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THE WORLDS OF THE TRUST

Despite the common belief that they are found only in the common law tradition, trusts have long been known in mixed jurisdictions even where they have a civilian law of property. Trusts have now been introduced by legislation in a number of civilian jurisdictions, such as France and China. Other recent developments include the reception of foreign trusts through private international law in Italy and Switzerland and the inclusion of a chapter on trusts in Europe's Draft Common Frame of Reference.

As a result, there is a growing interest in the ways in which the trust can be accommodated in civil law systems. This collection explores this question, as well as general issues such as the juridical nature of the trust, the role and qualifications of the trustee and particular developments in specific jurisdictions.

LIONEL SMITH is James McGill Professor of Law and Director of the Paul-André Crépeau Centre for Private and Comparative Law at the Faculty of Law, McGill University, Montreal, Canada.

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PREFACE

The essays in this book were all presented as papers at an international conference of the Quebec Research Centre of Private and Comparative Law, which took place at McGill University's Faculty of Law in September 2010. Since that event, the Centre has been renamed the Paul-André Crépeau Centre for Private and Comparative Law, in homage to its Founding Director, who passed away in 2011 after a distinguished career spanning more than fifty years at McGill. Paul-André Crépeau's contributions to the worlds of comparative law, international commercial law and jurilinguistics, to say nothing of the recodification and development of Quebec private law, are known to everyone who works in these fields. It is an honour to be a part of a research centre that now bears his name.

This volume is one of the most significant fruits of a research project relating to trusts in civilian and mixed legal systems, which was launched at the Centre in 2007. During 2008–2009, we hosted an international series of civil law workshops, the papers from which were published as *Re-imagining the Trust: Trusts in Civil Law*.¹ The next step was the 2010 conference, entitled 'The Worlds of the Trust / *La fiducie dans tous ses États*'. There was an international call for papers, which generated a strong response, and the conference took place with a range of speakers and commentators from all over the world and from all career stages, including a number of doctoral students. Many of the commentators turned their contributions into formal texts, which are included in this volume.

The research project has also involved financial support for postgraduate research in the field of comparative trust law. Thanks to our funding partners, the Centre has in this way been able to nurture exciting new work by young scholars. Remus Valsan, who is a contributor to this volume, completed his doctoral thesis at McGill University on comparative fiduciary obligations, and is now a lecturer at the Law School of the

¹ L. Smith (ed.), *Re-imagining the Trust: Trusts in Civil Law* (Cambridge University Press, 2012).

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University of Edinburgh. Alexandra Popovici, formerly Assistant Director of the Centre and now Project Director in the Centre and Wainwright Junior Fellow at McGill's Faculty of Law, completed her master's thesis at the *Université Laval* under the direction of Dean Sylvio Normand, addressing aspects of patrimonial law under the title '*La fiducie: traduction d'un intraduisible*'. She has now commenced doctoral research addressing the intersection of personality, patrimony and subjective rights. Daniel Clarry, who is now a doctoral student at Cambridge University, completed his master's thesis at McGill on the subject of the irreducible core of the trust institution. Ruiqiao Zhang is a doctoral student at McGill, exploring comparatively elements of the law of trusts in China and in the common law. And Caroline Cassagnabère, who holds a doctorate from the *Université de Rennes 1*, became the Centre's first postdoctoral researcher in August 2011.

A great deal of work has gone into this volume. First, I thank all of the speakers and commentators at the conference, whose energy and ideas made the event such a success. The majority of them appear as contributors to this book. Among the speakers and commentators whose contributions do not appear in this collection, I thank Professor John Langbein, Yale Law School; Emeritus Professor Donovan Waters QC, University of Victoria; Mr Justice Nicholas Kasirer of the Quebec Court of Appeal; Michael McAuley, of counsel, Carey Olsen, Guernsey; Professor Aline Grenon, University of Ottawa; and Professor Adam Parachin, University of Western Ontario. I note that by unanimous agreement of the contributors to this volume, the royalties will be devoted to the research activities of the Crépeau Centre. I also thank the attendees at the conference, who came from all over the world and made it such a memorable event. I am grateful to Nicholas Kasirer and Yaëll Emerich, who joined me to constitute the scientific committee that reviewed all of the responses to the call for papers. Jean-Frédéric Ménard, who went on to do his BCL at Oxford and is now a doctoral fellow at the Centre for Ethics and Law at University College London, was the Assistant Director of the Centre at the time of the conference, and did a magnificent job of organizing every detail. Manon Berthiaume, the Centre's Senior Administrative Coordinator, was invaluable, as she always is, in every aspect of financial and logistical management. Joining them on the organizing committee were Alexandra Popovici and Remus Valsan, and I am grateful to the whole committee for helping to plan and run the event. Lysanne Larose deserves thanks for her hard work on the conference website and other aspects of communications. A whole team of student researchers,

working under the supervision of Régine Tremblay who is the current Assistant Director, edited all of the contributions into a common style. Four of the papers were originally written in French, and for the arduous process of translation I thank Jean-Frédéric Hübsch, Edmund Coates and Jeff Noh, all researchers at the Crépeau Centre.² I am also grateful to Finola O'Sullivan of Cambridge University Press for her confidence in the project, and her assistance in the publication process.

The financial support of a number of partners was essential. The Centre benefits from a grant of the *Fonds de recherche du Québec – Société et culture*, which largely contributed to our research project on trusts in civilian and mixed jurisdictions. Also very important for the project was substantial funding received from the Research Assistance Program of Quebec's *Ministère du Développement économique, de l'Innovation et de l'Exportation*. For a substantial grant that supported the conference itself, I thank the Social Sciences and Humanities Research Council of Canada. Another significant grant was received for the event from the American College of Trusts and Estates Counsel Foundation. I am most grateful for the confidence the ACTEC Foundation showed in sponsoring the conference, and in sending two representatives, namely Duncan E. Osborne and Anne O'Brien, who attended the whole event. I also thank Scott McCue, one of the Directors of the Foundation, for his generous assistance with the application process. The Montreal offices of the law firms Borden Ladner Gervais LLP, Davies Ward Phillips and Vineberg LLP, and Osler, Hoskin and Harcourt LLP also provided material support, while the Canadian Bar Association – Quebec Section helped with publicity. McGill University provided financial support through the James McGill Chair, and the Faculty of Law provided the conference venue. I thank Dean Daniel Jutras for his ongoing support of the Centre's activities.

The book is a long one; it gives some idea of the fascinating exchange of ideas that took place over two and a half days in the fall of 2010. It also gives a taste of the future, because the comparative study of trust law holds many challenges and promises to develop into one of the most fascinating fields of comparative inquiry. The acceptance of trusts in civilian and mixed jurisdictions is an ongoing story, one that is creating a range of debates and difficulties about the nature of a trustee's ownership, fiduciary obligations and, as the reader will discover, many other issues besides. *Bonne lecture!*

² See the 'Note on translation' for more about the translations.

NOTE ON TRANSLATION

Four of the texts in this collection – those of François Barrière, Yaëll Emerich, Blandine Mallet-Bricout and Aude Peyrot – were written in French, and have been translated into English for this collection.

Anyone who works in comparative law is familiar with the difficulties of translation, and indeed with the parallels found between the challenges presented by translation and those presented by comparative law itself. Incommensurability, the false friend, the referent known in one system or language but unknown in the other – all of these, and more, make the two undertakings seem closely akin.

There are particular challenges in the field of trusts. In Quebec law, with its bilingual Civil Code, the same institution is called a trust in English, a *fiducie* in French.¹ In other words, in Quebec civil law, these words mean the same thing. But the Quebec trust is not, in its conceptual structure, at all like a common law trust; and a common lawyer might be tempted to say, ‘it is not a trust’, perhaps unconsciously forgetting that there is a difference between common law English and civil law English. Such a common lawyer might instead call it a *fiducie*, even in English, allowing the untranslated word to signal the foreignness of the legal institution. But this reveals not only that we have forgotten that civil law English is not the same as common law English; we have also forgotten that common law French is not necessarily the same as civil law French. In common law French, the common law trust is called a *fiducie*.²

There is no easy way out of these difficulties. One solution would be to use the word ‘trust’ for every functionally comparable legal structure; this

¹ Civil Code of Québec, arts. 1260ff.

² See *Lexique du droit des fiducies (common law)*, *Bulletin de terminologie 259 / Law of Trusts Glossary (common law)*, *Terminology Bulletin 259* (Ottawa: Department of Justice Canada & Translation Bureau, 2005), available from the federal Translation Bureau at www.btb.gc.ca.

is, more or less, what the Hague Trusts Convention³ famously does in its article 2 – using, interestingly, the word ‘trust’ in both its English and French texts. In consultation with the authors of the translated texts, however, we have adopted a different convention, one which may seem to run contrary to the teachings of the Civil Code of Québec, but which seemed best suited to the goals of the current project. The present translations generally use ‘trust’ for the common law trust, and keep the untranslated *fiducie* for the civilian institutions under discussion. The convention, however, is not followed slavishly. For example, where no ambiguity is so created, ‘*les biens en fiducie*’ may be translated as ‘the trust property’ even though it is a French or Quebec *fiducie* that is under discussion. In this, therefore, we have occasionally sought to favour linguistic felicity over absolute consistency of terminology. Similarly, we have used expressions such as ‘management trust’ and ‘security trust’ for ‘*fiducie-gestion*’ and ‘*fiducie-sûreté*’ where it is clear that the common law trust is not under discussion.

The common law reader of these texts, however, has still to bear in mind the uniqueness of civil law English. ‘Compensation’ does not mean reparation, but something closer to set-off;⁴ the registration of an interest in a public register is ‘publication’;⁵ and words like ‘resolution’, ‘resiliation’ and ‘opposable’ are not so much false friends, as unknown strangers.⁶ For all of these difficulties, the dictionaries of the Paul-André Crépeau Centre for Private and Comparative Law will provide some assistance.⁷

The principal work of the translations was done by researchers of the Crépeau Centre: in the case of the text of Yaëll Emerich, by Jeff Noh and Edmund Coates; in the case of the text of François Barrière, by Edmund Coates; and in the case of those of Blandine Mallet-Bricout and Aude Peyrot, by Jean-Frédéric Hübsch. I express my gratitude to all. Some adjustments were made by Régine Tremblay and by myself, and the authors, of course, reviewed and contributed to the final products.

³ Hague Convention on the Law Applicable to Trusts and Their Recognition, The Hague, 1 July 1985, in force 1 July 1992.

⁴ Civil Code of Québec, arts. 1672ff. ⁵ Ibid., Book Nine, ‘Publication of Rights’.

⁶ Ibid., arts. 1604, 2942.

⁷ France Allard et al. (eds.), *Private Law Dictionary of the Family and Bilingual Lexicons* (Cowansville: Yvon Blais, 1999); France Allard et al. (eds.), *Private Law Dictionary and Bilingual Lexicons: Obligations* (Cowansville: Yvon Blais, 2003); France Allard et al. (eds.), *Private Law Dictionary: Property and Bilingual Lexicons* (Cowansville: Yvon Blais, 2012). Of course each dictionary is also published in French.

Where the original texts included quotations in French, the translation into English was done for the present chapter unless otherwise noted.

I close with a final note for those who would prefer to read these contributions as they were written. I thank Cambridge University Press for allowing the republication, in the original French, of these four texts, along with two other papers published in English translation in an earlier collection.⁸ The six texts will appear in 2013 in a special issue of volume 58 of the *McGill Law Journal*.

⁸ Namely, the papers of François Barrière and Madeleine Cantin Cumyn that were published in English translation in L. Smith (ed.), *Re-imagining the Trust: Trusts in Civil Law* (Cambridge University Press, 2012).