

Beneficiary-Initiated Modification of Trusts: A Comparative Examination

Joshua A. Krane

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Résumé de l'article

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JOSHUA A. KRANE

Legal Methodology Student Co-ordinator, Faculty of Law,
McGill University, Montreal

ABSTRACT

This paper will explore the differences in Canadian common law and Québec civil law in relation to beneficiary-initiated variation and termination of trusts. Modification in Québec civil law focuses on giving proper effect to the intent of the settlor. This results in a far more restrictive regime than in common law Canada, which focuses on the rights of the beneficiaries. However, a rights-based model that recognizes beneficiary-initiated modification would also be compatible with Québec civil law

RÉSUMÉ

Cette section explore la différence entre la common law canadienne et le droit civil québécois en ce qui a trait au droit des bénéficiaires d'une fiducie de la modifier ou d'y mettre fin. Les modifications permises en droit civil québécois visent principalement le respect de l'intention du disposant. Le régime qui en découle est plus restrictif que celui qui a cours dans le reste du Canada, où l'accent est mis sur les droits des bénéficiaires. Il ne serait cependant pas incompatible avec le droit civil québécois d'envisager un modèle fondé sur les droits des bénéficiaires à initier les modifications de la fiducie.

Keywords: *Trust* —
Modification — *Saunders v.*
Vautier — *Termination* —
Variation — *Renunciation* —
Income Trusts — *Section*
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Mots-clés: *Fiducie* —
modification — *Saunders v.*
Vautier — *extinction d'une*
fiducie — *modification* —
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revenu — *article 1294 C.c.Q.*

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INTRODUCTION

1. This paper will explore the differences in Canadian common law and Québec civil law in relation to beneficiary-initiated variation and termination (together, “modification”) of trusts. It will examine the principles that underlie these events and will consider whether it would be possible for Québec civil law to accept modification by the beneficiaries. The common law provinces follow the British approach to beneficiary-initiated modifications: a model, which focuses on giving effect to the rights of the beneficiaries (a “rights-based model”). In most of those jurisdictions, beneficiaries may make modifications even without judicial approval.¹ However, modification in Québec civil law focuses on giving proper effect to the first intent of the settlor (an “intention-based model”). Extra-judicial trust modifications also have not gained acceptance in Québec civil law. This difference in approach results in a more restrictive, less flexible, modification regime in Québec.

2. As I will discuss below, the selection of a rights-based or an intention-based model for trust modification does not depend on the origins of the trust regime. Some civil law jurisdictions have adopted a rights-based model, while some common law jurisdictions have adopted an intention-based one. The selection of the appropriate model for trust modifications represents a policy choice — one that either gives more or less power to the beneficiaries to assume control over the property in their trust. If we believe that trusts benefit persons, rather than purposes, then it makes sense to adopt a rights-based model for trust modifications.² A rights-based approach to trust modifications would be more coherent with the structure and the purpose of the trust institution.

1. Legislation in Alberta and Manitoba precludes extra-judicial trust modifications. *Trustee Act*, R.S.A. 2000, c. T-8, s. 42. *Trustee Act*, R.S.M. 1987, c. T160, s. 59. Following, the recent decision by the Supreme Court of Canada in *Bushau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, modifications to pension trusts cannot be made judicially, because pensions are governed by special legislation. *Pension Benefits Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.).

2. Paul MATTHEWS, “The Comparative Importance of the Rule in *Saunders v. Vautier*”, (2006) 122 *L.Q.R.* 266, at 275.

3. Although changes to the *judicial* modification regime in Québec would require a revision to the *Civil Code of Québec* (C.C.Q.), it is possible within the current framework of Québec trust law to derive a rights-based model to *extra-judicial* modification, without undermining the current structure of the trust institution. Although such a model conflicts with the current doctrinal and jurisprudential consensus, it still merits serious consideration. Québec civil law generally should accept beneficiary-initiated extra-judicial trust modifications when the beneficiaries can reach a consensus to make modifications to their trust and when the interests of future beneficiaries can be protected.

4. This paper aims to understand beneficiary-initiated modification in the Québec civil law tradition, with reference to approaches taken in the Canadian common law provinces. Part I will review the development of the law on beneficiary-initiated trust modification in common law Canada, with particular emphasis on the law of Ontario. Part II will place section 1294 C.C.Q., the controversial legislative provision that addresses trust modification, within the doctrinal framework of the Québec trust, while Part III will speculate why the legislature took a restrictive approach to modifications. Part IV will assess the compatibility of two methods of extra-judicial modification with the general civil law doctrinal framework — modification by express grant and modification by agreement. Finally, Part V will advocate for a change to Québec's current modification regime as it applies to both personal trusts (express trusts)³ and income trusts.

I. TRUST MODIFICATION IN THE COMMON LAW: THE RIGHTS-BASED MODEL

5. Settlers constitute express trusts deliberately for the benefit of persons or for the benefit of purposes to fulfill a particular objective. Instead of conveying (transferring) the property directly by means of a gift or a devise (legacy), an express

3. As some of the technical terms vary as between the common law and civil law, I will include the concept from the other legal system in parentheses.

trust delays conveyance of the property.⁴ To delay conveyance, the settlor may set conditions which specify which beneficiaries will receive income or capital, at which points in time, and under what circumstances.⁵ The settlor also may set conditions to circumscribe the scope of the trustee's powers and duties. In this part, I will outline the two types of common law trusts that are generally subject to beneficiary-initiated modifications. I will then briefly outline the development of the common law approach to trust modifications.

A. EXPRESS TRUSTS AND INCOME TRUSTS

6. There are two types of trusts commonly used to benefit named or identifiable beneficiaries. Express trusts are voluntarily created and generally gratuitous.⁶ Settlers will use express trusts typically for transfers of property within the family. Although bare express trusts can require that the trust execute a single discrete transfer of property, the conditions contained in the trust deed (constituting act) of an express trust may be such that it takes decades for the beneficiaries to receive all of the trust property.⁷

7. Investors also use trusts as instruments to pool funds for investment. The trust is a way for investors to divest control over their funds to a professional manager, but also retain the benefits of the investment. Examples include the pension trust, the real estate investment trust, and the registered retirement savings plan ("RRSP"). I will refer to these trusts specifically as "income trusts." An income trust can last indefinitely, since none of the interests in the trust is contingent

4. Aside from the trust, Québec civil law recognizes another form of relational transfer of property in the substitution. See sections 1218 to 1255 C.C.Q.

5. Donovan W.M. WATERS, Mark GILLEN, Lionel SMITH, *Waters' Law of Trusts in Canada*, 3rd ed., Toronto, Carswell, 2005, at 1179-1194, [D.W.M WATERS].

6. Unfortunately, the common law does not have a separate term for intentionally constituted trusts and trusts constituted specifically for gratuitous purposes. I will refer to these trusts as "express trusts."

7. The use of a trust instrument, as opposed to a gift, as a means of conveyance, says something important about the relationship between the settlor-conveyor and the recipient-beneficiary. By choosing a trustee — a third party — to hold and administer property for other persons — the beneficiaries, who may well be fully capacitated and legally able to administer their own property — the settlor denies the beneficiaries full legal control over the conveyed property.

and since it is the settlors who essentially are both the income and the capital beneficiaries of the trust.⁸ Nevertheless, the settlors still may include conditions to constrain the exercise of powers by the trustees that manage the trust investments.

B. BENEFICIARY-INITIATED MODIFICATION

8. There are situations, however, when the beneficiaries of either express trusts or income trusts want to terminate the trust or vary the terms in the trust deed. Beneficiaries can do so by invoking the common law rule in *Saunders' case*.⁹ The rule in *Saunders' case* derives from a judgment of the Chancery Court of the United Kingdom ("U.K."), *Saunders v. Vautier*, although the principle is thought to have originated nearly a century prior.¹⁰ In *Saunders v. Vautier*, the beneficiary, Daniel Vautier, applied to the Chancery Court to accelerate his interest in the capital. According to the trust deed, Vautier would have received the full capital at age twenty-five. The Court, however, granted Vautier's request to terminate the trust at age twenty-one, the age of majority at the time, holding that a fully capacitated trust beneficiary could terminate the trust notwithstanding a condition that delayed vesting.

9. The development and acceptance of this rule is linked to its focus on the rights of the beneficiaries, notwithstanding the position of the settlor or trustee. Although the legal title to trust property belongs to the trustee, the common law recognizes a duality of ownership interests, such that the beneficiaries of the trust have a parallel title in equity in the same

8. *Perpetuities Act*, R.S.O. 1990, c. P.9, ss. 2-3. The concept of vesting does not apply directly in the context of the Québec trust, since the interest does not become a patrimonial right until the beneficiary's rank opens and until the beneficiary meets the conditions set down by the constituting act. Section 1280 C.C.Q. See also *Trust Général du Canada c. Poitras*, J.E. 99-30 (C.S.), (DCL), [Poitras].

9. *Saunders v. Vautier*, (1841) 49 E.R. 282 (Ch.).

10. TRUSTEE ACT MODERNIZATION COMMITTEE, *Report on the Variation and Termination of Trust*, Vancouver, British Columbia Law Institute, 2003, at 1, citing ONTARIO, *Report on the Law of Trusts*, Toronto, Ministry of the Attorney General, 1984, at 393, and D.W.M. WATERS, *supra*, note 5 (2nd ed.), at 962.

property.¹¹ This equitable interest is a right *in rem*, essentially as good as a legal title.¹² The legal title primarily serves to identify the trustee as a manager of the trust property on behalf of the beneficiaries.

10. Courts that followed *Saunders v. Vautier* explained that because the beneficiaries have rights akin to ownership in the trust property, they can exercise these rights to overcome the intention of the settlor. This development parallels a policy choice in the law of equity that prefers the vesting of property.

11. In *Curtis v. Lukin*, decided a year after *Saunders v. Vautier*, Lord Langdale M.R. explained :

[The beneficiary] has the legal power of disposing of it, he may sell, charge, or assign it, for *he has an absolute, indefeasible interest in a thing defined and certain*; the Court, therefore, has thought fit [...] to say, that since *the legatee has such the legal right* and power over the property, and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest, *when the thing is his own*, at this very moment.¹³ (Emphasis added).

12. The same focus on the notion of rights and ownership carries through the case law today. For example, Quigley J.C.S. held in *Hubbard v. Hubbard* :

[... T]here are two fundamental principles which underlie the Rule in *Saunders v. Vautier*. The first is that the beneficiary must be of full capacity. The second is that the beneficiary must have the full beneficial interest, both as to payments during the beneficiary's lifetime, and to the residue or corpus of the Trust by reason of his or her control of the reversionary interest.

11. The Chancery Court wanted to make the interest of trust beneficiaries preferred to ordinary creditors, in case the trustee went bankrupt. Gregory ALEXANDER, "The Dead Hand and the Law of Trusts in the Nineteenth Century", (1985) 37 *Stan. L. Rev.* 1189, at 1197.

12. A beneficiary — either a moral person or a legal person — may lose its equitable interests if the trustee sells the legal title to a third party for fair value and without notice of the existence of the trust. D.W.M. WATERS, *supra*, note 5, at 1284.

13. *Curtis v. Lukin*, (1842) 49 E.R. 533 (Ch.), at 536, cited in G. ALEXANDER, *supra*, note 11, at 1200. (Emphasis added).

Where both of these elements are present *the beneficiary is entitled, as of right, to terminate the trust*.¹⁴ (Emphasis added).

13. By extension of the rule, beneficiaries can terminate a trust extra-judicially when as a group, they control the totality of the beneficial interest and they are all fully capacitated.¹⁵ This group also comprises objects of powers of appointment, because their interests are affected if the trust terminates without their consent.¹⁶

14. The beneficiaries essentially act as one mind when they modify the trust.¹⁷ It bears note, however, that the requirement for unanimity can have significant repercussions since it can often prevent modification from taking place. For example, a single beneficiary may exercise a veto,¹⁸ or a beneficiary or potential beneficiary who is a minor may be unable to give his or her consent. Good drafting of a trust deed by the settlor, therefore, can minimize the risk of the beneficiaries being able to terminate the trust prematurely.¹⁹

15. The drafting of trust deeds to frustrate the rule in *Saunders'* case had serious implications on beneficiaries during the 1950's, when post-war inflation combined with high taxation eroded the value of established trusts.²⁰ Furthermore, as Donovan Waters, Mark Gillen, and Lionel Smith explain, during this same period, the inherent jurisdiction of the courts to modify trusts was decreasing.²¹ Therefore, many beneficiaries had no means at their disposal to modify a trust

14. *Hubbard v. Hubbard*, [2005] O.J. No. 2405 (Ont. Sup. Ct (QL), at para. 25. (Emphasis added).

15. D.W.M. WATERS, *supra*, note 5, at 1176.

16. *Id.*, at 1188.

17. *Id.*, at 1176.

18. If the settlor, however, retains a beneficial interest in the trust or a power of revocation that would enable the settlor to exercise the veto, then the settlor would not benefit from the tax advantages. *Id.*, at 355, citing *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 75(2).

19. D.W.M. WATERS, *id.*, at 1179. Most American states rejected extra-judicial beneficiary-initiated modifications following the decision in *Chaflin v. Chaflin*, 149 Mass. 19, 20 N.E. 454 (Sup. Jud. Cr. Mass., 1889). Although a discussion of American case law is beyond the scope of this section, some authors suggest that this decision is an aberration of a common law trend in which the law has reduced barriers to the alienation of property to maximize the property's value. G. ALEXANDER, *supra*, note 11, at 1260.

20. D.W.M. WATERS, *id.*, at 1290.

21. *Id.*, at 1289.

in which the property was decreasing in value. Consequently, the British Parliament passed variation of trust legislation,²² which enabled the courts to provide consent on behalf of beneficiaries who were not adults, fully capacitated, existent, or identifiable. Provincial legislatures across common law Canada quickly followed suit.²³

16. As with the exercise of the rule in *Saunders'* case, beneficiary-initiated judicial modifications are beneficiary-driven and beneficiary-focused. The intention of the settlor and the purpose of the trust play a role only insofar as they prevent the beneficiaries from asking for a complete resettlement of the trust — although even this limitation is not always followed.²⁴ Otherwise, the beneficiaries can propose an arrangement to trade off long-term income interests for short-term capital gains, or else enlarge the trustees' powers of investment to allow for riskier investments or even capitalize the beneficiaries' interests. A judge will approve an arrangement if he or she believes that the arrangement appears to benefit those who cannot consent.²⁵

II. TRUST MODIFICATION IN QUÉBEC CIVIL LAW: THE INTENTION-BASED MODEL

17. Turning to Québec law, an analysis of section 1294 C.C.Q. reveals that the rules on judicial modification are not grounded in the patrimonial rights of the beneficiaries, but rather focus on the intention of the settlor. This provision, however, runs counter to the overall structure of the trust regime: a structure that the Québec legislature redesigned in

22. *Variation of Trusts Act* (U.K.), 1958, 6 & 7 Eliz. II, c. 175.

23. See e.g. *Variation of Trusts Act*, R.S.O. 1990, c. V.1.

24. Waters, Gillen, and Smith suggest that a court can vary a trust to the point where there are only hints of the original trust intact. D.W.M. WATERS, *supra*, note 5, at 1318, 1329. This, however, may be changing. Since trust variations are extensions of the rule in *Saunders'* case, the court will provide its consent on behalf of those unable, if the arrangement is in the best interests of that class of beneficiaries notwithstanding the intention of the settlor. See e.g. *Russ v. British Columbia (Public Trustee)*, (1994), 89 C.B.L.R. (2d) 35, [1994] B.C.J. No. 664 (B.C.C.A), at para. 49.

25. *Variation of Trusts Act*, *supra*, note 23, s. 1(2).

1994 precisely to protect the rights of the beneficiaries. In this part, I will briefly outline the current understanding of the Québec trust as a patrimony. I will also explain how the intention-based approach in Québec civil law has led to a less flexible form of trust modification than the rights-based approach.

A. THE TRUST AS A PATRIMONY

18. The patrimony constitutes a core element of civilian property law; ultimately, all property belongs in a patrimony, which is a collection of rights and obligations.²⁶ Under the C.C.Q., property held in trust forms its own patrimony²⁷ distinct from those of the settlor, trustee, or beneficiaries.²⁸ Since the trust is not a legal person,²⁹ it is a patrimony without an accompanying personality — a *patrimoine d'affectation*.

19. The introduction of the *patrimoine d'affectation* in 1994 represented a radical break from the trust institution set up under the *Civil Code of Lower Canada* (“C.C.L.C.”), which did not recognize trust patrimonies. Under the C.C.L.C., only legal persons — either human or corporate — could have patrimonies.³⁰ Since a patrimony is a prerequisite to ownership, only someone or something with a patrimony could own trust property. Although jurists debated who owned the trust property — possibly the trustee, the beneficiaries, or even something else³¹ — ultimately the Supreme Court of Canada determined that the trustee was the legal owner of trust property.³² This approach, however, was widely criticized

26. Section 2644 C.C.Q.

27. Section 2 C.C.Q.

28. Section 1261 C.C.Q.

29. Section 2 C.C.Q.

30. Sections 18, 352 C.C.L.C.

31. Marcel FARIBAULT, *Traité théorique et pratique de la fiducie ou trust du droit civil dans la province du Québec*, Montréal, Wilson & Lafleur, 1936, at 148-158.

32. *Royal Trust v. Tucker*, [1982] 1 S.C.R. 250, at 272-273. The Supreme Court of Canada considered that the trustee was the “*sui generis* owner” of the trust property. Although title vested with the trustee, the trustee did not have any rights to the trust property. For a brief history of this debate, see Jacques BEAULNE, *Droit des fiducies*, Montréal, Wilson & Lafleur, 2005, at paras. 28-30, [J. BEAULNE, *Fiducies*].

because the trustee exercises powers but does not benefit from the trust property.³³ The approach hindered the ability of beneficiaries to give effect to their rights against the trustee. Because the trustees owned the trust property, beneficiaries had to frame their claims of breach of trust as an “abuse of rights,” a measure that required proof of fault that approached fraud.³⁴

20. The introduction of the *patrimoine d'affectation* in part aimed to remedy this problem, by drawing a clearer distinction between the rights, interests, duties, and powers of the parties involved. There is no question now that the trust property is contained in its own patrimony. Jurists, however, still debate the nature of the trust patrimony. Madeleine Cantin Cumyn supposes that the trust patrimony constitutes an independent *sujet de droit* without legal personality.³⁵ Other scholars, including Jacques Beaulne, suggest that the creation of a separate *sujet de droit* is both precarious, since it leaves the trust property “ownerless,” and unnecessary, since section 2 C.C.Q. allows for the division of patrimonies.³⁶ Section 2 C.C.Q. raises the possibility that the *patrimoine d'affectation* could be linked to the trustee's person(ality). Either way, under the C.C.Q., trust property remains separate from

33. The reasons why a trustee could not be owner include: a true owner of property cannot be replaced by a court (although section 98(1)(d) C.C.L.C. stated otherwise), property is transmitted to a person's heirs upon death (section 98(1)(e) C.C.L.C.), property holders can be personally liable when injury results on their property (section 98(1)(i) C.C.L.C.), there is no division in a person's patrimony (section 98(1)(b) C.C.L.C.), and ownership is permanent and not temporary (section 98(1)(b) C.C.L.C.).

34. Madeleine CANTIN CUMYN, *Administration du bien d'autrui*, Cowansville, Éditions Yvon Blais, 2000, at para. 92. The classical conception of rights in the civil law is that rights are exercised in the interest of the rights-holder (*sujet de droit*). Powers, on the other hand, are exercised in the interest of another. Although a beneficiary might have been able to frame a claim in other ways under the C.C.L.C. (*i.e.* by claiming an interest) this problem is no longer of concern, since the trustee no longer holds any rights to the trust property.

35. Madeleine CANTIN CUMYN, “La fiducie, un nouveau sujet de droit?,” in Jacques BEAULNE (ed.), *Mélanges Ernest Caparros*, Montréal, Wilson & Lafleur, 2002, 129, at 139-142.

36. J. BEAULNE, *Fiducies*, *supra*, note 32 at 29-43.

the settlors' and the trustees' property otherwise used to secure their own obligations.³⁷

21. The civil law also distinguishes two primary classes of patrimonial rights: real rights (rights *in rem*), in which a direct link exists between a person and an object, and personal rights (rights *in personam*), in which one person, the creditor, can vindicate a claim against another person, the debtor.³⁸ The distinction has important consequences upon both the effect of exercise of the right — the remedy, as well to whom the right applies — opposability. Consequently, since trust property is held in a trust patrimony, the beneficiaries can hold only personal rights against the trust. This entitles them to vindicate their claims — to the income, to the capital, or to both³⁹ — against the entirety of the trust property, but not directly against an individual piece of trust property.

B. THE PREDOMINANCE OF THE SETTLOR'S INTENTION

22. Section 1294 C.C.Q. sets out the framework for judicial modifications, while section 1295 C.C.Q. details the notice requirements. Section 1294 C.C.Q. provides :

1294. Where a trust has ceased to meet the first intent of the settlor, particularly as a result of circumstances unknown to him or unforeseeable and which make the pursuit of the purpose of the trust impossible or too onerous, the court may, on the application of an interested person, terminate the trust; the court may also, in the case of a social trust, substitute another closely related purpose for the original purpose of the trust.

37. I will assume for ease of argument that the trust owns the trust property. The selection of this position will not affect my conclusions, since under either position the beneficiaries are not the legal owners of the trust property. The trust property is contained in a patrimony under the control of someone or something else which cannot exercise rights to the trust property.

38. Michael G. BRIDGE et al., "Formalism, Functionalism, and Understanding the Law of Secured Transactions", (1999) 44 *McGill L.J.* 567, at 651. In the context of the trust, the trust patrimony exercises real rights over the object, while beneficiaries exercise personal rights against the trust patrimony.

39. Section 1284 C.C.Q.

Where the trust continues to meet the intent of the settlor but new measures would allow a more faithful compliance with his intent or favour the fulfilment of the trust, the court may amend the provisions of the constituting act.

23. This section represented new law in Québec, as the C.C.L.C. did not contain a modification provision.⁴⁰ Prior to 1994, trust beneficiaries had to apply to the Québec legislature itself for relief⁴¹. Nevertheless, section 1294 C.C.Q. has not made the modification regime more flexible or beneficiary-focused because compliance with the settlor's intention informs every decision to modify a trust. Under the rights-based model adopted in the common law provinces, reference to the settlor's intention arises only as an ancillary consideration in the context of judicial modifications when the court is looking to protect the interests of future non-existent beneficiaries.

24. First, section 1294 C.C.Q. requires that beneficiaries go to court to obtain approval to modify a trust. Québec civil law has precluded the development of an extra-judicial mode of modification — which by its nature is always rights-based, because no one can compel the beneficiaries to account for the settlor's intention. This is a major difference from the common law, in which trust beneficiaries can make modifications extra-judicially. As a result, the court acts as a mechanism to ensure that trust modifications account for the intention of the settlor.

25. Second, because section 1294 C.C.Q. places the focus on the intention of the settlor, and is silent on the rights of the beneficiaries, a court can modify a trust despite the intentions, wishes, or rights of the beneficiaries. Although a court may not be willing to deprive a beneficiary of its rights without its consent,⁴² section 1294 C.C.Q. does not require

40. John CLAXTON, *Studies on the Québec Law of Trust*, Toronto, Carswell, 2005, at 586.

41. *Fortier*, 2006 QCCS 1281, AZ-50360867, B.E. 2006BE-489 (C.S.) (DCL), at para. 14.

42. J. CLAXTON, *supra*, note 40, at 592.

that all (or any) of the beneficiaries agree to the modification, including the representatives of unborn beneficiaries.⁴³

26. Third, the “intention” criterion factors predominately in the courts’ decisions to modify trusts. As stated in section 1294 C.C.Q., failure to meet the intention of the settlor is a necessary condition for termination, while conformity with the settlor’s intention is a necessary condition for variation. The jurisprudence establishes that when the settlor’s intention and beneficiaries’ intentions conflict, the settlor’s intention prevails.⁴⁴ The jurisprudence also shows that Québec courts will refuse to modify a trust unless the provisions of the constituting act begin to impede significantly upon the rights of present income beneficiaries. This has occurred, for example, when fees for professional trust companies became too onerous relative to the net worth of the trust,⁴⁵ or when the relative support payments for income beneficiaries are too low.⁴⁶ Courts will not make modifications simply for the evident financial advantage of the beneficiaries, even when the beneficiaries agree to an arrangement.⁴⁷

27. Yet another consequence of a model that focuses on the intention of the settlor, and more specifically on the first intention, is that the court will avoid straying too far from the actual text of the constituting act to interpret the settlor’s intention. Although this may have the effect of protecting some beneficiaries’ rights to income or capital, said

43. It is custom in Québec that the court advises the parties involved to find independent counsel to act on behalf of the unborn persons. J. CLAXTON, *id. supra*, note 40, at 596. The settlor may designate a curator, including the Public Curator, to act on behalf of unborn persons. Section 1289 C.C.Q. In Ontario, for example, the Children’s lawyer or the Public Guardian and Trustee will always act as an *amicus curiæ* for unborn persons, minors, or incapacitated persons. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 7.04 (1).

44. See *e.g. Alkallay v. Bratt*, J.E. 2003-388, (S.C.) (DCL).

45. *Vaillancourt (Succession de) c. Trust Banque Nationale Inc.*, J.E. 2002-427 (C.S.), (DCL); *Forgeron (Succession de) c. Forgeron*, EYB 1996-29204 (C.S.) (DCL).

46. *Doré, ès qualités c. Rodrigue*, EYB 2004-80130 (C.S.) (DCL), [*Doré*]; *P.(J.) c. P.(F.)*, 2003 IIJCan 795 (C.S.) (IIJCan). In *P.(J.) c. P.(F.)*, the court did not actually vary the trust according to section 1294 C.C.Q. It held, however, that payments made to the plaintiff were too low. The trustees, who held a discretionary power to pay out income, were not exercising their power in accordance with the intention of the settlor, which was to provide a comfortable income for the plaintiff.

47. See *e.g. Alkallay v. Bratt*, *supra*, note 44. See also *Fortier*, *supra*, note 41. See also *Trahan (Succession)*, *Re*, [2004] R.J.Q. 1613 (C.S.) (DCL), [*Trahan*].

interpretation may not always be in the beneficiaries' best interests. In *Poirier c. De Coste*, for example, a child's parents settled money in trust for her alone.⁴⁸ When they gave birth to a son, the parents applied to vary the terms to include the son as a beneficiary. The court denied their application, holding that the parents' intentions when they created the trust were clear :

Pour rechercher la volonté de la *Constituante*, il faut lire, en attribuant aux mots leur sens ordinaire, l'acte constitutif de fiducie (P-1), lequel n'aura pas à souffrir quelque interprétation si le sens de ces mots est clair; dans le cas contraire, il faudra l'interpréter. [...] En affirmant que la *Fiducie Catherine Poirier* répond toujours à la volonté de la *Constituante*, afin de loger la requête dans le cadre du deuxième alinéa de l'article 1294 C.c.Q., le *Fiduciaire*, tout comme la *Constituante*, ne peuvent traiter que de la volonté qui apparaît clairement au texte de l'acte de fiducie.⁴⁹

28. The court determined that any modification would compromise the *financial* interests of their daughter under the trust. Because the court was constrained by an intention-based interpretive framework which compelled the court to look plainly at the text of the constituting act, the court was not open to consider granting the parents' request to modify the trust in order to preserve family unity: an outcome that the daughter (or a curator speaking on her behalf) might very well have supported.⁵⁰ In the next part of this paper, I will speculate as to why I believe the Legislature adopted a strict intention-based model over a more flexible rights-based one.

III. EXCLUSION OF THE RULE IN SAUNDERS' CASE IN QUÉBEC

29. Judges and legislators summarily have dismissed the introduction of beneficiary-initiated modification into Québec

48. *Poirier c. De Coste*, REJB 97-07527 (C.S.).

49. *Id.*, at paras. 14-17.

50. A court applying the common law might have allowed the modification to protect family unity. See e.g. *Re Charlesworth Estate*, [1996] 5 W.W.R. 578, 12 E.T.R. (2d) 257, 108 Man. R. (2d) 228 (Man. Q.B.).

civil law without any discussion as to why this is the case. Conceptually, it would not have been problematic for the Québec legislature to have followed Scotland's lead and have adopted the common law position on judicial and extra-judicial modifications, described in Part I above.⁵¹ Instead, the Québec legislature adopted only a judicial model: one that constrains the discretion of the courts to modify trusts, when a proposed modification conflicts with the settlor's intention. It is also worth noting that in the draft proposals to revise Québec's trust law, the intention of the settlor was not a consideration with respect to trust modifications.⁵² The Civil Code Revision Office stated in 1978, however, that the voluntary termination of the trust by the beneficiaries is not part of Québec civil law.⁵³

30. Alberta and Manitoba are the only Canadian provinces that have abolished the common law rule in *Saunders' case*, requiring that the court approve trust modifications.⁵⁴ In Alberta, the Institute of Law Research and Reform recommended the change in order to protect the settlor's intent, which it felt the courts were not doing adequately.⁵⁵ A rights-based model still prevails in those provinces, because courts generally have approved the modifications, when all of the beneficiaries consent.⁵⁶ Although the courts have retained

51. SCOTTISH LAW COMMISSION, "Discussion Paper on Variation and Termination of Trusts", Edinburgh, The Stationary Office, 2005, [online]. www.scotlaw.com.gov.uk, at 4. In Scotland, the rule is known as the rule in *Miller's Trustees v. Miller*, (1890) 18 R. 301 (Ct. Sess. 2nd Div.).

52. CIVIL CODE REVISION OFFICE, COMMITTEE ON THE LAW OF TRUSTS, *Report on Trusts*, Montréal, Québec Official Publisher, 1976, at 37. Section 18 read as follows: "The court may terminate, or amend its [the trust's] provisions, on motion by any interested person. Notice of the motion must be served upon the trustees and upon any of the beneficiaries whom the judge indicates."

53. CIVIL CODE REVISION OFFICE, *Rapport sur le Code civil du Québec*, vol. 2, t. 1., Montréal, Éditeur officiel du Québec, 1978, at 558.

54. *Supra*, note 1.

55. ALBERTA, INSTITUTE OF LAW RESEARCH & REFORM, *Report #9: The Rule in Saunders v. Vautier (1972)*, [online]. ALRI. <http://www.law.ualberta.ca/alri/index.php>, at 5-6.

56. Neither jurisdiction has adopted a strict intention-based approach comparable to section 1294 C.C.Q. Although the courts in Manitoba, for example, will consider the intention of the settlor in the interpretation of the *Trustee Act*, *supra*, note 1, they do so at such a broad level of generality that the court's approval appears to be simply a technicality if the beneficiaries can all agree. *Re Charlesworth Estate*, *supra*, note 50, at para. 19, citing *Re Irving*, (1975) 66 D.L.R. (3d) 387, (Ont. H.C.J.). See also

their jurisdiction to disapprove of modification arrangements when the beneficiaries consent, they have exercised that jurisdiction only when the arrangement appears exploitative.⁵⁷

31. Whether or not the Revision Office openly considered a codal section to permit Saunders-type modifications, I think there are two additional historical considerations that explain why the Revision Office did not include such a section in the C.C.Q. First, the rule risked undermining the appearance that the *patrimoine d'affectation* was a distinctively civilian institution, because it can be mischaracterized to affirm a new set of rights *in rem* in the trust property separate from the title to that property. Second, the rule risked blurring the stark distinction between who holds the powers over the trust property and who holds the rights in it. The *patrimoine d'affectation* operates on a principle that powers vest solely with the trustee, while the trust and the beneficiaries hold rights in the trust property.⁵⁸

A. UNITY OF OWNERSHIP

32. The rule in *Saunders'* case generally is misunderstood in Québec trust law. Although the court in *Saunders v. Vautier* explained that the prerogative to terminate the trust in common law *derives* from ownership, the decision does not stand for the proposition that the prerogative to terminate or

Re Taylor Estate, [1998] A.J. No. 1185 (Q.B.). Furthermore, the Ontario Law Reform Commission proposed the abolition of extra-judicial trust modification in 1984. Wolfe GOODMAN, "Commentary on the Ontario Law Reform Commission Report on the Law of Trusts", (1986) 8 *Est. & T. Q.* 1, at 19. This proposal met with opposition and was ultimately rejected.

57. See D.W.M. WATERS, *supra*, note 5, at 1198, citing *Kinnee v. Kinnee Estate (Public Trustee of)*, [1977] A.J. No. 522 (T.D.).

58. I do not attribute the rigidity of section 1294 C.C.Q. to a re-affirmation or expression of the rules on testamentary freedom found under section 703 C.C.Q. and following. For one reason, section 1294 C.C.Q. applies to all forms of trust, including those that are usually not created by will — namely, income trusts. Furthermore, the British common law has recognized testamentary freedom since royal assent to the *Wills Act 1540*, c. 1, and yet, under the British and Canadian common law of trusts, beneficiaries can override the settlor's intention to modify a trust. I agree that section 1294 C.C.Q. can preserve the testamentary intentions of the settlor, but testamentary freedom is grounded in a principle of free alienation of property; the very same principle that grounds the idea that trust beneficiaries should be able to decide how they want to use the property over which they exercise all of the rights.

vary a trust is *indicative* of ownership. Ownership in common law and in civil law have different meanings because of the distinct development of property law in each tradition.

33. Since the reception of the trust into Québec civil law, Québec jurists have struggled to explain who owns the trust property. During the course of re-codification, civilian jurists sought to integrate the trust into civil law without importing a division between legal and equitable ownership, notwithstanding the origins of the trust in Equity. The adoption of the *patrimoine d'affectation* allowed the Legislature to keep the ownership of the trust property whole.⁵⁹ The trust owns the property, while beneficiaries hold personal rights against the trust. As stated above, any dispute that remains prevalent in the doctrine centres on the nature of the trust patrimony and its (dis-)associational nature with a legal personality.

34. Without ownership over the trust property, however, jurists have considered beneficiaries incapable of terminating the trust, because ownership over an object endures until the *owner* alienates the object.⁶⁰ This is a misconception, because equitable ownership and the power of modification are independent concepts. Beneficiaries of U.S. trusts are equitable

59. Ownership in the civil law is a unitary and unifying concept, based on the principle that each object can have only one owner. Different modalities of ownership such as co-ownership or superficial ownership allow for multiple owners. When multiple owners exercise ownership over the same undivided object, however, their ownership is temporary, according to section 1013 C.C.Q. The introduction of the *patrimoine d'affectation* did not require that Québec civil law introduce a new modality of ownership or adapt the institution to recognize real rights over incorporeal objects.

60. Some jurists assume that in order to modify a trust, beneficiaries must hold rights akin to ownership in the trust property, because in the common law tradition, beneficiaries hold rights *in rem* in the trust property. See e.g. John BRIERLEY, "Titre sixième : De certains patrimoines d'affectation : Les articles 1256-1298", in *La réforme du code civil*, Ste-Foy, Barreau du Québec, 1993, 735, at 774. See also Diane BRUNEAU, "La fiducie et le droit civil", (1996) 18 *R.P.F.S.* 755, at 790, 792. The personal rights held by beneficiaries are different from those of ordinary creditors in the civil law, namely because the trust is not a person. The property held in the trust is for the benefit of the beneficiaries only. Because of this characterization, we can rethink the nature of the beneficiaries' rights beyond the traditional categories of personal and real rights. Other authors have recognized the need to breakdown this division, favouring of a general category of property interests. Roderick MACDONALD, "Reconceiving the Symbols of Property: Universalities, Interests and Other Here-sies", (1994) 39 *McGill L.J.* 761, at 805.

owners without a power of modification, while beneficiaries of Scottish trusts are ordinary creditors with a power of modification. Furthermore, under the rule in *Saunders'* case, even objects of powers that have no rights in the trust property, must consent to a modification.

35. The legislature also could have adopted other models to redesign the trust, which would have maintained unity of ownership. For example, the legislature could have created a new form of legal person, like a corporation, in which beneficiaries would hold shares or units. Under this model, the beneficiaries could terminate the trust in accordance with sections 355 and 356 C.C.Q. The reason why the legislature chose to adopt the *patrimoine d'affectation* model, rather than constitute the trust as a legal person, was simply to avoid confusion between the Québec trust and the corporation.⁶¹ Yet, the Québec trust shares many, if not most, of the features of a legal person. Although legal persons can exist indefinitely, in my opinion, capping the limit on the existence of a legal person *cum* trust would have involved a far less radical change to the structure of the civil law than the re-conceptualization of the patrimony without an accompanying legal personality.

B. DISTINCTION BETWEEN RIGHTS AND POWERS

36. Québec trust law has never conferred the ability on beneficiaries to terminate their trust, because the trustee was regarded as the owner of the property, but also because the beneficiaries did not retain any powers to modify the trust. Following the 1994 re-codification, Québec trust law removed ownership from the trustee, and reified the strict division between patrimonial rights and powers. A patrimonial right

61. J. BEAULNE, *Fiducies, supra*, note 32, at 22-23, citing Madeleine CANTIN CUMYN, "La fiducie en droit québécois, dans une perspective nord-américaine", in Jacques HERBOTS et Daniel PHILIPPE (eds.), *Le trust et la fiducie de trust: implications pratiques*, Bruxelles, Bruylant, 1997, 71, at 75-76. The two models are virtually identical in practice. Ironically, the Québec trust has come to resemble the corporation, as the trust is being used more often as a vehicle for profit making (income trust). As I discuss below, without the affirmation of legal personality, the beneficiaries will have difficulty modifying or terminating the trust extra-judicially.

is a benefit that one accrues from property. A power, however, is a prerogative to make a decision with respect to property. Cantin Cumyn describes different types of powers — powers of representation and powers of management or *pouvoirs propres*.⁶² Although title vests with the trust and although the benefits accrue to the beneficiaries, all of the powers of management over the trust property vest in the trustees.⁶³ If the settlor or beneficiaries retain certain powers of management, the courts may regard them as owners of the property.

37. As I will discuss in Part IV below, it is possible to confer certain powers on the beneficiaries and still preserve the structure of the civil law trust. Adoption of the corporate model to structure the trust is not required to allow beneficiaries to modify trusts. Moreover, by not conferring a power of modification, the rights of the beneficiaries are actually weakened, because their property interests are limited by the settlor's intentions.⁶⁴ Conformity with those intentions also deprives beneficiaries of real control over the trustees or the trust property, and empowers the settlor, who is often the patriarch in the family, to set terms and conditions that foster social control.⁶⁵

62. M. CANTIN CUMYN, *supra*, note 34, at para. 109.

63. *Id.*, at para. 147.

64. Alexander describes the rule against beneficiary-initiated termination as a product of a particular social vision. If a society recognizes the sovereignty of an owner to dispose of property as he or she chooses, then the settlor can impose conditions in the transfer. Those conditions can then shape social relationships, because transferees often will modify their behaviour on the promise of acquiring wealth. This undermines the freedom of the recipient group, and thus acts as a mechanism for social control. G. ALEXANDER, *supra*, note 11, at 1240-1241. A testator can impose extensive conditions, only so long as they do not conflict with Charter principles. Trahan, *supra*, note 47.

65. The trust institution brought together two dominant themes in Québec private law: the liberation of private property from feudal restraint, and the autonomy of the patriarch in the family sphere. Murray GREENWOOD, "Lower Canada (Québec): Transformation of Civil Law, from Higher Morality to Autonomous Will, 1775-1866", (1996) 23 *Man. L.J.* 132, at 173-181. John E.C. BRIERLEY, Roderick A. MACDONALD, *Québec Civil Law: An Introduction to Québec Private Law*, Toronto, Emond Montgomery, 1993, at 35. For an example of a trust used for social control see e.g. *Re Trahan*, *ibid.*

IV. THE POSSIBILITY OF EXTRA-JUDICIAL MODIFICATION IN QUÉBEC CIVIL LAW

38. Extra-judicial modification would provide an alternative to allow beneficiaries to maximize their own financial interests, without having to conform to the limitative requirements in section 1294 C.C.Q. Extra-judicial modification can occur in one of two ways : either the constituting act can provide a provision to modify the trust based on the beneficiaries' consent, or the beneficiaries can do so by agreement. The former method has implications principally for income trusts, while the latter method has implications principally for personal trusts. I will establish that it is possible to ground an approach to extra-judicial modification within the current law of trusts in Québec. Of course, any changes to the rules relating to judicial modification would require an amendment to section 1294 C.C.Q.

A. MODIFICATION BY EXPRESS GRANT — MODIFICATION CLAUSES

39. Although it is possible for a settlor to confer authority to the trust beneficiaries to modify the trust, this prerogative is quite limited. Settlor incur a considerable risk that a court will fail to uphold the existence of a trust, when the constituting act includes a modification provision. This occurred in *Bank of Nova Scotia v. Thibault*,⁶⁶ where the Supreme Court of Canada held that a trust does not exist when a settlor or a beneficiary substantially enjoys of all the rights over the trust property. In the former case, the "trust" may be considered a vehicle to avoid creditors;⁶⁷ in the latter, it may be

66. 2004 SCC 29, [2004] 1 S.C.R. 758, [*Thibault*].

67. Guy Thibault, who was also the beneficiary, retained explicit control over the placement of investments, with the authority to recall the investments, and the authority to direct the beneficiaries of the payments. Thibault retained all of the rights to the property. Section 1260 C.C.Q. requires that trust property be vested in a separate patrimony until it is paid to the beneficiaries. By being able to deposit and withdraw funds, at will, from a Registered Retirement Savings Plan (RRSP) in the manner proposed by the plan in issue in *Thibault, ibid.*, a settlor in the quality of beneficiary would otherwise be able to render its own property unseizable from creditors. This contradicts a foundational principle in civil law that a person's entire patrimony acts as security for all of that person's personal obligations. D.W.M. WATERS, *supra*, note 5, at 1366.

considered an actual transfer of the trust property. A beneficiary with the ability to modify a trust also could compromise the independence of the trustees, which runs the risk of conflicting with section 1275 C.C.Q. that requires that the power to administer the property rest with the trustees.⁶⁸ Another problem arises where one beneficiary has the ability to modify the trust at the expense of the latter.

40. Although a court applying the common law would raise similar concerns about beneficiary-initiated modification clauses, the common law recognizes a considerable zone of autonomy for the beneficiaries to modify a trust, as evidenced, for example, by the beneficiary-directed RRSP. This autonomy also includes the ability to consent — under the rule in *Saunders' case* — to a modification clause, which would permit beneficiaries to make modifications at a later date *without unanimity*.⁶⁹ This can occur in the context of the income trust, where the beneficiaries are also the settlors, and where they have purchased their rights in the trust property.

B. MODIFICATION BY AGREEMENT

41. Common law judges have relied principally on equity to shape the rules on modification; civil law judges, on the other hand, are expected to comply more rigidly with the language of the C.C.Q. and established doctrine, which does not readily support beneficiary-initiated trust modification. Of the prominent jurists who have reflected upon the Québec trust, only John Claxton has presented an approach to extra-judicial modification by agreement: the collective exercise of personal rights. Other scholars, including Beaulne, have rejected modification by agreement because it does not conform to the

68. Unfortunately, the jurisprudence does not reflect this position. In *Gravel c. Dubois*, EYB 2003-43229, AZ-50160452 (C.S.) (DCL), a provision in the trust stated that once the two beneficiaries attained twenty-one years of age, they would become the only trustees. Although the court appointed an independent trustee in that case, unlike the common law rule that requires trustees to act unanimously, in Québec, trustees may act by a majority, which means that the two beneficiaries could out-vote the independent trustee.

69. For example, at the time of purchase of the units of an income trust by the underwriter, the underwriter, as sole beneficiary, can consent to the insertion of a modification clause. I will discuss income trusts in Part V below.

recommendation of the Revision Office.⁷⁰ The civil law doctrine of patrimonial rights, however, can support an alternative approach to beneficiary-initiated modification : modification by renunciation.

1. Approach 1 : Renunciation Under Section 1285 C.C.Q.

42. Renunciation of a right or an interest in a trust is one way to modify a trust extra-judicially without changing the provisions of the constituting act. Renunciation can lead to an accelerated distribution of trust property and likewise, an accelerated termination of the trust. Renunciation, however, only is relevant in the context of personal trusts with different ranks of beneficiaries. With income trusts, the beneficiaries simply can sell the units of the trust to capitalize their value.

43. Although the renunciation must conform to the proper form under section 1285 C.C.Q., it need not require judicial intervention. Renunciations need not be restricted to income beneficiaries; should all of the capital beneficiaries renounce their rights, the trustees would no longer be under an obligation to balance the concerns of income and capital beneficiaries, and could, for example, make riskier investments to yield higher returns for the income beneficiaries. Unlike in the common law, however, the renunciation of a right or interest in the context of the civil law trust cannot be *in favorem*.⁷¹ Instead, section 1286 C.C.Q. explains how the trustees must distribute the renounced interest among the remaining income and capital beneficiaries.

44. In practice, the courts have chosen to resolve renunciation situations under section 1294 C.C.Q. rather than section 1285 C.C.Q. In *Stevenson v. National Trust Co.*, for example, Audrey Stevenson, the income beneficiary renounced her life income interest, so that her children could take the capital

70. J. BEAULNE, *Fiducies*, *supra*, note 32, at 407.

71. Québec civil law does allow *in favorem* renunciations in other contexts. See e.g. section 641 C.C.Q. See also Jacques BEAULNE, *La liquidation des successions*, Montréal, Wilson & Lafleur, 2002, at 147-148.

immediately.⁷² The Court ordered the termination of the trust, rather than giving effect to Stevenson's renunciation.⁷³

45. Similarly, in *Alkallay v. Bratt*, Isaac Alkallay and six charities were the income beneficiaries of a trust.⁷⁴ The charities also were to receive the remaining capital when Alkallay died. The parties proposed an arrangement to the court to end the trust and to divide the capital between them while Alkallay was still alive. The court rejected the proposed arrangement, with Capirolo J.C.S. holding that the rule in *Saunders'* case does not apply in Québec civil law and that the parties were not able to rely on section 1294 C.C.Q. to terminate the trust in the manner proposed.

46. However, the parties in *Alkallay v. Bratt* were seeking the court's validation of what was, in effect, a renunciation by Alkallay in exchange for consideration. Alkallay's renunciation under the arrangement should have allowed the charities, as the next rank of beneficiaries, to receive the remaining trust property. The C.C.Q. does not require that renunciations of a beneficiary's rights be gratuitous. By paying Alkallay to renounce his interest, the capital beneficiaries should have been able to take the property, because the settlor did not place any other restrictions on the receipt of the capital by the charities, other than Alkallay's death.⁷⁵ In the common law provinces, the renunciation of a life interest would have allowed the subsequent capital beneficiaries to take the capital immediately,⁷⁶ provided no other contingencies limited the vesting of the capital.⁷⁷ There would be no need to resort either to an express rule providing for

72. AZ-95021322, J.E. 95-780 (C.S.) (DCL), [*Stevenson*].

73. Costs were paid by the trustees instead of by the trust, as the Court held that the trustees should never have defended the case. Section 1367 C.C.Q.

74. *Supra*, note 44.

75. The charities' interests were, in essence, vested interests. The concept of vesting does not apply directly in the context of the Québec trust, since the interest does not become a patrimonial right until the beneficiary's rank opens and until the beneficiary meets the conditions set down by the constituting act. Section 1280 C.C.Q. See also *Poitras, supra*, note 8.

76. *Re Coulson*, (1977) 16 O.R. (2d) 497, 78 D.L.R. 435 (O.C.A.), at 501 (cited to O.R.), unless the constituting act manifests a contrary intention. *Re Jacques*, (1986) 55 O.R. (2d) 534, 29 D.L.R. (4th) 319 (O.C.A.), at 535 (cited to O.R.).

77. See Keith FARQUHAR, "Recent Themes in the Variation of Trusts", (2001) 20 *Est. & Tr. J.* 181, at 185-186.

renunciation or to the rule in *Saunders'* case. The trust simply would terminate and the trustees would have to distribute the capital accordingly.

47. Capirolo J.C.S. held that the capital beneficiaries could not obtain the trust property until “the death of Isaac Alkallay.” However, that clause, along with the preceding clause, “To pay to Isaac Alkallay, [...] during his life time net revenues and income derived from seventy per cent of the residue of the trust property [...]” demonstrates that the settlor conferred the civil law equivalent of a *life estate* to Alkallay. The life term was almost certainly included exclusively to benefit Alkallay, who therefore should have been able to waive it unilaterally. The most plausible reading of the constituting act would hold that if Alkallay did not want to collect his life interest — and thus renounced it — the charities should receive right away, instead of the revenue having to accumulate in the trust until Alkallay’s death.⁷⁸ The court, however, chose to uphold the intent of the settlor, fixed a certain point in time, even at the expense of an arrangement that would maximize the benefit for all the beneficiaries.

48. The court in *Alkallay v. Bratt* should have recognized that Alkallay was to receive the income for life or until he *renounced his right to the income*. The only way to read the holding in *Alkallay v. Bratt* together with the holding in *Stevenson* is that a court will accept renunciations only if they are gratuitous. This, however, is inconsistent with the principle that a person is entitled to alienate property for value. Therefore, *Alkallay v. Bratt* highlights that the Québec court will uphold the intent of the settlor, fixed at a point in time in the past, even at the expense of an arrangement that maximizes benefits for the beneficiaries.

2. Approach 2: Collective Exercise of Personal Rights

49. Renunciation does not work in all situations where beneficiaries would like to modify a trust extra-judicially. It will

78. Even if the case does stand on its merits, the removal of the clause “upon the death” would make a future trust readily distinguishable from the trust in this case.

not work when beneficiaries — particularly capital beneficiaries — have only future interests in the trust property. These beneficiaries would be ineligible to receive trust property if a renunciation were to occur, because they do not meet a certain precedent condition in the constituting act. As a result, the property would result to the settlor, rather than pass to the beneficiaries.⁷⁹ For example, renunciation would not have benefited Vautier in *Saunders v. Vautier*, because his capital interest was contingent upon him turning twenty-five. All Vautier had was a hope that he would receive the capital, provided that he survived until his twenty-fifth birthday.

50. Furthermore, renunciation only allows beneficiaries to accelerate the transfer of trust property from the trust. It does not allow beneficiaries to vary the provisions of the trust — which, as stated in Part I above, is another reason beneficiaries invoke the rule in *Saunders'* case. To deal with these situations, Claxton proposes that the trust constitutes a quasi-contractual relationship between the trustee, settlor, and beneficiaries. He explains :

Even though none of the parties have any real rights to the property, all such rights have been commuted to rights (powers and obligations) of the trustee and rights of the beneficiaries against the trustee initially and eventually to obtain the trust property.⁸⁰

51. Claxton proposes that the sum of the beneficiaries' rights constitutes the totality of the trust property.⁸¹ Therefore, when the settlor, trustees, and beneficiaries come together, they can agree to terminate the trust extra-judicially, notwithstanding the operation of section 1294 C.C.Q.

52. In essence, section 1294 C.C.Q. represents civil law variation legislation, but an analogous rule to the rule in *Saunders'* case should apply when extra-judicial modifications

79. Section 1297 C.C.Q.

80. J. CLAXTON, *supra*, note 40, at 597.

81. Claxton fails to consider cases where the beneficiaries lack capacity to consent, or when their capacity to consent is subject to authorizations or restrictions such as in cases of tutorship. Section 213 C.C.Q. The rule in *Saunders'* case precludes minors from consenting to trust terminations. A civil law court could impose the same restrictions. Normally, under section 177 C.C.Q. a tutor exercises its charge's civil rights.

are concerned.⁸² The only pronouncement on the applicability of such a rule in Québec since 1994 was made in *Alkallay v. Bratt*. As discussed above, however, Capriolo J.C.S. erred in law by relying on section 1294 C.C.Q. instead of section 1285 C.C.Q. to decide that case. If, when applying section 1294 C.C.Q., courts continue to read the “intention of the settlor” requirement in a restrictive fashion, then beneficiaries will continue to push for an extra-judicial form of modification to avoid this issue.⁸³

a. Grounding this Approach in Civilian Property Law

53. Should all of the parties, including the settlor and the trustees, agree on the modification, there would be no reason to oppose the modification of the trust. The settlor’s intention would be the only ground to oppose the modification; however, under Claxton’s hypothesis, the settlor would have to give its consent. No one else would have a legal interest or reason to oppose the termination of the trust, because the interests of all of the relevant parties would be considered. Furthermore, Québec civil law, unlike the common law, does not face the problem of undetermined beneficiaries or objects of powers of appointment.⁸⁴ Section 1282 C.C.Q. requires that the class of beneficiaries must be sufficiently certain or determinable. Therefore, with each trust, it is clear exactly who has present

82. The trust was foreign to the Québec civil law until the legislature imported it into the C.C.L.C. in 1879. *L’Acte concernant la fiducie*, L.Q. 1879, c. 29. It was imported essentially from the common law to satisfy British testators living in Québec at the time. Madeleine CANTIN CUMYN, “L’origine de la fiducie québécoise”, in *Mélanges Paul-André Crépeau*, Montréal, Éditions Yvon Blais, 1997, 199, at 214. Québec courts have relied on common law principles, when the civil law is silent on a particular point of law. *Senex v. Montréal Real Estate Board*, [1980] 2 S.C.R. 555, at 562. See also Pierre-Basile MIGNAULT, *Droit civil canadien*, Montréal, C. Théoret, 1896, t. 5, at 157. If the settlor truly wants to entrench its intention to prevent modifications, it can do so simply by making the trustee a beneficiary, or by including beneficiaries that may not be born until sometime in the future.

83. Beneficiaries may be able to extend section 33 C.C.P. to compel the courts to intervene notwithstanding the limitations of section 1294 C.C.Q. *Desautels c. Desautels*, [2005] J.Q. 10009 (C.S.).

84. The common law requires that individual beneficiaries be determinable under the trust deed, but not determined. *McPhail v. Doullton*, [1971] A.C. 424 (H.L.); *Re Gulbenkian*, [1970] A.C. 508 (H.L.).

rights in the trust property and who, if anyone has future interests in it.

54. Moreover, it should not matter what type of rights or interests — personal or real — that the beneficiaries have. First, in the common law, the courts require the consent of *all* of the beneficiaries and potential beneficiaries regardless of what rights or interests they may have (if any). Second, in Québec civil law, there is no difference between a present or future *real* interest and a present or future *personal* interest in the trust property. Both types of interest holders are entitled to receive trust property provided there is any left for them to take and provided they meet the conditions in the constituting act.⁸⁵ Unlike in the common law, where rights *in rem* in the trust property may give beneficiaries priority in the insolvency of the trustee personally,⁸⁶ this is not the case in Québec, since the patrimonies — and hence the debts — of the trust and trustee are separate. Furthermore, provided the creditors receive payment for outstanding debts, the collapse of a trust by consent of all of the parties involved would have no foreseeable detrimental effects on the rights of third parties.

55. With the Québec trust, all of the real rights are attributable to the trust,⁸⁷ yet the trust cannot exercise those rights because it does not use, benefit, or alienate goods for itself. It is not a person.⁸⁸ In lay terms, the trust has no material interest in the property; it is but an empty shell to hold the property for the *beneficiaries*, who use and benefit from — and I would suggest ought to be able to alienate — the trust property. Since the property ultimately will belong to the beneficiaries, they should have the unencumbered right to

85. Sections 1279-1280 C.C.Q.

86. *Supra*, note 11; see also D.W.M. WATERS, *supra*, note 5, at 1266-1268.

87. Following the abolition of the feudal tenure system, unitary ownership became the organizing principle in the law of real property in the civil law, as codified by Québec in the C.C.L.C. *An Act for the Abolition of Feudal Rights and Duties in Lower Canada* (U.K.), 1854, 18 Vict., c. 3.

88. This is a deviation of the classical conception of the patrimony and ownership. See John BRIERLEY, “De la fiducie”, in *La réforme du Code civil*, Québec, Presses de l'Université Laval, 1993, 735, at para. 13. If the goods were not objects of the rights of ownership, they could be appropriated by occupation under section 914 C.C.Q.

ensure that the property is used for their benefit, even if that means ending the trust prematurely or varying its terms.⁸⁹

56. Although I suggested above that the legislature sought to maintain the separation between those who exercise powers and those who hold rights, there is nothing objectionable to giving certain powers to beneficiaries. The decision in *Thibault* in which the Supreme Court of Canada precluded the settlor *cum* beneficiary of a self-directed RRSP from reserving certain powers was subject to a lot of criticism.⁹⁰ Even if beneficiaries used a power of modification to hide assets in a trust to defraud their creditors, a Paulian action gives the creditors recourse to recover their debts.⁹¹ Furthermore, there are other examples in the civil law where persons can have both rights and powers arising from the same office.⁹²

57. Québec civil law already recognizes ways to defeat ownership by both private and public parties.⁹³ If the trust's ownership of the property creates economic waste for the beneficiaries, then the beneficiaries should be able to terminate the trust's ownership on the basis that said action would maximize the rights of the collective in this case.⁹⁴ This is not controversial since only a person can suffer from the effects of expropriation. The trust patrimony exists to provide income

89. I note, as well, that a system of equity is not a necessary prerequisite to recognize what the common law would describe as equitable rights or remedies, such as specific performance (section 1601 C.C.Q.) or injunctions (section 751 C.C.P.), in private law.

90. Khashayar Haghgouyan explains that the Supreme Court of Canada's decision in *Thibault*, *supra*, note 66, was too restrictive in light of the policy set into place by the Legislature, consistent with those in the other common law provinces. That policy is designed to encourage people to save for retirement to protect the integrity of the family after working life ends. Khashayar HAGHGOUYAN, "L'affaire Thibault et la saisissabilité des fonds détenus dans un régime enregistré d'épargne-retraite", (2005) *Repères* EYB2005DEV793 (DCL). See also Stéphane HARVEY, "Commentaire sur la décision *Banque de Nouvelle-Écosse c. Thibault — L'insaisissabilité des REÉR remise en cause*", (2004) *Repères* EYB2004REP243 (DCL). Ironically, Québec courts have been willing to bend the rules in cases of perceived injustices. See *e.g. Bagnoud (Faillite de)*, EYB 2005-90306 (C.A.) (DCL).

91. Sections 1361-1366 C.C.Q.

92. Parenthood is an example. See section 599 C.C.Q.

93. Sections 992, 1116 C.C.Q.

94. Section 7 C.C.Q.

and capital to beneficiaries. It is not a self-serving entity such as a human or legal person, which seeks to maximize profit for itself.

58. Trust ownership is also the only form of ownership where the owner cannot terminate its own rights. Although income trusts, private trusts, and social trusts can exist indefinitely, personal trusts are necessarily temporary. Beneficiary-initiated modification, at least in the concept of the personal trust, would simply accelerate the inevitable defeasance of the trust's rights.

59. To adopt Claxton's approach, a court would have to adopt a mechanism for beneficiaries to exercise their personal rights collectively to order modifications to the trust. The C.C.Q. establishes collective governance structures in closely analogous situations. For example, sections 355 and 356 C.C.Q. provide a mechanism for the termination of a legal person, such as a company — an ability distinct from the right of shareholders to wind up a corporation under corporate law. Even though the relationship between trust beneficiaries and a trust resembles that of shareholders and a company — both situations involving strictly personal rights against a particular patrimony — trust beneficiaries have no recognized vehicles like a general meeting to assert their rights collectively.

60. Another example of a collective exercise of rights, which the law does not define as real rights, is the example of Aboriginal rights in land or Aboriginal title. The courts have described Aboriginal title as *sui generis*;⁹⁵ however, the process for modifying Aboriginal land-holding arrangements is analogous to the process of modifying a trust under the rule in *Saunders'* case. The Crown holds legal title to Aboriginal lands in trust for Aboriginal peoples. Aboriginal communities have a collective interest in their lands and they can attempt to terminate the Crown's fiduciary control over their lands upon the consent of the collective.⁹⁶ Instead of going to a court to seek a modification of this land-holding arrangement, the Crown — the trustee — may approve the proposal to transfer

95. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 82.

96. *Id.*, at para. 115. *Indian Act*, R.S.C. 1985, c. I-5, ss. 37-41.

control over the land if it is in the best interests of the community — the beneficiaries.

61. Québec civil law should not take the silence of the C.C.Q. as dispositive of a rejection of modification by agreement. Québec courts have long derived new legal principles and procedures through analysis and analogy of specific provisions of the Civil Code.⁹⁷ Sections 355 and 356 C.C.Q. provide a framework for trust beneficiaries to assert control over trust assets. These sections allow titularies of personal rights, such as shareholders, to terminate the legal entity under their control. Should, for example, shareholders wish to terminate a corporation, they would, in effect, assume any remaining real rights in the corporation's property once its debts are paid.

62. When terminating the legal entity, the shareholders become *propriétaires des créances* — the functional equivalent to owners of property.⁹⁸ Like shareholders, beneficiaries also are titularies of personal rights towards the trust and could by extension of this principle, be characterized as owners of the trust property, only when they seek to modify the trust. This certainly seems to be the position taken in France in relation to its new *contrat de fiducie* when modification is concerned.⁹⁹ One way to characterize this approach without recreating the distinction between legal and equitable ownership is to recognize that beneficiaries collectively hold the right of *abusus* (or alienation) in place of the trust, which cannot exercise that aspect of its ownership.

b. Forgoing the Settlor's and the Trustee's Consents

63. Claxton suggests that for his approach to be consistent with section 1294 C.C.Q., the beneficiaries would require the consent of the settlor and the trustees. Claxton contends that

97. See e.g. *Lauréat Giguère Inc. v. Cie Immobilière Viger Ltée*, [1977] 2 S.C.R. 67, in which the Supreme Court of Canada recognized a generalized principle of unjust enrichment in Québec civil law even though the C.C.L.C. only provided for more specific forms of action of unjust enrichment.

98. For an explanation of this concept generally, see Yaëll EMERICH, *La propriété des créances: approche comparative*, Cowansville, Éditions Yvon Blais, 2006, at 1-9. Emerich does not apply the concept specifically to beneficiaries of trust property.

99. Section 2012 *Code civil* français.

the settlor retains this prerogative by virtue of his or her participation in the contract to create the trust.¹⁰⁰ Some American scholars also rely upon the contractual basis of trust formation to justify the position that any modification of the trust must correspond to the settlor's intention:¹⁰¹ either as a product of an agreement involving the settlor, or with reference to the trust deed or other evidence. However, contrary to Claxton's claim, four reasons suggest that the exercise of the beneficiaries' prerogative to modify the trust need not even require the consent of the settlor or compliance with its intentions.

64. First, the settlor holds no rights in the trust property, once the settlor constitutes the trust.¹⁰² Although the trust may be created by a contract,¹⁰³ the trust is not a contract, but a separate patrimony created by the constituting act.¹⁰⁴ The only persons with any rights in the trust property or against the trust are the beneficiaries. The settlor's intention is neither a patrimonial right, because it is not transferable upon death, seizable, or alienable, nor an extra-patrimonial right, because intention does not purport to deal with the inviolability of the human person.¹⁰⁵ The settlor's intention is possibly an interest, but one that may not be worth protecting when the beneficiaries can agree on their collective interests. Furthermore, the trustees exercise powers as full administrators. This means that they are under a duty to preserve the property and make it productive, but that they do not hold

100. Claxton also fails to consider what might happen if the settlor then died. We would have to ask whether the ability to consent to the modification of a trust pass to his heirs.

101. John LANGBEIN, "The Contractarian Basis of the Law of Trusts", (1995) 105 *Yale L.J.* 625, at 664. See also Robert H. SITKOFF, "An Agency Costs Theory of Trust Law", (2004) 89 *Cornell L. Rev.* 621, at 658-9.

102. Section 1265 C.C.Q. Once the transfer of trust property occurs, the settlor's role is exhausted. The obligations assumed by the trustee are owed entirely to the beneficiaries, who are now in a relationship with the trustee. The settlor and trustee also are no longer in a legal relationship that binds their patrimonies. Should the settlor be so concerned about modification to the trust then the settlor should make itself a beneficiary of the trust. A settlor also can constitute the trust so that it would very difficult for the beneficiaries to invoke the rule in *Saunders'* case or to exercise their rights collectively.

103. Section 1262 C.C.Q.

104. Section 1261 C.C.Q.

105. See e.g. sections 10-11, 32, and 35 C.C.Q.

rights in the property that they administer.¹⁰⁶ A decision to modify the trust seemingly would relieve the trustees of their duties, as nothing compels the trustees to continue acting in that capacity.¹⁰⁷ The trustees also must act in the best interests of the beneficiaries and would be in furtherance of their duties if the beneficiaries agree to a modification.

65. Second, absent the requirement to consider the settlor's intention under section 1294 C.C.Q., extra-judicial modification can draw from other principles to validate why the settlor's consent is not necessary. The overall structure of the Québec law of trusts is not based on the intention of the settlor, but on the distinctive purposes of the *patrimoine d'affectation*.¹⁰⁸ The settlor's intention is mentioned only once in the Civil Code — in section 1294 C.C.Q. Furthermore, it is quite possible to fulfill a trust's purpose without reference or adherence to the settlor's intention. For example, a gratuitous trust can still benefit the beneficiaries even if the beneficiaries claim their benefits prematurely.¹⁰⁹

66. Third, section 1287 C.C.Q., which gives the settlor the prerogative to supervise the administration of the trust, aims to benefit the beneficiaries, not the settlor. Section 1287 C.C.Q., along with section 1290 C.C.Q., provides that a settlor may have standing to ask the court to compel the trustee to fulfil its obligations or exercise its powers. As Rousseau-Houle J.A. of the Québec Court of Appeal explained in *Caisse populaire St-Zacharie c. J.G. Allen industries inc.* (C.A.): “Les articles 1287 à 1292 C.c.Q. ont pour but de pourvoir à la surveillance et au contrôle de l'administration des biens exercés par le fiduciaire, et ce, afin d'assurer une certaine protection des intérêts du bénéficiaire.”¹¹⁰ These sections appear in the section of Title 6 that deals with supervision and control of the trustees. Extra-judicial modification of the trust is a prerogative of the *beneficiaries*, and not the *trustees*. This prerogative does not affect the fulfilment of the trustee's obligations

106. Section 1306 C.C.Q.

107. Sections 1356-1357 C.C.Q.

108. Section 1260 C.C.Q.

109. See e.g. *May v. May*, [1995] 1 W.W.R. 70, 96, Man. R. (2d) 268 (Man. Q.B.), at para. 27, citing *Re Irving*, *supra*, note 56.

110. *Caisse populaire St-Zacharie c. J.G. Allen Industries inc.*, REJB 1999-15659 (C.A.) (DCL), at para. 37.

or the exercise of the trustee's powers. Claxton also fails to consider what might happen if the settlor then died. We would have to ask whether the "ability to consent" to the modification of a trust would then pass to the settlor's heirs.

67. Finally, it is important to consider whether it makes good policy that a settlor's intention — the so-called "dead hand of the settlor" — remains determinative in the administration of a trust. In some cases, the settlor's lack of foresight with respect to its selection of conditions in a constituting act either could frustrate the trustee's ability to invest or could create a situation where the trustee is unable to alienate property that *may* be decreasing in value rapidly. With a personal trust, there may be important reasons to deprive beneficiaries of the prerogative to make modifications, such as when the settlor believes that the beneficiaries are not fully able to manage their own assets, despite legal capacity. Trust legislation in Alberta and Manitoba protects against such a situation. But we should also be wary about conferring jurisdiction on the courts to assess a capacitated beneficiary's bargain, when a court would otherwise not be able to do so of its own prerogative in the contractual context. Finally, these issues are not even pertinent to income trusts — where the settlors are the beneficiaries and the income trust exists purely as a tax-efficient investment vehicle. It makes no practical sense to have one modification rule — section 1294 C.C.Q. — that applies to all types of trusts.

V. RETHINKING TRUST MODIFICATION IN QUÉBEC

68. The rules on trust modifications fall outside the core doctrinal concepts related to the trust, both in the common law and in the civil law traditions, because either tradition can adopt a rights-based or an intention-based model. Acceptance of either model; a mixed model as in the case of Alberta and Manitoba; or no model at all as under the C.C.L.C.; represents a policy choice. Other sets of rules, such as the duties of loyalty and prudence of the trustee fall within the core, since it is not possible to conceive of a trust institution without said duties.

69. The approach taken under section 1294 C.C.Q. both hinders the beneficiaries' ability to assert their own rights

without the assistance of the court, and also denies the court the flexibility to balance the beneficiaries' and settlors' interests should they conflict. This plainly contradicts the main purpose of the trust regime — which is to ensure that beneficiaries fully benefit from their trusts. In this part, I will show why adopting a mixed model for modifications to personal trusts and a rights-based model for modifications to income trusts is both practicable and sensible in light of the Legislature's policy objectives.

A. PERSONAL TRUSTS

70. If, in fact, the current policy on modifications to personal trusts is meant to protect both the interests of the beneficiaries and those of the settlor — notwithstanding my criticism of this policy — then an intention-based model is not actually necessary to accomplish that policy. To require that the beneficiaries defer to the settlor's first intention can prejudice their interests, as was evidenced by cases like *Alkallay v. Bratt, Re Trahan*,¹¹¹ and even *Poirier c. De Coste*. A rights-based model empowers the beneficiaries to determine the distribution of the trust property when they act collectively, though a mixed model, with a supervisory role for the court, also can protect the settlor's interests.

71. There are two related reasons why a settlor would not want the beneficiaries to modify a trust without approval to do so. First, the settlor would want to protect the interests of the beneficiaries who cannot otherwise consent to an arrangement. Second, the settlor would want to ensure that the beneficiaries, who can consent, respect the deliberate choice to delay the transfer of trust property.

1. Protection of Incapacitated or Non-Existent Beneficiaries

72. Rules on the simple administration of property of another are already in place to protect minor or incapacitated beneficiaries who cannot consent to a trust modification.

111. *Supra*, note 47.

Section 1305 C.C.Q., for example, requires that simple administrators, such as tutors, obtain judicial authorization before they alienate their charges' property by onerous title. There is a necessary role for the court to play, however, when a modification will affect the interests of future beneficiaries (generally children or spouses) that may not yet be alive or existent. The court can protect their rights by requiring that the present beneficiaries insure against the possibility that the future beneficiaries will come into existence and be eligible to receive trust property. Québec courts also could retain their jurisdiction to supervise modifications in order to ensure that a small class of beneficiaries, which opposes an arrangement to modify a trust, does not extort the others in favour of modification.¹¹²

73. The first intention rule in section 1294 C.C.Q. oversimplifies the solution to the evidentiary problem faced by the court, when it is confronted with an arrangement in the absence of the consent of future beneficiaries. It is simply easier for the court to look to the text of the constituting act and reject the arrangement, than to determine whether the future beneficiaries would benefit from the proposed modification. Courts applying the common law require that the beneficiaries proposing the modification present evidence that the modification will benefit future beneficiaries. There is no reason why a Québec court could not require the same.

2. Avoiding Premature Terminations

74. Second, under some circumstances, the settlor would not want the beneficiaries to prematurely end the trust, when the settlor deliberately designed the trust to delay the transfer of property. This was the problem facing the settlor in *Saunders v. Vautier*. The settlor in that case failed to include provisions that would render the operation of the now rule in *Saunders'* case practically inoperative. The intention-based model limits the risk of premature terminations because the default rule precludes terminations that do

112. Eun C. HAN, "Premature Judicial Termination of Non-Spendthrift Trusts: Reconciling a Dead Settlor's Intent with a Living Beneficiary's Needs", (1996) 3 *Tex. Wesleyan L. Rev.* 191, at 204.

not comply with the settlor's first intentions. Settlers, who constitute a Québec trust for example, do not have to include special provisions in the constituting act to limit the operation of the rule in *Saunders'* case.

75. Without the possibility of modification down the line, however, the rule can become a form of social control, because the settlor can affect the beneficiaries' behaviour and expectations until they receive the totality of the trust property. To resolve this problem, we must draw a distinction between the premature termination of a trust by the beneficiaries and the timely termination of the trust by them. I will address the latter situation first.

76. As trusts can endure for decades, a settlor's intention may change from constitution. A settlor cannot always anticipate how a trust, or the circumstances surrounding its administration, will unfold far into the future. An arrangement by all of the capacitated beneficiaries is an expression of their collective interests. This collective expression can act also as a proxy for both the settlor's *present* interest and intentions. As Pennel J. explained in *Salt v. Salt (Pub. Trustee)* :

Conjointly with an appraisal of intention, the Court is directed to look steadfastly to the benefit to be gained by the parties, being those very persons whom the testator intended to benefit in the first instance. The economy is largely an uncharted sea. Changes may often work to the detriment or frustration of the testator's intention at a time when he is no longer able to modify the methods for the carrying out of his intention. The hope behind the Act is to provide protection against these problems. In my view this is the framework within which the Court must approach the question of what is of benefit to the parties for whom the Court is charged to exercise its jurisdiction.¹¹³

77. If the beneficiaries do not propose modifications to the trust, then everyone can simply assume that the trustees will execute the trust in accordance with the settlor's *original* and *continuing* intentions.

113. *Salt v. Salt (Pub. Trustee)*, (1986) 45 Alta. L.R. (2d) 331 (Q.B.), at 448-449.

78. Courts in both *Re Irving*¹¹⁴ and *Teichman v. Teichman Estate*¹¹⁵ have adopted this approach. Although the arrangements to modify the trusts differed from the settlor's first intention, the courts considered the arrangements, by giving appropriate consideration to the interests of the future beneficiaries. In *Re Irving*, the beneficiaries convinced the court that the proposed modification was a prudent bargain for everyone involved; in *Teichman*, the beneficiaries could not do so. The courts relied on the concept of the settlor's intention as a means to ensure that the parties who were supposed to benefit from the trust did. In light of this approach, a court applying the common law would not have hesitated to modify the trust in *Alkallay v. Bratt*, and quite possibly in *Poirier c. De Coste*.

79. As to premature terminations by the beneficiaries, the solution to balance the conflicting interests at stake is more nuanced. Legislators in Alberta and Manitoba have conferred jurisdiction on the courts to approve of arrangements even when all of the beneficiaries agree. The legislation also provides guidance to the courts on how to determine the appropriateness of a modification. In Manitoba, for example, the modification must benefit the financial, social, moral, or familial wellbeing of the beneficiaries.¹¹⁶ Furthermore, the circumstances and timing of the modification must be appropriate.¹¹⁷ Had the Chancery Court in *Saunders v. Vautier*

114. *Supra*, note 56. The settlors created trusts for their daughter, Edith, to provide an income for life. Edith retained the power to appoint the remainder under one trust by will, with gift-overs to Edith's children and if necessary, to Edith's next of kin. Edith and her children proposed two arrangements to capitalize the value in favour of the living beneficiaries. The court rejected the arrangements, not because of their merits, but because they were insufficiently detailed.

115. (1996) 134 D.L.R. (4th) 155 (M.C.A.) [*Teichman*]. The settlor left property in trust for his son, Daniel and daughter, Evelyn. Although the son received the capital, the trustees paid a weekly income to Evelyn, because she suffered from depression. When her condition improved, the siblings and the Public Guardian and Trustee proposed an arrangement to vary the trust to provide Evelyn with the capital. The court accepted the proposal, on the condition that part of Evelyn's share would remain in trust for her children, who the trust also named as future beneficiaries. The purpose of the trust, which was to protect Evelyn's share of the estate, became obsolete, once Evelyn recovered.

116. *Trustee Act, supra*, note 1, s. 59(7).

117. The statute also could have prevented the operation of the rule in *Saunders'* case for a fixed period (such as five years).

been directed by a similar legislative provision, it may not have approved Vautier's arrangement.

80. If Québec's trust modification policy is meant to protect both the settlor's and the beneficiaries' interests, then it should strike an appropriate balance between them. An intention-based approach places too much importance on the interests of the settlor and on non-existent beneficiaries at the expense of the present beneficiaries. Although the mixed model weakens the rights of present beneficiaries by placing the court in a supervisory capacity to assess the appropriateness of a modification, at least as time passes, the beneficiaries collectively gain more control over the ultimate distribution of trust property.¹¹⁸

B. INCOME TRUSTS

81. The adoption of a rights-based model for modifications to income trusts is even less controversial, given that there are no policy reasons to protect the settlor's first intentions. Because the beneficiaries of an income trust have generally acquired their interests by onerous contract, they are, in effect, the settlors of the trust. The underwriter, which offers the trust units publicly for sale, merely supplies the capital to finance or "settle" the income trust.

82. The income trust is not so much a property transfer device, like a personal trust, as it is a sophisticated investment vehicle. Other than its lack of legal personality, the income trust is substantially similar to the corporation, especially in light of the limited unit-holder liability and the impending reforms to the *Income Tax Act*.¹¹⁹ Yet, income trust beneficiaries are unable to modify their trust by agreement: a prerogative enjoyed by corporate shareholders.

118. Matthews qualifies the rights of beneficiaries without the power of modification as a degraded form of property (property-light) that falls somewhere between property (*in rem*) and contract (*in personam*). P. MATTHEWS, *supra*, note 2, at 293.

119. *Supra*, note 18. For a draft proposal of the revision to the *Income Tax Act*, see DEPARTMENT OF FINANCE, "Explanatory Notes to Legislative Proposals Concerning Specified Investment Flow-Through Trusts and Partnerships" (21 December 2006), [online]. http://www.fin.gc.ca/drleg/ITA-n_ftt1206e.html.

83. In 1994, sections 1263 and 1269 C.C.Q. opened the Québec trust up to commercial applications.¹²⁰ The income trust was a new legal institution, and the Legislature might not have considered the full impact of an intention-based modification rule — which applies to all forms of the Québec trust — on the operation of the income trust in particular. Drafters of income trust constituting acts often include modification clauses that allow the unit holders to make amendments extra-judicially. According to section 1294 C.C.Q. and the Supreme Court of Canada's holding in *Thibault*, however, the inclusion of these clauses can cause problems for the income trust beneficiaries.

84. First, following the authority in *Thibault*, clauses that authorize modification risk avoidance by the courts. The purpose of the income trust company may deviate from the “intention” of the underwriter in the quality of settlor, which supplied the capital for constitution. In such a circumstance, section 1294 C.C.Q. would prohibit a court from amending the constituting act, which could hinder the company's ability to adapt in a changing market. This contrasts starkly with the common law model, which allows the income trusts to include modification clauses that allow beneficiaries to make substantial changes to the trust, even without unanimous consent.

85. Furthermore, an income trust company that includes a modification clause in its constituting act risks that the court will determine that the company is not an income trust at all. Instead of voiding such a clause, a court may determine that the unit-holders did not divest themselves of the trust property. A civil law judge who identifies possible classifications and who assesses facts in light of those classifications may determine that the company is not a trust, but rather a limited partnership under section 2236 C.C.Q. In that case, the unit-holders/partners would not benefit from full liability protection, and they could be personally liable to pay for damages that arise from obligations incurred by the partnership.

120. Robert GODIN, “Utilisation de la fiducie dans le domaine commercial au Québec”, in ASSOCIATION CANADIENNE DE DROIT COMPARÉ AND ASSOCIATION QUÉBÉCOISE DE DROIT COMPARÉ (eds.), *Droit contemporain : rapports canadiens au Congrès international de droit comparé*, Bristol, 1998, Cowansville, Éditions Yvon Blais, 1999, 147.

It is for this reason, as well as the impending tax reforms, that it is now advisable to avoid using income trusts for investment purposes unless the Legislature reforms the regime to allow unit holders to make modifications notwithstanding the first intention rule in section 1294 C.C.Q. Without legislative reform, and where financially viable, it may also be advisable to convert existing trusts to corporations to avoid the constraints of section 1294 C.C.Q.

CONCLUDING COMMENTS

86. Extra-judicial control of the trust by the beneficiaries is yet another way for the beneficiaries to hold the trustees accountable to act in the interests of the beneficiaries. Although this mechanism may not be effective in the context of unit-holders in a large company, it can provide a mechanism for beneficiaries of a personal trust to terminate an inadequate administration of the trust. When trust beneficiaries are capable of managing their finances on their own, the law should not bind them into an administration that fails to meet their needs.

87. If we believe, therefore, that trusts are for the benefit of persons rather than purposes or intentions then a generalized acceptance into Québec trust law of a rule comparable to the rule in *Saunders'* case should flow from this belief. Although trusts are often characterized as property-holding devices, they are so only because transfer to the beneficiaries is delayed by conditions — conditions which require that the property be held in trust. Ultimately, a trust cannot exist for self-perpetuating purposes, where the property is held indefinitely to accumulate interest without payment; trusts, by their nature require beneficiaries. This is true even of social and private trusts. Otherwise, if no one were entitled to receive the trust property, the property would be philosophically ownerless, even if not legally so.

88. The usefulness of the trust to the beneficiaries is constrained by paternalistic modification rules that keep the property unnecessarily within the trust — merely to perpetuate the settlor's first intention. Either Québec courts should avail themselves of the opportunity to recognize extra-judicial

beneficiary-initiated modification, to allow beneficiaries of both personal trusts and income trusts to adapt the institution to meet their needs, or the Legislature should reform section 1294 C.C.Q. to do so.

Joshua A. Krane
4 Cimarron Crescent
Ottawa, ON K2G 6C9
Tel. : 613-226-5473
joshua.krane@elf.mcgill.ca