

THE WORLDS OF THE TRUST

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Categorically different: unintended consequences of trust taxonomy

MICHAEL LUBETSKY

Your client, in Quebec, wants to create a trust which will be used exclusively for the education of his descendants. He asks how long such a trust can legally last. Answering this question requires determination of the trust category under the Civil Code of Québec (C.C.Q.). If the trust is ‘social’ or ‘private’, the trust can potentially last perpetually;¹ if it is ‘personal’, its maximum duration will be limited.²

As this example illustrates, the classification of a trust can have profound legal consequences and practitioners need to give informed advice – *today* – on the category into which a proposed trust may fall. However, the definitions of the three trust categories in the C.C.Q. largely overlap, making it extremely difficult – if not impossible – to say *a priori* where one category ends and another begins. The courts in Quebec have yet to provide any guidance on the classification of trusts and they may well not have occasion to do so for another hundred years or so, when settlors’ heirs may be motivated to seek the disbursement of assets held by social and private trusts on the grounds that they are actually personal trusts that have remained in existence beyond the maximum time.

A number of Quebec authors have considered trusts for the education of members of a particular family, although they have disagreed (interestingly, along language lines) on their classification. Authors writing in French have tended to consider them ‘private trusts’ (Beaulne,³ Brierley⁴ and Bruneau⁵), whilst those writing in English have found the ‘personal

¹ Civil Code of Québec (C.C.Q.), art. 1273. ² *Ibid.*, arts. 1271–2.

³ J. Beaulne, *Droit des fiducies*, 2nd edn (Montreal: Wilson & Lafleur, 2005), para. 112.

⁴ J. E. C. Brierley, ‘De certains patrimoines d’affection’, in A. Laprise and D. Vaugeois (eds.), *La réforme du Code civil: Textes réunis par le Barreau du Québec et la Chambre de notaires du Québec* (Sainte-Foy: Les Presses de l’Université Laval, 1993), vol. 1, p. 758.

⁵ D. Bruneau, ‘La fiducie et le droit civil’ (1996) 18:4 R.P.F.S. 755, 765.

trust' category more appropriate (Claxton⁶ and McClean⁷). Perhaps more interestingly, none of these authors, in making their assessments, considered it necessary to consider the treatment of such trusts in the common law.

In the face of this ongoing uncertainty, the present debate among scholars will likely play a vital role in shaping how the codal trust categories evolve. This chapter aims to advance this discussion by identifying and tracing the common law origins of the three C.C.Q. trust categories, and discussing the degree to which common law jurisprudence on classifying trusts can help inform their interpretation.

To this end, this chapter first reviews the classification of trusts in the common law (Part I) and the C.C.Q. (Part II), then outlines how the common law jurisprudence can inform the C.C.Q. regime (Part III). After considering the special case of non-charitable purpose trusts (Part IV), the chapter concludes with a plea for greater trans-systemic dialogue.

I The classification of trusts in the common law

Figure 14.1 illustrates, in a simplified manner, the classification of intentional trusts⁸ in the common law:

First, intentional trusts divide into charitable and non-charitable. To qualify as charitable, a trust must provide a 'public benefit' and its object(s) must fall exclusively into the four nominate categories developed by the jurisprudence: education, religion, relief of poverty, and general public utility.⁹ Charitable trusts have a number of well-known advantages that make them particularly attractive to settlors: they qualify for perpetual existence, they can benefit from the *cy-près* rule, and they typically enjoy preferable taxation.¹⁰

Non-charitable trusts, also known as 'private' trusts, bifurcate into trusts for persons and trusts for purposes. A trust for persons has one

⁶ J. B. Claxton, *Studies on the Quebec Law of Trust* (Toronto: Thompson Canada, 2005), n. 5–5.

⁷ A. J. McClean, 'The Trust in the Civil Code of Quebec', in Canadian Institute for Advanced Legal Studies, *Conférences sur le nouveau Code civil du Québec* (Cowansville: Yvon Blais, 1992), pp. 94–5.

⁸ This chapter leaves to future scholarship the question of trusts arising by operation of law.

⁹ D. W. M. Waters, M. Gillen and L. Smith, *Waters' Law of Trusts in Canada*, 4th edn (Toronto: Thomson Carswell, 2012), pp. 721–2; A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th edn (Toronto: Thomson Carswell, 2009), p. 382.

¹⁰ Waters, *ibid.*, pp. 664, 666, 680–720; Oosterhoff, *ibid.*, pp. 376–9, 462–503.

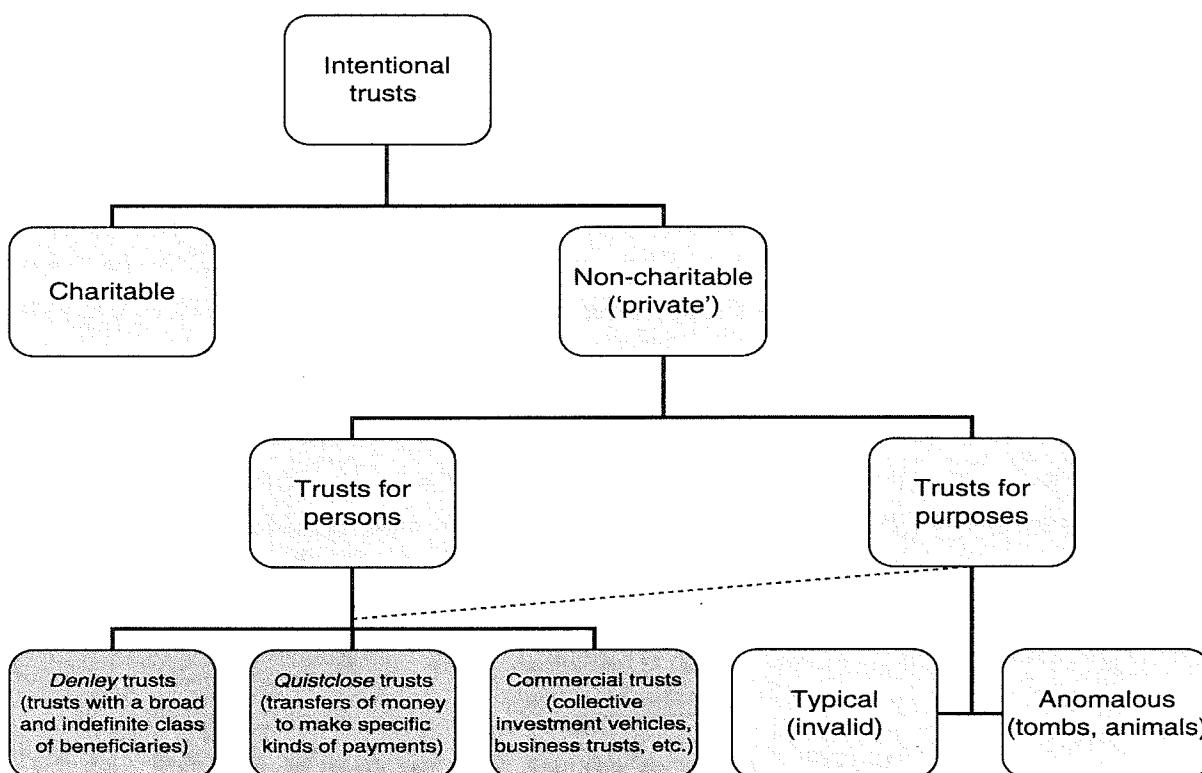


Fig. 14.1 Classification of intentional trusts.

or more identifiable individuals as its objects, whilst a trust for purposes aims to promote an activity or initiative.

Non-charitable trusts for purposes in the common law are prima facie invalid¹¹ – celebrated examples of such invalid trusts include a trust to endow a prize for an annual yacht race (*Re Nottage*)¹² and a trust to promote the conversion of English to a new phonetic alphabet (*Re Shaw*).¹³ However, a non-charitable trust for purposes can be saved if it falls into one of the ‘anomalous cases’ recognized in the jurisprudence, primarily trusts for the care of specific animals or for the maintenance of graves.¹⁴

¹¹ Waters, *ibid.*, pp. 163, 625–6; Oosterhoff, *ibid.*, pp. 523–9. The jurisprudence has identified four reasons for the presumptive invalidity of purpose trusts: (a) want of a party with standing to enforce its terms, (b) violation of the rule against perpetuities, (c) uncertainty of objects and (d) improper delegation of testamentary powers. (*Re Russell Estate* [1977] 6 WWR 273, 1 ETR 285, 20 (Alta SC (TD))).

¹² *Re Nottage* [1895] 2 Ch 649 (Ch. Div.).

¹³ *Re Shaw* [1957] 1 All ER 745 (CA), settled on appeal [1958] 1 All ER 245n.

¹⁴ Waters, *Waters’ Law of Trusts*, above, note 9, p. 667; Oosterhoff, *Oosterhoff on Trusts*, above, note 9, pp. 530–5.

Because of the presumptive invalidity of trusts for purposes, common law jurists often engage in considerable (if not heroic) intellectual gymnastics to characterize what are essentially trusts for purposes as trusts for persons.¹⁵ The jurisprudence has generally taken a permissive attitude to what might be called 'quasi-purpose' trusts, with *Re Denley's Trusts*¹⁶ and *Barclays Bank Ltd v. Quistclose Investments Ltd*¹⁷ establishing themselves as classic (and still controversial) cases. *Denley* involved an employer who transferred land to a trust, with instructions that it be maintained as a campground for its employees and their guests. *Quistclose* involved the transfer of a sum of money on trust to pay specific kinds of expenses. The courts eventually upheld both trusts, holding either that there exists an identifiable (if diffuse) class of beneficiaries (the company employees in *Denley*) or else that the trust has an identifiable beneficiary in the person of the settlor himself (the transferor of the funds in *Quistclose*).

'Commercial trusts', such as collective investment vehicles, special-purpose entities for financing transactions, income trusts (like real estate investment trusts) and business trusts, although not a formal category, differ sufficiently from other forms of trusts in their constitution, governance and regulation that they tend to be treated as a distinct group.¹⁸ Although commercial trusts have largely managed to escape the theoretical controversies that have dogged other forms of trusts,¹⁹ they also straddle the line between trusts for purposes and trusts for persons²⁰ and potentially raise challenging theoretical issues about their fundamental nature and validity.²¹

¹⁵ Oosterhoff, *Oosterhoff on Trusts*, above, note 9, pp. 556–83.

¹⁶ *Re Denley's Trusts* [1968] 3 All ER 65. For discussion, see Waters, *Waters' Law of Trusts*, above, note 9, pp. 670–2.

¹⁷ *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567. See also *Twinsectra Ltd v. Yardley*, 2002 UKHL 12.

¹⁸ A. W. Scott et al., *Scott and Ascher on Trusts*, 5th edn (New York: Aspen Publishers, 2006), vol. 1, pp. 34–5; K. Fan Sin, *The Legal Nature of the Unit Trust* (Oxford: Clarendon Press, 1997), pp. 2–3.

¹⁹ The primary conceptual debate before the courts on commercial trusts has been whether to assimilate them with corporations for purposes of corporate and tax legislation. See e.g. *Smith v. Anderson* (1880), 15 Ch D 247 (CA) and *Eliot v. Freeman*, 220 US 178 (1911).

²⁰ Fan Sin, *The Legal Nature of the Unit Trust*, above, note 18, p. 72.

²¹ *Ibid.*, devotes an entire monograph to this subject.

II The classification of trusts in the C.C.Q.

The Civil Code of Lower Canada, in force in Quebec until 1994, only recognized a small subset of all the trusts permitted by the common law. Trusts for persons could only be established by will or donation – a formulation that essentially excluded all commercial trusts.²² Charitable trusts (technically not trusts at all, but a *sui generis* institution dating back to old French law) could be established only by will.²³ Quebec had no provision at all for the anomalous graveyard and animal care trusts.²⁴

During the recodification, the legislature sought to give Quebeckers access to most of the trusts available in other jurisdictions,²⁵ and therefore posited a trust regime with three new trust categories: the ‘personal trust’, corresponding roughly to the gratuitous trusts for persons previously recognized under the former Code (article 1267 C.C.Q.),²⁶ the ‘social trust’, analogous to the common law charitable trust (article 1270 C.C.Q.), and the ‘private trust’, a uniquely Quebec institution encompassing a broad range of trusts not previously permitted (articles 1268–9 C.C.Q.):

1267. A personal trust is constituted gratuitously for the purpose of securing a benefit for a determinate or determinable person.

1267. La fiducie personnelle est constituée à titre gratuit, dans le but de procurer un avantage à une personne déterminée ou qui peut l'être.

1268. A private trust is a trust created for the object of erecting,

1268. La fiducie d'utilité privée est celle qui a pour objet l'érection, l'entretien

²² For a summary list of the relevant jurisprudence, see J. L. Baudouin and Y. Renaud, *Code civil annoté* (Montreal: Wilson & Lafleur, 1989), vol. 1, pp. 543–4. Note that separate legislation in Quebec provided for ‘security trusts’ (Beaulne, *Droit des fiducies*, above, note 3, para. 7, n. 19) as well as trusts held by pension plans and trust companies (Claxton, *Studies on the Quebec Law of Trust*, above, note 6, pp. 11–12).

²³ Civil Code of Lower Canada (C.C.L.C.), art. 869; G. Brière, *Donations, substitutions et fiducie* (Montreal: Wilson & Lafleur, 1988), pp. 266–7.

²⁴ Although there apparently was some discussion about whether such trusts were contemplated by art. 869 C.C.L.C. *Ibid.*, para. 88; Brière, *Donations*, above, note 23, p. 271; Brierley, ‘De certains patrimoines d'affection’, above, note 4, p. 759.

²⁵ Claxton, *Studies on the Quebec Law of Trust*, above, note 6, p. 25; Brière, *Donations*, above, note 23, p. 270. Note, however, that the recodification maintained the bar against purely self-constituted trusts (viz., trusts created by a ‘unilateral declaration of trust’) (C.C.Q. art. 1275). But see Claxton, *Studies on the Quebec Law of Trust*, above, note 6, pp. 80–1.

²⁶ D. C. Lamontagne, *Biens et propriété*, 5th edn (Cowansville: Yvon Blais, 2005), para. 187; Beaulne, *Droit des fiducies*, above, note 3, para. 82.

maintaining or preserving a thing or of using a property appropriated to a specific use, whether for the indirect benefit of a person or in his memory, or for some other private purpose.

ou la conservation d'un bien corporel, ou l'utilisation d'un bien affecté à un usage déterminé, soit à l'avantage indirect d'une personne ou à sa mémoire, soit dans un autre but de nature privée.

1269. A trust constituted by onerous title, particularly one created for the purpose 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.

1269. Est aussi d'utilité privée la fiducie constituée à titre onéreux dans le but, notamment, de permettre la réalisation d'un profit au moyen de placements ou d'investissements, de pourvoir à une retraite ou de procurer un autre avantage au constituant ou aux personnes qu'il désigne, aux membres d'une société ou d'une association, à des salariés ou à des porteurs de titre.

1270. A social trust is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose. It does not have the making of profit or the operation of an enterprise as its main object.

1270. La fiducie d'utilité sociale est celle qui est constituée dans un but d'intérêt général, notamment à caractère culturel, éducatif, philanthropique, religieux ou scientifique. Elle n'a pas pour objet essentiel de réaliser un bénéfice ni d'exploiter une entreprise.

A closer look at articles 1268 and 1269 C.C.Q. reveals three distinct kinds of 'private trust':

- (a) a trust for erecting, maintaining or preserving a thing ('*un bien corporel*') (article 1268 C.C.Q. *in inceptum*);
- (b) a trust for using a property ('*un bien*'), which can include a sum of money, appropriated to a specific use (article 1268 C.C.Q. *in fine*); and
- (c) a trust created 'by onerous title' (article 1269 C.C.Q.).²⁷

²⁷ For an enumeration of various kinds of trusts allowable under art. 1269 C.C.Q., see Beaulne, *Droit des fiducies*, above, note 3, paras. 94–108; Claxton, *Studies on the Quebec Law of Trust*, above, note 6, pp. 99–100.

The *Commentaires du ministre*, issued by the Quebec government during the recodification, illustrate the kinds of trusts covered by the three sub-categories:

Il vise plusieurs situations. Il permet, d'une part, d'englober les fiducies constituées même à titre onéreux, où aucune personne physique ou morale n'est vraiment bénéficiaire, mais dont le but revêt un caractère purement privé. C'est le cas, par exemple, de la fiducie constituée dans le but *d'ériger et d'entretenir un monument funéraire* à la mémoire du défunt ou des membres de sa famille, ou encore d'assurer la *survie des animaux préférés* du défunt.

Il permet, d'autre part, de couvrir les fiducies constituées dans le but de procurer un avantage indirect à une personne ou à un groupe, en lui permettant d'utiliser un bien affecté à un usage déterminé, par exemple *une somme destinée à l'achat de médicaments, d'appareils médicaux, fauteuil roulant etc.*, ou *un immeuble destiné à servir de lieu de villégiature aux salariés d'une entreprise*.²⁸

L'article 1269 vise ainsi les fiducies d'investissement en matière immobilière ou relatives à des valeurs mobilières, les fiducies établissant des fonds de retraite et autres fiducies à titre onéreux, de même que les fiducies constituées à l'occasion d'une émission d'obligations.²⁹

The examples given in the *Commentaires du ministre* evoke classic cases in the common law jurisprudence and leave no doubt about the inspiration behind the different private trust categories. The first kind of private trust comes from the 'anomalous trust for purposes' of the common law ('dans le but d'ériger et d'entretenir un monument funéraire . . . ou encore d'assurer la survie des animaux préférés'). The second kind corresponds to *Quistclose* trusts ('une somme destinée à l'achat de médicaments, d'appareils médicaux, fauteuil roulant etc.') and *Denley* trusts ('un immeuble destiné à servir de lieu de villégiature aux salariés d'une entreprise'). The final kind corresponds to the various commercial trusts that have become commonplace in common law jurisdictions, including business trusts, special-purpose entities and collective investment vehicles.

Considerable overlap exists between the codal definitions of 'personal trust' and 'private trust'. Difficulties in classification occur when (a) a gratuitous trust has a 'purpose' which directly benefits identifiable individuals (such as a trust to provide for the education of the settlor's

²⁸ Quebec, Ministère de la justice, *Commentaires du ministre de la justice* (Quebec: Publications du Québec, 1993), vol. 1, p. 754 (*Commentaires du ministre*) (emphasis added).

²⁹ *Ibid.*, p. 755.

descendants), or (b) it is not clear whether the trust has been established 'by onerous title'. A number of Quebec authors have discussed how to characterize such ambiguous trusts³⁰ and have even speculated on whether a trust can change its classification over time and/or be both 'personal' and 'private' simultaneously.³¹ However, the courts have yet to provide any guidance on these matters and, as discussed above, it may take decades before they have occasion to do so.

The new definition of 'social trust' also creates ambiguity insofar as a trust can simultaneously advance some kind of 'general interest' while still 'securing a benefit for a determinate or determinable person' or 'using a thing for a particular purpose' – such as a building fund for a particular educational institution. The C.C.Q. provides for no hierarchy between the trust categories and, as in the case of private trusts, no clear line delineates where the personal or private trusts end and social trusts begin.³²

III Relevance of common law classifications in Quebec

The common law has seen no shortage of cases on the classification of trusts that straddle the line between charitable and non-charitable, or

³⁰ The most complete discussion on characterizing gratuitous 'private' trusts that benefit identifiable individuals comes from Beaulne, who argues that classification of the trust requires the identification of its '*finalité*'. Does the beneficiary 'only benefit from the trust through 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). Such characterization essentially constitutes a question of fact. (Beaulne, *Droit des fiducies*, above, note 3, pp. 110–12.)

In a similar vein, Bruneau has considered the question of 'onerous title', and has observed that trusts constituted through onerous title fall into three broad categories: (a) cases where the settlor receives something in return for setting up the trust, (b) cases where the beneficiaries buy into the trust, and (c) cases where the trust has the vocation to generate income and profits '*sur une base commerciale [plutôt que] personnelle*'. By operation of art. 1269, such trusts necessarily qualify as 'private' regardless of whether they benefit identifiable individuals (Bruneau, '*La fiducie et le droit civil*', above, note 5, 795–801).

See also McClean, 'The Trust in the Civil Code of Quebec', above, note 7, p. 94.

³¹ Claxton, *Studies on the Quebec Law of Trust*, above, note 6, p. 108; L. Jeannotte and S. D'Aoust, '*La fiducie de protection du capital, de sa mise en place à sa liquidation*', in *Cours de perfectionnement du Notariat* (Montreal: Chambres des notaires du Québec, 2005), para. 260, n. 205.

It is very difficult to see how a trust can be simultaneously personal and private, given that the C.C.Q. expressly states that a personal trust cannot last perpetually (C.C.Q. art. 1272) while a private trust can (C.C.Q. art. 1273).

³² See Claxton, *Studies on the Quebec Law of Trust*, above, note 6, p. 105.

between trusts for persons and trusts for purposes. To the extent that the C.C.Q. trust categories trace their origins to common law trust categories, the common law jurisprudence can potentially offer useful guidance on trust categorization in Quebec.

As discussed above, the C.C.Q. social trust traces its origins to the common law charitable trust. A charitable trust must satisfy a two-part test: (a) it must confer a 'public benefit' and (b) its object(s) must fall exclusively into the nominate categories of charity. The C.C.Q. social trust has largely retained the first prong of this test ('a trust constituted for a purpose of general interest'), although it has not retained the second ('such as a cultural, educational, philanthropic, religious or scientific purpose').

Consequently, it stands to reason that the common law jurisprudence on the first prong of the test – namely, whether a putative charitable trust actually confers a 'public benefit' – should meaningfully inform the application of article 1270 C.C.Q. For example, common law courts in Canada and the United Kingdom have repeatedly held that trusts for the education of members of a particular family or for employees of a particular company do *not* provide a public benefit and thus do *not* qualify as charitable.³³ These cases would seem to provide persuasive authority for the proposition that such trusts likewise do not qualify as 'social trusts' under the C.C.Q.

That said, a question remains whether 'general interest' ('*intérêt général*') captures a slightly different scope of activity than 'public benefit'. In the common law, for example, trusts to promote political causes have been routinely found non-charitable primarily on the grounds that the Court cannot assess the 'benefit' such causes bring to the community.³⁴ A political charity, however, might pass a 'general interest' test more readily than a 'public benefit' test. It therefore remains to be seen whether a trust to promote a particular political point of view will qualify in Quebec as a social trust.³⁵

The common law jurisprudence on the categories of charity offers more limited usefulness in the Quebec context. A trust to promote amateur sport, for example, might conceivably qualify as a social trust

³³ *Re Compton, Power v. Compton* [1945] 1 All ER 198 (CA), discussed in Oosterhoff, *Oosterhoff on Trusts*, above, note 9, pp. 395–6. See also Waters, *Waters' Law of Trusts*, above, note 9, pp. 743–6 and accompanying notes.

³⁴ *McGovern v. Attorney-General* [1981] 3 All ER 493 (Ch D). For a more complete review of jurisprudence, see Waters, *Waters' Law of Trusts*, above, note 9, p. 742; Oosterhoff, *Oosterhoff on Trusts*, above, note 9, pp. 398–401.

³⁵ Claxton, *Studies on the Quebec Law of Trust*, above, note 6, pp. 104–5.

in Quebec even though common law courts have traditionally found such trusts non-charitable for failing to fall into a nominate charitable category.³⁶ That said, Quebec jurists should not completely discount the common law jurisprudence on categories of charity, since it could indirectly contribute to the assessment of 'public interest'. A trust to promote the development and implementation of a new phonetic alphabet in Quebec, for example, could conceivably fail to qualify as a social trust on the grounds that it advances no genuine 'public interest', with *Re Shaw* serving as persuasive authority for the result if not the reason.

It bears note that a number of common law jurisdictions (particularly in Canada) have also started tentatively moving away from nominate categories of charity, viewing them more as simply examples of the kinds of trusts that confer a genuine public benefit.³⁷ For this reason, the decision to dispense with the nominate categories in the C.C.Q. may represent not so much a departure of the common law but more a reinterpretation of previous case law and an anticipation of how the law will be understood in the future.

Although the common law courts have repeatedly held that a charitable trust's objects must be exclusively charitable, no such language appears in article 1270 C.C.Q., potentially raising the question of whether a social trust can legitimately have a mixture of general and private objects. The common law jurisprudence would seem to provide persuasive authority that the phrase 'a purpose of general interest' includes an exclusivity element, although it remains to be seen whether the Quebec courts will emend article 1270 C.C.Q. accordingly.

Distinguishing a personal from a private trust requires a more nuanced analysis. The C.C.Q. private trust encompasses various kinds of trusts which clearly constitute trusts for persons in the common law. Consequently, although a trust to provide for the education of one's descendants incontrovertibly constitutes a 'trust for persons' under the common law, it does not immediately follow that it constitutes a 'personal trust' under the C.C.Q.

That said, it is important to remember that the private trust, as defined in articles 1268 and 1269 C.C.Q., represents an amalgam of four well-known kinds of trust that have long proven conceptually challenging and/or controversial in the common law: anomalous trusts for purposes

³⁶ Oosterhoff, *Oosterhoff on Trusts*, above, note 9, pp. 443–52.

³⁷ *Ibid.*, p. 444; *Cassano v. Toronto-Dominion Bank*, 2009 CanLII 35732 (Ont Sup Ct), para. 27.

(graveyards and animals), trusts for a diffuse and variable class of beneficiaries (*Denley* trusts), trusts to make certain kinds of payments on behalf of the settlor (*Quistclose* trusts) and commercial trusts. A trust for the education of one's descendants does not fall into any of these broad groupings. To the contrary, such a trust presents absolutely no conceptual difficulty in the common law and exemplifies a discretionary trust for persons with the settlor's descendants as its objects. It stands to reason that such a trust should likewise constitute a 'personal trust' under article 1267 C.C.Q.³⁸

IV The non-anomalous, non-charitable trust for purposes under the C.C.Q.

Parts II and III of this chapter traced the three C.C.Q. trust categories to their common law antecedents. A review of Figure 14.1, however, reveals one common law category which remains unaccounted for: the non-commercial, non-anomalous, non-charitable trust for purposes which, under the common law, is presumptively invalid. Is such a trust also invalid in Quebec, and if so, why?

By construction, such a trust could not constitute a social trust (since not charitable), a personal trust (since it lacks a beneficiary) or an article 1269 private trust (since not commercial). Such a trust, therefore, could only constitute an article 1268 private trust. A careful look at article 1268 C.C.Q., however, reveals that it contains internal limits in the words 'thing' (*'bien corporel'*) and 'specific' (*'déterminé'*). Both of these words seem to import a certainty requirement; a private trust cannot have a completely abstract and imprecise purpose, but must relate to a tangible piece of property or else have a purpose identified with some degree of precision.

As Scott et al. have observed, the common law jurisprudence on trusts for purposes (including graves, animals, *Quistclose* and *Denley* trusts) can be essentially reconstrued as a specificity test. According to this theory, a trust for purposes only fails when the trust purpose is 'general and indefinite'.³⁹ Otherwise, the trustee holds the *corpus* on trust for the

³⁸ It also bears noting that such a trust would certainly have been lawful under the former Code, which only recognized what are now called trusts for persons. Indeed, perhaps the simplest way to distinguish a personal from a private trust is simply to ask whether the trust would have been allowed under the former Code. If 'yes', then the trust is personal; if 'no', then it must be private.

³⁹ Scott et al., *Scott and Ascher on Trusts*, above, note 18, vol. 2, p. 735.

settlor (or his heirs) with a *power* to spend trust funds in fulfilment of the specific purpose. Consistent with this theory, a number of common law jurisdictions (including Ontario, Alberta and British Columbia) have enacted legislation to the effect that a trust purpose, if articulated with sufficient specificity, is to be reconstrued as a power⁴⁰ – an approach also endorsed by the United States *Restatement (Third) of Trusts*.⁴¹ Since under the common law, the validity of a power is subject to a certainty test,⁴² a trust purpose which fails the power certainty test cannot be reconstrued as a power and thus precipitates the immediate failure of the trust.

Quebec doctrine and jurisprudence have paid scant attention to the question of uncertainty in trust formation⁴³ – which is particularly surprising given how prominently the issue features in common law trust theory.⁴⁴ However, it seems that the certainty test as developed by the common law courts could meaningfully inform the interpretation of ‘specific’ in article 1268 C.C.Q. If adopted, this approach would result

⁴⁰ Waters, *Waters’ Law of Trusts*, above, note 9, p. 175. For example, in Ontario’s Perpetuities Act, R.S.O. 1990, c. P.9, s. 16(1).

⁴¹ American Law Institute, *Restatement of the Law Third: Trusts* (St Paul: American Law Institute Publications, 2003), vol. 2, s. 47.

⁴² According to which the court must be able to ‘say that a given application of the money does or does not fall within its terms’ (*Twinsectra*, above, note 17, para. 16). See also *Russell*, above, note 11, paras. 30–5; *Dionisio v. Mancinelli* [2004] O.J. No. 4354 (S.C.J.) (review of jurisprudence); Waters, *Waters’ Law of Trusts*, above, note 9, pp. 105–8.

⁴³ A body of doctrine and jurisprudence under the former Code considered wills that give executors and trustees the power to distribute, as they see fit, an estate among a class of heirs. Generally speaking, the jurisprudence evidenced a fairly permissive approach to evaluating whether such powers fail for uncertainty, upholding clauses instructing executors to distribute an estate ‘to the poorest’ or ‘most needy’ heir. However, in such cases, the courts have insisted either that (a) the trust be charitable, or (b) the *class of potential recipients* be identified with sufficient certainty (Claxton, *Studies on the Quebec Law of Trust*, above, note 6, pp. 284–96 (review of jurisprudence)). Given that a private trust under the C.C.Q. does not require a clearly identified class of potential recipients, this older jurisprudence would seem to have only limited relevance today.

⁴⁴ A number of authors (Brierley, ‘De certains patrimoines d’affection’, above, note 4, pp. 750–1; Claxton, *Studies on the Quebec Law of Trust*, above, note 6, pp. 393–4; Beaulne, *Droit des fiducies*, above, note 3, para. 77, n. 267) and a handful of cases (*Sécurité Saglac (1992) Inc. (Syndic de)* [1997] R.J.Q. 2448 at 2453 (CA); *Chibou-vrac inc. (Syndic de)* [2003] R.J.Q. 2809, 2821–3; *Ateliers Dominique inc. (Syndic de)* [1995] R.J.Q. 2165, 2173; *Multi-sens inc. (Syndic de)* [1995] R.J.Q. 1876, 1880; *Droit de la famille – 071938*, 2007 QCCS 3792, para. 49; *Laporte v. Lauzon*, 2007 QCCS 6226, n. 38) have opined that the ‘three certainties’ of the common law apply to Quebec trusts. However, as Beaulne has lamented, there is very little foundation in the C.C.Q. for saying so (Beaulne, *Droit des fiducies*, above, note 3, para. 77).

in the rejection of trusts with broad and amorphous purposes and largely harmonize the categories of trusts recognized by the C.C.Q. with those recognized by the common law, thus fulfilling the legislature's intent of bringing Quebec's trust regime more in line with that of the rest of the world.

V Conclusion: the evolution of Quebec trust law

For jurists versed in the history of the trust and supportive of trans-systemic dialogue, the conclusions of this chapter will likely not prove overly controversial. It is common knowledge that Quebec did not create the trust from whole cloth, but rather imported it from the common law in response to demands from various constituencies within the province.⁴⁵ The reform of trust law during the recodification, though providing a uniquely civilian conceptual framework based on the *patrimoine d'affectation*, nonetheless reflected a stated policy to give Quebecers access to financial options analogous with those available in other jurisdictions. Consequently, to give proper effect to the will of the legislature, it stands to reason that common law precedents and principles should continue to serve as guides for interpretation of trust principles to the extent that they do not contradict the express provisions of the C.C.Q., just as the Supreme Court of Canada held during the time of the former Code.⁴⁶

However, few lawyers and notaries in Quebec have occasion to study common law property law or trust theory, which is largely perceived (with some justification) as unfathomably arcane. Quebec's leading authors on property law have likewise long criticized the trust as fundamentally incompatible with the civilian property system.⁴⁷ Consequently, jurists in Quebec do not turn to the common law casebooks when

⁴⁵ For a review of the history, see Brière, *Donations, substitutions et fiducie*, above, note 23, pp. 267–9; Waters, *Waters' Law of Trusts*, above, note 9, pp. 14–17, 1414–21; Claxton, *Studies on the Quebec Law of Trust*, above, note 6, pp. 8–12.

⁴⁶ *Tucker v. Royal Trust Co.* [1982] 1 S.C.R. 250, paras. 260–1. For an example of where a common law principle was held *not* to apply in Quebec, see *Alkallay v. Bratt*, REJB 2002–38861 (C.S.) (inapplicability of the *Saunders* rule). See also Beaulne, *Droit des fiducies*, above, note 3, paras. 58–78.1.

⁴⁷ See generally *Tucker*, above, note 46; R. A. Macdonald, 'Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies' (1994) 39 McGill L.J. 761, paras. 11–12; J. Ghestin and G. Goubeaux, *Traité de droit civil: Introduction générale*, 3rd edn (Paris: LGDJ, 1990), paras. 200–1. See also F. Terré and P. Simler, *Droit civil: Les biens*, 6th edn (Paris: Dalloz, 2002), para. 21.

seeking to interpret article 1260 *et seq.* C.C.Q., and instead tend to interpret the provisions endogenously.

Moreover, article 1273 C.C.Q., which allows private trusts to exist perpetually, creates a powerful incentive for practitioners in Quebec to interpret the category as broadly as possible so that their clients can have the maximum flexibility to define the terms and activities of the trusts they create.⁴⁸ Whilst common law practitioners exert themselves to characterize trusts as ‘trusts for persons’ to avoid their presumptive invalidity, Quebec practitioners have the incentive to avoid characterizing trusts as ‘personal trusts’ as much as possible, to avoid the time limits on their duration.

Consequently, it is foreseeable that the Quebec private trust will expand in popularity and extend its scope until the courts finally have occasion – perhaps a hundred years from now – to lay down clear guidelines on trust classification.⁴⁹ By then, however, the expansive notion of the ‘private trusts’ could be so ingrained that the courts may hesitate to adopt a more restrictive view, even if more in line with the original intent of the legislature back in 1994.

This development is particularly ironic given that the civil law property system was originally conceived to do away as much as possible with trust-like structures. The classical civilian property regime, with its notions of absolute ownership and the indivisible patrimony, arose in response to a profound distrust, following the French Revolution, of families and institutions that perpetuated their wealth and power through perpetual reserved landholdings.⁵⁰ Today,

⁴⁸ Art. 1273 C.C.Q. represents a major substantive difference from the common law, in which all non-charitable trusts – including commercial trusts, *Denley*-like trusts, and trusts for graveyards and animals – fall subject to the rule against perpetuities and (in the absence of statutory protection) must eventually terminate.

⁴⁹ But see *Trust Général du Canada c. Fleury*, J.E. 99-419 (C.S.) (14 January 1999), an unreported decision concerning a ‘foundation’ that aimed to subsidize education expenses of the direct descendants of the settlor and, alternatively, the poor and needy. The trial judge commented, without analysis and apparently without the points being contested, that the ‘foundation’ constituted ‘une fiducie sociale constituée dans un but d’intérêt général, notamment à caractère culturel et éducatif conformément aux dispositions de l’article 1270 du Code civil du Québec’.

⁵⁰ Waters, *Waters’ Law of Trusts*, above, note 9, pp. 15–16; P. Glenn, *Legal Traditions of the World*, 2nd edn (Oxford University Press, 2004), pp. 140ff; J. Carbonnier, ‘Le Code civil’, in P. Nora (ed.), *Les lieux de mémoire II: La Nation* (Paris: Gallimard, 1986), pp. 297ff; Macdonald, ‘Reconceiving the Symbols of Property’, above, note 47, para. 10. See also M. Cantin Cumyn, ‘La fiducie, un nouveau sujet de droit?’, in *Mélanges Ernest Caparos* (Montreal: Wilson & Lafleur, 2002), p. 67, para. 4.

however, the combined effect of articles 1268 and 1273 C.C.Q. – which amorphously define the ‘private trust’ and endow it with perpetual existence – negates these principles entirely and arguably makes Quebec even more accepting than the common law has ever been of reserved property-holding.

There is no suggestion that the legislature ever intended such a radical reconceptualization of its property regime, and unless the legal community in Quebec adopts a more restrictive view on what kind of trusts can qualify as ‘private’, the private trust may well prove a particularly subversive institution. A greater awareness of and willingness to refer to the common law origins of the private trust can help set workable limits for the institution and keep it largely in line with its counterparts in other jurisdictions. It remains to be seen, however, whether such awareness and willingness will be forthcoming.