

The Quebec Trust: Role Rich and Principle Poor?

Fourth Wainwright Lecture

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Introduction

The exact nature of the trust as an institution in the law of Quebec¹ has been a source of continual controversy. Some, but not all of that controversy will be stilled if the proposals contained in the Draft Civil Code of the Civil Code Revision Office are adopted.² The debate on the nature of the trust has usually been conducted on a conceptual level, and that aspect of the issue cannot, of course, be ignored. It is, however, possible at least to start the debate by looking at the function the trust serves. Its main reason for existence is to enable property owners to deal with their property, generally on a long-term basis, in such a way as to divide the burden and the benefit of ownership, the burden being thrown on the trustee and the benefit conferred on the beneficiaries.³ It is, therefore, a planning device, and in order to be a useful planning device it must satisfy three criteria. It

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¹Quebec enacted legislation on trusts in 1879: see *An Act Concerning the Trust*, S.Q. 1879, c. 29. In 1889 the provisions of the legislation were incorporated into the Civil Code: see articles 981a *et seq.*

²*Report on the Quebec Civil Code (1977)*, vol. 1 : *Draft Civil Code*, Book Four, arts 600 *et seq.* [hereinafter cited to *Draft*].

³There are, of course, in all legal systems various techniques which may be used to ensure in some measure a division of burden and benefit; examples include agency, incorporation and contracts for the benefit of third parties.

must be versatile, it must encompass the elements, at first glance perhaps contradictory, of predictability and flexibility, and it must be compatible with the general structure of the legal system in which it is being used. It is arguable that the trust of both the Civil Code and of the Draft fail to meet all three of these criteria. Little that is new can be added to the controversy about the nature of the trust under the Code. It therefore will be dealt with very briefly here, and the bulk of these comments will be devoted to a consideration of the provisions of the Draft.

I. The Code

A. Versatility

The trust as a planning device must be versatile, that is it must be role rich. Different property owners may well want to achieve different ends, and a rigid mechanism which will achieve only a limited range of objectives will inevitably be of limited usefulness. The trust that can be created under the Code lacks this element of versatility. It may be created only by way of gift or legacy and, read literally, article 981a of the Code would confine the beneficiaries to those who could take under a gift or legacy.⁴ It may not be created by onerous title,⁵ and it would seem that this prohibition may not be avoided by adding an onerous obligation to a trust created gratuitously.⁶ In general, therefore, the trust of the Code can be used only in a limited fashion in a family setting, and not at all for commercial purposes.⁷

B. Predictability and Flexibility

Even if a trust is of the type that apparently may be created under the Code it is not always clear how it will function. In part this is owing to uncertainty about the very nature of the basic concept. *La doctrine*, if not *la jurisprudence*, has not yet agreed on such fundamental questions as who is the owner of the trust property and what is the nature of the beneficiaries'

⁴But see *Tucker v. Royal Trust Company* [1982] 1 S.C.R. 250; (1982) 40 N.R. 361 [hereinafter cited to S.C.R.].

⁵*Birks v. Birks* [1980] C.S. 730, rev'd on appeal, C.A. (Montreal, 500-09-001011-808) April, 1983, but on other grounds. This decision is under appeal.

⁶*Crown Trust Company v. Higher* [1977] 1 S.C.R. 418; (1975) 69 D.L.R. (3d) 404 [hereinafter cited to S.C.R.].

⁷See the difficulties encountered with trusts for bond-holders; *The Special Corporate Powers Act*, R.S.Q. 1977, c. P-16; *Laliberté v. Larue* [1931] S.C.R. 7; [1931] 2 D.L.R. 12 (*sub nom. Lafontaine Apts. v. Larue*); Caron, *The Trust for Bond-holders in Quebec* (unpublished D. Phil. thesis, 1964); McGill University Faculty of Law, *The W.C.J. Meredith Memorial Lectures* (1976-77), Part 1, *Legal Aspects of Corporate Debt Financing*; J. Smith and Y. Renaud, *Droit québécois des corporations commerciales* (1974), vol. 2, ch. 26.

interest.⁸ In part the uncertainty flows from the very sparse detailed provisions in the Code. Two examples will serve to illustrate the point. It is clear that a trust may be created for charitable and other public purposes; it is not clear who may enforce the carrying out of the obligations thereby imposed on trustees.⁹ Who would use a device whose enforceability is in doubt? It has only recently been decided in *Tucker v. Royal Trust Company*¹⁰ that a trust may be created for the benefit of primary beneficiaries who were not born when the trust was established. If such a basic question was not settled until 1982 would not a draftsman be hesitant about using a trust in a way not expressly and clearly provided for by the Code?

The trust is thus not predictable in its operation; nor can it be said to be a flexible institution. Circumstances may change dramatically during the life of any trust. It is highly desirable that there be some mechanism available whereby the trust may accommodate itself to such change. It is not totally clear how far powers of variation may be built into the original trust document. More importantly, the courts have no power, inherent or statutory, to authorize variation of trusts that have been overtaken by the passage of time. There is thus an unfortunate lack of flexibility in a device which can be used to control the property affairs of families for up to two generations.

C. *Compatibility*

One of the reasons for the unpredictability that surrounds the use of the trust is the lack of agreement on the basic nature of the institution. That disagreement is by itself a major obstacle to the acceptance of the trust in

⁸See, for example, Cardinal, *La fiducie du Code civil* (1966) 26 R. du B. 522; Caron, *The Trust in Quebec* (1980) 25 McGill L.J. 421; Dussault, *La fiducie dans le droit québécois* (1963) 5 C. de D. 57; M. Faribault, *Traité théorique et pratique de la fiducie ou trust du droit civil dans la province de Québec* (1936); Graham, *Some Peculiarities of Trusts in Quebec* (1962) 22 R. de B. 137; Mankiewicz, *La fiducie québécoise et le trust de Common Law* (1952) 12 R. du B. 16; Mettarlin, *The Quebec Trust and the Civil Law* (1975) 21 McGill L.J. 175; Mignault, *A propos de fiducie* (1933) 12 R. du D. 73.

⁹*Valois v. de Boucherville* [1929] S.C.R. 234, [1929] 3 D.L.R. 801.

¹⁰*Supra*, note 4. But, as is pointed out earlier, the decision is of arguable validity. Art. 981a C.C. provides that a trust may be created "for the benefit of any persons in whose favour they [settlers or testators] can validly make gifts or legacies." That, contrary to the decision of the Supreme Court of Canada, would seem to require that the primary beneficiaries of a trust must be born at the date the trust was created: see arts 608 and 765 C.C. On the facts of the case the settlor had in fact reserved a life interest to herself. It was apparently not argued that she could be treated as a primary beneficiary, thereby avoiding the question of the validity of the gift to her unborn children. If, however, beneficiaries are confined to those in whose favour a gift or legacy may be made, it is arguable that a settlor could not be made a beneficiary under a trust, for a settlor could not make a direct gift to herself. On this latter question see *Draft*, *supra*, note 2, Book Four, arts 600, 607, and 613.

a civil law system. Professor Lawson has drawn a general comparison between the civil and the common law which is particularly apt in the case of a planning device like the trust:

The civilian likes to be able to see clearly the shape and limits of the abstract concepts and doctrines with which he has to work before he starts to work with them. Moreover, the law resembles the game of chess: the concepts must move according to clear and definite rules; and indeed very often they are like the pieces in chess, which are defined only in terms of the moves they can make. The common lawyer is much more inclined to use a concept of half-known outline as soon as he knows it is capable of performing the actual limited task he wants it to perform, leaving for further consideration what its other possibilities may be. Common law concepts are much more like human beings whose personalities become known only by experience and may easily change in course of time.¹¹

... The difference between the two points of view owes much to history; for whereas in the Common Law systems, at any rate in the mother-system, English law, the facts have always tended to be ahead of the law, in the Civil Law for many centuries the law was usually ahead of the facts.¹²

The "shape" and "limits" of the trust are not clear. A lawyer, whether drafting a simple will, or, assuming it were possible to use the trust in such a context, arranging a complex commercial transaction, cannot set off on a voyage into the unknown with impunity. If the concept he is using has not sufficiently crystallized, if it is not capable of giving reasonably clear operation and effect to the terms of the document that he is drafting, he will shy away from using it. While its basic conceptual framework is not clearly defined, the trust will always be regarded as an alien institution in a civil law system, and until it acquires more precise definition its use will be inhibited. The trust of the Code, not only role poor but also principle poor, fits uneasily into the framework of Quebec law.

II. Draft Civil Code

A. *Versatility*

It is clear that the trust provided for in the Draft is a much more versatile institution than is the trust of the Code. Under the Draft trusts may be created by onerous title.¹³ It is true that trusts for bond-holders are probably still governed by the provisions of the *Special Corporate Powers Act*,¹⁴ and it may be argued, though wrongly it is submitted, that trusts created by onerous title must be confined to those listed in article 607 of

¹¹F. Lawson, *A Common Lawyer Looks at the Civil Law* (1953), 66.

¹²*Ibid.*, 79.

¹³Draft, *supra*, note 2, Book Four, arts 601, 607.

¹⁴*Special Corporate Powers Act*, R.S.Q. 1977, c. P-16.

the Title on Trusts. However, there is no doubt that voting trusts or trusts conferring benefits on employees could be validly created under the Draft. There are very few restrictions on who may be the beneficiaries of trusts for individuals,¹⁵ and trusts for public or private purposes would appear to be subject only to such restrictions as would arise on the application of the general principles of the Draft in relation to such matters as public order and good morals. The trust of the Draft has clearly the potential to be role rich.

B. Predictability and Flexibility

The Draft contains answers to many more specific questions than does the Code, and if it is enacted the Quebec lawyer could grasp the trust with a surer hand. The nature of the interest of the beneficiary is clearly stated. During the trust a beneficiary has no right in the trust property, but simply a personal right, exercisable against the trustee, to call for the payment to him of income or, where appropriate, capital.¹⁶ Full provision is made for the enforcement of the trust. Private trusts, and purpose trusts assimilated to them, can be enforced by private individuals. Purpose trusts may be enforced by the public curator; that fills a major gap in the present law. A settlor may enforce both public and private trusts, a novel provision in the eyes of a common lawyer.¹⁷ The duties and powers of trustees are comprehensively spelled out.¹⁸ Finally, the revision makes provision for the duration, for the failure and for the termination of trusts.¹⁹

The trust contemplated by the Draft is also a much more flexible device. For example, the settlor need not at the outset spell out precisely the exact share of each beneficiary, but may reserve to himself, or may confer on a trustee, a beneficiary or a third party, the power of designating from time to time what the shares of the beneficiaries shall be.²⁰ More importantly perhaps, there is conferred on the court a power of variation which will enable the trust to be adapted to changing circumstances.²¹

But comprehensive though these detailed provisions may be, they will not solve all of the issues that may arise in the creation or administration of trusts. Nuances of interpretation will need to be settled, conflicts between the various provisions may arise, and it may become apparent that there are gaps in the law. Is there in the Draft a general concept of the nature of

¹⁵*Draft, supra*, note 2, Book Four, art. 613 makes it clear that the settlor may be a beneficiary.

¹⁶*Ibid.*, Book Four, art. 618.

¹⁷*Ibid.*, Book Four, arts 607, 618, 626, 629.

¹⁸*Ibid.*, Book Four, Title Seven, Ch. IV; see also Book Four, Title Six.

¹⁹*Ibid.*, Book Four, arts 621, 622, 632-8.

²⁰*Ibid.*, Book Four, art. 619.

²¹*Ibid.*, Book Four, arts 636-7.

a trust to which a lawyer can turn, and on the basis of which he can make reasonably confident predictions about how the courts will interpret, resolve conflicts or fill in gaps? If that is not possible then the inhibitions against the use of the trust may still exist.

At first glance, it would seem that for all its detailed rules the Draft has not addressed itself to the fundamental question of the nature of the trust. The very first article of Title Seven of Book Four raises the same vexed question that has been the object of so much debate under the Code — who is the owner of the trust property, and, if it is thought that the trustee is the owner, what is the nature of that ownership? If that question is still unsettled, then so also is the nature of the trust, and so the issue remains as to whether the trust of the Draft, rich in role, rich in many ways in detail, is still principle poor.

In the past, the tendency of *la doctrine*, but not of *la jurisprudence*, has been to approach that issue obliquely. The nature of the trust has been sought not in a direct analysis of that institution *per se*, but by the pursuit of analogy. Nuances of interpretation, conflicts and gaps in the law are then to be filled in by reference to the ways in which the comparable institution works. This methodology may be illustrated by a brief consideration of three of the analogies that have been traditionally pursued.

The first can be mentioned only to be quickly dismissed. It is generally accepted that the trust in Quebec owes something to the common law trust. It does not follow, however, that either in concept or in detail the Quebec trust need be but a pale reflection of its common law counterpart. Both the Privy Council, and, more recently, the Supreme Court of Canada have made that clear. In *O'Meara v. Bennett*²² it was argued that as there was no trust in French law the provisions in the Civil Code ought to be interpreted as having introduced English law except so far as that was expressly excluded. The Privy Council rejected that argument. In doing so it stated:

[I]t is essential to remember that the law of trusts is not innate in the law of Quebec, and that an examination of the question of how far the transaction would have been valid at English law is misleading until it is ascertained to what extent the English law applies.²³

The Supreme Court of Canada took the same position in *Tucker v. Royal Trust Company*.²⁴ Beetz J., speaking for the Court, said that it was

²²[1922] 1 A.C. 80 (P.C.).

²³*Ibid.*, 85.

²⁴*Supra*, note 4.

legitimate to refer to English law in dealing with arguments as to the nature of the Quebec trust. He continued, however:

Mais l'argument n'est pas décisif car ce n'est pas tout le droit anglais des trusts qui a été introduit en droit civil. Ainsi par exemple, on ne peut, en vertu des articles 981a et suivants se constituer soi-même fiduciaire au moyen d'une "declaration of trust". . . . Au surplus, l'adoption des articles 981a et suivants, n'a pas eu pour effet d'introduire au Québec la distinction anglaise entre le "legal title" et le "beneficial ownership", sorte de dédoublement de la propriété, notion étrangère au droit québécois qui veut que la propriété reste unique et porte toute entière sur une seule tête: . . . Le droit anglais n'est donc pas pertinent que dans la mesure de sa compatibilité avec les articles 981a et suivants du *Code civil*.²⁵

The second and third analogies seek to "civilize" the trust by treating it as no more than a specific example of an existing civil law institution. The trust has been said to be, or at least to resemble, a contract for the benefit of a third party, or to be a separate legal entity.

Even under the Code, the trust had been compared with a contract for the benefit of a third party, but that analogy was convincingly refuted by Faribault.²⁶ The Draft, not only because of the way in which it deals with trusts, but also because of the way in which it deals with contracts for the benefit of third parties,²⁷ enables the analogy to be re-examined. In the case of a contract one of the contracting parties, the promisee, may enforce the contract in favour of the third party beneficiary; as we have seen, in the Draft a settlor may also enforce a trust in favour of a beneficiary. The right of a beneficiary under a trust is expressly stated in the Draft to be a right *in personam* against the trustee; it is thus similar to the right of a third party to enforce a contract for his benefit. Third party contracts are no longer to be confined to contracts which are for the benefit of the promisee or which are donations with charges; that eliminates many of Faribault's objections to the analogy between contract and trust.²⁸

But even allowing for all of these changes, substantial objections still remain to the assimilation of one institution to the other. In the case of a contract for the benefit of a third party the Draft provides that the beneficiary must be alive at the date of the creation of the contract;²⁹ that, as *Tucker v. Royal Trust Company*³⁰ decided, is not the law in the case of a trust. A promisee, who, in the case of a contract, stipulates for the benefit of a third

²⁵*Ibid.*, 261.

²⁶Faribault, *supra*, note 8, 86.

²⁷*Draft*, *supra*, note 2, Book Five, arts 85-93.

²⁸In relation to contracts for the benefit of third parties, see *ibid.*, Book Five, arts 85-93; in relation to trusts see text following note 13, *supra*.

²⁹*Ibid.*, Book Five, art. 87.

³⁰*Supra*, note 4.

party, may revoke that stipulation before the third party accepts the benefit; a trust is complete and irrevocable before the beneficiary accepts, or indeed even knows of the provision operating in his favour.³¹ And, more significantly, it is difficult to apply the third party contract analysis to a testamentary trust. Thus the resemblances between a trust and a contract for the benefit of a third party may be greater under the Draft than under the Code, but there are still too many differences between them for the trust to be regarded as a third party contract *manqué*. The pursuit of this analogy is still not going to be of any great value in any attempt to clarify the nature of a trust.

It has also been argued that the trust is a separate legal entity, of which the trustee is simply an administrator. Many of the provisions in the Draft dealing with the notion of legal person and the trust are compatible with that theory. Property transferred on trust constitutes a distinct legal patrimony.³² The trust documents regulate the use which may be made of the trust *corpus* and income; this corresponds to the provision in the case of a legal person that the articles determine the purpose or the objects of the entity.³³ The administrator of a legal person and a trustee both have the same general powers of administration.³⁴

The analogy may in some measure be sustained even with respect to the liability of the trustee or the administrator towards third parties. Under article 570 of Book Four neither an administrator of a legal person, nor a trustee, are personally liable to a third party if they contract in the name of their beneficiary. For the purposes of the article a beneficiary is a person whose property is subject to administration.³⁵ In the case of an administrator the beneficiary is obviously the legal person. In the case of a trust it cannot be the beneficiaries, for the one thing that the Title on Trusts appears to try to do is to ensure that the beneficiary will not be treated as an owner.³⁶ The trustee himself cannot of course be the beneficiary. Does it not then make more sense to regard the trust as a separate legal entity, which is the owner of the trust property and one on whose behalf the trustee is acting as an administrator? That argument does eventually lead to some difficulty. The members of a legal person are responsible for the debts of the entity. If a trust were to be regarded as a separate legal entity would the beneficiaries become liable for its debts? That would be a strange position, and article

³¹*Draft, supra*, note 2, Book Five, art. 88, and Book Four, art. 620; see also *Curran v. Davis* [1933] S.C.R. 283; [1934] 1 D.L.R. 161.

³²*Draft, supra*, note 2, Book Four, art. 603.

³³*Ibid.*, Book Four, art. 603; see also Book One, art. 248.

³⁴*Ibid.*, Book One, art. 247; see also Book Four, art. 624.

³⁵*Ibid.*, Book Four, art. 488.

³⁶*Ibid.*, Book Four, arts 617-8.

625 of the Title on Trusts suggests that that is not the case. If, therefore, a trust is to be regarded as a legal person, it appears that it should be treated as a corporation, or as a special legal person to which article 249 does not apply.

If, however, the analogy becomes difficult to pursue in considering the liability of the beneficiaries towards third parties, it breaks down with respect to some aspects of the formation, the management and the termination of the legal person and of the trust. A trust may be created by a private transfer of property; a legal person must be created according to law and registered.³⁷ The members of a legal person have a right to be consulted in general meeting and may, in some degree, exercise control over the decisions of the administrators;³⁸ as a general rule those rights are not available to beneficiaries under a trust. Any legal person may have a perpetual existence, but that is true only of trusts established for public or private purposes.³⁹ The termination of a legal person and of a trust is governed by quite different rules. To take but one example, the members of a legal person may agree to bring its existence to an end, but the beneficiaries of a trust may not unilaterally decide that the trust should be terminated.⁴⁰

One can only conclude that, as with the common law trust and the contract for the benefit of a third party, a sufficiently close parallel cannot be established between the trust and the legal person. That is not really a surprising result. If it had been intended that the trust was to be a replica of its common law counterpart, or a type of contract or legal person, express provisions to that effect would no doubt have been made. Rather than that being done, at least one of those possibilities, the classification of the trust as a legal person, was considered and rejected during the deliberations leading up to the writing of the Draft.⁴¹ The pursuit of analogy may be a fascinating and, on occasion, an illuminating process. It will not however disclose the true nature of the trust. That can only be done, if at all, by an analysis of the nature of that institution itself.

The Draft treats the trust as an institution of the law of property. In the first instance, *la doctrine* and *la jurisprudence* should so treat it unless it becomes clearly impossible to do so. The vexatious question in pursuing that analysis is, of course, the location and the nature of the ownership of the property subject to the trust. The Draft, unfortunately, does not address either of those issues. Indeed it gives less direction than does the Code.

³⁷*Ibid.*, Book One, arts 241-2.

³⁸*Ibid.*, Book One, arts 253-64, 275.

³⁹*Ibid.*, Book One, art. 266; see also Book Four, art. 634.

⁴⁰*Ibid.*, Book One, arts 266-9; see also Book Four, arts 622-8.

⁴¹Caron, *supra*, note 8.

Article 981a of the Code states that the property is transferred to the trustees. In general the courts have interpreted this as meaning that the trustees do become the owners of the trust property. On the other hand, *la doctrine* has consistently refused to accept that such is necessarily the case.⁴² Article 600 of the Draft refers simply to a transfer, but does not purport to name the transferee. Nonetheless, it may be implied that the trustees should be held to be the owners. A trust is created by a transfer; ownership therefore would seem to leave the settlor. A beneficiary has, during the trust, only personal rights against the trustee, and no real rights in the trust property itself.⁴³ Ownership would thus seem in the first instance to vest in the trustee.⁴⁴

But if that be so, what is the nature of that ownership? Quebec lawyers will often start an analysis of that question by denying the possibility of any dismemberment or dual ownership of property such as is said to occur in the case of a common law trust. A common lawyer would no doubt respond that no such dismemberment or dual ownership takes place. If a settlor creates a trust by transferring property to a trustee to hold on trust for a beneficiary, he does not divide his existing ownership into two parts, giving one to the trustee and the other to the beneficiary. He gives his ownership to the trustee, and then imposes an obligation on him running in favour of the beneficiary. The effect of the creation of a trust is to bring into existence a right which did not exist before. But if that is not a dismemberment of ownership, is it not dual ownership? Again, the common law answer is in the negative, for the Court of Chancery in recognizing the trust gave the beneficiary no control over the trust property, but rather control over the trustee. This was done by imposing a personal obligation on the owner enforceable in favour of the beneficiary. Thus, in *Underhill on Trusts*⁴⁵ a trust is defined in terms of obligation running against the owner of property rather than in terms of ownership *per se*. The rights of the beneficiary under the Draft are, as we have just noted, also stated to be personal rights against the trustee. Does that not solve the dilemma of ownership? The trustee is indeed the owner; the beneficiary has *in personam* rights against him, but no *in rem* rights in the trust property.

Even if all that be accepted, a civil lawyer would still have doubts about the nature of the trustee's ownership. A common lawyer, if he ever stopped

⁴²As to the case law, see the latest judicial pronouncement in *Tucker v. Royal Trust Company*, *supra*, note 4. As to *la doctrine*, see the material cited, *supra*, note 8.

⁴³*Draft*, *supra*, note 2, Book Four, art. 618.

⁴⁴Assuming, of course, the rejection of the analogy to the legal person.

⁴⁵D. Hayton, ed., *Underhill's Law Relating to Trusts and Trustees*, 13th ed. (1979) 1.

to analyze the trust in terms of general principle, might also share those doubts. The Draft defines ownership in article 34 of Book Four:

Ownership is the right to use, enjoy and dispose of things to the fullest, within the limits and under the conditions established by law.

If a common lawyer were to think in these terms, this definition could apply quite easily to a fee simple title in the case of realty, or to the ownership of personal property — for example shares. If the trustee is the owner of the trust property, does that not mean that in both the common law and the civil law there are significant departures from the usual concept of ownership? It may be argued that that is indeed the case in at least three important respects.

First, a trustee does not personally enjoy any of the benefits arising from the property of which he is said to be the owner. For example, during the trust he must account to the income beneficiary for the profits arising from the trust property. However, a common lawyer would argue that he is still the owner of the property against all the world, including the beneficiary. If in a trust of realty the trust property is leased to a lessee, the trustee alone can sue for the rent and enforce the terms of the lease. In the case of a trust of shares, the trustee alone is registered as the owner, he alone can vote at company meetings and he alone is entitled to receive dividends. Does his obligation to account make him any less an owner than someone who has contracted to account to a third party?

Second, are trustees' powers of disposition not more limited than would be the powers of disposition of any ordinary owner? In the common law, a trustee is always in a position to pass good title to trust property to a third party. Even if the transfer is made in breach of his duty as a trustee, the third party nonetheless acquires title. He in turn may have an obligation imposed upon him in favour of the beneficiary if he is not a *bona fide* purchaser for value without notice of a breach of trust.⁴⁶ But, the common lawyer would contend, the normal attributes of title are not changed; the fact that the courts control the good conscience of the owner from time to time by the imposition of personal obligations is not incompatible with the existence of normal powers of disposition. The terms of the Draft make such an analysis difficult in the civil law. A trustee may dispose of property by onerous title if that is in the interests of the beneficiaries.⁴⁷ The Draft does not state what are the consequences of an unauthorized disposition being made. May it be set aside or, if it is valid, are the trustees liable in damages? However, if the consequences of an unauthorized disposition by onerous title are not clear, the consequences of a disposition by gratuitous

⁴⁶This may, of course, need to be modified where there is a system of registration of title.

⁴⁷Draft, *supra*, note 2, Book Four, art. 508.

title are. Article 528 of Book Four prohibits gifts by trustees, and provides that any attempt to make a gift is void. Here, therefore, the common law retains the facade of ownership, but the civil law does not.

Third, a trustee may lose title during, and inevitably will lose title at the end of, a trust. In both systems a trustee may be removed by a court order during the administration of the trust. That, it may be argued, is surely not compatible with the idea of ownership, or with the idea that the beneficiary simply controls the trustee and not the property. Even more significantly, under article 630 of the Draft a trustee at the end of the trust must transfer the corpus to those beneficiaries then entitled to it. Equally, in the common law, if one beneficiary, or between them a group of beneficiaries, controls the total beneficial interest, then the trustees may be compelled to make a transfer of the property at his or their direction. It is surely a strange type of ownership in respect of which the owner from the outset knows that he will be under an obligation in due course to make a transfer of his title at the direction of a third party.

It may therefore be possible to explain away arguments about the nature of the trustee's ownership in so far as the trustee must account to the income beneficiary for the profits arising from time to time from the trust property. It is somewhat more difficult to explain away the limits on a trustee's powers of disposition, and impossible to explain the limited duration of what in most cases is *prima facie* supposed to be a perpetual title. The common lawyer has not concerned himself with these conceptual problems. They loom large in any attempt to fit the trust into the more conceptual and more principled framework of the civil law. If issues such as the location of ownership or, should it be vested in the trustee, the nature of ownership, are as unsettled under the Draft as they were under the Code, the trust, for all the detail of the Draft, remains principle poor, or at least principle suspect.

C. *Compatibility*

If, as has just been suggested, the trust of the Draft is still principle poor, its status within the Quebec legal system remains unresolved. Assuming that the Draft is enacted without amendment, the attempt to accommodate the trust to a civil law system can take two forms. Neither offers an attractive prospect for the future.

One possibility is that the debate about the nature of the trust will be continued through a search for analogies that has not produced any consensus in the past. There is no reason to suspect that, in the absence of more precise guidance from the legislature, it will do so in the future. The Quebec lawyer may still then hesitate about using the trust to the full, and, if that

be so, the rich potential apparently offered by the provisions of the Draft will remain untapped.

The second and, perhaps, more likely possibility, is that under the Draft as under the Code, the courts, or at least the Supreme Court of Canada, will continue to take a pragmatic approach to the way in which the trust should operate. In *Tucker v. Royal Trust Company*⁴⁸ there are, either implicit or explicit, three suggestions as to how the trust should be dealt with.

First, it must be accepted that the trustee is the owner of the trust property, and that his ownership is a modification of the conventional view of ownership. This is a necessary inference from the way in which the trust has been incorporated into the civil law. In this connection, the Supreme Court might also have noted that there is some authority for the view that Roman law and early civil law did accept a form of fiduciary ownership, and that the absolute concept of ownership which is presently found in the Code is, arguably, a somewhat modern Napoleonic conceit.⁴⁹

Second, *Tucker* suggests that the search for analogies in the civil law should be abandoned. In that case the Court rejected the argument that because a gift could not be made in favour of an unborn person, it follows that a trust could not be created for unborn persons who were to be the primary beneficiaries. The trust has an independent status. It was introduced into Quebec law in order to enable things to be done that otherwise perhaps might not have been possible. Applying that reasoning to the Draft, the potentially rich trust would be unduly constrained if it were narrowed by drawing unnecessary analogies to other legal institutions.

The third point may in part overlap the second. It would be going too far to suggest that *Tucker* is authority for the view that one should abandon the search for principle. The case does, however, support the proposition that one should pay due attention to purpose. The trust in both the Code and the Draft is designed to enable property owners to plan for the long term management and enjoyment of property. A draftsman should obviously expect a trust to be held invalid if it contravenes any of the specific mandatory provisions of the Draft. Equally, he should not be surprised if the trust is held invalid on the basis that it runs contrary to principles of public order or good morals. Beyond that, however, his expectation should be that the trust will be held valid rather than invalid, even if there is no specific provision authorizing the provisions in question. Again in terms of the Draft, if that is not done, the potentially wide range of uses to which the trust may be put will be unduly limited.

⁴⁸*Supra*, note 4.

⁴⁹Bolgar, *Why No Trusts in the Civil Law?* (1953) 2 Am. J. Comp. L. 204.

If this approach is taken, it may by force of authority bind the courts. But, judging by the relationship between *la jurisprudence* and *la doctrine* with respect to trusts under the Code, it will probably not still the debate about the nature of the trust. The practising lawyer, assured though he may be by judicial decision, may still hesitate to use the trust to the full, and once more the potentially rich role of the trust will be frustrated.

Conclusion

The Draft, it is suggested, should have grasped the nettle more firmly. There is, it would seem, one of two ways of dealing with the issue of the integration of the trust into Quebec law. On the one hand, it can be argued that the trust *mechanism*, as it exists in the common law, should either be fully accepted or should not be accepted at all. If it is decided that the common law mechanism is to be accepted, the Draft should give clear guidance, in terms of basic principle, on what consequences flow from that decision. If the trustee is to be the owner of the property, then that position should be stated in the Draft, with whatever qualifications may be necessary in light of the general definition of ownership in article 34 of Book Four. Assuming that this is a desirable solution, it should be spelled out in the Code rather than based upon judicial decision. If that is not done it seems clear, from past experience, that the debate about the nature of the trust in Quebec will never be stilled.

The other possible approach is to abandon the use of the trust mechanism completely, and to provide in some other way for the carrying out of the purposes for which the trust is needed. It is clear that there is great value in being able to arrange a division of burden and benefit with respect to property. It may, however, be that the incompatibility of the common law trust mechanism with what are regarded as basic concepts of the civil law make it an undesirable device in the law of Quebec. The solution then would be to select an existing civil law device that has the capacity to bring about the end of the division of burden and benefit, making whatever modifications may be necessary to that institution. Adopting that approach, it would make most sense to treat the trust as a separate independent legal entity, in other words as a legal person. The legal person would then be the owner of the trust property, and the trustees would be simple administrators. That solution was rejected by the Civil Code Revision Office.⁵⁰ However, having rejected that option, the Draft does not clearly adopt any alternative. It would be unfortunate if, as a result of this failure to settle basic issues, uncertainty and doubt as to the nature of the trust continue to plague Quebec law.

⁵⁰Caron, *supra*, note 8. But see now Title Six of Bill 58, *An Act to add the reformed law of property to the Civil Code of Québec* 1983, presently in first reading. This proposed legislation describes the trust as a "patrimonium by appropriation": see arts 1292-6.