

## Trusts in Quebec

Jean Turcotte, Director, ITS Group

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# Trusts in Quebec

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There are significant differences between trusts created under common law and those created under the *Civil Code of Quebec*. These differences are particularly notable when it comes to the nature of the trust, the functions participants can perform, the ability to change beneficiaries and the termination of trusts.

## Background

Quebec's current Civil Code provides a set of rules governing trusts, property settlement and administration, as well as the variation and termination of trusts. Since the adoption of this Code in 1994 allowing a broader use of trusts, there has been an explosion in the number of trusts constituted in Quebec. Trusts are being used for a variety of purposes, such as estate planning, the protection of minor beneficiaries, asset protection, tax planning and even operating businesses.

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Under the *Civil Code of Quebec*, a trust is created by the transfer of property from the settlor of the trust to the trustee, as stated in article 1260:

**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.*

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In addition, the trust constitutes a distinct patrimony by appropriation, pursuant to article 1261:

**1261.** *The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.*

Although a trust in Quebec is a patrimony by appropriation, it has no legal personality of its own.<sup>1</sup> Consequently, a trust cannot take part in legal proceedings; only the trustee has the power to do that, as administrator of the property of another.<sup>2</sup>

Article 1262 sets out the various ways in which a trust can be established:

**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.*

Trusts can therefore be created by means of a will, a contract by onerous or gratuitous title, by law or by a judgment where the law permits the court to order the constitution of a trust for a particular purpose.

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<sup>1</sup> *Myers c. House Trust*, 2015 QCCS 885 (CanLII).

<sup>2</sup> Article 1274 of the *Civil Code of Quebec* (C.C.Q.).

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The titles relating to the property of which the trust patrimony is composed are drawn up in the trustee's name.<sup>3</sup> As the trust has no legal personality, it cannot itself be prosecuted. Any legal action would have to be taken against the trustee.

By law, any natural or legal person can be a trustee.<sup>4</sup> In the case of natural persons, they must have the full exercise of their civil rights. Legal persons must be authorized by law to act as a trustee. Unless otherwise stipulated in the act constituting the trust, the trustee is subject to the rules governing the administration of the property of others.<sup>5</sup>

A trust can have more than one trustee.<sup>6</sup> In such a case, the trustees must act by majority. In addition, the settlor or a beneficiary may be a trustee, but must act jointly with another trustee who is neither the settlor nor a beneficiary.<sup>7</sup> A trust beneficiary can be a natural or a legal person. The beneficiary must, however, satisfy the conditions for being a beneficiary as stated in the act constituting the trust.

## Types of trusts in Quebec

The Civil Code provides for three types of trusts: trusts constituted for personal purposes, trusts for purposes of private utility, and trusts for purposes of social utility.<sup>8</sup> While there are rules that apply to all three, there are also specific rules for each of them.

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<sup>3</sup> Article 1278 C.C.Q.

<sup>4</sup> Article 1274 C.C.Q.

<sup>5</sup> Article 1278 par. 2 and article 1306 et seq. C.C.Q.

<sup>6</sup> Article 1276 C.C.Q.

<sup>7</sup> Article 1275 C.C.Q.

<sup>8</sup> Article 1266 C.C.Q.

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Personal trusts are created for the purpose of securing a benefit for a determinate or determinable person. This type of trust is commonly used in wills in Quebec. In that context it is known as a testamentary trust and can be used, for example, when a testator wishes to benefit his or her children, as well as existing and future grandchildren if desired, and wants the property to be administered by a third party.

The testator may, for example, designate his or her children as beneficiaries of the fruits and revenues of the trust for a specified period of time, and his or her existing and future grandchildren as beneficiaries of the trust capital. A trustee may also be chosen to administer the property until such time as it is transferred to the designated beneficiaries.

A personal trust cannot be perpetual. The Civil Code stipulates that it may not include more than two ranks of beneficiaries of the fruits and revenues, in addition to the beneficiary of the capital.<sup>9</sup> Also, the right of beneficiaries of the first rank opens not later than 100 years after the trust is constituted. A legal person cannot be a beneficiary for a period exceeding 100 years.<sup>10</sup>

The second type of trust under Quebec law, a private trust, is one that is created for specific private purposes, such as the maintenance or preservation of corporeal property or the use of property appropriated to a particular use, whether for the indirect benefit of a person or in that person's memory, or for some other private purpose.<sup>11</sup> A private trust is not necessarily established for the benefit of any one particular person.

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<sup>9</sup> Article 1271 C.C.Q.

<sup>10</sup> Article 1272 C.C.Q.

<sup>11</sup> Article 1268 C.C.Q.

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The third type of trust, a social trust, is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose.<sup>12</sup> The essential purpose of this type of trust is not to make a profit or operate a business.

### The advantages of using a trust

A trust provides a way to protect vulnerable persons, such as a minor child or a person with a disability, who might find it difficult to administer property bequeathed to them. In a trust, the capital can be protected or sheltered from beneficiaries who might otherwise squander it. Also, with a legacy in trust, the rules pertaining to tutorship or curatorship will not apply, as the property bequeathed "for the benefit" of a minor or a protected person of full age does not actually belong to that person. Only the trustee has any power over the property.

Under certain conditions, there are tax advantages to using a trust. A legacy in trust allows the testator to choose a trustee who will be charged with the administration of all or part of the property for a specified period of time following the testator's death. This means that the testator retains some control over the patrimony for many years into the future, well after his or her death.

### Common law and civil law trusts: key differences

There are differences between trusts established under common law and civil law systems.

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<sup>12</sup> Article 1270 C.C.Q.

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Firstly, unlike common law trusts, trusts in Quebec do not recognize duality of ownership interests. Quebec law instead recognizes the existence of a patrimony by appropriation that is autonomous and distinct, in which the trustee has power of management over the property.

In common law, there are two owners for property held in trust: the beneficiary, who has title in equity, and the trustee, who holds legal title to the property. Although the trustee only holds title to the property transferred, he or she remains the true owner of the trust property. This stands in contrast to the trust patrimony in civil law. In Quebec, the trustee is only an administrator and has no ownership right over the property in the trust.

Unlike the situation under Quebec law, in common law, the settlor is allowed to appoint him- or herself as trustee, with no requirement to act jointly with another trustee for administering the trust. This is seen frequently in personal trusts, where the settlor can even be the beneficiary as well.

A trust in Quebec cannot be a "bare Trust" or "implied Trust". So, even after the transfer of assets, the trust may not exist if the trustee refuses the duties assigned under the trust agreement.

There are four main points of difference between these concepts:

### **1. The nature of the trust**

In contrast to the dual ownership of property held in trust at common law, the trust patrimony in civil law is owned by no one.

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### 2. The plurality of the functions of settlor, trustee, and beneficiary

Plurality of offices or functions is not permitted by the *Civil Code of Quebec*, as article 1275 stipulates that the settlor or the beneficiary may be a trustee but he or she must act jointly with a trustee who is neither the settlor nor a beneficiary. This is true for common law trusts, except that there is no requirement to act jointly.

### 3. The power to appoint beneficiaries

In common law the settlor may give the trustee unlimited power to add or remove trust beneficiaries. The granting of such power is not permitted under civil law.

### 4. The variation and termination of the trust

The ability to vary or terminate a trust depends on the jurisdiction. Although, in principle, variation and termination can be effected on the mere consent of the beneficiaries, such modifications are generally subject to certain requirements specified under provincial laws. In Quebec, 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.

Other examples of differences in civil law include the prohibition against appointing a corporate trustee other than a trust company, the absence of a protector, the absence of extensive jurisprudence on trusts, and the impossibility of using a declaration of trust.

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## Functions of settlor, trustee, and beneficiary under civil law

A trust created under the Civil Code requires the settlor to transfer assets to a separate patrimony by appropriation. This is autonomous and distinct from the patrimony of the settlor, the trustee and the beneficiary. Here, the trustee and beneficiary have no ownership rights to the property.

- **The settlor (or transferor)**

The settlor is the person who sets up the trust. In Quebec, a trust can be set up either during the transferor's lifetime (inter vivos trust) or upon the transferor's death (testamentary trust) until all property in the trust has been distributed to the heirs.

- **The trustee**

The Civil Code provides specific rules for appointing the trustee and his or her acceptance of duty. The trustee is assigned the full administration of the property of the trust, including the preservation and maintenance of the assets. The trustee holds and manages the property placed in trust and reports to the transferor, beneficiary, and any other party involved. The trustee also ensures strict compliance with the provisions of the act constituting the trust that protect the rights of the beneficiary.

Equally important, the trustee also has an obligation to increase the patrimony or use it for its intended purpose as specified in the act constituting the trust.

A trustee's authority is defined in the act constituting the trust. In the case of a personal or private trust, the Civil Code restricts the power of a trustee to appoint a beneficiary only to the class of persons clearly determined in the document that creates the trust.



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While settlors are prevented from appointing themselves as the only trustee, the rules do offer trustees more security than common law trusts when it comes to personal liability.

- **The beneficiary**

The beneficiary is the person designated in the act constituting the trust to receive the property, under certain conditions. Depending on the terms of the act constituting the trust, the beneficiary may have the right, for example, to draw an income from the trust up to a certain age, then cash in the balance. For tax purposes, a trust is considered a distinct entity separate from the transferor and beneficiary.

When a beneficiary of the trust is a minor, the trustee is not required to guarantee the administration of the trust to the Public Curator, as is the case for tutors (guardians) and estate liquidators when they are responsible for assets of \$25,000 or more.

## Civil law trusts and the *Income Tax Act*

The *Income Tax Act* governs the taxation of trusts, even in Quebec. However, the different rules that create the trust under common law or civil law can result in different tax treatment. It's important for the act constituting the trust to address tax matters in the context of the rules governing the trust.

## Registering trusts in Quebec

All those who administer or have an interest in a trust should take note of a registration rule that came into effect July 1, 2014. As a result of an amendment to Quebec's *Act respecting the legal publicity of enterprises*, any trust (regardless of the jurisdiction where it

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was formed and regardless of the law governing the trust) that operates a “commercial enterprise” in Quebec will have to register under the *Legal Publicity Act*, in much the same way that corporations carrying on an activity in Quebec are required to register under the *Legal Publicity Act*.

***All examples presented in this article are for illustration purposes only. No one should act upon these examples or information without a thorough examination of their tax and legal situation with their own professional advisors after the facts of the specific case are considered.***

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