to trace and claim property wrongfully transferred, or the right to obtain an equitable lien. And because Quebec law does not recognize the existence of the constructive trust, the beneficiary has no remedy in that direction either. The result is that the beneficiaries of civil law trusts have much weaker protections than those of common law trusts.

Some have suggested that the relationship between beneficiary and trust is one of debtor and creditor. This cannot be correct, however, because the trust is not a person, and thus no rights can exist against it *in personam*. Nor is the beneficiary a creditor of the trustee, because the trust patrimony exists independently of the trustee. Moreover, the CcQ makes it clear that the trustee's obligations are to the patrimony and not to any particular party. On its face, therefore, the beneficiary of the Quebec trust has no rights against either the trust or the trustee under the normal principles of civil law obligations. In order to remedy this, the drafters of the CcQ provided for a series of specific statutory actions in favour of the beneficiary against the trustee that largely mimic traditional debtor–creditor claims, but exist independently of the Code's section on obligations. These include the right to commence an action to require the trustee to pay or provide a benefit.[139] In addition, the beneficiary may commence an action to compel the trustee to perform an obligation or to refrain from taking an action.[140] A court may also permit the settlor or a beneficiary to take "legal action" in the place of the trustee when, without sufficient reason, he fails to do so.[141] Finally, like the settlor, the beneficiary has the right to "supervise" the actions of the trustee to ensure that the terms of the trust are faithfully executed, and to move to have the trustee removed for malfeasance or nonfeasance.[142]

137 CcQ, art 1285.

138 CcQ, art 1286.

139 CcQ, art 1284.

140 CcQ, art 1290.

141 CcQ, art 1291.

142 CcQ, arts 1287, 1290.

B. MODIFICATION AND AMENDMENT

The Quebec trust exists by virtue of its being a "patrimony by appropriation" that is "autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right."[143] This theory means that once the trust is established, it is designed to function independently of the settlor who created it and the beneficiaries who receive its benefits. One commentator compares the Quebec trust to a kite put aloft by a settlor, who then gives over the strings to the trustee. The settlor has set the course of the flight, but he cannot control the strings. The trustee holds the string, but is limited in the manner and direction in which it flies. For their part, the beneficiaries are largely spectators watching the kite in motion but powerless to affect its travels.[144]

This rather fanciful image is designed to make one thing clear—the fact of its autonomy makes modification of the Quebec trust theoretically difficult. This theoretical difficulty is compounded by the fact that the CcQ contains no article specifically providing for the modification of a trust. It is clear that neither the settlor nor the beneficiaries have any control over the trust. As a result, some have argued that the trustee, as the person with actual control over the patrimony, is the only entity (other than a court), that can modify or amend a trust. This silence of the Code has thus generated a great deal of controversy.

1. Modification and Amendment by the Trustee

At common law, the trustee is prevented from modifying or amending a trust in the absence of a clause specifically giving the trustee that power. In Quebec, the situation is unclear. A number of authors contend that the trustee cannot modify a trust even if the trust instrument contains a clause allowing him to do so. These commentators argue that art 1294 of the CcQ implicitly vests courts alone with the power to modify trusts and that this power is exclusive. Others assert that a clause inserted in the trust instrument giving the trustee power to modify the trust would be valid.[145] This latter position seems to have gained wider acceptance among members of the academic and legal community, although the courts have yet to rule on its validity.[146]

2. Termination, Modification, and Amendment by the Court

Article 1294 provides that a court may terminate a trust when the settlor's intent can no longer be carried out because doing so would be either impossible or impracticable.

> 1294. Where a trust has ceased to meet the original intent of the settlor, particularly as a result of circumstances unknown to him or unforeseeable and which make the pursuit of the purpose of the trust impossible or too onerous, the court may, on the application of an interested person, terminate the trust; the court may also, in the case of a social trust, substitute another closely related purpose for the original purpose of the trust.
>
> Where the trust continues to meet the intent of the settlor but new measures would allow a more faithful compliance with his intent or facilitate the fulfilment of the trust, the court may amend the provisions of the constituting act.

143 CcQ, art 1265.

144 Beaulne, *supra* note 12 at 220.

145 This debate is extensively reviewed in Jacques Beaulne, *Droit des fiducies*, 2nd ed (Montreal: Wilson & Lafleur, 2005).

146 Diane Bruneau, "La modification et la terminaison des fiducies par les tribunaux du Québec" (2003) 105:2 R du N 409 at 435-36.

The court's power to terminate a trust is dependent on the purposes of the trust being "too onerous" to carry out. This generally means that it is either impossible or impracticable to carry out the trust's original purpose. The cause of the impossibility is largely irrelevant. It does not matter whether the impossibility is created by the fact that that purpose has been fulfilled or that the settlor was mistaken as to the manner by which the object might have been pursued. Once the impossibility exists, any party may move to terminate the trust.

Note that art 1294 makes a distinction between social trusts and other trusts. The first part of the article makes clear that, although a court may terminate either kind of trust, only a social trust may be modified in a manner akin to the common law's *cy-près* doctrine—that is, if the purpose of a personal or private trust becomes too onerous to pursue, then the trust is terminated. In the case of a social trust, the court may either terminate or "substitute another closely related purpose for the original purpose of the trust." If the court cannot save the trust by substituting another "closely related purpose," it will terminate the trust and direct that the patrimony be "devoted to a purpose as nearly like that of the trust as possible." Before doing so, however, the court will seek the recommendation of the trustee and any agency authorized by law to supervise the trust.[147]

The power to substitute a purpose in the CcQ is similar to the equitable power of *cy près*. However, there are significant differences between the two, which caution against considering the two powers as equivalent. At common law, if a court concludes that it is impossible to carry out the terms of the trust, it may apply *cy près* to substitute a closely related purpose in order to comply with the settlor's presumed general charitable intent. In addition, courts of equity have the power to "make a scheme"—that is, to amend or interpret provisions in a trust to avoid uncertainty or otherwise allow the settlor's intent to be fulfilled. Under the CcQ, however, the court's power is limited to substituting another purpose for the original one. Quebec courts do not have "scheme-making" power along the lines of those exercised by courts of equity.

A second important distinction concerns the timing of the impossibility. Equity courts have traditionally exercised the power of *cy près* in cases where the impossibility arose both before and after the trust was constituted. Quebec law seems not to permit substitution in cases where the purpose of the trust was impossible *ab initio*. Article 1294 states that the court's power applies "[w]here a trust has ceased to meet the original intent of the settlor." This language indicates that the trust must have been both duly constituted and functioning before the impossibility or impracticability arose.

These two differences—the lack of a scheme-making power and the requirement that the impossibility arise after the establishment of the trust—make the power to modify a trust less extensive than is the case with common law trusts.

In any event, if the purpose of a trust—whether personal, private, or social—may still be carried out in accordance with the settlor's purpose, then the court can order an amendment, providing "new measures" that would allow "a more faithful compliance with his intent."[148] This power is similar to the power to vary trusts given to courts of equity. However, it may be exercised only with respect to the administration of the trust; it cannot be used to modify the purpose. Significantly, the CcQ permits a court to amend the trust provisions without the consent of the beneficiaries.

C. TERMINATION

A trust may be terminated for a variety of reasons. These include the fact that the purposes for which the trust was established have been met, or because it is no longer possible to

147 CcQ, art 1298.

148 CcQ, art 1294.

achieve the settlor's intent. In addition, trusts may come to an end because their beneficiaries have renounced their interest, or the stipulated term has expired. Finally, there is some debate as to whether the beneficiaries may bring a trust to an end. These are all discussed below.

1. Expiry of the Term

A personal, private, or social trust may expire simply because it has reached the end of its stipulated term of life. Thus, a testamentary trust established to pay the widow of the settlor a stated income for her life, with a provision requiring payment of the capital to the settlor's children upon her death, will terminate when the capital is disbursed. Similarly, a trust to establish a fund for the building of a new library will terminate when the library is built.[149]

2. Impossibility

As discussed above in Section VI.B.2, if a court finds that the settlor's purposes cannot be achieved, it may terminate the trust.[150] In the case of a social trust, the court may then apply the funds to another purpose closely related to the settlor's original intent.[151]

3. Lapse of the Right of Beneficiaries

A trust may also terminate when the right of all the beneficiaries has lapsed. This might occur in two circumstances. The first would be where the trust has paid out all the benefits so that there are no more claims on its assets. The most likely scenario for this is when the trust has fulfilled it purposes. A second situation would be where the beneficiaries have renounced their rights.[152]

4. Termination by the Settlor, the Trustee, or the Beneficiaries

A trust cannot be terminated by the settlor alone. This is because the establishment of the trust creates an independent patrimony. Once the trustee has accepted the appointment, the settlor is divested of the property that forms the patrimony. He cannot, therefore, unilaterally revoke a trust. Moreover, a gratuitous trust cannot be revoked by the settlor.[153] As a result, once the trust is established, the settlor has limited rights of supervision pursuant to art 1287, but there is no power given to the settlor to unilaterally revoke.

The trustee also appears to lack the power to terminate. Although the trustee has control over the patrimony, the trustee's duty is to implement the settlor's intent. In the first instance, then, a trustee cannot, on his own authority, bring an end to a trust. However, an interesting question arises as to whether he might do so where a clause in the trust instrument confers that power directly. Although the courts have not yet ruled specifically on this point, it seems that the requirement in art 1294 for court intervention would make any such unilateral power void.[154]

149 CcQ, art 1296.

150 CcQ, art 1294.

151 CcQ, art 1298.

152 CcQ, art 1296.

153 CcQ, art 1822.

154 See e.g. *Fiducie Desjardins Inc c AP*, [2004] JQ no 6690 (QL), EYB 2004-64957.

Finally, it has been suggested that the beneficiaries of a trust may bring about its early termination along the lines of the rule in *Saunders v Vautier*.[155] However, the only case to have considered the question thus far has refused to incorporate the rule into Quebec law.[156]

VII. CONCLUSION

The Quebec trust is now a little more than 25 years old. There seems little doubt that the trust established by the CcQ (1994) is a dramatic improvement over the tentative and piecemeal approach of the old CCLC and the 1879 trusts act. The new Code provides a theoretical basis for the trust in the civil law context, as well as clearly setting forth the procedures by which trusts are established, administered, modified, and terminated.

One of the more interesting questions for the future is the extent to which Quebec jurists will rely on common law principles and precedents to guide their interpretation of the trust provisions of the CcQ. There is no doubt that the Quebec trust owes a great deal to its common law analogue. However, the need to firmly ground the Quebec version in the principles of the civil law will prevent the wholesale importation of common law rules in what is clearly a uniquely Quebec institution.

155 (1841), EWHC Ch J82, 41 ER 482 (Ch).

156 *Alkallay c Bratt*, REJB 2002-38861 at para 6, [2002] JQ No 6120 (QL) (Sup Ct).