The Nature of the Beneficiary's Interest in English, Japanese and Quebec Trusts

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Abstract: In the English trust, the beneficiary is viewed as the substantive owner of property held under trust, even as the trustee holds legal title to the property and is the only party who is able to perform the legal functions associated with ownership. In the mixed legal systems of Quebec and of Japan, the juristic pathways to the beneficiary's substantive ownership are vastly different. In the case of Japan, arguably the 'patrimony' conception is applicable, whereas in Quebec the new 'ownerless' trust departed significantly from the problems associated with the trustee's 'ownership' of property under the old trust. The paper submits that the ability of the beneficiary to enforce his interests independently from other parties is crucial to the trust's ability to achieve broadly similar effects to English law. From an English perspective, it is vital that civilian trusts recognise and accommodate the differences inherent in the beneficiary's rights to due administration and to the economic enjoyment of property.

Résumé: Dans le *trust* anglais, le bénéficiaire est vu comme le titulaire effectif des droits de propriété, même si le titre de propriété appartient au fiduciaire, et seul ce dernier peut remplir les fonctions juridiques associées à la propriété. En revanche, dans les systèmes juridiques mixtes du Québec et du Japon, la manière dans laquelle le bénéficiaire jouit de la propriété économique des biens est assez différente. Au Japon, on peut dire que la notion du « patrimoine » est applicable, tandis qu'au Québec la fiducie « sans propriétaire » est sortie des problèmes liés à la « propriété » du fiduciaire sous l'ancien droit. Dans cet article, il est proposé que la capacité du bénéficiaire d'exécuter ses droits sans l'intervention d'autres parties est primordiale pour que la fiducie obtienne des effets similaires au *trust* de *common law*. Vue de la perspective anglaise, il est impératif que les fiducies civilistes reconnaissent et s'ajustent aux différences entre les droits du bénéficiaire à la bonne administration et à la jouissance economique des biens.

Zusammenfassung: Im englischen *trust* wird der Begünstigte als wahrer Eigentümer des Treugutes angesehen, obwohl der Treuhänder unzweifelhaft Eigentümer in rechtlicher Hinsicht und infolgedessen allein befugt ist, die Eigentümerbefugnisse auszuüben. In den Mischrechtsordnungen Japans und Quebecs ist die Stellung des Begünstigten völlig anders ausgestaltet. Im Falle Japans scheint ein auf dem Vermögen beruhendes Verständnis zugrunde zu liegen, während die in Quebec neu eingeführte eigentümerlose *fiducie* eine deutliche Abkehr vom Gedanken des rechtlichen Eigentums des Treuhänders und damit verbundenen Problemen vollzog. Dieser Beitrag stellt die Befugnis des Begünstigten zur eigenständigen Anspruchsverfolgung als zentrale Voraussetzung dafür heraus, dem englischen *trust* vergleichbare Rechtsfolgen hervorzubringen. Aus der

Sichtweise englischen Rechts ist es unerlässlich, Unterschiede im Hinblick auf die pflichtgemäße Verwaltung und die wahren wirtschaftlichen Interessen des Treugutes anzuerkennen und zu berücksichtigen.

1. Introduction

1. In the English trust, the beneficiary is the substantive owner of property held under trust, even as the trustee holds legal title to the property and is the only party who is able to perform the legal functions associated with ownership. Although the beneficiary has a relatively passive image, after the trust is constituted and the settlor drops out of the picture, the beneficiary is the more important of the remaining trust parties, both in the sense of his economic ownership of property and the fact that trustee duties can only be enforced by him. Historically the English court has rationalised the division of the roles of trustee and beneficiary in terms of the division between legal and equitable titles to property. Whereas a trustee owns the property in law, the beneficiary does so in equity,[1] which explains the duties that the trustee owes to the beneficiary. While this view still commands support,[2] other commentators have viewed the beneficiary's right as a right in the trustee's rights.[3] Under such a formulation, it is not necessary to resort to the metaphor of the division of legal and equitable titles; rather, the beneficiary's rights are held in the rights of the trustee.

2. This paper examines the Japanese and Quebec trusts from the perspective of the English trust. At one level, there are important similarities between the three trusts. In all three cases the beneficiary is usually the economic owner of the property, and he is able to enforce duties owed by the trustee.[4] However, the juristic paths for arriving at such a formulation are very different from England. In Japan, the beneficiary's rights are clearly personal or contractual at the formal level, although as the late Shinomiya Kazuo has pointed out, the legislator's emphasis on the independence of the trust fund bears much resemblance to the patrimony view of the trust advocated by French jurist Pierre Lepaulle.[5] In contrast, the rights of the beneficiary in Quebec before 1994 were explicitly held to be a *sui generis* proprietary right by the Supreme Court of Canada.[6] The incompatibility of the notion of trustee ownership with civilian notions of property

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[1] *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669, p 705. However, it is important to note that objects of a discretionary trust are not viewed as having a proprietary right. *Gartside v. IRC* [1968] AC 553, pp 617-18 (Lord Wilberforce).

[2] *Westdeutsche, supra* n. 1, p 705; *Re Lehman brothers International (Europe) (No 2)* [2009] EWCA Civ 1161; *Pearson v. Lehman Brothers Finance SA* [2010] EWHC 2914 (Ch), [225] (Briggs J); R. NOLAN, 'Equitable Property', 122. *LQR* (*Law Quarterly Review*) 2006, p 232.

[3] B. MCFARLANE and R. STEVENS, 'The Nature of Equitable Property', 4. *J Eq (Journal of Equity)* 2010, p 1.

[4] It is important to note that as Quebec trusts are purpose trusts, there is not always a beneficiary, and Civil Code of Québec, CQLR c. CCQ-1991, arts. 1290, 1291 give the beneficiary and 'any other interested person' the right to enforce the trust. In commercial situations the 'beneficiary' in Quebec trusts would be better described as objects of powers in English law.

[5] K. SHINOMIYA, *Shintakuhō* (Trust law) (Tokyo: Yūhikaku 1989); P. LEPAULLE, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international* (Paris: Rousseau 1932).

[6] *Curran v. Davis* [1933] SCR 283.

resulted in significant difficulties of enforcing the trust on the part of the Quebec beneficiary, as well as a lack of litigation owing to practitioners' fear of upsetting the status quo. The two factors played a significant role in jurists and later the legislator's push to adopt the *patrimoine d'affectation* as an 'ownerless' patrimony in the Civil Code of Quebec (C.C.Q.) in 1994. In this new model the beneficiary formally does not have ownership rights in the property,[7] at the same time that he gains a greater ability to hold the trustee to account.[8]

3. By examining the nature of the beneficiary's interest, my aim is to achieve a better understanding of what distinguishes the Japanese and Quebec trusts from the English trust as well as other civilian trusts. It is submitted that the ability of the beneficiary to enforce his interests autonomously from other parties is crucial to the trust's ability to achieve broadly similar effects to English law,[9] particularly the harnessing of the trustee's role and skills as an exclusive manager of property, while allowing the beneficiary to control the trustee. For trusts to be effective across a range of settings, there needs to be a degree of respect for the trust's nature as a 'fundamental' legal institution, which Lionel Smith defines as one which cannot be understood in terms of other institutions.[10] Whereas it is not usually possible to achieve a division between legal and equitable titles in the civilian context, the likely adaptability of the trust to the civilian legal environment depends in no small measure on whether a coherent rationalisation of the role of the beneficiary can be achieved. In particular, a focus on the role of the beneficiary highlights the fact that the greatest obstacle to the successful use of trusts in civilian jurisdictions may come from local structures of property rather than trusts rules themselves. This is a point which has been well recognised by Quebec jurists but which requires more attention from other common law and civilian jurists.

2. The Common Law Trust

4. The scope of the beneficiary's rights in common law trusts is well known and needs not be extensively repeated here. At its core, the beneficiary is the economic owner of property, enjoying rights over the property which the trustee as a fiduciary holds on his behalf. In English law, the operation of the *Saunders v. Vautier*[11] principle means that collectively beneficiaries are able to bring an end to the trust, even if the purpose of the trust as defined by the settlor continues to serve a useful function.[12] Furthermore, the

[7] Civil Code, *supra* n. 4, art. 1261.
[8] *Ibid.*, arts. 1287, 1299-1370 (Title 7).
[9] One such test can be found in the Hague Convention on the Law Applicable to Trusts and on their Recognition, art. 2, which asks whether the trust forms a separate patrimony under the trustee and whether the trustee enjoys full control of the property. In the opinion of practitioner Marilyn Roy, the Quebec trust meets all these requirements and can be described as a 'close parallel' of the common law trust. M. ROY, 'Quebec', in A. Kaplan (ed.), *Trusts in Prime Jurisdictions* (Woking: Globe Law and Business, 4th edn 2016), p 359.
[10] L. SMITH, 'Trust and Patrimony', in R. Valsan (ed.), *Trusts and Patrimonies* (Edinburgh: Edinburgh University Press 2015), pp 56, 59.
[11] (1841) 4 Beav 115.
[12] In many American states, the law takes a different position under *Claflin v. Claflin*, 149 Mass. 19, 20 N.E. 454 (1889), which requires the settlor's intent to be respected where practicable notwithstanding the wishes

existence of ascertainable beneficiaries is a requirement for the valid formation of a trust under the beneficiary principle.[13] One important implication is that non-charitable purpose trusts cannot be formed under English law. This rule is justified on the basis that only beneficiaries can enforce trustee duties; in other words, without a party who is able to hold the trustee to account, the trustee cannot be prevented from enjoying outright ownership of the property transferred to him by the settlor.[14]

5. Nonetheless, the above account can be viewed as attributing too much weight to the beneficiary's economic interests, which form only one part of his rights in the trust. Arguably, the beneficiary's interest in the due administration of the trust by the trustee is a more direct expression of his right. As Lord Millett writes extrajudicially, 'the primary obligation of a trustee is to account for his stewardship. The primary remedy of the beneficiary—any beneficiary no matter how limited his interest—is to have the account taken, to surcharge and falsify the account , and to require the trustee to restore to the trust estate any deficiency'.[15] The distinction between the beneficiary's economic interests and his *in personam* rights against the trustee was recognised by Lord Sumption in *Akers v. Samba*.[16] While in many cases the two sets of rights overlap, as Lord Sumption puts it, 'the personal and proprietary rights of the beneficiary exist independently, and neither is dependent on the continued existence of the other'.[17] Whereas the beneficiary's economic interests are relevant only between the beneficiary and a third party or in the case of the trustee's insolvency, the beneficiary's *in personam* rights against the trustee are far more extensive.

6. Furthermore, the fact that many common law trusts are discretionary as opposed to fixed trusts—the latter being more common in civilian jurisdictions—renders a 'proprietary' view of the trust less appropriate. In a discretionary trust, the trustee is able to choose the manner of distributing the property, in other words how much property to give (appoint) to any number of beneficiaries. In such a situation, while beneficiaries or objects of a fiduciary power have standing to monitor trustees, it is difficult to speak of the existence of a property right, in the sense that the trustee is not bound to appoint property to him. This observation explains the lack of a right in the trust fund to which the trustee in bankruptcy or the estate beneficiary of a trust beneficiary could succeed.[18]

7. A nuanced approach to the characterisation of the rights of the English beneficiary is important for comparative purposes, which often focus on the question of whether trust rights are *in rem* or *in personam* in character. Historically, the characterisation of the

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of the beneficiaries. The new Quebec trust follows an even bolder position where the property is owned by the trust's purpose rather than by the beneficiaries.

[13] *Morris v. Bishop of Durham* (1805) 10 Ves 522.

[14] The requirement for a beneficiary to exist might have been loosened by *Schmidt v. Rosewood Trust Ltd* [2003] 2 AC 709, which holds that objects of discretionary powers an also have standing to enforce a trust against trustees.

[15] P. MILLETT, 'Equity's Place in the Law of Commerce', 114. *LQR* 1998, p (214) at 225.

[16] [2017] AC 424, [83].

[17] *Ibid*.

[18] *Re Smith* [1928] Ch. 915, p 919; C. MITCHELL, '*Commissioner of Stamp Duties (Queensland) v. Livingston* (1964): Rights of Estate Beneficiaries and Trust Beneficiaries Compared', in B. Sloan (ed.), *Landmark Cases in Succession Law* (Oxford: Hart Publishing 2019), pp 274-276.

beneficiary's right in terms of a division between legal and equitable titles is highly visible to civilian jurists,[19] which explains tidily the difficulty of accommodating the trust in the 'absolutist' vision of property as expressed in civilian law.[20] However, as discussed above, English jurists have come to reject the utility of such a distinction, not least in its encouragement of a conflation between the rights and privileges enjoyed by legal and 'equitable' owners of property.[21] Rather, it is important to recognise that different types of beneficiaries enjoy different types of rights,[22] with the result that the English beneficiary's interests are best conceptualised as particular rights in the property rights of the trustee over property.[23] From this perspective, the central question in the comparative context ought to lie less in a characterisation of the juristic nature of the beneficiary's rights, but the manner in which a beneficiary can hold effective rights in the trustee's rights.

3. Japan: The Role of the Beneficiary

8. As in the case of the fixed trust in English law, in Japan the beneficiary is the economic owner of the trust fund. In principle the beneficiary is relatively passive, at the same time that he is usually the only party who is able to monitor the actions of the trustee. Under the current Japanese Trust Act,[24] the beneficiary is defined in article 2(6) and (7) as the party with the power to require the trustee to transfer the trust property to him. Article 92 prescribes a list of core rights of the beneficiary analysed below, which are mandatory in nature. Given that the Japanese trust was modelled after the Indian and Californian trusts, the view of beneficiaries as the *de facto* owners of the property was so strong that in a 1938 case the Supreme Court of Judicature affirmed the validity of the trust even where the beneficiaries enjoyed complete control over a bare trust.[25] Although strong juristic opinions exist against the recognition of 'nominal trusts' as they do not involve any active trustee duties,[26] the case nonetheless highlights the perception by courts of the beneficiary as the owner of the property, notwithstanding its legal characterisation as a 'beneficial interest obligation' (*jueki saiken*) in the language of the statute.[27]

9. Like in the common law trust, there appears to be no restriction as to who can be a beneficiary , with the only exception being that the trust form should not be used to circumvent existing laws.[28] For instance, as foreigners are not eligible to hold mining

[19] In Quebec jurisprudence, the separation of legal and equitable titles was expressly rejected in *Laliberté v. LaRue* [1931] SCR 7, p 16 (Rinfret J), a decision which was affirmed in *Royal Trust Co v. Tucker* [1982] 1 SCR 250, p 261. Leading Quebec authors such as the late Yves Caron and Madeleine Cantin Cumyn have also adopted the split legal and equitable titles as a way of understanding the common law trust.
[20] For example art. 544 of the French *Code civil*, Civil Code, *supra n. 4*, art. 947 in Quebec, and Civil Code, Act No. 89 of Meiji 29 (1896), art. 206 in Japan.
[21] C. MITCHELL, *Landmark Cases*, p. 282.
[22] Ibid.
[23] B. MCFARLANE, 4. *J Eq* 2010.
[24] Trust Act, Act No. 108 of Heisei 18 (2006).
[25] Supreme Court of Judicature 21 September 1938, Minshū 20-1854.
[26] M. ARAI, *Shintakuhō* (Trust Law) (Tokyo: Yūhikaku, 4th edn 2014), pp 127-129.
[27] Trust Act, *supra* n. 24, art. 2(7).
[28] *Ibid.*, art. 9.

rights in Japan, it follows that a foreigner cannot be the beneficiary of a trust of mining rights in Japan.[29]

3.1 *Differences from Contract*

10. Given that most Japanese trusts are formed by contract, there is always a strong risk of confusing the form of the contract with the nature of the beneficiary's interest. Technically there are a number of important differences. Unlike contract, for the formation of a trust the beneficiary's declaration of intent is not required, as the beneficiary does not in general receive a burden and only a benefit;[30] and the beneficial interest accrues from the moment the trust contract is concluded, rather than through a declaration of intent by the beneficiary. Consequently, unlike contracts for the benefit of third parties, where the benefit can be revoked by the contracting parties until the beneficiary declares his intent, in a trust context the settlor and trustee cannot alter the content of the interest once it is created, which solidifies the parties' intent in a way that is not dissimilar to the 'unconscionability' doctrine with respect to the constitution of English trusts.[31] In essence, unlike contract, the agreement of all three trust parties is required for the basic content of the beneficial interest to be adjusted,[32] with the exception of changes that do not alter the basic goal of the trust, in which case agreement between the beneficiary and the trustee suffices.[33] At the same time, the conclusion of a trust contract imposes a number of duties on the trustee. The trust thus stands apart form a contractual situation, in that the beneficiary is entitled to exercise many of the core functions in the trust, in spite of not being a party to the contract.[34]

3.2 Core Rights of the Beneficiary

11. Per article 92, a beneficiary can exercise a number of powers on his own, and these are core rules which cannot be altered by parties. This is significant given that the new Trust Act has introduced a number of majority decision-making mechanisms, which resemble the rights of shareholders in the company law context. The rights conferred by article 92 include, among others: the power to petition the court; to receive payments from the trust; and to oppose compulsory execution against the trust. A beneficiary also has the right to be reimbursed for the cost of litigation to enforce his rights; to access information relating to the trust; to sue for compensation or the restoration of the trust fund upon the breach of trust; to request an injunction against a trustee's breach of duty; to request an injunction against the disposal of trust property by a previous trustee, by the trustee's successor, or by his trustee in bankruptcy; to request the appointment of a new trustee where there is no trustee; to abandon his beneficial interest; to buy out minority beneficial interests in certain situations; and to request the appointment of protectors to the trust.

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[29] M. ARAI, *Shintakuhō*, p 179.
[30] Y. NŌMI and H. DŌGAUCHI (eds.), *Shintakuhō zeminā (3): juekishatō itakusa* (Trust law seminar [3]: beneficiaries and others, and settlors) (Tokyo: Yūhikaku 2015), p 13.
[31] *Pennington v. Waine* [2002] 1 WLR 2075 held that detrimental reliance can be one ground by which it can become 'unconscionable' for a settlor to resile from a gift.
[32] Y. NŌMI, *Shintakuhō zeminā*, p 10; Trust Act, *supra* n. 24, art. 149(1).
[33] Trust Act, *supra* n. 24, art. 149(2).
[34] M. ARAI, *Shintakuhō*, p 223.

12. With respect to the right to oppose compulsory execution against the property,[35] it is fundamental to the beneficiary's ability to exclude others from his beneficial interest and to maintain the integrity of the trust fund, which in many respects satisfies Richard Nolan's understanding of the beneficial interest in the English trust as primarily a right to exclude non-beneficiaries from enjoying the property and a secondary right to prevent their access to the property.[36] As for rights to information and explanation, clearly these are crucial to the beneficiary's monitoring functions against the trustee. Under the old Act the Japanese court had difficulty in viewing the trust as a whole in a trust consisting of multiple beneficiaries, but rather upheld only the individual beneficiary's right to access information with respect to his own relations with the trustee.[37] This is problematic as it shows a failure to understand the nature of the beneficiary's right in a trust, which ought to entitle him to hold the trustee to account with respect to the entire trust, rather than as a right to enforce only his own interests.[38]

3.3 Duration of Beneficial Interest

13. Whereas in the common law trust the perpetuity rule requires property to be vested within 21 years after the lifetimes of those living at the time of the trust's creation,[39] the Japanese trust is faced with a much shorter perpetuity period. Under article 167 of the civil code, an obligation is extinguished after ten years, whereas the limitation period for property rights is twenty years. The first rule is applied to trusts, per article 102(1) of the Trust Act. In view of the proprietary characteristics of trusts, there is also a view that article 167(2) of the civil code should apply by analogy, meaning that a longer period of twenty years should apply. However, there is little consensus that this should be the case, particularly in light of the fact that most trusts in Japan are commercial trusts, and some scholars believe that the adverse effects caused by a shorter perpetuity period may be offset by the requirement of formalities prior to its invocation.[40] Per article 102(2), the perpetuity period runs from the point when a beneficiary is notified of his status as a beneficiary, rather than from the point of the conclusion of the trust contract, which is the point when the trust takes effect.

3.4 Remedies

14. The Japanese beneficiary has important proprietary rights in the form of exclusion of third parties from the trust property. This is primarily manifested in his ability to compel trustees to provide compensation or to restore the trust fund, and also in his ability to oppose mandatory execution against the trust fund. As Dōgauchi argues, despite the considerable similarities between the two legal forms, there is a significant difference between the remedies available in mandate and trusts, which in his view ought to be merged with the segregation of assets serving as the main threshold for generating

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[35] Trust Act, *supra* n. 24, arts. 92(3), 23(5), (6).
[36] R. NOLAN, 122. *LQR* 2006, p 233.
[37] Tokyo District Court 1 February 2001, Hanta 1074-249.
[38] R. NOLAN, 'Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures', in P. Davies and J. Penner (eds.), *Equity, Trusts and Commerce* (Oxford: Hart 2017), p 168.
[39] This was changed to 125 years per Perpetuities and Accumulations Act 2009, s. 5.
[40] M. ARAI, *Shintakuhō*, p 235.

proprietary remedies of the kind available to the beneficiaries of a trust in Japan.[41] This is an interesting point, partly because the trust in Scotland, a jurisdiction where the trusts law is quite similar to Japan, is also viewed by jurists as a cross between the mandate and the deposit.[42] It is submitted that the availability of powerful remedies supports the basic premise of the beneficiary as the economic owner of the property.

4. The Nature of the Japanese Beneficiary's Rights

15. The first Japanese jurists to have reflected on the nature of the Japanese trust, including one of the leading drafters of the 1922 Act, viewed the beneficiary's right as an obligation.[43] Over the course of the twentieth century, however, there was a shift in juristic opinion on the beneficiary's interest from a purely personal right to a *sui generis* right. The most influential author in this context was Shinomiya, who argued that the beneficiary's right was a 'proprietary' one by emphasising the beneficiary's ability to void the trustee's actions in breach of trust per article 31 of the 1922 Trust Act. The most important idea of Shinomiya's is the beneficiary's rights against third parties, the effects of which a personal right is incapable of producing. Under Shinomiya's formulation, Lepaulle's patrimony model is helpful to understanding the rights of a Japanese beneficiary, because it highlights the independence of the trust fund from the trustee's personal assets, which protects the beneficiary's interest as the *de facto* sole owner of the segregated fund.

16. In highlighting the limited nature of the trustee's ownership, Shinomiya highlights three rules in the 1922 Trust Act which in his view cannot be explained by the notion of party autonomy underlying obligational relationships. Firstly, the act provides the beneficiary with the ability to void transactions in breach of trust.[44] Secondly, it emphasises the independence of the trust fund, by stipulating that trust property does not form part of the trustee's estate upon death, and by prohibiting compulsory execution against trust property.[45] Thirdly, the definition of trust property includes property acquired by the trustee as a result of the management, disposal or destruction of trust property.[46] In other words the act permits the real subrogation of trust property (*butsujō dai'isei*), a right which is usually exercised in the context of security interests such as a lien, hypothec, or pledge, based on which the beneficiary can assert a claim for the market value of the property.[47] To Shinomiya, the inability of the obligational view and its main principle of autonomy to explain these features underlines the *sui generis* nature of the

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[41] H. DŌGAUCHI, *Shintaku hōri to shihō taikei* (The principles of trusts law and the structure of private law) (Tokyo: Yūhikaku 1996).
[42] F. ZENATI-CASTAING, 'L'affectation québécoise, un malentendu porteur d'avenir. Réflexions de synthèse', 48. *RJTUM (Revue juridique Thémis de l'Université de Montréal)* 2014, p (623) at 625.
[43] T. IKEDA, 'Shintaku hōan no kōyō' (An outline of the draft Trust Act), 38. *Hōgaku kyōkai zasshi* 1920(7).
[44] Trust Act, Act No 62 of Taishō 11 (1922), art. 31.
[45] *Ibid*. arts. 15-16.
[46] *Ibid*. art. 4.
[47] Civil Code, *supra* n. 20, arts. 304, 350, 372. In the Quebec context discussed below, Smith suggests that real subrogation can potentially play a role similar to tracing in English law, in spite of the lack of clarity regarding the concept. L. SMITH, 'Unauthorized Dispositions of Trust Property: Tracing in Quebec Law', 58. *McGill LJ (McGill Law Journal)* 2013, p 795.

trust as a legal institution. By focusing on the trust fund, or in the case of the Quebec trust below, by characterising the trust as 'ownerless', it is possible to marginalise the role of will as expressed through contract in creating the trust, and to focus instead on the trust's autonomy as governed by its purpose, even if autonomy serves only to govern the internal relations of the trust.

17. To Arai Makoto, three important arguments are advanced by Shinomiya with respect to the nature of the trust. Shinomiya's first key argument is that the law recognises the *de facto* independence or legal subjecthood of the trust fund, in other words the notion that the trust property is independent from all trust parties, namely the settlor, the trustee, and the beneficiary. This claim is evidenced by the provisions on additions or improvements to and mixing of trust property,[48] the continuation of trust property as a distinct entity notwithstanding mixing,[49] the payment of fees to the trustee,[50] the fund's liability to compensate the trustee,[51] and the trustee's limited liability in relation to the performance of trust duties.[52] Furthermore, like the Scottish trust but unlike the English trust, trust debts are automatically passed onto the new trustee upon the termination of office of a previous trustee.[53] From such a perspective, Shinomiya observes that the trustee is less the central institution of the trust as in the case of England, but rather the trust can properly be understood as a 'patrimony' or a legal institution, of which the trustee is only a 'representative'.

18. Shinomiya offers further support for his submission on the independence of the trust fund from the rules on trustee liability. For example, where the trust incurs a debt to a third party, in principle the trustee has the obligation to pay, but this debt continues notwithstanding a change of trustees,[54] and the trustee can recover from the trust fund where he pays out of pocket.[55] However, there are two important qualifications to the trustee's *de facto* exemption from personal liability: firstly, in his conduct of affairs on behalf of the trust, the trustee comes under personal liability to meet these obligations with respect to third parties at a *de jure* level, and secondly, there are limits to the trustee's exemption from liability, specifically where he commits an unlawful act, in which case the trust fund is not liable to reimbursing him. Although these exceptions may not change the fact that the trust fund is substantively independent from the trustee, at a formal level the exceptions render the Japanese trust a more faithful reconstruction of the English trust centring on the trustee, than the patrimony model would allow.

19. Secondly, Shinomiya emphasises the management character of trusteeship, and he views the trustee's powers as greater than a simple management power, and entails a form of nominal ownership. In today's theoretical discussion there is probably little that is

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[48] Trust Act, *supra* n. 44, art. 30.
[49] *Ibid.*, art. 18.
[50] *Ibid.*, arts. 36-38.
[51] *Ibid.*, arts. 27, 29
[52] *Ibid.*, art. 19. This last provision is especially interesting, given that it is one of the features adopted in China's Trust Law of 2001, which has since been rejected in Japan.
[53] *Ibid.*, art. 52; L. SMITH, *Trusts and Patrimonies*, p 54.
[54] Trust Act, *supra* n. 44, art. 52.
[55] *Ibid.*, art. 36.

contentious or unusual in such an arrangement, as it is widely accepted in civilian trust laws that in his exercise of his management powers, the trustee may exercise some powers associated with ownership. Drawing for the most part on the views of Obo Fujio on property management rights (*zaisan kanriken*),[56] Shinomiya notes that the trustee's 'management power' encompasses a broad range of powers, including a number of real acts (*Realakt*), the ability to act on behalf of the fund including in litigation, the ability to acquire new powers, designate new duties, to exercise and dispose of existing rights, and the execution of duties. To this broad definition one can also add two further attributes: firstly, this management power is akin to agency, although it relates to property, and not a person; and secondly, the trustees' management powers are exclusive, meaning that neither the beneficiary nor settlor can interfere.

20. Shinomiya's third and most interesting argument is that the nature of the beneficiary's right can only be meaningfully understood as a proprietary right or a right *in rem*. In a manner reminiscent of *Akers v. Samba* as discussed above,[57] Shinomiya suggests that the beneficiary's interest in the property is both obligational and proprietary. He draws support for the proprietary dimension of the beneficiary's rights from three rules: firstly, the rule on liability in event of the destruction of property from force majeure, which is borne by the beneficiary;[58] secondly, the rule on real subrogation which allows physical changes to the trust fund to be reflected in the content of the beneficial interest;[59] and thirdly, the rules on notice which allow trust rights to be asserted against third parties.[60] In Shinomiya's view the proprietary character of the beneficial interest is largely internal to the trust, resting primarily on a restriction of the use of the trust property to the purposes of the trust, which is the main similarity between Shinomiya's conception of the Japanese trust and the second limb of Lepaulle's theory on the primacy of purpose over ownership, as embraced in the modern Quebec trust. However, as submitted previously, Shinomiya's reliance on this argument is considerably less than either Lepaulle or the Quebec legislator. What is most interesting in Shinomiya's proprietary view therefore is his emphasis on the fact that an act in breach of trust can be voided by the beneficiary based on article 31 cannot be explained by the obligational view,[61] which follows from his perception that an *in personam* claim against the trustee alone would be insufficient to allow a claim against a third party.

21. Shinomiya's arguments identify very clearly the powerful nature of the Japanese beneficiary's rights against the trustee, which are stronger than an ordinary personal claim, and are more akin to McFarlane and Stevens's notion of an *in personam* right in the trustee's rights, or in French jurist Frédéric Zenati-Castaing's words, a right in the manner of property (*un droit à la propriété*).[62] In this respect the discussion is not

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[56] F. OBO, *Zaisan kanriken ron josetsu* (An introduction to the theory of property management rights) (Tokyo: Yūshindō 1954).
[57] *Supra* n. 16, [83].
[58] Trust Act, *supra* n. 44, art. 19.
[59] *Ibid.*, art. 24.
[60] *Ibid.*, arts. 3, 31.
[61] *Ibid.*, art. 31.
[62] F. ZENATI-CASTAING, 48. *RJTUM*, p 644.

altogether different from the one which exists on the English trust, in which it is also unclear whether the impact of the beneficiary's rights on third parties have to be described as proprietary for it to possess the effects that it has.

4.1 Sui Generis Right

22. Shinomiya's work opened the door to recognising the proprietary characteristics of the Japanese beneficiary's interest, and it was Ōsakadani Kimio who explicitly framed the beneficiary's interest as *sui generis*, or in his words, *zuibutsuken* (a right attached to property).[63] Whereas in Quebec, as we see below, the formulation of the trust as a *sui generis* arrangement caused intense juristic problems, in Japan this was mostly welcomed. In opposition to Shinomiya, Ōsakadani submits that the trustee's legal position is akin to that of a full legal owner, for Shinomiya's idea of a proprietary management power (*butsuteki kanriken*) both contradicts the principle of *numerus clausus* in Japanese law, and it is also unsupported by the fact that the power of the trustee is not limited to that of management but encompasses all the powers of the legal owner, and his external liabilities are essentially unlimited.

23. Ōsakadani emphasises that even in the common law, the beneficiary cannot claim against a bona fide purchaser for value without notice, and the fact that a beneficiary's interest cannot be asserted against such parties involves the taking into account of subjective factors on the part of the acquirer of the property, which contradicts the basic definition of property as a right that is good against the whole world. Hence, to Ōsakadani, the beneficiary's interest is not a proprietary right but a *sui generis* right, which Ōsakadani submits is similar in nature to a registered leasehold of immovable property in Japanese law,[64] which once registered can be claimed against third parties and successors in title.

24. The views of Ōsakadani, which call for a distinction between the management functions held by the trustee and the right to benefit from and to control the property held by the beneficiary, currently represent the mainstream Japanese position. Unlike in Scotland,[65] there is no express recognition of the legal status of patrimony; from the standpoint of the beneficiary's interest, the patrimony model is helpful in highlighting how the Japanese beneficiary possesses a stronger right in the trustee's rights, compared to trusts in continental Europe which are more expressly contractual in nature.[66]

5. Quebec: Problems with Trustee Ownership

25. In Quebec, the struggle over defining the nature of ownership in trusts has dominated the juristic conversation for over a century.[67] Although Quebec shares with other mixed

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[63] K. ŌSAKADANI, *Shintakuhō kenkyū (jō) (ka)* (Studies on trust law, Vols. 1-2) (Tokyo: Shinzansha 1991).
[64] Civil Code, *supra* n. 20, art. 645.
[65] *O'Boyle's Trustee v. Brennan* [2020] CSIH 3.
[66] See G. GRETTON, 'Trusts Without Equity', in R. Valsan, *Trusts and Patrimonies*; K. REID, 'Trusts in Scotland', in D. Hayton, S. Kortmann and R. Verhagen (eds.), *Principles of European Trust Law* (The Hague: Kluwer Law International 1999).
[67] For an authoritative summary up to 1982 see *Royal Trust*, *supra* n. 19, and Y. CARON, 'The Trust in Quebec', 25. *McGill LJ* 1980, p 421 posthumously completed by John Brierley.

jurisdictions the confluence of English and civilian juristic influences, in Quebec the maintenance of the civilian features of private law was at various points in history associated with the political and cultural goal of maintaining the province's distinctive Francophone identity. Although Quebec's fear of Anglophone dominance in the legal sphere has ebbed in recent decades,[68] there continues to be a strong commitment to the civilian tradition in its private law,[69] and part of the goal of recodification in 1994 was to revitalise the *droit commun* in the province.[70] In many ways the political and emotional attachment to civilian features has given the juristic discussion in Quebec a particular intensity; it has also provided the stimulus for *métissage*, or the 'mixing' of legal concepts in creative ways.[71]

26. The development of the trust has played a central role in Quebec's legal history. Shortly after the British conquest, the Quebec Act of 1774, which maintained Quebec's distinctive legal system, also protected the freedom of testation (*liberté de tester*), thus allowing trusts to be developed by users and practitioners. Although the trust was primarily a vehicle for gifts and testation, business factors were also present as Montreal became the primary hub of commerce in British North America.[72] What was distinctive about the Quebec experience, however, was that the use of trusts by high-net-worth users was on the whole resisted by jurists, who viewed the trust as incompatible with the civil law,[73] in particular the requirement under article 406[74] that an owner must enjoy 'the right of enjoying and of disposing of things in the most absolute manner' modelled after article 544 of the French *Code civil*. At various points, for example in *Reford v. National Trust Co.*[75] the Court of the Queen's Bench qualified that the trustee's ownership of property did not amount to an article 406 ownership right. As John Brierley explains, this discussion is important because it is impossible to avoid further recourse to common law rules to operate the trust unless the institution is reconciled with the broader civilian legal

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[68] H. Patrick Glenn attributes this in part to a more sophisticated approach on the part of the Supreme Court of Canada, which reversed the early twentieth century court's inclination to harmonise Quebec law with the common law. H. GLENN, 'La Cour Suprême du Canada et la tradition du droit civil', 80. *Can Bar Rev (The Canadian Bar Review)* 2001, p 151.

[69] A. POPOVICI, 'Le droit civil, avant tout un style?', in N. Kaisrer (ed.), *Le droit civil, avant tout un style?* (Montréal: Éditions Themis 2003).

[70] H. GLENN, 'La disposition préliminaire du *Code civil du Québec*, le droit commun et les principes généraux du droit', 46. *C de D (Les cahiers de droit)* 2005, p (339) at 347-351; J. BRIERLEY, 'The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec', 42. *U Toronto LJ (The University of Toronto Law Journal)* 1992, p 484.

[71] Y. EMERICH, *Conceptualising Property Law* (Cheltenham: Edward Elgar 2018), ch. 1.

[72] Early examples of the use of the trust in business contexts include financing based on the issuing of bonds, guaranteed by a floating charge, which were preferable to the traditional institutions of real estate mortgage (*hypothèque immobilière*) and pledge on goods (*gage sur les meubles*). S. NORMAND, 'La culture juridique et l'acculturation du droit: le Québec', in J. Cordero (ed.), *La culture juridique et l'acculturation du droit, Rapports au XVIIIe Congrès international de droit comparé* (Mexico City: International Academy of Comparative Law 2010), p 30.

[73] S. NORMAND and J. GOSSELIN, 'La fiducie du Code civil: un sujet d'affrontement dans la communauté juridique québécoise', 31. *C de D* 1990, p (681) at 728.

[74] Civil Code of Lower Canada, 29 Vict., ch. 41, (1865).

[75] [1967] CarswellQue 276, [28] (Salvas JA).

environment, and it is widely perceived by Quebec jurists that such independence is desirable and necessary.[76]

5.1 Nature of the Old Quebec Trust

27. Although the use of the trust was formalised in the statute of 1879 and incorporated into the civil code in 1888: with only eighteen clauses, article 981 of the Civil Code of Lower Canada was extremely vague, and courts tended to restrict the application of the trust to purposes identified in the code.[77] In the leading case of *Curran v. Davis*, which concerned a deed of donation and trust in which the grantor (settlor) sought to revoke the benefit before it was accepted, Rinfret J held that the revocation was void because the trustee's acceptance was sufficient to constitute the trust and make the gift to the trustee irrevocable. This was because the trustee was not a depository or administrator in the sense of the civil code, but rather he held all the rights of the owner without having legal title (*ils possèdent à peu près tous les droits du propriétaire sans en avoir le titre*).[78] Thus the judge held that it was the trustee who owned the property, at the same time he accepted that the trustee lacked *usus*, *fructus*, and *abusus* in the trust property; like the English trustee, he does not have the right to profit from the property, and has the obligation to administer the property for the best interests of the beneficiary.[79] In contrast, the beneficiary, although a nominal owner (*un propriétaire nominal*), does not have a property right but only a personal claim (*une créance*) against the trustee, which does not encompass a right to possession, but includes a right to payment or a right in the event of the dissipation or wastage of the property.[80] Rinfret J also held that for the purpose of relations between the trust and third parties, the beneficiary was a third party for whom the creator of the trust had made a stipulation.[81]

28. While Rinfret J's decision has largely been followed by Quebec courts: in *Guaranty Trust v. The King*, Taschereau J held that the beneficiary was only a creditor of the trustees,[82] whereas in *Reford* where Salvas JA accepted that ownership during a trust was not in suspense, but rather the trustee had full ownership of the property, albeit this was not ownership in the article 406 sense and his rights were necessarily constrained by the trust.[83] The late jurist Yves Caron noted that no case has departed from Rinfret J's holding in *Curran*,[84] which also affirmed the view Rinfret J expressed in *Laliberté v. LaRue*,[85] where he suggested that it was unlikely the legislator would have intended to introduce with a single stroke the full English trust with its complex rules to the legally alien environment of Quebec. Yet, there was little clarity in the detailed operation of

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[76] J. BRIERLEY, 'Editor's Post Scriptum', in Y. Caron, 25. *McGill LJ*, pp 440, 443.
[77] For example in *O'Meara v. Bennett* [1922] 1 AC 80, p 86 (Lord Buckmaster), the Privy Council refused to recognise self-declarations of trust in Quebec, and unit trusts for investment purposes were rejected in *Crown Trust v. Higher* [1977] 1 SCR 418, pp 425-426 (De Grandpré J).
[78] *Curran*, *supra* n. 6, p 305.
[79] *Ibid.*, pp 293-294.
[80] *Ibid.*, pp 293-294.
[81] *Ibid.*, p 305.
[82] [1948] SCR 183, pp 205-206.
[83] *Reford*, *supra* n. 75.
[84] Y. CARON, 25. *McGill LJ*, p 428 (fn. 26).
[85] *Supra* n. 19.

trusts rules, as practitioners avoided litigating out of fear of disturbing the fragile juristic status quo. Juristically, the most significant effect of the stalemate was the lack of clarity with respect to the beneficiary's ability to enforce the trust.[86] Without a party who can effectively enforce the trust inside the trust structure, any discussion of the beneficiary's right is moot.

6. The New Quebec Trust

29. The civil code of 1994 fundamentally reshaped the juristic character of the Quebec trust by declaring the trust patrimony 'ownerless', which means that both the trustee and the beneficiary now only have personal rights in the trust property. At a juristic level, the new trust severed its links with the old Quebec trust. However, notwithstanding two and a half decades of operation, the *patrimoine d'affectation* is not perceived to have altered practitioners' understanding of the beneficiary as the substantive owner of the property. Rather, the new trust architecture has been stronger at protecting the beneficiary's rights relative to the trustee, and thus the label of 'personal' right does not detract significantly from the level of substantive rights which a beneficiary enjoys in an English trust.[87]

30. As Alexandra Popovici explains,[88] the Quebec legislator was influenced by the notary Pierre Charbonneau, who worked at the Ministry of Justice at the time of recodification, and Charbonneau suggested that Lepaulle's theory applied particularly well to the Quebec trust at the time, which he saw as an autonomous and personless patrimony which was held together by its purpose. Although Charbonneau accepted Mazeaud's identification that a legal owner of property is required at all times,[89] he nonetheless hypothesised that an 'ownerless' trust would generate the same effects as a legal person.[90] This vision of the patrimony is boldly reflected the new article 2 of the Civil Code, which distinguishes between personal, divided and affected patrimonies.[91] In other words, the Quebec legislator did not choose Lepaulle's model because they shared his misunderstanding of the English trust; rather, it is likely that Lepaulle's use of the English trust as a springboard for articulating a new conception of patrimony and of property was attractive to the legislator, even if the idea itself may be radical or experimental.

6.1 Core Rights of the Beneficiary

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[86] M. CANTIN CUMYN, 'The Trust in a Civilian Context: The Quebec Case', 3. *J Int'l Tr & Corp Pl* (*Journal of International Trust and Corporate Planning*) 1994, p (69) at 75, 79.
[87] In *Fonds Norbourg Placements Équilibrés (Re)* [2006] RJQ 1848 (QL), for example, Mongeon J of the Quebec Superior Court did not find any difference in outcome between Quebec and Ontario rules in a case concerning investment unit trusts, at least from the perspective of the investors, who were settlors and beneficiaries, and the decision was upheld at the Court of Appeal.
[88] A. POPOVICI, 'Trust in Quebec and Czech Law: Autonomous Patrimonies?', 6. *Eur Rev Priv Law (European Review of Private Law)* 2016, p (929) at 942.
[89] H., L. and J. MAZEAUD, *Leçons de droit civil*, vol. 1, *Introduction à l'étude du droit* (Paris: Éditions Montchrestien, 6th edn 1980), p 357.
[90] P. CHARBONNEAU, 'Les Patrimoines d'affectation: vers un nouveau paradigme en droit québécois du patrimoine', 85. *R du N* (*Revue du notariat*) 1983, p (491) at 527-528.
[91] Civil Code, *supra n. 4*, art. 2.

31. The new beneficiary is best characterised as a creditor of the new Quebec trust,[92] although the code itself does not define the nature of this right, except in the negative sense that the trust does not generate real rights.[93] However, unlike the old trust, the basic entitlement to trust assets is supplemented by a number of supervisory and monitoring rights against the trustee, including the right to compel the trustee to perform a particular act, or to sue to have him removed.[94] Although these rights are shared with the settlor, or where there are no beneficiaries, they are exercisable by a curator (protector) or another person appointed by the court,[95] the rights are independent of the beneficiary's position as claimants under the trust,[96] thereby giving an interest to potential beneficiaries in a manner similar to the objects of a discretionary trust in the common law.[97]

32. As the right to demand performance or payment is now firmly protected by law,[98] the beneficiary's rights as a creditor of the trust are enhanced.[99] As Brierley puts it , the right to request the removal of the trustee or to exercise remedies against him is not usually part of the rights of a creditor.[100] Like in Japan, the Quebec beneficiary enjoys a number of other rights which make it possible to view the beneficiary as the economic owner of the trust. Like in Japan, a beneficiary is able to disclaim his interest in the trust.[101] His rights in the trust can be assigned, and are available to the beneficiary's creditors.[102] The beneficiary is also well-protected from third-party claims, unless the beneficiary engages in fraud.[103] Where the trustee refuses without good reason to take action on behalf of the trust against third parties, the beneficiary has the right to apply to the court for permission to step in himself.[104] The new law also provides for the use of social and

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[92] A. POPOVICI, 'Le patrimoine d'affectation: nature, culture, rupture' (LLM thesis, Université Laval 2012), p 113. Civil Code, *supra n. 4*, art. 1261 also implies the same by declaring that neither the settlor, trustee nor beneficiary has a real right.

[93] Civil Code, *supra n. 4*, art. 1261. The idea that the trust does not generate real rights has been challenged by Naccarato based on cases on the settlor's retention of rights. M. NACCARATO, 'La fiducie de protection d'actifs: un mirage?', 60. *C de D* 2019, p 283 and M. NACCARATO, 'La fiducie: réflexion sur la reception judicaire d'un nouveau code', 48. *C de D* 2007, p 505.

[94] Civil Code, *supra n. 4*, arts. 1287-1291.

[95] *Ibid.*, art. 1289.

[96] *Ibid.*, art. 1290 gives 'the settlor, the beneficiary or any other interested person' the right to take action against the trustee.

[97] M. CANTIN CUMYN, 3. *J Int'l Tr & Corp Pl*, p 79; J. BRIERLEY, 'Regards sur le droit des biens dans le nouveau Code civil du Québec', 1. *RIDC* (*La revue internationale de droit comparé*) 1995, p (33) at 47-48; *Schmidt*, *supra* n. 14.

[98] Civil Code, *supra n. 4*, art. 1284.

[99] In Cantin Cumyn's view, it is only by removing the trustee's 'ownership' of trust property that a beneficiary can meaningfully enforce duties owed to the trust by the trustee, which are now governed by a common set of duties imposed on those managing the property of others. M. CANTIN CUMYN, *L'administration du bien d'autrui: Traité de droit civil* (Montréal: Éditions Yvon Blais 2014).

[100] J. BRIERLEY, 1. *RIDC*, p 47.

[101] Civil Code, *supra n. 4*, art. 1285.

[102] Implied from *ibid.*, arts. 1212-1217, which state that stipulations of inalienability apply to gifts or to wills only; M. CANTIN CUMYN, 3. *J Int'l Tr & Corp Pl*, p 78.

[103] Civil Code, *supra n. 4*, art. 1322, which restricts the beneficiary's liability to the extent that he has benefitted from the trust, and unless he has committed fraud (art. 1292), the liability is to be met out of trust funds.

[104] *Ibid.*, art. 1291.

private utility trusts, where there is no beneficiary like in the English charitable trust, in which case a public authority is provided with the duty to monitor the trust and with the ability to step in.[105] Thus, in the context of enhanced rights, the beneficiary's position as the owner of 'entitlements' against a juridically-protected patrimony (*patrimoniaux juridiquement protégés*) rather than the owner of the property itself is significant.[106]

6.2 Nature of the 'Ownerless' Trust

33. As Popovici explains, the new Quebec trust is not composed of a set of obligations but is a mode of detaining property, which entails a distinct and autonomous patrimony. The trust is not defined in relation to obligations between parties within the trust mechanism, and nothing is 'owned' in such an institution.[107] Building on the ideas of French jurists Charles Aubry and Frédéric Rau, who first articulated the idea of patrimony as the sum of a person's rights and the only 'legal universality' which can exist; [108] to Lepaulle a patrimony was a legal universality which is brought together not by the relationship between persons but by a purpose. This idea was a central component in Lepaulle's theory, even if it would strike the modern English reader as a fundamental misunderstanding of the fact that purpose trusts play only a marginal role in English law.[109] Furthermore, Lepaulle's formulation also ignores the trustee's ownership rights, and privileges instead the eighteenth-century French view that the trust was no more than a deposit (*dépôt*) or an outright fiction.[110]

34. Under such a characterisation there are two conditions which must be satisfied for the trust to be constituted: firstly, the property must be divided and refashioned into a patrimony, and secondly, it must be attached to a purpose. However, at the same time as radically redefining property as a patrimony which can be owned by person or else it can be divided or defined by a goal,[111] the reformulation was not carried through to the level of the constituent legal relationships forming the patrimony. The first article in Book 5 on obligations defines the concept as one which requires 'that there be persons between whom it exists, [and] a prestation which forms its object',[112] which means that either a living or legal person is still necessary.[113]

35. The second part of Lepaulle's formulation—the attachment of property to a purpose—is less problematic on its own terms, although its main problem is that it remains at best a poor characterisation of the trust in common law, where the beneficiary

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[105] *Ibid.*, art. 1287.
[106] J. BRIERLEY, 1. *RIDC*, pp 48, 82. In the same connection Brierley submits that the view of some jurists that the Quebec legislator has sought to overhaul the very definition of property is overstated, and he points in particular to Civil Code, *supra n. 4*, art. 947, which retains the same quality as article 544 of the French *Code civil*.
[107] A. POPOVICI, 6. *Eur Rev Priv Law*, p 931.
[108] C. AUBRY and F. RAU, *Cours de droit civil français* (Marchal et Godde 5th edn 1917) vol 9. It is worth noting that Aubry and Rau were known for drawing inspiration from German legal studies to break away from the taxonomic structure imposed by France's *Code civil*.
[109] A. POPOVICI, 6. *Eur Rev Priv Law*, pp 935-936.
[110] F. ZENATI-CASTAING, 48. *RJTUM*, p 628.
[111] Civil Code, *supra* n. 4, art. 2.
[112] *Ibid.*, art. 1371. A prestation can be defined as a performance due upon an obligation.
[113] A. POPOVICI, 'Le patrimoine d'affectation', p 93.

enjoys a substantive right irrespective of the trust's purpose. Even though charitable trusts exist in England and purpose trusts have become important in offshore jurisdictions, these trusts are not seen as the main prototype of trusts, and non-charitable purpose trusts are void from the outset.[114] Yet, it is fair to say that purpose is a relatively attractive concept, for notwithstanding the similarities between the *patrimoine d'affectation* and legal personality, the idea that it is purpose rather than patrimony *per se* which provides the gel for a bundle of rights is one which gives the Quebec innovation its creative edge, without being trapped in the endless and repetitive debates between trustee or beneficiary ownership of property which marred the old trust.

6.3 Differences From Legal Personality

36. The main danger inherent in the new trust structure lies in its substantive resemblance to legal personality. Although the new Quebec trust is formally a 'patrimony' rather than a legal person, the rejection of legal personality may have more to do with its signalling effect than the inapplicability of the label to the trust. As Caron puts it, whereas 'property' is a vehicle for rights in the common law, it is fixed and monolithic to the civilian. For 'legal personality', in contrast, it is monolithic in the common law but it is a vehicle for rights in the civilian context.[115] In other words, whereas in English law legal personality is only available to certain entities, for example a corporation but not a partnership, in French law all corporations and civil as well as commercial partnerships have legal personality. From a practical standpoint therefore, the legal personality solution would be highly problematic, as the existing status quo relied in part on practitioners being able to form trusts for their clients and market them as products compatible with common law trusts. Furthermore, the legal person idea was opposed by common law jurists, most notably Smith, who observes that recognising the trust's legal personality amounts to acknowledging a personal interest of the trust, which would be distinct from that of the beneficiary.[116] From the standpoint of trustees, it relegates the beneficiary to the status of a third party in the relationship between the trust and its creditors.[117] To the common lawyer at least, this would collapse the distinction between a trust, where the beneficiary *is* the entity, and a company, where the beneficiary has a stake in a larger entity.[118]

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[114] The best known cases in this area, such as *Re The Trusts of the Abbott Fund* [1900] 2 Ch 326 or *Re Osoba* [1978] 1 WLR 791, are viewed as exceptions rather than the norm. J. PENNER, 'Purposes and Rights in the Common Law of Trusts', 48. RJTUM 2014, p (579) at 579.

[115] Y. CARON, 25. *McGill LJ*, p 437.

[116] L. SMITH, 'The Re-imagined Trust', in L. Smith (ed.), *Re-imagining the Trust: Trusts in Civil Law* (Cambridge: Cambridge University Press 2012), p 262. It is worth noting that in Scotland too there was a discussion as to whether the trust should be given legal personality, for example SCOTTISH LAW COMMISSION, *The Nature and Constitution of Trusts* (Scot Law Com No. 133, 2006), before the adoption of the patrimony view by leading Scottish authors cited above.

[117] L. SMITH, *Re-imagining the Trust,* p 262. It is worth noting that this was precisely what Rinfret J held in *Curran*, *supra* n. 6, p 305.

[118] Yet, it is submitted that the Japanese trust—with its majority decision-making mechanisms—does not privilege the trust's interests above those of the beneficiaries, even though there may only be a thin line between recognising the interests of the majority of beneficiaries (with the option of buying out the minority) and acknowledging that the trust has its own interests.

37. It may be the case that the 'ownerless' nature of the Quebec trust means that it has an interest that is different from the sum interests of beneficiaries, which both detracts from the nature of the trust as a fundamental institution in English law,[119] and subverts the very meaning of property.[120] In any event practitioners have been less interested in this question than the larger problem of whether the Quebec trust is compatible with the common law trust for practical purposes. As Smith points out, whether a right is personal or proprietary is not necessary pertinent from the perspective of practitioners, given that personal rights can also offer effective protection over property, for example in the lease of immovable dwellings.[121] Thus it is submitted that the Quebec trust currently enjoys an equilibrium where it provides a workable arrangement to practitioners as a result of its stronger protection of the beneficiary's interests.

7. Conclusion

38. The most important commonality between the English, Japanese and Quebec trusts lies in their effective protection of the beneficiary's rights. While it is true that for civilian jurisdictions, the label of property has the useful effect of highlighting the enhanced protection given to beneficiaries, particularly with respect to third parties and in the event of insolvency; from the perspective of English law the label of property is likely to distract from a focus on the trustee's duties to the beneficiary, particularly with respect to the due administration of the trust. Taking the two sets of interests in turn: there is no compelling reason why a detailed contract cannot allow the beneficiary to monitor trustees. What is required is for courts to recognise the far-reaching effects of the beneficiary's interest in all aspects of the trustee's control over property. The case of Japan highlights the minimum which needs to be done, namely enhanced measures to ensure the independence of the trust fund, and the right of beneficiaries to monitor trustees even where they lack direct contractual standing. Meanwhile, by denying the trust parties' ownership of property, the Quebec trust has gone further in disrupting the nature of ownership under a trust. Yet, like in the case of Japan, there is nothing to prevent the Quebec trust from being used in the manner of a traditional English express trust, so long as the beneficiaries are clearly specified, and the purpose of the trust is aligned with the beneficiary's enjoyment of the property. The crucial problem which faced the old Quebec trust was the juristic obstacle posed by an absolutist notion of property; the new Quebec trust has clearly been effective in overcoming that problem.

39. In the end, it is by recognising the separate nature of the two sets of the rights of the beneficiary that it becomes possible to replicate the core functions of the English trust, while continuing to respect the rules of property found in civilian jurisdictions. The beneficiary's monitoring functions are clearly replicable by contract with only a few significant adjustments. Nonetheless, third party effects are also important to the nature

[119] L. SMITH, *Trusts and Patrimonies*, pp 56-59.
[120] F. ZENATI-CASTAING, 48. *RJTUM*.
[121] L. SMITH, *Trusts and Patrimonies*, p. 59. In addition one should also bear in mind the different natures of rights held by different beneficiaries, as discussed in C. MITCHELL, *Landmark Cases*, p 282.

of the trust, and in order for trusts to work effectively, civilian trusts must provide solutions to both dimensions of the beneficiary's interest.