

An overview

Definition And Implementation Of Data Trusts In Quebec Civil Law



About TIESS

TIESS is a liaison and transfer organization in social innovation (OLTIS) recognized by Quebec's Ministry of Economy and Innovation. TIESS brings together many organizations from the social economy and the territorial development sector, as well as research centres, universities and CEGEPS.

TIESS contributes to territorial development through knowledge transfer. We provide tools to social and solidarity economy organizations to help them transform their practices and respond to societal challenges in innovative ways.

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COMMON APPROACH
TO IMPACT MEASUREMENT

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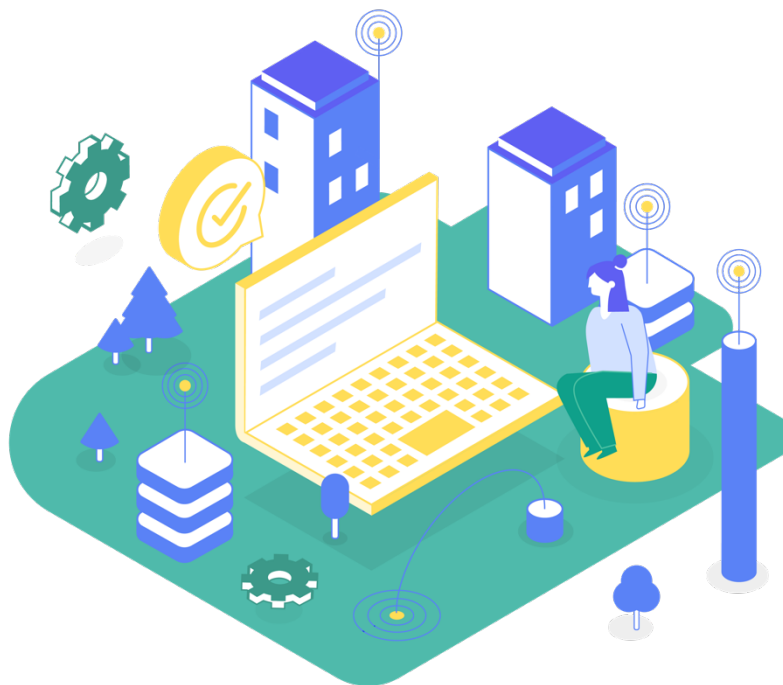
FOREWORD

This document was prepared under a partnership between TIESS (Territoires innovants en économie sociale et solidaire) and the Common Approach to Impact Measurement. It is also part of a larger effort led by TIESS and its partners to test new concepts in data governance using decentralized models that are based on the theory of the commons.

This document provides a review of the literature on data trusts in common law and in civil law jurisdictions. It also summarizes the specific features of the civil law trusts in Quebec, as they apply to data governance.

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1. INTRODUCTION

Technological advances such as the development of the Internet, and more recently artificial intelligence (hereinafter "AI"), have highlighted the value of digital data. Yet, the wealth generated by this progress is still concentrated in the hands of a small number of actors, including the companies known under the acronym GAFAM.¹

This concentration of digital data raises or reveals different issues of both individual and collective concern.

On the one hand, individuals have little control over their data. Personal data is usually passed on to companies in transactions or during the course of normal online activities. Our rights regarding this data are regularly signed away with complex consent forms that often lack transparency. The companies collecting this data have been unable or unwilling to adopt effective safeguards, spawning scandal after scandal.²

¹ Acronym standing for Google, Apple, Facebook, Amazon and Microsoft.

² For example, see the case of Cambridge Analytica, suspected of using personal data generated by Facebook for political purposes. Cadwalladr, C. & Graham-Harrison, E. (2018, March 10). Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach. *The Guardian*. Retrieved from www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election.

On the other hand, the lack of protection of personal data has created a climate of mistrust towards organizations that collect, share and use digital data, whether these organizations be public or private.³ Because of this distrust, some technological initiatives or innovations remain untapped.⁴

Nevertheless, our wariness should not supersede the potential of quality digital data to deepen our knowledge of the world and human interactions. Such high-quality digital data can be used for political, social or economic purposes, rather than strictly pecuniary reasons.

Many researchers and public stakeholders are currently seeking new ways to address issues concerning data privacy and data governance. The ongoing modernization of privacy laws in Quebec, Ontario and Canada provides one type of solution, as does the recent adoption of the “Digital Data Charter” by the City of Montréal.⁵

It is against this background that data trusts have emerged as one of many ways of addressing the issues surrounding personal data protection and the power imbalance between citizens, governments and the businesses that control this data. Data trusts could facilitate the sharing and exchange of data between organizations (Hardinges, 2020), recalibrate the power imbalance between companies and individuals (Delacroix & Lawrence, 2019) and strengthen privacy protection and individual autonomy with regard to such data (Element AI & Nesta, 2019).

From a legal standpoint, a trust is the ownership of an asset for the benefit of another person. With this ownership comes obligations of loyalty, prudence and diligence towards the beneficiary. These obligations are called “fiduciary obligations.” We find these trusts in countries that have a common law legal tradition, such as in the United Kingdom, in the U.S., and in the Commonwealth (Canada, Australia, India, etc.).

Quebec possesses an equivalent legal instrument—the “*fiducie*”—which has different characteristics from those of the trust. We believe that these differences are of particular interest in the context of the aforementioned challenges and therefore merit a deeper examination.

In short, this overview aims to examine the potential of the Quebec trust to bring about responsible data governance. We begin with the following sub-questions.

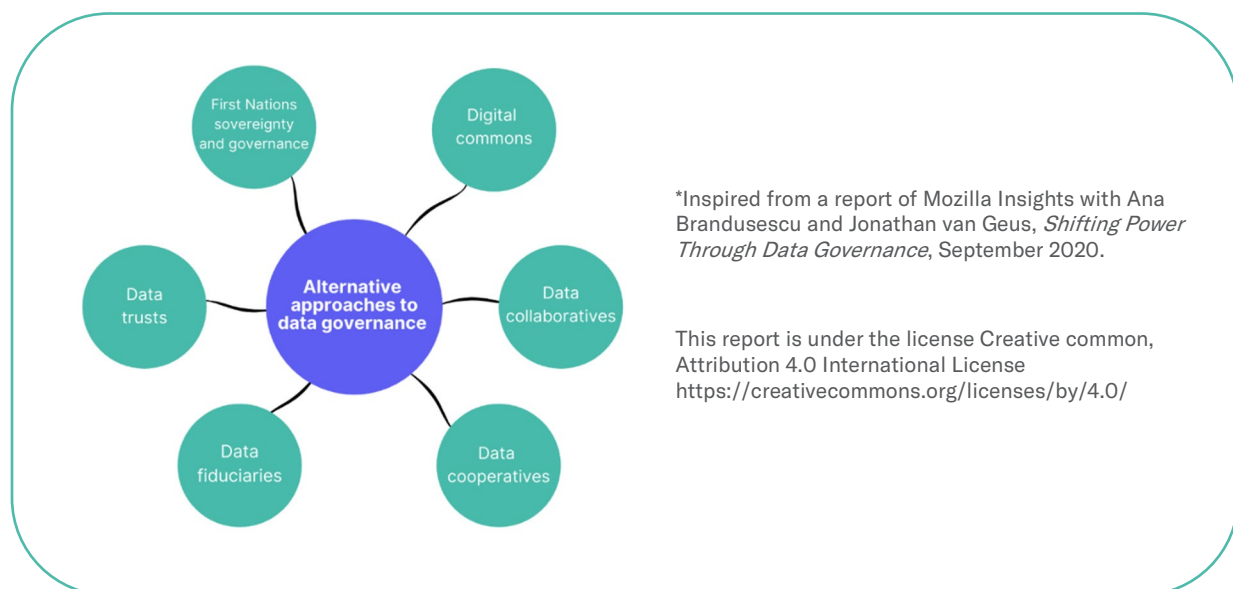
- 1) What is digital data?
- 2) What are the differences between the common law trust and the civil law trust?
- 3) What is a data trust?

³ A Statistics Canada survey revealed that a majority of Canadian Internet users in 2018 employed one or the other of these privacy protection methods: “Most Internet users took some steps to protect their privacy in 2018: 61% reported deleting their browser history, 60% blocked emails (junk mail and spam), and 42% changed the privacy settings on accounts or apps to protect their profile or personal information.” Statistics Canada. (2019). *Canadian Survey of Internet use*. Retrieved from www150.statcan.gc.ca/n1/daily-quotidien/191029/dq191029a-eng.pdf.

⁴ The case of the COVI application developed by the MILA in the midst of a pandemic and finally abandoned, perfectly illustrates this issue. See article by Jung, D. (2020, June 10). COVID-19: l'application de traçage du Mila mise au placard par Ottawa. *Radio-Canada*. Retrieved from www.ici.radio-canada.ca/nouvelle/1710961/coronavirus-tracage-application-mila-canada.

⁵ Laboratoire d'innovation urbaine de Montréal. (2020, October). *Charte des données numériques*. Ville de Montréal. Retrieved from https://laburbain.montreal.ca/sites/default/files/charte_donnees_numeriques_1_0.pdf?fbclid=IwAR2PWKyS98hrB0nJ58-xKTn_Ll6ztuBvdNOWISCMobdhBCzErGAudnQOxo

This overview focuses primarily on data trusts. However, there are alternative approaches to data governance that pursue similar goals.



For example, the implementation of digital commons represents an alternative approach to data governance that allows for the pooling and sharing of data as collective resources. Wikipedia is possibly the largest and most significant knowledge or data commons (Le Crosnier, 2018).

The cooperative model also allows for alternative data governance. In Switzerland, for example, the cooperative MIDATA⁶ has adopted the principle of voluntary transfer of some personal data to a cooperative entity. An individual can upload its data into the cooperative, become a member of the cooperative and thus take part in decisions that affect the organization. The members choose the research projects (generally in the health sector) in which they wish to participate. A charter provides for the right to withdraw recorded data. Unlike other companies (TaData and Datawallet, for example), MIDATA does not compensate individuals for their data.

Other approaches to data governance will be explored later on, as part of a subsequent and broader knowledge synthesis.

⁶ MIDATA. (n.d.). *Coopérative*. Retrieved from www.midata.coop/fr/cooperative/.



2. WHAT IS DIGITAL DATA?

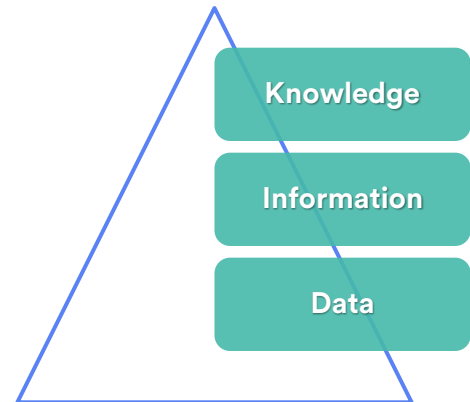
To understand digital data (2.2), one must first understand data (2.1). Once these definitions are established, it becomes easier to demystify the different types of data (2.3).

2.1 Definition of data

In the field of information science, the knowledge pyramid stands as a classic and essential representation of the dynamics between data, information and knowledge (Rowley, 2017, p. 163). The premise of this pyramid is that data is used to generate information and information is used to create knowledge. Each category encompasses the one below. Data is the basis of this pyramid, acting as the “raw material” in its construction.

Data can thus be understood as the raw material produced by a process of abstraction and objectification of the world in terms of categories, measurements and other forms of representation—such as numbers, characters, symbols, images, and sounds—from which information and knowledge are generated.

Hence, data makes it possible to produce information and knowledge through intellectual processes. Information is data that acquires meaning through contextualization; knowledge is mainly derived from the interpretation of this information (Courmont, 2016, p. 49).



Data does not, however, provide an immediate key to knowledge. As the pyramid above implies, there is a further intellectual operation that is needed. Some authors, therefore, argue that an avalanche of data does not necessarily translate into better knowledge of our world:

Data is always constructed through an operation and must also always be interpreted. To this end, it is necessary to have precise knowledge of the field in question. This remark dispels the fantasy of a knowledge tool that can be immediately transferred from one object to another. (Ollion & Boelaert, 2015, para. 3) [Translation]

Also, data is neither neutral nor pre-analytical. The data that is collected is the product of choices made in terms of scope, precision and location and reflects the decisions of the person or organization that collected it. According to a researcher who has analyzed the impact of the French authorities’ decisions regarding citizens’ access to public data:

It is impossible to separate data from its use, to separate the technical instrument from its social environment. This data, made available to us, is used daily by the various territorial administrations and is generated to serve a particular purpose. Unlike what the advocates of open data claim, there is no such thing as raw data (Gitelman, 2013). It always contains a certain representation of the social world, determined by the will of the actors to ‘act on it’. Reference data performs not only a representational but also a performative function, for reasons which are primarily pragmatic: it is impossible to represent everything. This remark may seem trivial, but it is nevertheless fundamental. Data is nothing but one possible representation of the city. It is therefore necessarily partial and reductionist. Data and the city can intersect without one being confused for the other. (Courmont, 2015, p. 43) [Translation]

Data can be divided into different categories. Certain types of data, because of their particularities, are framed by specific laws.

2.2 Digital data

Digital data takes the form of numbers and symbols and can be processed by computers (Chen et al., 2009, p. 12; Courmont, 2016, p. 48). For example, a bird song has to be transformed and represented in numbers in order to be understood by a computer system.

The digitization of data has spawned a movement for open access to data of public interest (Courmont, 2016, p. 32). The International Charter on **Open Data** (2015) provides the following definition:

Open data is digital data that is made available with the technical and legal characteristics necessary for it to be freely used, reused, and redistributed by anyone, anytime, anywhere.

The Digital Data Charter adopted by the City of Montréal (Laboratoire d'innovation urbaine, 2020) suggests an alternative definition:

Digitally structured information resources made available to the public under an open-use license.

The digitization of data has also led to its accumulation in proportions never seen before, giving rise to the term “**big data**.” There is no agreed upon or fixed definition of big data. It is nevertheless often qualified by the three Vs: volume, variety and velocity (Da Sylva, 2017, p. 6-7; Zikopoulos et al., 2012, p. 5; Kitchin & McArdle, 2016, p. 1; Ollion & Boelaert, 2015, para. 4), i.e.:

- volume corresponds to the quantity of data;
- velocity means that data is created in real time—permanently or immediately—unlike, for example, scientific data which must be collected over a long period of time, which involves several stages;
- the variety of data highlights the range of sources and types of data.

2.3 Data classification

Data is often classified according to the way it was created. It is generally **representative**, that is, it measures a phenomenon such as age, number of cars or opinions. It can also be **inferred** from an absence or **derived** from other data (Scassa, 2018, p. 43; Kitchin, 2014, p. 1; Coutts & Gagnon-Turcotte, 2020, p. 12-13).

It is important to distinguish **non-personal** from **personal information**, in view of the sensitive nature of the latter. According to the *Act respecting the protection of personal information in the private sector*, personal information is any information that concerns a natural person and allows that person to be identified.⁷ One of the exceptions to the application of this law concerns information that is considered public: for example, certain information concerning bankruptcy (Guilmain & Gratton, 2019, p. 67). The *Act respecting access to documents held by public bodies and the protection of personal*

⁷ *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1, art. 2.

information, which applies to public organizations, also provides that, in certain cases, personal information may be of a public nature.⁸

Public data should also be distinguished from **private data**, although the distinction can sometimes be difficult to establish. The Organization for Economic Co-operation and Development (OECD) defines public data as data generated, created, collected, processed, preserved, disseminated or financed by or for the benefit of a government or public institution.⁹ Public data is generally **open**, that is, accessible to the public without restriction, unless it conflicts with public safety or considerations of privacy.

Decision makers, including those in Quebec, see many benefits to making public data accessible, such as increased support for social and digital innovation, as well as greater transparency by institutions.¹⁰

Finally, we cannot ignore the controversies¹¹ surrounding **urban data**, a concept strongly linked to smart cities. The notion of a “smart city” originated in the context of urban marketing and was fostered, in particular, by IBM, which identified cities as potential markets (Breux and Diaz, 2017, p. 3). More broadly, the expression “smart city” is used to describe the city of the future.

Professor Jonathan Durand Folco presents three models of smart cities that have emerged through the implementation of such projects (Folco, 2019, p. 29-30).

- The neoliberal model refers to technological solutionism, the idea that all urban problems and challenges can be solved through intelligent use of new technologies and AI.
- The collaborative and sustainable city model is based on a reasonable use of technology to promote inclusion, citizen participation and ecological transition.
- Finally, the smart city is based on the right to the city, the commons and technological sovereignty and demonstrates that it is possible to build a smart city project whose goals are at odds with those put forward by big technological companies.¹²

Although there is no agreed upon definition of “smart city,” the above definitions show that data is at the centre of any smart city project (Breux & Diaz, 2017, p. 7). Urban data, therefore, refers to data collected in the physical spaces of the city (Sidewalk Labs, 2018). Unlike personal data and certain public data, urban data does not correspond to any category in law and is not framed, as such, by specific regulations.

⁸ *Act respecting access to documents held by public bodies and the protection of personal information*, CQLR c A-2.1, art. 53.

⁹ OECD. (2020). *Recommendation of the Council for Enhanced Access and More Effective Use of Public Sector Information*. OECD/LEGAL/0362. Retrieved from <https://legalinstruments.oecd.org/public/doc/122/122.en.pdf>.

¹⁰ See Secrétariat du Conseil du trésor du Gouvernement du Québec. (2018, June). *Plan d'action pour l'accessibilité et le partage des données ouvertes des Ministères et des organismes publics*. Retrieved from www.tresor.gouv.qc.ca/fileadmin/PDF/ressources_informationnelles/gouvernement_ouvert/plan_action_gouvernement_ouvert.pdf; Secrétariat du Conseil du trésor. (2019, June), *Stratégie de transformation numérique gouvernementale 2019-2023*. Retrieved from www.tresor.gouv.qc.ca/fileadmin/PDF/ressources_informationnelles/Strategie_TNG.pdf.

¹¹ For example, the controversy surrounding the use of urban data by Sidewalk Labs as part of the Quayside project in Toronto. See Valverde, M. (2019b). *Google's "Urban Data" Plan: Evading Regulation While Promoting the Appearance of Transparency*. Centre for Free Expression. Retrieved from <https://cfe.ryerson.ca/blog/2019/05/google%E2%80%99s-%E2%80%99Curban-data%E2%80%99D-plan-evading-regulation-while-promoting-appearance-transparency>.

¹² On the smart city project in Barcelona, see Bass, T. & Old, R. (2020). *Decode. Common Knowledge: Citizen-led data governance for better cities*. DECODE and Nesta. Retrieved from https://media.nesta.org.uk/documents/DECODE_Common_Knowledge_Citizen_led_data_governance_for_better_cities_Jan_2020.pdf.



3. WHAT ARE THE DIFFERENCES BETWEEN THE COMMON LAW TRUST AND THE CIVIL LAW TRUST IN QUEBEC?

This section introduces the common law trust (3.1), fiduciary obligations (3.2) and the civil law trust (3.3). It is important to specify that the trust presented in this section is specific to Quebec. Other civil law systems, notably in France, refer to trusts defined by their national laws, but these trusts have nothing to do with the *fiducie* as we know it in Quebec. Also, though the Quebec trust shares certain characteristics with the Canadian trust, they are essentially different (Beaulne, 2015, p. 49). We cannot therefore generalize from one legal tradition to the other.

It should also be noted that trust is a legal concept that originates from positive law, that is to say, the law enacted by the Canadian state. First Nations have their own legal traditions, which lead them to assert authority and sovereignty over their data (The First Nations Information Governance Centre, 2019, p. 58). This sovereignty is based on the principles of OCAP—Ownership, Control, Access and Possession.¹³ The question of the participation of First Nations in the implementation of data trusts remains open and subject to the study of the First Nation Information Governance Centre.

¹³ See the website of the First Nations Information Governance Centre. (2021). *Les principes de PCAP des Premières Nations*. Retrieved from <https://fnigc.ca/fr/les-principes-de-pcap-des-premieres-nations/>.

3.1 The common law trust

Trust law in Canada derived from the British legal system. This system is characterized by two sets of rules stemming from legal and political structures of the Middle Ages: the King's Court (common law) and the Court of Chancery (equity). The latter represented the residual power of the King of England to adjudicate disputes according to equity, rather than with respect to the rules of common law. The two sets of rules have evolved together, one modifying and correcting the other. The trust developed as a result of this dynamic (Pavlich, 2019, p. 4). An individual could be a full owner within the definition of the common law, but if that same individual had promised to hold that property for the benefit of another, he was held to that promise under equity. The beneficiary, according to the rules of equity, could force the owner to administer the property to his advantage (Waters, Gillen & Smith, 2012, p. 5-6).

Since the Middle Ages, trusts have gone through different evolutions before taking the form we know today.

Broadly speaking, a trust can be defined as a relationship in which one or many persons (the trustees) own property for the benefit of others.¹⁴ These other persons are called beneficiaries, and their existence is essential to the creation of a trust (see box to the right).

The trustees must act in the best interest of the beneficiaries. In particular, they must show loyalty to the beneficiaries, be diligent in their actions and demonstrate prudent decision-making.

The trustees cannot enjoy the property. They own it, but in a selfless way. Property placed in trust cannot be seized by the personal creditors of the trustees. However, a trustee can be a designated beneficiary, provided that there are other beneficiaries. Trustees may also receive a salary for services rendered.

The beneficiary, an essential element of the trust ...

The designated beneficiary is the person who gives rise to the fiduciary obligations of the trustee. This is an essential element of the trust, since, without a beneficiary, the trustee is not obligated to anyone. Without a beneficiary, the trustee owns only for himself.

Except for the charitable trust

There is, however, one exception to this principle, namely, the charitable trust. This type of trust is created for charitable purposes, i.e.: the advancement of education or of religion, the alleviation of poverty or other purposes in the public interest. The charitable trust is subject to the supervision of a person designated by law.

¹⁴ Definition adapted from Vanderlinden, J., Snow, G. & Poirier, D. (2017). *La common law de A à Z*, (2nd ed). Montréal: Yvon Blais, s.v. trust.

3.2 Fiduciary obligations

In the context of this overview of data trusts, it is important to distinguish trusts from fiduciary relationships. Indeed, the creation of a fiduciary relationship between data controllers and data subjects constitutes another possibility for protecting data privacy.¹⁵

In common law, there are other relationships besides the one between trustee and beneficiary which give rise to fiduciary obligations. For instance, there is the relationship between doctors and patients or the relationship between attorneys and clients. In such relationships, fiduciary obligations include acting in good faith and in the interest of the vulnerable party. A general fiduciary relationship like these ones, unlike a trust, does not require the existence of assets placed in trust.

There is no exhaustive and complete list of fiduciary relationships in Canadian law. Each situation must be analyzed on a case-by-case basis to determine whether the relationship gives rise to a fiduciary relationship and to fiduciary obligations. To assist with this, the Supreme Court of Canada has identified a set of criteria.¹⁶

In Quebec law, these general fiduciary relationships do not exist and have, according to the highest court in the province, no relevance in civil law.¹⁷ As explained by the Court of Appeal:

The theory of obligation based on fiduciary relationship is specific to common law. This Court has expressly excluded its relevance and application in civil law.¹⁸ [Translation]

The absence of fiduciary relationships in Quebec law is not the only difference between common law and civil law. There are also a number of distinctions between a trust and its counterpart in Quebec civil law, the *fiducie*.

3.3 The trust in Quebec civil law

A trust is not a legal person, but a collection of property assigned to a purpose.¹⁹ To further explain, property can exist in two ways under civil law: it can belong to someone or be appropriated to a particular purpose. The *Civil Code of Quebec* provides as follows:

¹⁵ See Balkin, J.M. (2016). Information Fiduciaries and the First Amendment, *UC Davis Law Review*, 49(4), 1183-1234.

¹⁶ *Frame v. Smith*, [1987] 2 S.C.R. 99; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

¹⁷ *Provigo Distribution Inc. c. Supermarché ARG Inc.*, JE 98-39, [1998] R.J.Q. 47, p. 58 (C.A.).

¹⁸ *Financière Banque Nationale Inc. c. Dussault*, 2009 QCCA 1594, para. 71.

¹⁹ On this question, see Popovici, A. (2012). *Le patrimoine d'affectation. Nature, culture, rupture* [Master thesis, Université Laval].

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

There are two concepts here:

- 1) properties can belong to natural or legal persons and to the State—this is traditional ownership;
- 2) properties can also be appropriated (assigned) to a purpose.

Appropriation refers to a goal or an end. An appropriated asset has a specific purpose (Gidrol-Mistral, 2016, p. 107). The property must be used for this purpose and not otherwise. A land designated for ecological conservation cannot be used for anything other than ecological conservation (for example, it can't be used for a commercial goal) as long as this assignment lasts.

Trust is based on appropriation to a particular purpose, not on ownership. This difference has the following consequences. Unlike in the case of the common law trust, the civil law trustee does not own the property placed in trust. These goods, because of their purpose, no longer have an owner. Indeed, trust and ownership represent two distinct systems. The appropriation to a purpose establishes a new relationship, based entirely on that purpose. The person who chooses this purpose is called the "settlor."

The *Civil Code of Quebec* indicates how the trust is constituted:

1260. A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.

To create a trust, four elements are therefore essential (Beaulne, 2015, p. 131):

- 1) the creation of the patrimony;
- 2) the transfer of property (land, financial, digital, etc.) by the settlor to this patrimony;
- 3) the holding and administration of the property by the trustee and the acceptance of his office;
- 4) the appropriation to a purpose permitted by law (determination of the purpose).

The **settlor** is the person who creates the trust by a transfer of property. The settlor literally brings the trust to life. In transferring the property to the patrimony that is created, the settlor gives up any real right to this property since he or she is no longer the owner. A real right is a right that can be exercised directly on the property (i.e. right of use, usufruct, servitude), as opposed to a personal right, which is exercised against a person (i.e. claiming the payment of a debt). The settlor can monitor the management of the trust, but not directly. The settlor must address himself or herself to the trustee.²⁰

The **trustee** is the person appointed, usually by the settlor, to hold and administer the trust for the benefit of one or more third parties or, in the case of a private or social utility trust, to carry out the purpose of the trust. The trustee does not own the property in trust but merely administers it according to the rules of administration of the property of others.²¹ The trustee is therefore central to the existence of the trust: without a trustee, the trust cannot fulfill its role since neither the settlor nor the beneficiary has any rights over the trust property.

²⁰ Art. 1287 CCQ.

²¹ Art. 1278 CCQ.

The **beneficiaries** are the people intended to benefit from the property or from the existence of the trust. Their role is not essential in setting up a trust; rather, what matters is the specific purpose of the trust.

The *Civil Code of Quebec* provides for three types of trusts.²²

The **personal trust** is created for the purpose of providing a benefit to a specific person.²³ A classic example is a will that creates a trust and identifies beneficiaries of the deceased's assets. The benefit is direct; in this example, the beneficiaries receive a sum of money according to the terms set out in the will.

The **private utility trust** is put in place either for the erection, maintenance or conservation of corporeal property, or for the use of property appropriated to a particular purpose. This trust must be created to indirectly benefit a person or in their memory, or for another purpose of a private nature.²⁴ The scope of this trust is very broad. Private utility trusts can be commercial or non-commercial and may also be perpetual.

Finally, the **social utility trust** is established in the general interest, for example, for a purpose that is cultural, educational, philanthropic, religious or scientific in nature. It cannot have the essential purpose of making a profit or operating a business.²⁵

The social utility trust is, in a sense, the extension of the private utility trust. What really distinguishes it is its general interest purpose (Beaulne, 2015, p.107). Let's take a look at the example of a fund created to finance post-secondary education. If the stated purpose is to provide financial support to a specific person, such as the settlor's child, it is a private utility trust, since the purpose is private. If the stated purpose is to provide financial support to annually selected students in order to encourage academic perseverance, it is a social utility trust, since the stated purpose is of general interest.

Thus, in the case of digital data, both the private utility trust and the social utility trust could be possible options. It all depends on the goal of the settlors.



²² Art. 1266 CCQ.

²³ Art. 1267 CCQ.

²⁴ Art. 1268 CCQ.

²⁵ Art. 1270 CCQ.

What is essential to remember about the trust of the *Civil Code of Quebec* is the centrality of the purpose. **Trusts are created for a purpose and cannot be used to serve a different one.**

The following table summarizes the main distinctions and similarities between the common law trust and the civil law trust:

Common Law Trust	Civil Law Trust
The trustee is the owner of the property for the benefit of another person; the trustee has obligations towards the beneficiary.	The trustee administers the property according to the predetermined purpose. The trustee's obligations are those of an administrator of the property of others.
The beneficiary is an essential element of the trust; all trusts must have at least one beneficiary (with the exception of the charitable trust).	The purpose is at the heart of the trust. The beneficiary is not an essential element of the trust (with the exception of the personal trust).
The trustee has obligations of prudence, loyalty and diligence.	
The assets in trust are not sizeable by the creditors of the trustee.	





4. WHAT DOES “DATA TRUST” MEAN?

4.1 Origin of the expression “data trust”

The use of the expression “data trust” is recent and has rapidly gained momentum. This sudden rush in popularity has been accompanied by a certain confusion regarding its definition. Before presenting alternative definitions, it may be useful to consider the origins of the expression of data trusts, a consideration that may enable us to identify the underlying concerns, as well as the various influences related to this notion.

An early formulation of the idea of data trusts was set forth in 2004 in an article written by the British law Professor Lilian Edwards (2004). In her text, she acknowledges the failure of the legislative and regulatory efforts to have an impact on the question of individual consent in any online business, since the conditions for a free and informed consent were rarely met. Instead, the author suggests resorting to the legal concept of trust in order to cultivate consumer confidence in this type of trade. According to Edwards, the trust is the most appropriate legal tool in situations where it is necessary to manage assets consisting of individual contributions which, once aggregated, acquire considerable value (2004, p. 330). The use of the trust could resolve issues associated with online consent by focusing on the obligations of the data controller.²⁶

²⁶ The term “data controller” comes from *Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of individuals with regard to the processing of data to character staff and the free movement of such data, and repealing Directive 95/46 / EC*. This expression refers to the person or the entity that determines the purpose attributed to data.

This idea was left aside for a few years. Then, in 2016, Neil Lawrence, a Cambridge University professor of AI, suggested in his blog that we should bring back the idea of data trusts (Lawrence, 2016). The main concern at that point was the widening gap between the actors that collect data (large technology companies such as Google or Facebook) and the data subjects (individuals whose data are collected daily through these platforms). In order to democratize data management and to allocate control of this data back to its sources, Professor Lawrence suggested the creation of data trusts. He described these trusts as follows:

The trustors of a data trust would be the originators of the data. A data trust would be an organization set up to manage data on the trustors' behalf. The trust would stipulate the conditions under which the data was to be managed and shared. Trustees would have responsibility to ensure that those conditions were upheld. They would be the data controllers (Lawrence, 2016).

This idea of data trusts was taken up and recommended to the British government in 2017 in an independent report, whose objective was to make recommendations to increase and encourage the AI industry in England (Hall & Pesenti, 2017). For the authors, the idea at the heart of data trusts is to cultivate trust and ease in sharing data, so as to increase the reach and development of AI. Also, these trusts are not legal entities or institutions, but rather a “set of relationships underpinned by a repeatable framework, compliant with parties’ obligations, to share data in a fair, safe and equitable way” (Hall & Pesenti, 2017, p. 46). The objective is thus to facilitate negotiations between the actors wishing to share data by offering a replicable model.

This report would later increase interest and popularity in the idea of data trusts (Lau, Penner & Wong, 2020, p. 2).

In 2018, in the wake of a smart city project in the Quayside area of Toronto, Sidewalk Labs presented a civic data trust project to administer the collection of urban data. This civic data trust was defined as follows:

It is an independent third party that ensures that value from data goes to the people, communities, government, industry, and society from which it was collected, and that data privacy and security are protected. A Data Review Board, assembled of diverse members of the community, would monitor and enforce data collection and use. (Sidewalk Labs, 2018)

The project as proposed by Sidewalk Labs was met with a great deal of opposition and controversy. It is worthy to mention that Sidewalk Labs was run by Alphabet, a company that also owns Google. Sidewalk Labs was criticized in particular for its lack of transparency, as well as for the creation of terms such as data trusts, the meaning of which remained unclear (Valverde, 2019a). Sidewalk Labs eventually abandoned the project.

The next section presents the various conceptions of data trusts that have developed following these initial formulations.

4.2 The different definitions of data trusts

One of the challenges in understanding the idea of data trusts is the fact that it is primarily defined through analogies and examples. Up until now, there hasn't been any effective implementation of the concept.

There are at least three definitions of data trusts: a data trust in the legal sense of the term (4.2.1); an independent third party responsible for administering the data of others (4.2.2) and a perspective on data sharing (4.2.3).

4.2.1 Data trust corresponding to a legal trust

As mentioned, the common law trust means the ownership of property for the benefit of another person. The owner, who is called a trustee, takes on obligations towards this other person, namely that of prudence, loyalty and diligence. These obligations are called fiduciary obligations.

The common law trust has characteristics and mechanisms that are interesting from a data governance point of view. This is notably a concept well established in law, which clearly identifies a data controller—the trustee—and which assigns this person clear duties.

Despite some debates (Lau, Penner & Wong, 2020; McFarlane, 2019) concerning the compatibility of the common law trust with the world of data (see box beside), some authors propose creating data trusts on the model of the common law trust.

More Details

Several debates have emerged between lawyers and experts as to the compatibility of the common law trust with the world of digital data. These debates generally focus on the following points:

- The ability to treat digital data as property;
- The requirement in common law that a trust have an identified beneficiary;
- The inability of a fiduciary to profit from a trust.

In addition to the article by Lilian Edwards, cited earlier, one of the first texts to suggest a data trust that is compatible with the common law trust was written by law Professor Sylvie Delacroix and AI Professor Neil Lawrence (2019). They proposed a common law trust in which data subjects would be both the settlors and the beneficiaries. They imagined an ecosystem in which public and private trusts emerge and where the data subjects have the power to choose a data governance that suits them. This type of trust would be created intentionally by an act of the settlor,²⁷ and its terms could provide for a governance structure in which the trustees would have an obligation to consult both the settlors and the beneficiaries. In such a trust, the beneficiaries are essential, since it is their existence that gives rise to the obligations of the trustee.

²⁷ This is called an express trust.

4.2.2 Data trust as an independent third party

As mentioned, the compatibility of the legal trust with the world of data has been questioned, in particular by the *Open Data Institute* (hereinafter “ODI”). To resolve this difficulty, this organization suggested creating data trusts which would take up the underlying ideas of the trust—in particular, the presence of a trustee with the accompanying obligations of loyalty, prudence and diligence—without necessarily constituting a trust in the legal sense of the word. A data trust is therefore understood as a legal structure that provides independent and fiduciary stewardship of data (Hardinges, 2020). Stewardship refers to the idea of administering property belonging to someone else (BPE Solicitors, Pinsent Masons & Reed, 2019, p. 42).

The central idea is thus to delegate to an independent third party—a public or private entity—the decisions concerning who has access to this data and what its purpose is. Hence, the entity or organization that collects the data would delegate to a third party the task of ensuring its proper administration by allowing it to make decisions regarding access and use (Hardinges et al., 2019, p. 6).

This independent third party would undertake obligations similar to those of the trustee in the case of a legal trust. These obligations would be tied to the interests of beneficiaries, who could either be people who have access to the data or who benefit from all that can be created with this data (Hardinges, 2020).

One of the advantages of this form of data trust is its characteristically flexible structure, which allows the trust to meet the needs of different actors involved in data sharing (O’Hara, 2019, p. 7). The need to cultivate the trust of these actors must, however, remain a central element of any data trust (O’Hara, 2019, p. 11).

Despite the recent popularity of this model of data governance, there isn’t any actual example of data trusts (Mozilla Insights, Brandusescu & van Geus, 2020, p. 13).

4.2.3 Data trust as a perspective on data sharing

The lack of an agreed upon definition of data trusts has, perhaps, resulted in the understanding of data trusts more as an approach or underlying idea rather than an actual governance model. The authors Micheli et al., for example, note that the idea of data trusts is included in one way or another in all other models of data governance studied (2020, p. 11).

This lack of clarity regarding the notion of data trust is apparent in some of its definitions. For some authors, a data trust is nothing more than a “legal, technical, and organizational structure for enabling the sharing of data” (Stalla-Bourdillon et al., 2020, p. 2). For others, a data trust “is a repeatable mechanism or approach to sharing data in a timely, fair, safe and equitable way” (Paprica et al., 2020, p. 2).



5. THE POTENTIAL OF THE CIVIL LAW TRUST IN THE IMPLEMENTATION OF RESPONSIBLE DATA GOVERNANCE

5.1 The potential of the civil law trust

5.1.1 Avoiding the question of data ownership

Digital data is mystifying. Its use is non-rival in nature, which means that the use of data by one person does not prevent its use by another. This characteristic is difficult to reconcile with the nature of ownership which social value lies in the individual use of resources. In addition, data often gains in value as it is shared rather than kept for oneself, a behaviour that is not generally associated with ownership (Cornu, Orsi & Rochfeld, 2017, p. 275-276).

Dutch law Professor Sjef van Erp points out that, practically speaking, the debate over whether or not we should have property rights over data has not prevented the development of an international data market (van Erp, 2020). Data is frequently being sold and shared, and uncertainty has not affected these contracts. Van Erp suggests that it may be time to think about another kind of ownership (or degrees of ownership) to reflect the particular nature of data. In this regard, the Quebec trust is cited as a model.

It is true that trusts are generally associated with the management of financial or land assets. This perception is, however, linked to a social fact and not to a legal observation: for a long time, land and financial assets had the greatest economic value. The economic valuation of data is relatively recent. However, the reason why the *fiducie* could provide a good model for data governance, the way it has for land and financial assets, is that it is founded upon and exists for a goal or purpose. Whether the asset is a building or information does not change this essential characteristic of the trust.

The trust thus makes it possible to side-step the thorny question of data ownership, to ask much more concrete questions about its governance, questions like who benefits from this data, what powers can the trustee exercise over it and in whose interest?

5.1.2 Clear responsibility

As mentioned in the introduction, the lack of trust and accountability in the use of personal data poses a problem that must be addressed by data governance. Fortunately, an important aspect of the civil law trust is that it makes the trustees responsible for their actions with respect to data.

Indeed, the purpose of the trust limits the actions and decisions that may be taken by trustees. The latter *must* make decisions and take actions that respect the purpose of the trust. If they do otherwise, they become personally liable for the consequence of their actions.

In addition, the *Civil Code of Quebec* provides a mechanism for monitoring and controlling the administration of the trust.²⁸ It is built into the framework of this mechanism that the settlors, the beneficiaries, if they exist, or "another interested person" can apply to the court (Popovici, 2018, p. 230) to compel the trustee to perform their obligations, whether that is taking necessary action or refraining from committing a harmful act.²⁹

5.1.3 Solution to the issue of consent obtained online

An important problem in the collection of personal digital data is user consent. This consent is usually obtained through a form containing unclear terms and of a length that discourages reading. It is therefore difficult to speak of free and informed consent, all the more so against the background of

²⁸ Art. 1287-1292 CCQ.

²⁹ Art. 1290 CCQ.

massive data collection. One of the key necessities in ensuring free and informed consent is the obligation to inform individuals of the purposes or reasons for this data collection.³⁰

This is where the Quebec trust becomes interesting. Much like the rules around obtaining online consent, a data trust would place the purpose of data collection at the heart of its existence and operation.

Indeed, the purpose of the trust would be determined in the act of creation, by the originator of the trust (the settlor). The identified trustee(s) is/are responsible for ensuring that the use of data conforms with the purpose that has been determined upstream. This purpose cannot be modified easily, since such a change would require the authorization of the court.

As a result, in the context of data sharing, the trustee(s) would be exempt from re-requesting the individual consent of the data subjects, provided certain conditions are met.

Data trust expert Anne-Sophie Hulin explains this idea as follows:

[...] The trust would make meta consent possible: by consenting to the data being placed in trust, people delegate their consent to the trustee to assess to what extent the use and data-sharing remain in accordance with fiduciary requirements. Thus, indirectly, people regain control over the use of their data through the intermediary of the trustee (Hulin, 2020) [Translation]

The trustee(s) could thus provide access and share the data they control, ensuring that this use of the data meets the purpose of the trust—all this without having to repeatedly request individual consent.

5.1.4 The trust: a versatile tool

Almost everything in a trust is subject to the will and preference of the persons who have created it, that is, the settlors. The rules that govern trusts in the *Civil Code of Quebec* are few and leave a lot of room for the will of those involved.

Unlike the charitable trust in common law, the *Civil Code of Quebec* does not limit the goals that can be pursued by a trust. These purposes can be commercial, non-commercial, charitable or of general

A social utility trust with a unique purpose

A good example of the versatility of the trust is the Fiducie des Cantons-de-l'Est, which is dedicated to the production of scientific knowledge. The mission of this trust is "to promote the development and transfer of scientific knowledge related to forest management and agroforestry in order to propose concrete solutions related to sustainable development of forest resources and land in inhabited areas." [Translation] The settlors thus created a trust with a unique purpose which met their goals.

³⁰ Art. 9 of *Bill 64, An Act to modernize legislative provisions relating to the protection of personal information*, 1st session, 42nd Legislature, Quebec, 2020; Art. 13 of *Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of individuals with regard to the processing of data to character personal and on the free movement of such data, and repealing Directive 95/46 / EC*.

interest. It also leaves it to the settlors to determine the term of the trust. Private utility trust and social utility trust can be perpetual.³¹

On this aspect of versatility, the Quebec trust seems to have more potential than the common law trust does.

5.1.5 A tool for bringing together various interests towards a common goal

The trust, and more particularly the social or private utility trust, may make it possible to bring together the different interests represented by those from whom data originates, those who collect the data and those who use it.

The social utility trust must be set up for a general purpose and not for the purpose of making profits or operating a business. It thus offers a useful legal framework to balance these different interests with a common objective.

5.2 Limits of the trust

Importantly, however, data trusts have many limitations. It is a complex legal tool, a difficulty exacerbated by a general misunderstanding of various digital and technological issues. When such a trust is created, some effort must be devoted to education and training.

Another obvious limitation of this type of trust is that it is unique to Quebec. Examining the Quebec trust, however, can help us understand data sharing and management more generally. In addition, observers from other countries may be interested in this model to solve problems of general concern.

Finally, several questions concerning data trusts remain unresolved, including the question of the compatibility of the world of data with the world of trusts. It is not entirely clear that trusts will be accepted as an alternative to individual consent.

³¹ Art. 2173 CCQ.

6. CONCLUSION

In conclusion, it is important to reiterate that data trusts are only one model of data governance and can certainly not apply to all situations. An analysis of needs and objectives will remain an essential step in any project.

Yet, data trusts stand out from other approaches to data governance for three reasons: they provide a legal framework that is both established and versatile; the establishment and function of data trusts revolve around a defined goal and, finally, they ensure that those responsible for decisions about data—the trustees—are clearly identified.

Although data trusts are not suitable in all situations, the social economy sector could provide fertile ground for experimentation with an implementation of this legal tool. Indeed, this sector has a long tradition of collective practices directed towards a common goal, providing an environment in which the social utility trust could operate well.

In any case, data trusts still raise many questions that can only be resolved through experimentation and practice.

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Data privacy, lack of control over personal data and the appropriation of our personal information by platforms have become a recurrent theme and a constant concern for citizens and public bodies. In the midst of these developments, data trusts have become an idea that cannot be overlooked.

This document examines the idea of data trusts as it emerged in the past few years and tries to understand what it stands for and how it can be translated in the Quebec legal system. It also explores the potential of the Quebec trust to bring about responsible data governance.

