

THE CANADA NOT-FOR-PROFIT CORPORATIONS ACT AND QUEBEC TRUST LAW: A NEW OPPORTUNITY FOR QUEBEC DONORS

Troy McEachren* and Christos Panagopoulos

The law of Quebec generally prohibits corporate trustees only where such corporations are authorized by law to act as a trust. At present, only federally incorporated or provincially incorporated trust companies may act as trustees of a Quebec trust as well as certain hospital foundations or in the context of pensions plans. The authors argue that the Canada Not-for-profit Corporations Act (CNCA) provides an additional authorisation such that corporations governed by the CNCA may accept assets in trust in Quebec. The CNCA now provides new opportunities for Quebec donors by allowing them to use the legal mechanisms of a Quebec trust when making a donation to a registered charity. Thus, there can be greater certainty as to how the donor's wishes are met, segregation of funds, and asset protection. Additionally, the authors will briefly discuss how residents of common law jurisdictions can use a Quebec trust to avoid the limitations of a charitable purpose trust.

Le droit québécois interdit, de façon générale, aux sociétés d'agir à titre de fiduciaires, sauf dans la mesure où elles sont autorisées par la loi à agir à ce titre. Actuellement, seules les sociétés de fiducie constituées en vertu d'une loi fédérale ou d'une loi provinciale du Québec peuvent agir en qualité de fiduciaires d'une fiducie québécoise, ainsi que certaines fondations d'hôpitaux ou dans le contexte d'un régime de retraite. Les auteurs font valoir que la Loi canadienne sur les organisations à but non lucratif (LCOBNL) fournit une autorisation supplémentaire qui permet aux organisations régies par cette loi d'accepter des biens en fiducie au Québec. La LCOBNL offre ainsi de nouvelles possibilités aux donateurs québécois en leur permettant de recourir aux mécanismes légaux d'une fiducie québécoise lorsqu'ils font un don à un organisme de bienfaisance enregistré. Cela aurait pour effet d'assurer une plus grande certitude quant au respect des choix du donateur, à la séparation des fonds et à la protection des biens. Les auteurs discutent également brièvement des moyens par lesquels la constitution d'une fiducie au Québec permettrait aux résidents des ressorts de common law de contrer les limites qui leur sont imposées par une fiducie constituée à des fins de bienfaisance.

* Miller Thomson LLP.

1. Introduction

It has been increasingly recognised by commentators that the next generation of philanthropists have a different approach to giving than did past generations.¹ Donors today have increased expectations as to the use of their donations and an increased desire to participate in how the funds they donate are spent. Charities are responding to this change in donors' behaviour by permitting donors to restrict the use of their funds or to participate in the decision making process as to how funds are spent. Charities also know that involved donors typically give more than uninvolved donors.²

To permit such participation or to impose such restrictions, several legal vehicles are available to donors. One such vehicle is the charitable purpose trust. A charitable purpose trust has been described in the *Restatement of Trusts* as follows:

A charitable purpose trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.³

In essence, a charitable purpose trust is a trust that is administered by its trustee for the furtherance of a charitable purpose. When a donor makes a gift to a charity using a charitable purpose trust, he or she creates a separate trust that is administered in accordance with the law of trusts, which includes the prohibition from using the funds given for a purpose other than the purposes set out in the trust deed.

In addition, the Canada Revenue Agency (CRA) takes the position that if the trustee of a charitable purpose trust is a registered charity no separate charitable registration of the trust is required.⁴

¹ See e.g. Charlotte Cloutier, "Donor-Advised Funds in the U.S.: Controversy and Debate" (2004) 19:2 *The Philanthropist* 85; Terrance S Carter, "Donor-Restricted Charitable Gifts: A Practical Overview Revisited II" (2003) 18:1 *The Philanthropist* 121.

² Cloutier, *ibid* at 88.

³ American Law Institute, *Restatement (Second) of Trusts* (Washington, DC: American Law Institute, 1959) at para 348.

⁴ Canada Revenue Agency, "Summary Policy CSP-R22: Restricted Funds" (September 3, 2003; revised November 23, 2005).

2. General Prohibition Against Corporate Trustees in Quebec and Exceptions

With the adoption of the *Civil Code of Québec (CCQ)* in 1994, Quebec introduced the social trust. Article 1270 *CCQ* provides that a social trust is a trust constituted for a purpose of general interest such a cultural, educational, philanthropic, religious or scientific purpose.⁵ It is prohibited by article 1270 *CCQ* from having the making of profit or the operation of a business as its main object. As the *CCQ* provides a complete code for the use of trusts, a social trust would be a convenient as well as an efficient vehicle for donors to use.

Unfortunately, the use of a social trust by donors in the context of making a donation to a charity that is a corporation is not possible in Quebec due to a technical prohibition contained in the *CCQ* unless the trustee of such a trust is a natural person. As mentioned above, no separate charitable registration is required when the trustee of a trust is already a registered charity. Also, given the increased standard of care to which a trustee is subjected, in most instances it would be preferable to have the corporation act as trustee.

The *CCQ* contains a general prohibition against corporations acting as trustees unless such corporations are authorised by law to act as such.⁶ It is generally accepted that the expression “authorised by law” means

⁵ SRQ, c C-1991 (*CCQ*). The purposes contemplated by article 1270 *CCQ* are broader than the common law definition of charity, which is the definition generally used by the tax authorities under the *Income Tax Act* (Canada) (*ITA*), RSC 1985, c 1 (5th Supp) and the *Taxation Act* (Quebec) (*TA*), CQLR, c I-3. Generally, under both the *ITA* and the *TA*, the definition of charity developed by the courts culminating in the House of Lords decision *Commissioners for Special Purposes of the Income Tax Act v Pemsel*, [1891] AC 531 (HL), is used to determine what purposes are charitable. At common law, purposes and activities are charitable if they fall within one or more of the following four heads: relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community. At present, there has been limited analysis in Quebec on a civil law definition of charity and whether it is broader than the *Pemsel* definition. If such a civil law definition exists or is developed, given sections 8.1 and 8.2 of the *Interpretation Act*, RSC 1985, c I-21 it is arguable that the civilian definition should be adopted under both the *ITA* and the *TA* for charities that are located in Quebec.

⁶ Troy McEachren, *L'Administration du bien d'autrui* (Montreal: JurisClasseur Québec – Collection Thema, 2013) at para 3; Maurice Martel and Paul Martel, *La compagnie au Québec, les aspects juridiques*, rev ed (Montreal: Éditions Wilson & Lafleur, Martel ltée, 1999) vol 1 at 9-2 to 9-3; Jacques Beaulne, *Droits des fiducies*, 2nd ed (Montreal: Wilson & Lafleur, 2005) at para.192; and John B Claxton, *Studies on the Quebec Law of Trusts* (Toronto: Thomson Carswell, 2005) at para 7.32

authorised by legislation.⁷ The *CCQ*, which lays down the *jus commune*⁸ (or common law) of Quebec, creates the general prohibition at article 304 *CCQ*, which provides:

304. Legal persons may not exercise tutorship or curatorship to the person.

They may, however, to the extent that they are authorized by law to act as such, hold office as tutor or curator to property, liquidator of a succession, sequestrator, *trustee* or administrator of another legal person.

304. Les personnes morales ne peuvent exercer ni la tutelle ni la curatelle à la personne.

Elles peuvent cependant, dans la mesure où elles sont autorisées par la loi à ce titre, exercer la charge de tuteur ou de curateur aux biens, de liquidateur d'une succession, de séquestre, *de fiduciaire* ou d'administrateur d'une autre personne morale.⁹

Article 304 *CCQ* is completed by article 1274 *CCQ*, found in Title Six of Book Five governing the law of trusts, which reads:

1274. Any natural person having the full exercise of his civil rights, and any legal person authorized by law, may act as a trustee.

1274. La personne physique pleinement capable de l'exercice ses droits civils peut être fiduciaire, de même que la personne morale autorisée par la loi.

Thus, any trustee other than a natural person must be authorized by law (that is, by statute) to act as a trustee. It is accepted by the doctrine that the authorising law can be either an act of the Quebec legislature or of Parliament.¹⁰ This logically flows from the shared distribution of the power of incorporation found in the *Constitution Act 1867*.¹¹

Provincial incorporation power is found in subsection 92(11) of the *Constitution Act 1867* which provides that the provinces have the power to make laws in relation to "the incorporation of companies with provincial objects." The Supreme Court of Canada in *Canadian Pioneer Management Ltd et al v Labour Relations Board of Saskatchewan et al*¹² confirmed provincial power over the regulation of the activities of a trust company.

⁷ McEachren, *ibid*.

⁸ *CCQ*, *supra* note 5, Preliminary Provision.

⁹ *Ibid*, s 304 [emphasis added].

¹⁰ See authorities cited *supra* note 6.

¹¹ 30 & 31 Victoria, c 3 (UK).

¹² [1980] 1 SCR 433.

As concerns Parliament, the courts have recognized the federal incorporating power by virtue of the residuary nature of the peace, order, and good government power found in the opening words of section 91 of the *Constitution Act, 1867*,¹³ which the Supreme Court of Canada has held includes the power to incorporate trust companies.¹⁴

Also, there is no requirement that the authorization be express. For example, a trust company incorporated under the *Act respecting trust companies and savings companies*,¹⁵ or the *Trust and Loan Companies Act*,¹⁶ may act as a trustee in Quebec even though neither statute expressly mentions the *CCQ* or expressly grants such authorization in the context of the *CCQ*. Health care or social service institutions governed by the *Act respecting health services and social services (Health Act)*,¹⁷ as well as foundations of such institutions,¹⁸ may also act as trustees of contributions made to such institutions for special purposes.¹⁹ To this list one may now add not-for-profit corporations governed by the *Canada Not-for-profit Corporations Act (CNCA)*.²⁰

3. Additional Exception Created by the CNCA

We argue that one of the consequences of the coming into force of the *CNCA* is that it contains an additional authorization for corporations governed by the *CNCA* to act as trustees of a Quebec trust. This authorization flows from sections 31 and 32 of the *CNCA*, which provide:

31. A corporation owns any property of any kind that is transferred to or otherwise vested in the corporation and does not hold any property in trust unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.

31. L'organisation est propriétaire de tous les biens qui lui sont transférés ou autrement dévolus et ne détient aucun bien en fiducie, à moins que le bien ne lui ait été expressément transféré en fiducie dans un but déterminé.

¹³ *Supra* note 11.

¹⁴ *Supra* note 12.

¹⁵ CQLR, c S-29.01.

¹⁶ SC 1991, c 45.

¹⁷ CQLR, c S-4.2.

¹⁸ As defined in section 132.2 of the *Health Act*, *ibid.*

¹⁹ Sections 269 and 271 of the *Health Act*, *ibid.* See also *Bank of Nova Scotia Co v Raymond Chabot Inc* (2001), JE 2001-1452 (Qc Sup Ct).

²⁰ SC 2009, c 23.

32. Directors are not, in that capacity, trustees for any property of the corporation, including property held in trust by the corporation.

32. Les administrateurs ne sont pas, en cette qualité, fiduciaires des biens de l'organisation ni de ceux qu'elle détient en fiducie.

Section 31 of the *CNCA* makes clear that unless property is the subject of an express trust for a specific purpose such property is owned beneficially by and vested in the corporation. Section 32 of the *CNCA* makes clear that the directors are not the trustees of the property of the corporation even if the property is held in trust. When property is transferred to a corporation in trust, it is the corporation that is the trustee of such a trust and not the directors. To understand the scope of sections 31 and 32 of the *CNCA* one must understand the purpose of the provisions.²¹

It appears that the purpose behind the inclusion of sections 31 and 32 in the *CNCA* was to address the confusion under the common law as to how property of a charitable corporation is owned. Is the property owned beneficially by the charity or on trust for charitable purposes? Are the directors of a “charitable” corporation trustees and therefore subject to a higher standard of care than directors of non-charitable corporations?²² The confusion in this area stems from a number of decisions of the courts in Ontario. In *Re Christian Brothers of Ireland in Canada*, the Court of Appeal of Ontario had to address, in part, whether the assets of the Christian Brothers were immune from tort liability because of the manner in which the assets were held. In the Court of Appeal, Feldman JA for the

²¹ As Elmer Driedger wrote in his seminal text, *Construction of Statutes*, 2d ed (Toronto: Butterworths, 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in the entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

With respect to the purposes method of interpreting legislation, reference should be made to Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Toronto: LexisNexis Canada Inc., 2008) at 255ff; see also Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Thomson Reuters, 2011) at 407ff.

²² Paul Martel, *Loi canadienne sur les organisations à but non lucratif, Loi, règlement et commentaires*, (Montreal: Wilson & Lafleur Martel Itée, 2012) at 33; Peter Broder, ed, *Primer for Directors of Not-for-profit Corporations* (Ottawa: Industry Canada, 2002). See also *Christian Brothers of Ireland in Canada (Re)* (2000), 47 OR (3d) 674 (CA) [*Christian Brothers*]; *Rowland v Vancouver College Ltd.*, 2001 BCCA 527, (2001), 94 BCLR (3d) 249; *O'Neill Community Ratepayers Assn v Oshawa (City)* (1995), 22 OR (3d) 648 (Sup Ct); *Save Our Waterfront Parks Society v The City of Vancouver et al*, 2004 BCSC 430, (2004), 28 BCLR (4th) 142; *Gibbons et al v St John's (City) et al*, 2005 NLTD 124 (2005), 250 Nfld & PEIR 4; *Save the Heritage Simpson Covenant Society v City of Kelowna*, 2008 BCSC 1084, (2008), 296 DLR (4th) 419; *TLC The Land Conservancy of British Columbia (Re)*, 2014 BCSC 97, (2014) 58 BCLR (5th) 321 .

majority recognized that while a charitable corporation generally holds its assets beneficially as all corporations do, she found that a charitable corporation is obliged to use its assets only to further the charitable purposes of the corporation.²³ She based her conclusion on the following passage by Slade J in *Liverpool and District Hospital for Diseases of the Heart v A-G*:

In a broad sense a corporate body may no doubt aptly be said to hold its assets as a “trustee” for charitable purposes in any case where the terms of its constitution place a legally binding restriction upon it which obliges it to apply its assets for exclusively charitable purposes. In a broad sense it may even be said, in such a case, that the company is not the “beneficial owner” of its assets. In my judgment, however, none of the authorities on which Mr. Mummery has relied, including the decision in *Construction Industry Training Board v. Attorney General*, [1973] Ch. 173, establish that a company formed under the Companies Act 1948 for charitable purposes is a trustee in the strict sense of its corporate assets, so that on a winding up these assets do not fall to be dealt with in accordance with the provisions of s. 257 et seq. of that Act. They do, in my opinion, clearly establish that such a company is in a position analogous to that of a trustee in relation to its corporate assets, such as ordinarily to give rise to the jurisdiction of the court to intervene in its affairs; but that is quite a different matter.²⁴

Feldman JA then went on to state that “[b]ecause of the trust-like obligations of the charitable corporation, it is accepted that the court maintains its supervisory scheme-making power whether a charity’s legal form is as a charitable trust or a charitable corporation.” While she found that the assets of the Christian Brothers, regardless of whether they were held in trust or not, were available to pay the tort claims made against the corporation, her judgement essentially supported the recognition of trustee-like obligations of charitable corporations. To find that property donated to a charity is held in a trust-like relationship, when the donor did not express such intention, could impose unnecessary restrictions on the manner in which such corporations use or dispose of their assets.

Likewise, in a number of decisions, Ontario courts have grappled with the question of whether directors of a charitable corporation are subject to the same fiduciary duties as directors of non-charitable corporations or whether a higher standard of care is imposed upon such directors.²⁵

²³ *Christian Brothers*, *ibid* at paras 69-71.

²⁴ [1981] 1 Ch 193 at 209.

²⁵ See generally Jane Burke-Robertson, “Liability Issues Affecting Directors and Officers in the Voluntary Sector” (2002) 17 *The Philanthropist* 46.

It is arguable therefore that sections 31 and 32 of the *CNCA* are remedial in nature²⁶ in that the provisions are designed to provide clarity to the confusion caused by the decisions mentioned above. The provisions make clear that the directors of a corporation governed by the *CNCA* are not trustees of funds held by the corporation. It also makes clear that the corporation will only be holding funds in trust when property is transferred to the corporation expressly in trust for a specific purpose or purposes.

The *CNCA* does not prescribe the law that governs trusts such as those referred to in section 31. Based on sections 8.1 and 8.2 of the *Interpretation Act*,²⁷ it is arguable that when property is transferred to a corporation governed by the *CNCA* in trust by way of a contract that would be subject to Quebec law under the *CCQ*, the trust would be governed by the law of Quebec. It is submitted that section 31 of the *CNCA* provides legislative authorization within the meaning of the expression “authorised by law” in articles 304 and 1274 *CCQ*. As discussed above, neither article 304 nor 1274 *CCQ* prescribe the manner by which a corporate trustee is to be authorized by law. It is arguable that section 31 of the *CNCA* gives such authorisation in its closing words that provide “... unless that property was transferred to the corporation expressly in trust for a specific purpose or purposes.” Thus, if property were transferred by way of an express purpose trust the corporation would be entitled to act as trustee of those funds.

There is no public policy reason that would argue against such recognition especially since the *CCQ* contains detailed rules on social trusts that create a framework for the proper administration of such trusts.²⁸

The *CCQ* contains a rule at article 1275 *CCQ* that most common law lawyers would find curious. Article 1275 *CCQ* provides that a beneficiary or settlor of a trust may act as trustee but he or she must act with a trustee who is neither a settlor nor a beneficiary. The courts have held that article 1275 *CCQ* is of public order therefore it cannot be contracted out of by the parties to the trust.²⁹ The trust contemplated by section 31 of the *CNCA*

²⁶ Section 12 of the *Interpretation Act*, *supra* note 5, provides that every enactment is “deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

²⁷ *Ibid.*

²⁸ See John Claxton, *Studies on the Quebec Law of Trust* (Toronto: Thomson Carswell, 2005) at para 5.24ff.

²⁹ *Brassard v Brassard*, 2009 QCCA 898, [2009] JQ no 4352 (QL). As to the consequences of the failure to respect the provisions of article 1275 *CCQ*, see *Financière Transcapitale inc v Fiducie succession Jean-Marc Allaire*, 2012 QCCS 5733, [2012] JQ no 13169 (QL).

refers to a specific purpose or purposes in which case the corporation is not a beneficiary of the trust *per se* therefore, there is no breach of article 1275 *CCQ* if a corporation were to act alone as trustee.³⁰

4. *Use of Quebec Trust by Non-Quebec Residents*

As purpose trusts under the common law are generally limited to charitable purposes,³¹ a corporation governed by the *CNCA* that is not a registered charity cannot use a purpose trust under the common law. Quebec social trusts have much broader application in that they are not limited to charitable purposes. Additionally, article 1268 *CCQ* permits the creation of a private trust for any private purpose. A social or purpose trust under the *CCQ* can be perpetual³² unlike the common law, which permits perpetuity only for charitable trusts. Thus, the combination of articles 1268 and 1270 *CCQ* contemplates a variety of trusts that are simply impossible to create under the common law. As will be discussed below, Quebec's rules of private international law permit the creation and operation of a Quebec trust even if there is no connecting factor to Quebec.

Article 3111 *CCQ* acknowledges the capacity of parties to choose the rules that will govern their contractual relationship, whether they be domestic or foreign. The Supreme Court of Canada in *Dell Computer Corp v Union des consommateurs*³³ held that the purpose of this particular rule of Quebec's private international law is to respect the principle of the autonomy of the parties. This principle had significant influence in the crafting of the new private international rules in Book Ten of the *CCQ*. The following commentary from Jeffrey-Alan Talpis, which was endorsed by the Supreme Court of Canada, explains the principle of an unrestricted choice of law that is found in the *CCQ*:

[T]he New Code adopts a very subjective approach to party autonomy. Going well beyond the Rome Convention on the Law Applicable to Contractual Relations of June 19, 1980 and the Swiss Code of Private International Law of December 18, 1987, from which many of the rules on contractual obligations were drawn, party autonomy under the new Code allows for an unrestricted choice of law, even in the absence of a foreign element (Paragraph 2 of Art. 3111), for the severance of the contract (Paragraph 3 of Art. 3111), extension to succession (Paragraph 2 of Art. 3098), to

³⁰ If a *CNCA* corporation were to settle a purpose trust, it would have to act with a trustee who is neither a settlor nor a beneficiary but it could still act as a trustee.

³¹ Donovan WM Waters, Mark R Gillen and Lionel D Smith, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thomson Carswell, 2005) at 632-38.

³² Art 1273 *CCQ*.

³³ 2007 SCC 34, [2007] 2 SCR 801.

certain aspects of civil responsibility (Art. 3127), and even to the external relationships of conventional representation (Art. 3116).³⁴

With respect to trusts, the principle of unfettered choice of law is found at articles 3107 and 3108 *CCQ*,³⁵ which permit the settlor of a Quebec trust to designate expressly the governing law of the trust regardless of where the trust is constituted. A Quebec trust could validly be constituted even if there is no connection with Quebec.³⁶ The common law courts have readily enforced a Quebec trust.³⁷ Thus, *CNCA* corporations throughout the country can now establish a Quebec social or purpose trust thereby permitting them far greater flexibility in arranging their affairs than is possible under the common law.

5. Conclusion

With the *CNCA*, Parliament has created modern corporate legislation to govern non-share capital corporations. Moreover, for Quebec donors, it has opened the door to new opportunities by providing a legal vehicle to make charitable gifts in a manner that was only permitted in common law provinces. We are convinced that this modern approach will be well received by Quebec donors. Given the considerable freedom of choice that the Quebec legislature has adopted in the *CCQ* with respect to the choice

³⁴ Jeffrey-Alan Talpis, "Choice of Law and Forum Selection Clauses under the New *Civil Code of Quebec*" (1994) R du N 183 at 189.

³⁵ *Bell v Molson*, 2008 QCCS 992, [2008] JQ no 1978 (QL), aff'd 2015 QCCA 583, [2015] JQ no 2759 (QL); *Webster-Tweel v Royal Trust Corporation of Canada*, 2010 ABQB 139, (2010), 33 Alta LR (5th) 91.

³⁶ In *GreCon Dimter inc v JR Normand Inc*, 2005 SCC 46 at para 38, [2005] 2 SCR 401, Gonthier J wrote the following with respect to the considerable freedom of choice that the Quebec legislature has adopted in the *CCQ* with respect to the choice of governing law applicable to a legal arrangement:

Also with respect to designation of the applicable law, there are numerous provisions that allow the parties considerable freedom of choice regarding the law that will be applicable to specific juridical acts or situations, including provisions on successions (art 3098 *CCQ*), trusts (art 3107 *CCQ*), juridical acts (art 3111 *CCQ*) and arbitration agreements (art 3121 *CCQ*). The multitude of situations in which the intention of the parties provides a basis for determining the jurisdiction of Quebec or foreign authorities, or for resolving conflicts of laws, attests to the legislature's intention to allow room for the autonomy of contracting parties in private international law, and confirms the primacy of that principle. Recognition of the principle also goes hand in hand with the legislature's tendency toward recognizing the existence and legitimacy of the private justice system, which is often consensual and is parallel to the state's judicial system. One example of this is art 2638 *CCQ*, which defines the arbitration agreement: see *Desputeaux v Éditions Chouette (1987) inc.*, at para. 40.

³⁷ *Ibid*; see also *Chellaram v Chellaram*, [1985] Ch 409.

of governing law applicable to a legal arrangement, a Quebec social or purpose trust can be established by any corporation governed by the *CNCA* regardless of where it is resident. Given the very limited context in which a purpose trust can be used under the common law, the Quebec social and purpose trust provides *CNCA* corporations with significant flexibility that is not possible under the common law.