

CONFERENCE REPORT DATA TRUSTS IN QUEBEC'S CIVIL LAW TRADITION

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General introduction

In the past few years, we have seen a proliferation of references to data trusts—in scientific and grey literature.

Traditionally, and legally, when we talk about a trust in common law, we refer to the ownership of a property, a good like a fund, a land or a house, for the beneficial interest of someone else.

A trust means that instead of owning for my own interest, I own for the interest of someone else. This ownership for someone else comes with obligations—we call them fiduciary obligations.

The very fast emergence of data trusts—we are talking about a couple of years only—indicates an urge to find a solution to problems that lie at the core of data collection and sharing. Sarah explained them to us: there are problems of trust, accountability and concentration of data in the hands of corporations.

But what is behind this concept? What is the relationship between a data trust as a concept and a trust as a legal mechanism? And how can we apply it to Quebec's trusts? These are the questions I will try to answer in this presentation.

The programme of this webinar will be as follows:

- the origin and meaning of data trusts;
- the differences between common law trust and civil law trust;
- the advantages and downsides of a civil law data trust.

Origin and meanings of data trusts

First, I want to emphasize the reasons why I think it is important to explore and question the origin of the expression data trust.

Data trusts are characterized by controversies and a lot of buzz. If we don't take the time to really understand what's behind the idea of a data trust, we can very easily get mixed up in all that buzz, in all this information. So, it may seem academic to some, but in the end, I think it will pay off if we want to go ahead with the creation of data trusts, because this kind of project needs mutual understanding and transparency.

The idea of a data trust was first expressed a few years ago, in 2004 to be exact. A law professor, [Lilian Edwards](#), was concerned with the lack of trust in the Internet as a safe environment. She suggested that a trust could be created between collectors of online data and consumers.

This was very innovative at the time, but it did not receive much attention until 2016 or 2017. At that time, the idea of data trusts was recommended to the British government by an independent report as a way to develop and encourage AI. The resurgence of data trusts is thus related to the development of massive data sets and computing capacity.

One of the barriers to the use of these huge amounts of data was, of course, trust. Trusts were perceived as a way to enhance the fluidity of data exchange, to ensure these exchanges are secure and mutually beneficial.

From then, data trusts became very popular.

They were at the centre of the [Quayside project](#) in Toronto. This smart city project was led by Sidewalk Labs, a sister company of Google Inc. So, of course, the question of Sidewalk Labs owning urban data, and even the need to collect this data, received a lot of attention and opposition. One major problem of the Sidewalk Labs Quayside project was the ambiguity surrounding data trusts. I like to quote Marianna Valverde on this subject, a University of Toronto law professor, [who called the Sidewalk Labs' data trust, a magic trick](#), implying that some unknown scheme was hidden from the public. The Quayside project was later abandoned.

All these events gave rise to a huge debate about what exactly is a data trust and why we are even talking about it. As a consequence, we saw a huge increase of definitions and models. I synthesized all these definitions into three categories.

A data trust can be understood as:

- first, a legal trust;
- second, an independent stewardship of data;
- third, a perspective on data sharing.

First, there are some law professors who claim that a legal trust may be an adequate vehicle for the management of data for both private and public purposes.

I will give one example, the one suggested by Sylvie Delacroix and Neil Lawrence. They propose to create a [bottom-up data trust](#) in which data subjects pool their data together, either in a public or private structure. A data subject is simply the person from whom the data originates. They imagined a world where many data trusts could take form so that data subjects could choose where they want to pool their data and for what purpose.

The second way to define a data trust is confusing, because it uses the exact same vocabulary as a legal trust without being a legal trust. In this conception, a data trust is understood as a [legal structure that provides independent and fiduciary stewardship](#) of data for the benefit of organizations or persons. Stewardship refers to the idea of taking care of a property that belongs to someone else.

The way I understand it, a data trust is seen in this conception as a way to delegate the decision-making to an independent entity about who has access to data, under what condition and to whose benefit. The data trust is thus seen as an independent entity which will be legally bound by contract, not trust law, to act as a steward of this data with fiduciary obligations.

Finally, a data trust is sometimes considered like a perspective rather than a concrete model or solution to data governance. In some papers, I found that a data trust was defined as a legal structure or mechanism that enables a fair and trusted way to share data. In this sense, data trusts could be pretty much anything, as long as they convey the idea that data sharing

needs a structure with legal principles and rules that can enhance trust. That is why I call it a perspective.

These are the three meanings you might find if you read about data trusts.

As for our work, at TIESS, in collaboration with Open North, law professor Alexandra Popovici and legal expert Anne-Sophie Hulin, we are exploring how the Quebec legal trust might be an appropriate tool for data governance. In order to do this, we first need to understand what a trust is.

Trust laws in Canada and Quebec

Trusts, as a legal tool, come from England and were created a long time ago.

We also have trusts in Canada, because of the English colonization. There is also a specific trust in Quebec since 1994. However, this is a civil law trust.

Even though Canadian trusts and Quebec's trusts can be similar in some ways, they are fundamentally different. It is important to grasp the differences between both—or at least to be aware of these differences. Since they are so different in their essence, one solution cannot be imported or transferred from one legal tradition to another.

So what is the difference between common law trusts and civil law trusts. To put this very shortly:

- the common law trust is ownership with obligations towards the beneficiaries;
- the civil law trust is the administration of a property appropriated for a purpose.

Let's go a little bit deeper.

In both legal traditions, we find three roles:

- the settlor—the one that sets the trust by transferring an asset (“constituant” in French);
- the trustee—the one that manages the trust (“fiduciaire” in French);
- the beneficiary—the one that benefits from the trust (“bénéficiaire” in French).

Like I said at the beginning, **the common law trust** is the ownership of a property, a good, but an ownership that comes with obligations to use that property in the beneficial interest of someone else, the beneficiary.

The trustee bears obligations towards the beneficiaries, like duties of loyalty, prudence and diligence.

All common law trusts need to have a beneficiary who is different from the trustee. Trustees can benefit from the trust, under the condition that there are other beneficiaries.

Trustees can receive a salary for their position. Professional trustees exist, they work for example in banks. But they cannot make unauthorized or secret profits from their position.

Beneficiaries also have rights in this matter. They can go to court if a trustee fails to comply with his obligations.

Now that we have covered the common law trust, let's see how trusts work in **Quebec's civil law tradition**.

There is one major difference. It might not seem important at first, but I can assure you that it is. In Quebec's trusts, no one owns the property in a trust, no one owns the goods that are placed in a trust.

In civil law, there has always been ownership, the classic ownership we all know, because we all own something, alone or with others, like co-ownership.

But then, in 1994, there was this other way for properties to exist that was created, which is called appropriation to a purpose (in French "affectation").

Let's take a look at the section of the *Civil Code of Quebec* that expresses these concepts:

915. Property belongs to persons or to the State or, in certain cases, is appropriated to a purpose.

We can clearly see here two concepts: belonging (ownership) and appropriation to a purpose (trust).

Quebec's trusts are based on appropriation to a purpose, not on ownership of the trustee, like in common law.

What does appropriation to a purpose mean?

It means that every trust in Quebec must have a purpose, a goal that is determined in the legal act, the legal document that creates the trust. The properties in the trust can only be used in a way that respects and ensures the specified goal.

It also means that the trustee does not have ownership of the properties. He or she has power over it. It is a power of administration and management.

Because goals or purposes are at the centre, at the heart of Quebec's trusts, the designation of beneficiaries is not always necessary. There could be a trust that has one purpose like the construction and maintenance of a funeral monument. It is easy to understand that no beneficiaries would be named in this kind of trust.

The importance of the purpose in a Quebec trust explains why this trust, compared to the common law trust, is interesting in general and why it is particularly interesting for data collection and sharing.

This brings me to the question of why Quebec's trusts could be an appropriate tool for data.

A civil law data trust

I will discuss five features or aspects that make Quebec's trusts interesting for data governance.

1) Evacuation of the question of data ownership

The first prominent aspect of Quebec's trusts is the evacuation of the question of who owns the data.

Many academic papers have been written about this topic, but Quebec's trusts give us an opportunity to put these questions aside and focus on the subject of how we want our data to be used and to what purpose.

2) Delegation of consent to the trust

The second interesting feature of a Quebec trust is that it is a way to address the question of individual consent to data collection, use and sharing.

Like I said, and I repeat it because it is essential to understand and remember this about Quebec's trusts, trusts are created for a purpose.

As a matter of law, most recent laws concerning data privacy, like the [General Data Protection Regulation](#) (GDPR) in Europe or [Bill 64, An Act to modernize legislative provisions as regards the protection of personal information](#) in Quebec, express the principle that individual consent must be given for a specific purpose and individuals must be informed of this purpose.

Why? Because knowing why and how your data will be used is essential to express an informed consent.

So, you see where I'm heading with this, a data trust that takes the form of a legal trust in Quebec would have legal parameters that align with the general laws about data privacy and protection.

A data trust in Quebec would have these characteristics:

1. a specific purpose embodied in the legal document that creates it;
2. the trust could not use the data in a way that goes against this purpose;
3. the trustee would be responsible to pursue the specified purpose;
4. changing the purpose is not an act that can be done easily.

As a consequence, once the data is in the trust, trustees would not have to worry about obtaining consent again under certain conditions.

To explain this idea, I will quote and translate a recent [blog post](#) written by Anne-Sophie Hulin. She mentions the idea of metaconsent: when individuals give their consent to put their data in a trust, they delegate their consent to the trustee. Then, the trustee has the responsibility to make sure that the use and sharing of this data stay true to the trust's purpose. Data subjects can find some control over the use of their data through the intervention of the trustee.

As a consequence, the data trust could share and give access to the data it controls as long as the trustee makes sure it is done in compliance with its purpose. All this without the need to ask the consent from individuals again.

3) Versatility

A third aspect of Quebec's trusts which makes them an interesting legal instrument is their versatility. Why are they so versatile?

Because almost everything about trusts is left to intention, the intention of the settlors that create the trust.

The majority of the rules that apply to trusts can be found in the 1994 *Civil Code of Quebec*. The *Civil Code of Quebec* covers topics like the creation of a trust, the administration of the trustee, the beneficiaries and the modification and the end of the trust.

All these topics are covered in a little bit more than a hundred dispositions. This not a lot. I am saying this so you can understand how much Quebec's trust is the realm of intention. The

trust is what the settlor intends it to be.

Also, the *Civil Code of Quebec* does not limit the purpose that can be pursued or achieved with a trust. These goals can be commercial, private, charitable or of general interest.

As a very vivid example of this characteristic, I found a trust whose purpose is to create scientific knowledge about forests in the Eastern Townships, the Canton-de-l'Est region. The trust receives funding from scientific institutions and the government and one of the trustees engages in scientific research about forest and agriculture. The settlors in this trust imagined a legal structure that is their own with a very unique purpose.

The *Civil Code of Quebec* also leaves the settlor to decide the term of the trust. In some cases (like the private trust or the social trust), this term can be perpetual. Perpetuity is only a possibility. In the case of data, the term of the trust might be a sensible question because of the nature of data and the constant evolution of technology.

On this aspect of versatility, Quebec's trusts are much more permissive than the common law trust.

4) Balance different interests related to data collection and sharing

A fourth element to mention is the possibility to use the trust as a way to balance different interests represented by data subjects, data collectors and data users.

A good example to understand this application of the trust is the social trust, which is one of the three types of trusts in Quebec. In French it is called "fiducie d'utilité sociale".

A social trust is nothing more than a trust with a social or general interest purpose. Its essential object cannot be the making of profit or the operation of an enterprise.

So the social trust is a legal structure that has the potential to help us make all these interests converge into a general consideration.

5) Trustees are responsible

Finally, and this is a very important aspect because it addresses the question of trust mentioned earlier: the trustees are responsible for their administration of the trust.

The purpose of the trust limits the kind of action and decision the trustee can take. I repeat what I said earlier, the trustee must act and decide in accordance with the purpose of the trust; otherwise, he becomes personally liable.

Also, the administration of the trust is submitted to a surveillance mechanism. Some persons can go to court in case of problems with the administration, the actions or the decisions made by the trustee. These persons that can go to court are the settlors, the beneficiaries if they exist and, I quote the *Civil Code of Quebec*, "any other interested person" (art. 1290).

Now that I have mentioned the positive aspects of trusts for data governance, I have to say a few words about their downsides.

Trusts are complex legal tools so a lot of education about them is needed. Because of their complexity and versatility, it is possible that a legal expert like a lawyer or a notary will be necessary to create data trusts.

Also, we still need to ponder the compatibility of the world of data with trusts. It has never been done before, so many questions are still unanswered. We haven't discovered all the relevant questions and challenges that will arise by creating a data trust. This, we can only find by trying.

Finally, it is still unsure that trusts will be accepted as an alternative mechanism to consent given by individuals.

Conclusion

In conclusion, I want to emphasize that a trust is one model for data governance that shows great potential because it focuses on purpose. However, it is important to say that a data trust is not an end in itself; it is a legal tool among others. I don't want to give the impression that trusts will fit every situation, because they won't. An evaluation of the needs and objectives will always be necessary to decide if a data trust is an appropriate legal tool or not.

In a future stage of this knowledge synthesis, we will explore some topics left untouched today: the legal framework of privacy, intellectual property, international private law, fiscal considerations and other forms of data partnership such as data cooperatives.

At TIESS, in collaboration with Open North, Alexandra Popovici and Anne-Sophie Hulin, we will continue to work and do research on these fascinating questions for the next months and, we hope, for years to come.

I hope everything was clear even though it was dense. We have some time left for questions if you have any.

Thank you.