

TABLE OF CONTENTS

<i>Principal Abbreviations</i>	xxv
<i>Introduction</i>	xxvii

BOOK I

FUNDAMENTAL PRINCIPLES

CHAPTER 1 CHARACTERISTICS OF THE LAW OF TRUSTS, HISTORY AND LEGAL THEORY	3
Preliminary Notes	3
Principal Sources of Authority	4
Trust Defined	6
Part 1 — The Story of the Quebec Trust	8
1. The Civil Law Heritage	8
2. Legislative Experimentation	9
3. The Problem Facing the Courts	12
Characterization	13
Judicial Treatment of Trust Transfers as Security	14
Judicial Treatment of Trust Transfers of Beneficial Interests	18
Judicial Treatment of Real Estate Investment Trusts	22
Conclusions	23
Part 2 — Objectives of Reform and the Problem	25
A Fourfold Objective	25
The Problem of Location in the Civil Law	26
Ownership	27
The Apparent Attenuations of Ownership	28
The Patrimony	29
CHAPTER 2 SITING THE TRUST IN THE QUEBEC LEGAL LANDSCAPE	35
Part 1 — The Approach of the Legislature to the Problem	35
Concept of a Patrimony Enshrined in the Code — Article 2	35
Basic Juridical Characteristics of the Quebec Trust — Article 1261	37
Other Juridical Characteristics	40
New Powers and Recourses of Trustee and Courts	42
Part 2 — Additional Comments: The Common Law Parallel	44
Legislative Ingenuity	44
Criticism of the Autonomous Patrimony	44
Quebec Trust — A Parallel to the Common Law Trust	47

STUDIES ON THE QUEBEC LAW OF TRUST

General Conclusion	51
CHAPTER 3 THE FORMATION OF THE TRUST	53
Part 1 — The Essential Elements	53
Article 1260 CCQ	53
General Observations	54
1. A “Transfer of Property from his Patrimony”	56
2. To Another Patrimony Constituted by Him, and	61
3. Which He Appropriates to a Particular Purpose	61
3. <i>bis.</i> Which He Appropriates to a Particular Purpose	64
4. Acceptance of the Trust	65
Constitution of the Trust — Article 1264	66
Effect of Constitution — Article 1265	68
Part 2 — Examples Where the Intention to Establish a Trust is Implied	70
CHAPTER 4 THE FORM FOR THE CREATION OF THE TRUST	75
Article 1262	75
An Act	75
1. Trusts Constituted by Contract	76
Form of Contract Revisited	80
2. Trusts Constituted by Will	81
3. Trusts Constituted by Judgment Where Authorized	81
4. Trust Constituted by Operation of Law	84
Some Examples of Statutory Trusts	84
Deemed Trusts under Tax and Other Statutes	87
The Declaration of Trust Re-examined	89
CHAPTER 5 TRUST PURPOSES — BENEFITS AND BENEFICIARIES	93
Part 1 — Types of Trust Benefits	94
The Terms “Beneficiary”, “Benefit” and “Purpose”	94
Name of the Trust	94
The General Approach — Articles 1266 — 1270	95
1. The Personal Trust	96
2. The Private Trust	97
Supervision by an Authority	100
3. The Social Trust	102
4. The Commercial Trust	105
5. The Security Trust	107
6. Mixed Trusts	107
7. The Conditional, Revocable, Blind, and Bare Trusts	108
Trust Mixed With Other Institutions	111

TABLE OF CONTENTS

Mode of Establishment Has a Limited Role in Classifying Trusts	112
Part 2 — The Position of the Beneficiary	114
Acceptance by the Beneficiary — Article 1285	114
Renunciation	115
The Beneficiary Not an Ordinary Creditor of the Trust	116
CHAPTER 6 THE SETTLOR, HIS CONTINUING ROLES	117
Part 1 — The Default Position of the Settlor	117
Capacity	117
Settlor's Continuing Role Passive in Principle	118
One or Several Settlers	119
Characterization of Continuing Rights or Roles	119
Part 2 — Rights Reserved to the Settlor by the Code	121
Settlor Reserves Rights in the Trust Property — Article 1281 ...	121
Settlor a Beneficiary	122
Settlor a Co-Trustee — Article 1275	123
Right to Name Beneficiaries — Article 1280	123
Additions to the Trust Property — Article 1293	126
Right to Name Trustees	127
Part 3 — Other Roles the Settlor May Reserve	127
Codal Rights Not Restricted	127
Settlor may Assume Obligations	128
Right to Supervise — Article 1287	129
Right to Direct Investments	130
Right to Amend or Modify the Trust	131
Licence	131
Other Rights	134
Powers of the Settlor — Accessory Contracts	134
CHAPTER 7 THE TRUSTEE	135
Part 1 — The Position of the Trustee	135
Qualifications of the Trustee — Legal Capacity — Article 1274	135
The Trustee of Prime Importance	136
Delegation of Functions	136
Variation of Powers	137
Accumulation of Functions	137
Cessation of Functions	138
The Removal of the Trustee	139
Causes of Replacement	142
Designation or Replacement of the Trustee by the Court — Article 1277	144
Designation or Replacement Under the Trust Instrument	146
Part 2 — The Corporate Trustee	147

STUDIES ON THE QUEBEC LAW OF TRUST

A Qualified Corporation — Article 1274	147
Rule Sometimes Inoperative or Inappropriate	148
Basic Rule Not Always Prohibitive	150
A Relative Nullity	152
Part 3 — The Need for an Independent Trustee	153
Article 1275	153
Provision Unnecessary	154
Absence of Independent Trustee Not Fatal	155
Rule Difficult to Enforce	155
Part 4 — Co-Trustees	156
Article 1276	156
1. Decisions by a Majority	156
2. Delegation of Duties — Responsibility	158
3. Rules May be Varied by the Trust Instrument	159

CHAPTER 8 THE “CONTROL” REQUIRED BY THE TRUSTEE	163
Sources and Scope of Powers of the Trustee	163
Article 1278	164
Article 1308	164
“Control”, and Its Antecedents	166
Meaning of Control in Trust Law	170
Meaning of Exclusive Administration in Trust Law	170
Other Observations on Control and Exclusive Administration ..	173
Title to the Trust Property	174
All the Rights Pertaining to the Patrimony	176
Conclusions Respecting Control and Exclusive Administration	177

CHAPTER 9 PROPERTY OF THE TRUST	179
The Concept of Property	179
Classification of Rights in Property	180
Classification of Types of Property	183
The Hypothec	185

BOOK II

SPECIAL TRUSTS

CHAPTER 10 THE CORPORATE TRUST DEED — ARTICLE 2692 CCQ	193
Part 1 — The Corporate Trust Deed	193
The Contract	194
Scope of the Contract	195
The Right to Sue	198
“Rights”, “Powers”, and “Property”	200

TABLE OF CONTENTS

Juridical Nature of the Corporate Trust Deed	202
Characterization as a Trust — Its Importance	203
Taxation and the Corporate Trust Deed	204
Uses of the Corporate Trust Deed	205
Part 2 — Article 2692 CCQ	207
Background to the Article	207
Article 2692	208
Juridical Nature of the Article	209
Criticism of Article 2692	210
CHAPTER 11 THE SECURITY TRUST — ARTICLE 1263	215
Part 1 — The Problem with Security Trusts	216
Article 1263	216
Problems Arising from the Article	216
Suggested Orientation of Article 1263	217
The Three Elements of Article 1263	218
Collateral Versus Payor Security Trusts	221
Juridical Attributes of the Security Trust	222
Registration of the Trust	223
A Security Trust and Not a Hypothec	226
Part 2 — Types of Trust to Ensure an Obligation	227
1. Trusts to Ensure Performance of an Obligation	227
2. Types of Security Trust.	230
3. The Mixed Security Trust.	233
Types of Property Held by the Security Trust	234
Part 3 — Uses and Advantages of Security Trusts	235
Internal Regulation of Trust Assets	235
Limitation of the Rules for the Exercise of Hypothecary Rights	236
Isolation of Trust Patrimony	236
Beyond a Hypothec	236
Intellectual Property	238
Protect Against “Ordinary Course of Business” Sales	239
Sale of an Enterprise	239
Prior Claims and Legal Hypothecs	239
Pooling of Creditors Interests	240
CHAPTER 12 ENFORCEMENT OF THE SECURITY TRUST ...	241
Public Order and the Rules for the Exercise of Hypothecs	241
Exceptions to the Limitation of Four Recourses	242
Are all Supplementary Rules of Public Order?	244
A Pragmatic Approach and Solution	246
Application of the Procedural Rules for the Exercise of Hypothecary Rights to Security Trusts	248

STUDIES ON THE QUEBEC LAW OF TRUST

Application of the Hypothecary Recourses to the Security Trust	250
CHAPTER 13 THE TESTAMENTARY AND GRATUITOUS TRUSTS 255	
Part 1 — The Rights of Beneficiaries	255
Qualities to Receive — Article 1279	255
Duration of the Trust — Articles 1271, 1272	258
Accretion	262
Representation Different from Accretion	264
Transfer of a Benefit	265
Part 2 — The Personal Trust as a New Liberality?	266
The Traditional View	266
The Gratuitous Trust Juridically Defined	267
1. The Testamentary Trust	268
2. The Inter Vivos Gratuitous Trust	270
Conclusion	272
Part 3 — Consequences of the New Liberality	273
Inter Vivos Trusts and Future Successions	273
Other Consequences	276
CHAPTER 14 DISCRETIONARY TRUSTS — POWERS OF APPOINTMENT 277	
Power of Appointment Defined — Article 1282	277
The Utility of Powers of Appointment	278
Powers of Appointment and Discretionary Trusts	280
Part 1 — The Situation of Powers of Appointment in Civil Law	280
Types of Powers of Appointment	280
Types of Power of Appointment Regulated by the Code	282
Restricted to Special Powers Only; Judicial Reasons	284
Other Judicial Holdings	292
The Received Opinion	293
Criticism	294
Part 2 — Manner of Their Use and Consequences	296
Article 1283	296
Apparent Conflict of Interest	296
Form of Enactment of a Power of Appointment — Examples	298
Form of the Appointment by the Appointer	300
Institutions — Vehicles for Use of Powers of Appointment	302
Non-Trusteed Charitable Bequests	303
Juridical Nature of the Power of Appointment	305
Lapse of Powers	309
Powers of Appointment Under the Common Law	310
Contestation of Powers of Appointment	310
Part 3 — Enforcement and Judicial Review of Powers	312

TABLE OF CONTENTS

Judicial Enforcement of Powers of Appointment	312
Pure Powers and Trust Powers Distinguished	313
Judicial Review of Appointments and Other Discretionary Powers	315
Conclusion	318
CHAPTER 15 THE PENSION FUND TRUST, THE RRSP	321
Part 1 — The Pension Plan and the Trust	321
Description of a Pension Plan	321
Juridical Nature of the Plan	323
A Trust	324
The Supplemental Pension Plans Act	325
A Trust Imposed by Law	326
Consequences of a Trust	327
Part 2 — The Registered Retirement Savings Plan	328
What is an RRSP?	328
The RRSP and the Trust — the Issues	330
<i>Bank of Nova Scotia v. Thibault</i>	331
1. Was There an Annuity Contract?	332
2. Does the Plan Constitute a Trust?	333
3. Do the Amendments to the Insurance and Trust Legislation Affect the Situation?	336
Observations on Thibault	337
Part 3 — The RRSP Constituted as a Trust in Quebec	344
Terms of the Contract to Establish an RRSP as a Trust	344
CHAPTER 16 FOREIGN TRUSTS AND CONFLICT OF LAWS	347
Part 1 — General Principles	348
Basis of the Rules	348
The Relevance of Conflict Rules to the Trust	348
Examples of Trust Conflict of Law Problems	349
General Provisions of the Code	351
But What is a “Foreign Trust”?	355
Part 2 — Specific Rules for Trusts	356
Articles 3107 and 3108	356
General Observations	357
Statutory Trusts	360
Significance as Regards Quebec Law	360
Characterization as a Trust	363
Analysis of Article 3107	363
Article 3111	366
Analysis of Article 3108	367
Severable Aspects	370
Part 3 — Selected Special Rules	372

STUDIES ON THE QUEBEC LAW OF TRUST

Personal Status	372
Property	375
Security on Movable Property	376
Obligations Generally	381
Representation	382
Civil Liability	382
Other Special Rules	383
Part 4 — Jurisdiction and Foreign Judgments	383
Jurisdiction of the Quebec Courts	384
Certain Special Provisions Concerning Quebec Jurisdiction	385
Selected Express Jurisdiction Provisions	386
Recognition of Foreign Court Decisions	387
Jurisdiction of Foreign Authorities	388
CHAPTER 17 THE QUEBEC TRUST AND THE COMMON LAW	391
The Pragmatic Approach	391
The Patrimony by Appropriation	392
The Three Certainties	393
The Five Characteristics	394
The Quebec Trust and The Hague Convention States	399
Common Law Canada	401
BOOK III	
ADMINISTRATION AND IMPLEMENTATION	
CHAPTER 18 ADMINISTRATION OF THE TRUST	405
The Obligations of the Trustee	405
Part 1 — The Duty of Care	406
Background and Orientation of the Rules of Sound Administration	406
Juridical Characteristics of the Rules	408
Public Order — Recourses	411
Exculpatory Clauses	411
Contrast with the Common Law	412
The Standard of Care Generally — Article 1309	413
1. The Bon Père de Famille	414
2. Prudence and Diligence as Words of Art	416
3. The Separate Words of Article 1309	418
4. Competence: the Scope of Prudence and Diligence	421
5. Gross Negligence — Article 1474	423
6. An Assessment	424
The Common Law Parallel	425
Part 2 — Kinds of Administration	427

TABLE OF CONTENTS

The New Division of Kinds of Administration	427
Simple Administration	428
Full Administration	431
Additional Powers of Full Administration	433
Exceptions to the Prohibition to Alienate by Gratuitous Title	435
The Stipulation of Inalienability Generally	435
CCQ Uses of Simple and Full Administration, Prudence and Diligence	437
 CHAPTER 19 CONFLICTS OF INTEREST, ACCOUNTS AND OTHER RULES	 441
Part 1 — The Particular Conflict Rules	441
The General Principle — Article 1310	441
Act in the Common Interest of All the Beneficiaries	444
Declare Any Conflicting Interest — Article 1311	444
The Prohibition to Contract — Article 1312	444
The Prohibition Against Intermingling — Article 1313	446
The Prohibition to Use the Property or Information — Article 1314	446
Gratuitous Dispositions Prohibited — Article 1315	447
The Obligation to Act Impartially — Article 1317	448
Jurisprudence	448
Part 2 — Accounting and Other Rules of Sound Administration	448
Inventory — Article 1324	448
Security for the Administration — Article 1324	449
Insurance — Article 1331	450
Accounts — General Approach	450
Annual Accounting — Article 1351	451
Terminal Accounting — Article 1363	452
Generally Accepted Accounting Practices (GAAP), Accounts, Books	453
Attenuation of the Rules on Accounting	454
Additional Rules of Termination — Article 1365, etc.	455
Disclosure May Involve More than Accounting	456
 CHAPTER 20 THE RULE OF IMPARTIALITY	 457
The Basic Rule of Impartiality — Article 1317	458
Where Impartiality Presents a Problem	459
Apportionment of Revenues and Expenditures — Article 1345, etc.	461
Apportionment of Expenditures	463
Amortization	464
Amortization Exception for Personal Use	467
Apportionment of Revenues	467
Time of Accrual of Benefits to Income Beneficiary	468

STUDIES ON THE QUEBEC LAW OF TRUST

Portfolio Selection — A Diversified Portfolio — Article 1340 ..	469
Full Administration and Article 1340	473
Some Conclusions Respecting Impartiality	474
Administrator May Retain Existing Investments — Article 1342	476
When is the Rule of Impartiality Complied With?	480
CHAPTER 21 ANTECEDENTS OF THE RULE OF IMPARTIALITY 483	
Part 1 — The Inspiration for the Rule	483
Part 2 — The Historic Sources of the Rules	486
The United States Rules	486
The “Even Hand Rule” of Common Law Canada	490
Rules of Application of the “Even Hand Rule”	490
Other Matters	495
Part 3 — The Quebec Experience and Even Hand Rule Today	496
Quebec Cases to Date	497
Obligation to Convert	497
Duty to Convert Leads to Duty to Apportion	498
Manner of Apportionment of Benefits	498
Diversified Investment — to Protect Capital	499
Depreciation	499
Corporate Distributions	500
Apportionment of Administrative Costs	502
Quebec Treatment of Other Matters	503
Conclusions	504
CHAPTER 22 THE INVESTMENT PROCESS 507	
Part 1 — The Development of Trustee Investment Rules	507
Introduction	507
Orientation	508
Early Legislative Experience	508
Early Quebec Experience	509
Factors Guiding Legislative Policy	510
Post World War II Experience	511
Modern Criteria Guiding Trustees in Quebec and Ontario Compared	513
Part 2 — Investment in the Real World — Inflation	515
History of Inflation	515
Impact of Inflation	517
Part 3 — The Investment Markets	518
Offsets to Inflation	518
Markets’ Growth	521
Market Regulation	523
Economics of Investment — Investment Products	524

TABLE OF CONTENTS

New Securities Products	527
Part 4 — Modern Investment Principles	530
The Approaches to Investment	530
Tools of the Money Manager	531
Total Return Investment Policies	534
Model Trust Investment Clauses	534
Part 5 — Impact of Legal Changes on the Investment Process	537
The Legal Approach to Inflation Before Reform	537
The “Nominalist Approach” and the “Purchase Value Approach” to Obligations	538
The New Presumed Sound List	541
Responsibility of the “Simple” Versus the “Full” Administrator	543
The Special Position of the Testamentary Liquidator (Executor)	544
Investment Under “Simple” Versus “Full” Administration	544
Possible Approaches of the Courts After Reform	545
Additional Observations	546
 CHAPTER 23 RESPONSIBILITY OF THE SETTLOR, TRUSTEE, AND BENEFICIARIES — RECOURSES	
	551
Part 1 — Responsibility Among the Three Actors	551
General Limitation of Liability of the Trustee	551
Capacity of the Administrator to Sue and be Sued	552
Statutory Rights of Beneficiaries Against the Administrator	552
The Beneficiary as a Creditor of the Trust	553
The Statutory Rights Against the Trustee — Articles 1284, 1290, 1291	555
Beneficiary’s Right to Enforcement	555
The Right of Supervision — Article 1287	556
Other Express Rights of Action	561
Parties Who are Granted a Right of Action	562
Inherent Jurisdiction of the Court	562
Procedure	564
Seizability of Beneficiary’s Interest	566
Damages, Seizure by Trust Creditors	569
Rights are Personal Rights	569
Execution of Judgments	570
Exculpatory Clauses	570
Mitigation of Responsibility by the Court	572
Responsibility of Co-Trustees Inter se	572
Part 2 — Responsibility to Third Parties	573
1. Responsibility of the Trustee Generally	573

STUDIES ON THE QUEBEC LAW OF TRUST

2. Responsibility of the Trustee for Fault	574
3. Responsibility Where the Trustee Exceeds his Powers	575
4. Responsibility of the Beneficiary and Settlor for the Fault of the Trustee	577
5. Responsibility of the Trust Towards Third Parties	579
6. Responsibility of the Trust Towards the Beneficiary and the Settlor	580
CHAPTER 24 AUGMENTATION AND AMENDMENT	581
Part 1 — Augmentation of the Trust Patrimony	581
Methods of Augmentation — Article 1293	581
Further Contributions of the Settlor	582
Further Contributions by Third Parties	582
Inherent Nature of the Concept	583
Form of Augmentation	583
An Enabling and a Default Provision	584
Effects of Augmentation	585
Part 2 — Amendment by Judicial Authority	586
Article 1294 — New Law	586
Its Scope of Application	587
Need for a Modification Procedure	587
Criteria for an Application for Modification	587
Classification of Types of Amendments	589
Jurisdiction of the Court	592
Variation at Common Law	593
Procedure in Quebec	595
Part 3 — Modification by Extra-Judicial Means	596
By Agreement of All the Actors	597
The Exception — Limitation of the Principle	598
By an Amending Formula	599
By the Settlor or the Trustee or Both	602
By the Beneficiaries Alone	603
By a Proposal In Bankruptcy	603
Conclusions Respecting Extra Judicial Modification	604
CHAPTER 25 TERMINATION OF THE TRUST	607
Part 1 — Causes of Termination Listed in the Code	607
Article 1296	607
Renunciation or Lapse of the Benefit	608
Expiration of the Term or the Fulfilment of the Condition	608
Attainment of the Purpose of the Trust	609
Impossibility of Performance	609
Part 2 — Causes of Termination Not Listed in the Code	612
Exhaustion of Trust Assets	612
Termination Clause	613

TABLE OF CONTENTS

Termination by the Court with the Consent of the Beneficiaries	613
Effects of Termination	616
Form of Termination	617
Part 3 — Termination, and the Social Trust — Cy-Près — Articles 1294, 1298	617
Legislative Policy	618
Conditions Precedent to the Application of the Rule	619
Charitable Gifts and Charitable Trusts Revisited	622
The Cy-Près Doctrine in Common Law	623
Extent of Quebec Cy-Près Rule	626
Failure of a Cy-Près Application	627
Who May Make a Cy-Près Application?	627
Cy-Près Upon Termination of the Trust — Article 1298	628
CHAPTER 26 TAXATION AND THE TRUST	631
Orientation	631
Income Taxes	632
Other Taxes	632
Part 1 — The General Approach of Tax Law	633
The Power to Tax	633
The Basic Approach	634
Testamentary, Inter Vivos and Commercial Trusts	634
Certain Terms Employed	634
The Usufruct, Use, Substitution	636
Trust Deemed an Individual	636
Taxes Payable — Accounting Treatment	637
Tax Rate	637
Residence of a Trust for Tax Purposes	638
Tax Returns	638
Payment of Tax	638
Computation of Income	638
Computation of Taxable Income	639
Deductions and Allocations of Income and Expenses	640
Tax on Constitution of the Trust	642
Capital Gains	643
Other Benefits	645
Distribution of Corporate Dividends	645
Distribution of a Principal Residence	645
Distribution in Satisfaction of a Capital Interest	645
Distribution on Other Termination — Rights of Reversion	646
Assignment of an Interest by a Beneficiary	647
Commercial Trusts	648
Part 2 — Taxes and Special Trusts	648

STUDIES ON THE QUEBEC LAW OF TRUST

Types of Special Trusts for Tax Purposes	648
Employees' Profit Sharing Plan	649
Deferred Profit Sharing Plan	649
Registered Supplementary Unemployment Benefits Plan	650
Registered Retirement Savings Plan	650
Registered Education Savings Plan	651
Registered Retirement Income Funds	652
Registered Pension Plans	652
The Unit Trust	654
The Mutual Fund Trust	655
The "Prescribed Trust"	655
The Bare Trust Equated to a Mandatary, etc.	656
Part 3 — Taxation and Social (Charitable) Trusts	656
Relief Afforded the Individual	657
Relief Afforded the Corporate Donor	658
Form of Registered Charities	658
The Meaning of Charity	659
Charitable Organizations	659
Private Charitable Foundations	660
Public Charitable Foundations	661
Tax, Information Returns of Charities	662
Part 4 — Other Quebec Taxes	662
Municipal Taxation	662
Jurisprudence on Municipal Exemptions	663
Land Transfer Duties	664
CHAPTER 27 INTERPRETATION OF THE TRUST — CONCLUSIONS	667
Part 1 — The Rules of Interpretation	667
Rules of Interpretation of the Code and Statutes Generally	668
Source of the Rules	672
Interpretation of Contracts	672
Interpretation of Wills	673
The Trust Established by Contract	674
Part 2 — Common Law Influence?	675
1. Sources of the Law	675
2. The Pronouncements of the Courts	675
3. The Position of the Quebec Trust	676
Part 3 — A Broad Interpretation of the Code	678
Preliminary Provision of the Code	678
Interpretation of the Supreme Court of Canada	678
For a Broad Interpretation	680
Part 4 — Its Effect Upon the Trust	681
1. The Situation of the Trust in the Code	681

TABLE OF CONTENTS

2. The Legislative Intention	682
Part 5 — Conclusions	683
Interpretation of Specific Provisions	683
Caveats — Division of Opinion as to Scope of the Law of Trust	685
Conclusion	688

APPENDICES

Appendix A — THE HAGUE CONVENTION	691
Appendix B — UNIFORM PRINCIPAL AND INCOME ACT OF THE UNITED STATES (1962)	705
Appendix C — UNIFORM PRUDENT INVESTOR ACT OF THE UNITED STATES	715
Appendix D — VARIATION OF TRUST ACT (Ontario)	719
<i>Table of Cases</i>	721
<i>Bibliography</i>	741
<i>Table of Statutes</i>	755
<i>Topical Index</i>	785