

UNIFORM LAW CONFERENCE OF CANADA
CIVIL SECTION

SECOND REPORT OF THE WORKING GROUP ON A

Uniform Informal Public Appeals Act

**Loi uniforme sur les appels
informels aux dons du public**

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Whitehorse Yukon
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REPORT OF THE WORKING GROUP ON A UNIFORM INFORMAL PUBLIC APPEALS ACT

About the Project

[1] At its last annual meeting held in Winnipeg on August 7-11, 2011, the Uniform Law Conference of Canada (ULCC) adopted the *Uniform Informal Public Appeals Act*. The Act is designed so that it may be enacted in the common law provinces and territories of Canada, excluding Quebec (Uniform Act, common law version).¹ In Winnipeg, the ULCC also adopted a resolution pursuant to the Working Group's recommendation that a civil law version of the Uniform Act be prepared in time for its next annual meeting. The following report is to present the civil law version of the Act (Uniform Act, civil law version).

Working Group

[2] The Working Group members were **Arthur L. Close**, Q.C., group leader and past President of the ULCC; **Gregory G. Blue**, Q.C., Senior Staff Lawyer with the BC Law Institute; **Michelle Cumyn**, Professor at the Faculty of Law, Laval University; **Vera Mesenzew**, Counsel with the Royal Bank of Canada and a member of both the Ontario and Quebec bars; and **Albert Oosterhoff**, Professor Emeritus at the Faculty of Law, University of Western Ontario.

[3] In preparing the Uniform Act, civil law version, the Working Group received valuable advice from **Me Myriam Ancil** and **Me Pierre Charbonneau**, legislative drafters at the Ministry of Justice of Québec.

Context

[4] The context, issues and process followed by the Working Group were presented by Arthur Close in the Working Group's First Report.² We will only recall them briefly here. The reader should consult the First Report for more detail.

[5] Appeals to the public for donations are a feature of everyday life. Fundraising events and campaigns are frequently held by various organizations, groups or individuals. Appeals that occur on a regular basis are usually conducted by registered charities and other organizations having the benefit of experienced fundraisers and professional advice. But spontaneous appeals often occur as well, especially after a disaster like a fire or a flood. They may follow publication of a news item about a family or individual in some sort of distress. Campaigns on behalf of individual children requiring specialized medical treatment elsewhere have also become familiar examples of this kind of fundraising. Some appeals are organized in the hope of advancing a cause by other means, such as legal procedures to review a government decision. Spontaneous appeals such as those generally begun by a single person or a small group are those that concern us here, and which we describe as "informal."

[6] The appeals conducted by registered charities and organizations as part of a fundraising effort carried out on a permanent or continuing basis are not unproblematic. Donations are not always used exclusively for the purposes for which they were raised. They may be used in part to cover the operating costs of the organization, including wages and professional services, some of which were necessary to organize the fundraising itself. Fundraisers frequently use the names and photographs of real victims, a tactic which is known to attract greater sympathy from members of the public.³ Donations exceeding the needs of the objects of the appeal will often be used by the organization to assist other victims or advance other objects. This is a practice that sometimes attracts criticism⁴. However, organized charities operate within a legal framework defined by the CRA and their own corporate structure so the issues associated with the use of surpluses tend to be ones of public relations and perception rather than of law. The focus of the Working Group, therefore, was confined to the issues that need to be addressed in the context of informal appeals, as will be explained further below.

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[7] In the case of an informal appeal, rarely is a not-for-profit corporation, contractual association or foundation created at the beginning to manage the donations received from the public. The fundraisers simply issue a message asking for donations and frequently open a bank account to hold the money received. The help of the press and the electronic media may be enlisted to publicize the appeal. The emergency that gives rise to the appeal may have substantial emotional impact, and the generosity of the public's response is sometimes astonishing. The amounts donated may go well beyond what is required to meet the original need. Sometimes the appeal turns out to have been unnecessary, because the need is met through governmental or other sources. Occasionally the opposite situation arises. Too little may be raised to be of any use at all. In either case, the fundraisers may be left with a surplus. This does not cause any difficulty if they have created a trust agreement whose provisions indicate how a surplus will be handled, and if donations were made with that understanding. But in the heat of the moment, the fundraisers may not have thought of the possibility of a surplus, and they may not have put anything down in writing.

[8] At first glance, the courses of action open to the fundraisers who are left with a surplus appear to be straightforward. Either give the property back to the donors, turn it over to an equally worthy cause, or hand it to the beneficiary of the appeal. One would expect the law to provide an appropriate solution. However, it is quite unclear what the legal response would be. The powers and duties of fundraisers in an informal appeal are equally uncertain. Even the legal nature of an informal public appeal is open to question: does the appeal merely give rise to contracts of gift? If so, who is the donee? Does the appeal give rise to a trust? If so, what rules apply?

Uniform Act, common law version

[9] The Uniform Act adopted in Winnipeg in August, 2011 implements the following principles:

- Reform should be pursued through a stand-alone act dedicated to informal public appeals rather than as an amendment to an existing *Trustee Act*.⁵
- The application of the proposed Act should be narrow in scope so as to exclude the fundraising activities of established bodies for their usual purposes. In particular, charities and other qualified donees registered under the *Income Tax Act* (Canada)⁶ should be excluded.
- The proposed Act should confirm that money and other property raised through an informal public appeal is held in trust for the objects of the appeal.
- The proposed Act should be largely default in character and capable of being displaced by a trust agreement, if there is one, and the terms of the appeal.
- The proposed Act should confirm a power in the court to direct the application of any surplus funds raised for non-charitable objects.
- The proposed Act should provide a mechanism for the disposition of a small surplus.
- The proposed Act should provide a mechanism for refunds to identifiable donors of larger amounts where an appeal for non-charitable objects results in a surplus.
- The proposed Act should include, as a schedule, a model trust document to be completed by the fundraisers of the appeal. The schedule prompts the fundraisers to specify in writing the circumstances which gave rise to the appeal, the objects for which donations are requested and the manner in which trustees should dispose of a surplus, if one should arise. The terms of the model trust document are deemed to apply to an appeal except where they conflict with the terms of the appeal, a trust agreement specific to the appeal or other rule governing the trust.

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Uniform Act, civil law version

[10] In the case of Quebec, the Working Group reached the following additional conclusions:

- The trust is the most appropriate vehicle for governing an informal public appeal in Quebec, just as it is in the rest of Canada.
- Under present circumstances, Quebec courts are unlikely to characterize an appeal as a trust in the absence of a trust act clearly stating that the property received is subject to a trust. The situation appears to be different in the common law provinces and territories, where applying a trust appears to be possible even in the absence of a formal document.
- The Uniform Act, civil law version should ensure that the creation of a trust arises by operation of law, thus setting aside the requirements for constituting a trust by contract. Such requirements are usually not met in the case of an informal appeal.
- The Uniform Act, common law version contains several provisions which concern the disposal of the surplus of an appeal. Equivalent provisions are required in the civil law version, as the solutions derived from the *Civil Code of Québec* are inadequate.
- The Uniform Act, civil law version should adapt or complete some of the rules governing trusts and administration of the property of others in the *Civil Code of Québec*. The appropriate solutions to problems arising out of an informal public appeal are the same in Quebec as they are in the rest of Canada. However, the rules that need to be adopted in Quebec differ in some respects from those of the common law version, since the underlying law is different.
- The Uniform Act, civil law version should use concepts and adopt a structure that is in harmony with the *Civil Code of Québec*, which will continue to apply to an informal public appeal. It should also adopt the legislative drafting style typical of Quebec civil law.

Current Law Governing Informal Public Appeals in Quebec

[11] Two legal regimes are liable to apply to an informal public appeal under current law: the law of gifts and the law of trusts.

Law of gifts

[12] Under Quebec law, gift is a contract in which the donor and the donee agree to a gratuitous transfer of ownership of certain property from the donor to the donee (art. 1806 CCQ). Applying the law of gifts to an informal public appeal raises two main difficulties. The first concerns the formation and validity of such gifts. It is necessary to identify the parties, in particular the donee. Is the donee the fundraiser or the beneficiary of the appeal?

[13] In the case of a registered charity or an organization which organizes an appeal as part of a fundraising effort carried out on a permanent or continuing basis, the charity or organization – *ie* the fundraiser – is normally considered to be the donee. The fundraiser becomes the owner of the gifted property, even though it has announced that donations would be used for a specified purpose or to assist a specified group or individual.⁷ The question then

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becomes the extent to which the organization or charity is (or ought to be) legally bound to use the gifted property in accordance with the purposes it has announced, despite the fact that it owns such property. However, this is not the issue which the Uniform Act seeks to address. Indeed, the Uniform Act does not apply to such fundraising efforts.

[14] In the case of an informal public appeal, it is inconceivable that the fundraiser should be considered the donee of the gifted property. The fundraiser is not a not-for-profit corporation, a contractual association or a foundation whose purpose it is to receive public donations to pursue the objects for which it was established. In an informal appeal, the fundraiser is either an individual or a legal person for whom the object of the appeal is not one of its usual activities. Let us take the example of a computer firm that has issued an appeal to its employees, clients and suppliers to raise funds in order to assist an employee of the firm having suffered a tragic accident. This situation appears to be entirely different from one where an appeal is conducted by a foundation whose object it is to help such victims, even if there are named victims. In the case of the foundation, the latter acquires ownership of the gifted property. The same solution must not avail in the case of the computer firm. The fundraiser in an informal appeal does not acquire ownership of the donations it receives, with all the consequences that would follow: ability to dispose freely of such property or to treat it as one's own; possibility that such property be seized by one's creditors in the event of insolvency or bankruptcy, etc.

[15] It is therefore necessary to consider the beneficiary of the informal appeal as the donee. This raises a problem in relation to the valid formation of gifts. Indeed, members of the public who make donations generally do not have any direct contact with the beneficiaries of the appeal. The gifts are entered into by the donors and the fundraisers. One would then need to consider the fundraisers as mandataries (agents) of the beneficiaries, in order to explain how a contract has been entered into by each of the donors and each of the beneficiaries (art. 2130ff CCQ). In some instances, it may be difficult to prove that donations were accepted by the beneficiaries or that the latter conferred a mandate on the fundraisers before the donations were made. Furthermore, for a manual gift to be formed, an immediate transfer of possession of the gifted property is required.⁸ Possession might once more be obtained through a mandate; however, the existence of such mandate may be difficult to establish in practice.

[16] A second difficulty, if one applies the law of gifts in the case of an informal public appeal, concerns use of the gifted property. In a donation, the donee acquires ownership of the gifted property. He may dispose of it as he wishes. The donor cannot recover his donation, even if it is of no use to the donee, except in very limited cases where it might be argued that the gift is null or that the donor has grounds for revoking it.⁹ As owner of the gifted property, the donee is not obliged to hand it over to other persons who find themselves in circumstances similar to his own, for example.

[17] To conclude, the contract of gift is not an appropriate vehicle for governing an informal public appeal in the vast majority of cases. Indeed, one would have to consider the beneficiaries of the appeal to be the donees, which raises two difficulties. On the one hand, the validity of the gifts may be questionable to the extent that the beneficiaries have not accepted them or received them directly, but only via the fundraisers. On the other hand, there are no legal grounds for returning gifted property to a donor or for redirecting it to another worthy cause, if it is not required by the beneficiaries.¹⁰ Let us now turn to the law of trusts.

Law of trusts

[18] The contract of gift still has a role to play if the trust is adopted as a model, but its application no longer poses the same difficulties. The Civil Code provides that a person may add to the trust patrimony after creation of a trust, by transferring property to it by contract (art. 1293 CCQ). In the case of an informal public appeal, donations are added to the trust patrimony through a series of gifts, but the donee is the trust or, in other words, the trustee acting as administrator of the trust. Because the beneficiaries are not donees, the problems raised earlier regarding the valid formation of a gift disappear. The trust also offers solutions regarding the use of any residual property, as we will see. The trust is therefore the appropriate vehicle for governing an informal public

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appeal. However, the conditions for the formation of a trust constituted by contract are problematic in the case of an informal public appeal.

[19] The *Civil Code of Québec* distinguishes three varieties of trust, each of which may apply in the case of an informal public appeal, depending upon the circumstances: the personal trust,¹¹ the private trust (similar to the non-charitable purpose trust)¹² and the social trust (similar to the charitable purpose trust).¹³ An express trust may be created either by will or by contract (art. 1262 CCQ). When the trust is constituted gratuitously by contract, the relevant contract for its creation is that of gift.¹⁴ The Civil Code provisions on trusts do not impose formal requirements for drafting a trust act: for example, such act need not be notarized, and it need not even be in writing (art. 1260, 1262 CCQ). However, the trust act would need to comply with the conditions for a valid gift. Even though this is a matter of some debate, our view is that a trust may be constituted by manual gift, so that the trust act need not be notarized.¹⁵

[20] Commentators agree that creating a trust by contract in compliance with the Civil Code requires that there be a transfer of property. According to article 1260, the trust “results from an act whereby a person [...] transfers property from his patrimony to another patrimony constituted by him [...] and which a trustee undertakes, by his acceptance, to hold and administer.” It seems that the transfer needs to occur immediately when the trust is created,¹⁶ although opinions diverge.¹⁷

[21] Furthermore, the presence of at least two persons is required in Quebec where the trust is created by contract. This is not the case in the common law provinces and territories, where a trust may be created by a single person who declares himself the trustee (declaration of trust). In Quebec, one person, the settlor, must transfer ownership of certain property to another person, the trustee, with the intention of creating a trust.¹⁸

[22] Finally, the intention of creating a trust is required for a trust to be established by contract in accordance with Quebec law. This requirement is not easily met in Quebec where one still finds a perception of the trust as a technical and sophisticated legal instrument. For instance, we have no difficulty recognising the existence of numerous contracts which we witness in everyday life, even though the parties may not have formed the specific intent to enter into such contracts: we infer such intent from their words and deeds. Would it be as easy to recognise the intention of creating a trust in Quebec? We do not believe so. We feel that characterizing an informal public appeal as a trust, where the fundraisers have not clearly expressed their intention to establish such a trust, would be no easy matter.

[23] To conclude, three conditions must be met for the law of trusts to apply to an informal public appeal under current law: a) two persons at least must be present, one acting as the settlor, the other as the trustee; b) the settlor needs to transfer an item of property to the trustee to constitute the trust patrimony; c) the settlor and trustee must have the intention of creating a trust. These conditions are easily met, providing the fundraisers turn their minds to creating a trust. The trust is an appropriate legal vehicle easily within their reach. However, fundraisers need to turn their minds to it.¹⁹ That is where the difficulty lies, since they rarely do.

Features of the Uniform Act, civil law version

[24] The Working Group is of the opinion that the trust constitutes the appropriate legal vehicle for governing an informal public appeal, in the vast majority of cases. Such conclusion appears valid in Quebec as it does in the rest of Canada. That is why the Uniform Act subjects the appeal to a trust unless the intention manifested, as it stands out clearly in the terms of the appeal, is to subject the appeal to a different legal regime. The trust arises by operation of law. It is therefore not necessary for participants in an appeal to conform to the conditions set out at article 1260 CCQ discussed above.

[25] The Uniform Act contains precise rules regarding the disposal of a surplus (or residue, as it is named in

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Quebec), should one arise. The fundraisers are prompted to indicate how they would dispose of a residue in the trust act provided as a schedule to the Uniform Act. Such provisions are only opposable to donors if their content is made known by the terms of the appeal. Such provisions must also be in keeping with the spirit of the appeal. Failing any such provisions, trustees may dispose of a residue whose value does not exceed \$20 000 by handing it over to one or several registered donees under the *Income Tax Act* (Canada) and whose objects are in keeping with the spirit of the appeal. In all other cases, court approval must be sought to dispose of a residue. In certain cases, donors may claim a reimbursement or may request that their gift be redirected, before the trustee disposes of the residue. In the case of a personal trust, the residue is transferred to the beneficiary or his succession.

[26] The Uniform Act provides other rules that modify or complete the legal rules pertaining to trusts and administration of the property of others. Some rules are the same in the civil law and common law versions of the Uniform Act, but some are different. In Quebec, the Civil Code contains a fairly complete set of provisions governing trusts and administration of the property of others, since 1991. While it has borrowed quite liberally from the common law, it has also avoided some of the pitfalls which appear to cause difficulties in the common law provinces and territories, in particular the rule against perpetuities, the certainty of beneficiaries requirement and the restrictive application of the *cy-près* doctrine. Several rules of the Uniform Act, common law version that seek to alleviate these difficulties have not been reproduced in the civil law version. Overall, the private trust (similar to the *non-charitable purpose trust*) is treated favorably by the Civil Code.

[27] It is generally not necessary to reiterate the principles and rules formulated in the Civil Code in the context of special legislation such as the Uniform Act. It is well established that the Civil Code “is the foundation of all other laws, although other laws may complement the Code or make exceptions to it” (Preliminary Provision). To the extent that provisions in the Uniform Act would merely have repeated the solutions already present in the Civil Code, they have been omitted. Several provisions of the common law version did not find their way into the civil law version for that reason.

[28] Finally, the legislative style is very different in Quebec and in the other provinces and territories. Legislative drafters in Quebec use very few definitions. Rules are generally more abstract. Even the structure of a piece of legislation is rarely the same. The civil law version turns out to be quite different in form, but it is the same in substance, with a few rare exceptions.

[29] The commentaries that accompany the Uniform Act, civil law version are quite sparse, since we have not reiterated those that accompany the common law version and the First Report. New commentaries are introduced only to signal differences between the common law and civil law versions or to explain the Uniform Act’s interaction with certain key provisions of the *Civil Code of Québec*.

[30] After each article of the civil law version, we indicate in square brackets the corresponding sections of the common law version, so that the reader may refer to the relevant commentaries. The following table makes it possible to proceed in reverse.

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UIPAA (Common law)	UIPAA (Civil law)	UIPAA (Common law)	UIPAA (Civil law)	UIPAA (Common law)	UIPAA (Civil law)
1(1) « court »	--	8	21	16(1)	--
1(1) « fund »	8	9	--	16(2)	--
1(1) « governing authority »	--	10(1)	29	17(1)	19
1(1) « public appeal »	2, 3	10(2)	30	17(2)	19
1(1) « surplus »	--	10(3)	--	18	--
1(1) « terms of the public appeal »	4	10(4)	--	19	--
1(1) « trust document »	--	10(5)(a)	--	20(1)	--
1(1) « trustee »	--	10(5)(b)	31	20(2)	--
1(2)	--	10(6)	29	20(3)	14
2(1)	3	10(7)	31	21(1)	20
2(2)	--	10(8)	--	21(2)	--
2(3)	4, 6	10(9)	28	21(3)	--
2(4)	33	11(1)	24	22	--
3(1)	4	11(2)	24	23(1)	--
3(2)	--	11(3)	24	23(2)	--
3(3)	--	11(4)	26	23(3)	--
3(4)	--	11(5)	27	23(4)	--
3(5)	--	12(1)	25	23(5)	6
4(1)	8	12(2)	26	24(1)	16
4(2)	9	12(3)	27	24(2)	18
5(1)	5, 6	13(1)	17	24(3)	23
5(2)	5, 6	13(2)	--	24(4)	27
5(3)	5, 6	14(1)	13	24(5)	6
5(4)	15	14(2)	--	24(6)	18
6	7	14(3)	--		
7(1)	22	14(4)	--		
7(2)	27	15(1)	12		
7(3)	--	15(2)	11		

¹ Uniform Law Conference of Canada, *Uniform Informal Public Appeals Act*, Winnipeg, 7-11 August 2011, on line, www.ulcc.ca/en/us/index.cfm?

² Uniform Law Conference of Canada, *Report of the Working Group on a Uniform Informal Public Appeals Act*, Winnipeg, 7-11 August 2011, on line, www.ulcc.ca/en/poam2/index.cfm?sec=2011&sub=2011h

³ A good example is the sponsorship of children in Africa. See also : Bonnie S. GUY et Wesley E. PATTON, « The Marketing of Altruistic Causes : Understanding Why People Help », *Journal of Consumer Marketing*, Winter 1989, vol. 6, n° 1, p. 19 at 26; *Torrito c. Fondation Lise T. pour le respect du droit à la vie et à la dignité des personnes lourdement handicapées*, [1995] R.D.F. 429 (Qué. S.C.).

⁴ For example, the Red Cross used 12% of donations received in response to the tsunami in Asia for other purposes, see: Cécilia GABIZON, « Tsunami de 2004 : enquête sur l'utilisation des dons », *Le Figaro*, 11 Jan. 2011, on line, www.lefigaro.fr/actualite-france/2011/01/11/01016-20110111ARTFIG00688-tsunami-enquete-sur-l-utilisation-des-dons.php

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⁵ The *Trustee Acts* of the common law provinces and territories are based for the most part on similar legislation adopted in the United Kingdom during the 19th century.

⁶ *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

⁷ The *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23, s. 31, creates a presumption to that effect:

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

The Act also provides as follows:

33. Subject to the limitations accompanying any gift and the articles or by-laws, a corporation may invest its funds as its directors think fit.

See also: *Les Coopérants, société mutuelle d'assurance vie (Liquidation de)*, [2002] R.J.Q. 328 (Qué. C.A.), para. 43; *Samson c. Fondation Joie d'enfants*, J.E. 94-794 (Qué. S.C.).

Claxton, however, expressed the view that if a foundation raises funds for a given purpose, it holds such funds subject to a trust: John B. CLAXTON, « Language of the Law of the Trust », (2002) 62 *R. du B.* 273, 311.

⁸ Under Quebec law, a gift must be notarized, except if it is a manual gift: art. 1824 CCQ. A manual gift is one where the donee obtains immediate possession of the gifted property. See: *Spina c. Sauro*, [1990] R.L. 232 (Qué. C.A.).

⁹ See articles 1400, 1401 & 1836ff CCQ.

¹⁰ See: *Les Coopérants*, *supra*, note 7.

¹¹ Article 1267: “A personal trust is constituted gratuitously for the purpose of securing a benefit for a determinate or determinable person.” Its maximum duration is 100 years (art. 1272 CCQ).

¹² Article 1268: “A private trust is a trust created for the object of erecting, maintaining or preserving a thing or of using a property appropriated to a specific use, whether for the indirect benefit of a person or in his memory, or for some other private purpose.” It may be perpetual (art. 1273 CCQ).

¹³ Article 1270: “A social trust is a trust constituted for a purpose of general interest, such as a cultural, educational, philanthropic, religious or scientific purpose.” It may be perpetual (art. 1273 CCQ).

¹⁴ See : Jacques BEAULNE, *Droit des fiducies*, 2d ed., Montréal, Wilson & Lafleur, 2005, p. 157, para. 167; Madeleine CANTIN CUMYN, « L'acte constitutif d'une fiducie » in Benoît MOORE (ed.), *Mélanges Jean Pineau*, Montréal, Éditions Thémis, 2003, p. 649 at 657. Brierley, however, did not consider the trust act as a contract of gift, but as a specific juridical act: John E.C. BRIERLEY, « The Gratuitous Trust : A New Liberality in Quebec Law », in *Mélanges offerts par ses collègues de McGill à Paul-André Crépeau*, Cowansville, Yvon Blais, 1997, p. 119 at 141ff.

¹⁵ See Donovan W.M. WATER, Mark R. GILLEN & Lionel D. SMITH, *Waters' Law of Trusts in Canada*, 3d ed., Toronto, Thomson Carswell, 2009, p. 1358-1359; John B. CLAXTON, *Studies on the Quebec Law of Trust*, Toronto, Thomson Carswell, 2005, p. 78, para. 4.10ff & p. 266, para. 13.42ff. *Contra* : J. BEAULNE, *ibid.*, p. 153, para. 163 (the trust may not be constituted by verbal act); p. 158, para. 168 (the gratuitous trust must be notarized); p. 160, para. 170 (the trust may not be constituted by manual gift).

¹⁶ J. BEAULNE, *supra*, note 14, p. 136, para. 152ff; M. CANTIN CUMYN, *supra*, note 14 at 657.

¹⁷ J. BRIERLEY, *supra*, note 14 at 143-144; J. CLAXTON, *supra*, note 15, p. 59, para. 3.17 : both authors suggest that the initial transfer of property could take place after a trust's formation.

¹⁸ See: *Mathieu c. Tardif*, REJB 1997-03204, para. 16 (Qué. C.Q.). Compare: *Samson c. Talbot*, AZ-50162668, B.E. 2003-295 (Qué. C.Q.).

¹⁹ See: *Bolduc c. Carrier*, 2006 QCCS 5485.