Legal matters: In Quebec, trusts have different rules and different challenges

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"Don't try putting common-law language into a Quebec trust," says one lawyer. But there's more to Quebec's unique approach to trusts than different nomenclature.

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This article is part of our ongoing Legal series.

Trusts and their uses vary province by province, given regulations related to them that can be different in each jurisdiction. In the first article in this series on trusts, we looked at British Columbia and the special challenges the province presents when it cornes to estate planning. Today, we zoom in on Quebec,

which stands out with a predominantly civil law system, as opposed to those based on common law in the rest of Canada.

"You're starting off with a very different theoretical base in Quebec versus the other provinces when it comes to a trust," says Daniel Frajman, a lawyer and partner at Spiegel Ryan LLP in Montreal who practises in the areas of trusts, wills and estates, estate planning and charity/non-profit, as well as business law.

He notes that trust law is a branch of private law, which in Quebec has its roots in the civil laws of France, while in the other provinces private law emanates from English common law. In common-law provinces, "there's a division between legal and beneficial ownership that's the basis for a trust," he explains. A trustee holds legal ownership with respect to property held in trust for the beneficiaries, who have beneficial ownership.

Quebec law: a look back

Quebec's private law dates to at least Confederation in 1867, when the founding provinces maintained the roots of the two different systems in constitutional documents. Trusts did not exist in the *Civil Code of Lower Canada,* which became the *Quebec Civil Code;* rather, it had certain vehicles to pass on ownership of property, known as a substitution, for example. These were cumbersome and had limitations, Frajman says, so trusts were added to the Code in the late 1800s. But there was still no way to divide legal and beneficial ownership "because it was a common-law principle—it just did not exist in Quebec."

In 1994, the section of the *Quebec Civil Code* on trusts was rewritten, making them similar to common-law trusts, with clearer rules, but Quebec still does not use the legal and beneficial ownership concept, Frajman says. Instead, it "gives a quasi-ownership to the trust itself" through a "patrimony of appropriation," enumerating what's owned by the trust. The trustee and beneficiaries do not have

actual rights to the property, but the administrative rights of the trustee and beneficiaries to enjoy the property are spelled out.

"The results are not that different from a trust in common law, but the mechanics are different," he says, noting that using the correct terminology is critical. "Don't try putting common-law language into a Quebec trust."

That makes it important to work with a lawyer who's cognizant of the proper way to set up a trust, which you can find through a professional organization such as the Society of Trust and State Practitioners, the Canadian Tax Foundation or the Quebec Fiscal and Financial Planning Association.

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Sara Halickman

Drafting and creating a trust in Quebec

The need to formally establish the patrimony—essentially the trusts balance sheet of assets and liabilities—makes it difficult to have implied or bare trusts, which are simple legal arrangements that often arise in the common-law provinces. In the bare trust, a trustee holds legal title to property while the beneficiary has absolute and immediate ownership of the assets and any income generated, but you have to be a little bit more deliberate in drafting and creating a trust in Quebec," Frajman points out.

Under the *Civil Code of Quebec,* you also must have at least one trustee who is not a present or future beneficiary of the trust, for example an accountant or trust company, which is not the case in the other provinces.

Sara Halickman, vice-president of advisory services at Patrimonica, a multi-family office in Montreal, says that without an independent trustee, "it's as if a trust doesn't exist." Having "somebody who's not invested in the outcome" involved in the oversight of a trust makes sense "from a perspective of best practice," she says. "It's a huge advantage to make sure that everybody is protected, and that's what we're talking about at the end of the day when we talk about putting assets in a trust or using a trust as a vehicle for distribution and beneficiaries."

The *Quebec Civil Code* sets out certain responsibilities for trustees, she points out. "It creates a framework for administration and allows better protection for everybody involved, to a certain extent."

An independent trustee could be a trusted advisor or family friend. In Quebec, notaries are frequently used for setting up trusts, in addition to lawyers, Halickman notes. "Often there's a team working together," following a checklist that includes the need for an independent trustee.

Halickman, a Chartered Professional Accountant and Trust and Estate Practitioner, comments that "everything we do in Quebec trust-wise is always a little bit different" than other jurisdictions, which can be an education for clients. "We're able to sit with them and go through all the nuances."

One practical difference is that Quebec does not have a harmonized tax system, she says, "so everything essentially has to be done twice." Annual trust returns must be submitted to both the Canadian and Quebec governments. "It is two separate filings, two separate notices of assessment, two separate tax balances owing or refundable, and certain disclosures have to be done twice as well."

Frajman says another difference with trusts in Quebec is that it can be harder to amend them, under a rule saying that it's typically necessary to get a court to make changes. "It's a bit of a grey area," he says, while in other provinces simple tweaks like changing the number of trustees can often be made through a document signed by the trustees and beneficiaries.

Differences within the Quebec law

Quebec is also different when it cornes to the investments that a family trust can undertake, he says. The *Quebec Civil Code* stipulates that trustees have to act reasonably and prudently and have a fiduciary duty or duty of loyalty with respect to carrying out their duties.

In some other provinces, however, "there's more of a requirement to act as a 'prudent investor' with respect to meeting those duties, maybe having a need to consult professionals in investment," Frajman says. "That is not a bad thing to do in Quebec, but we wouldn't say that there's a quasi-statutory requirement to do so."

Another difference in Quebec is that wills are not often probated, because they are typically executed before notaries. This means there is no probate fee, and the will does not become a public document —both issues that often prompt people to set up trusts as "will substitutes" in the rest of Canada, he adds. "I think you see less use of them as a substitute in Quebec because you already have privacy and the lack of a probate fee."

Halickman agrees that "when you know you're going to have to deal with probate, there's more of an emphasis on looking at what assets can pass outside of the estate." In Quebec, that's not an issue, "so we're not so concerned with trusts for probate planning."

Families in the province are more interested in trusts for "protecting family patrimony," she says—essentially, controlling assets and their disposition. This includes spousal trusts created to protect the interests of a surviving spouse and the next generation, as well as trusts to determine how much money children can inherit at different ages. "It's really ensuring the legacy of the family and that the wealth is protected, but also that individuals are protected."

Mary Gooderham is a writer, editor and communication advisor based in Ottawa. She leads Cohen Gooderham Communications and bas worked as a journalist for more than 40 years at The Globe and Mail, as a recording officer at the International Monetary Fund and as a custom content creator for online and print media. She's been a contributing writer at Canadian Family Offices for four years, focusing on investment strategy, trusts, philanthropy, women in finance and estate planning.

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