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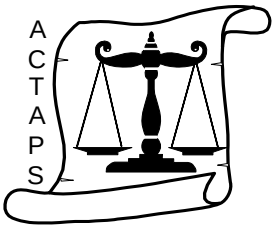

CHAIRMAN'S REVIEW

Welcome to Issue 140 of the ACTAPS Newsletter.

This contains a very comprehensive article by John O'Sullivan, a Canadian member, entitled "What privilege does a trustee enjoy?".

I also draw readers' attention to pages 37 and 38, which give details of the Association Annual Lecture on 1 November, and details of the Education course commencing in November this year, respectively. Take up for both of these has been very good indeed, and I would urge interested delegates to reply promptly to avoid disappointment.

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"What Privilege Does a Trustee Enjoy?"

by John O'Sullivan and Christine Wong-Chong, Weirfoulds LLP

INTRODUCTION

The law of Ontario is "reasonably clear" that trustees are under a duty to provide beneficiaries regularly with accurate information, and to make trust documents available for inspection by beneficiaries.[1] 'Reasonably clear' of course means that it is not particularly clear.

Unquestionably a trustee owes a fundamental and comprehensive fiduciary duty to the beneficiaries of the trust. As D.W.M. Waters states in The Law of Trusts in Canada, 2nd ed. (1984), at p.31,

> "The hallmark of a trust is the fiduciary relationship which it creates between the trustee and the beneficiary. The whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment. The express trustee is expected to put the interests of the trust and the beneficiaries first in his thinking whenever he is exercising the powers or performing the duties of his office. His duty is one of selfless service."[2]

The rationale for granting beneficiaries access to trust information, is that it is necessary to enable beneficiaries to ascertain the purposes and expectations of the settlor, so that they may be in a position to monitor and enforce the performance of the trustee's duties.

The countervailing tension is that an unfettered right to disclosure of trust information would not be in the best interests of the trust. The disclosure of some confidential information might lead to discord among the beneficiaries. The right not to disclose trust information can promote the due administration of trusts. It can reduce the scope for litigation regarding the

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[1] *Barkin v Royal Trust Co.*, 45 E.T.R. (2d) 1, 2002 CarswellOnt 669 at para 14 (Sup Ct J) Pitt J. [*Barkin*].

[2] D.W. M. Waters, *Law of Trusts in Canada*, 2d ed (Toronto: The Carswell Company Limited, 1984) at 31.

rationality of the exercise by trustees of their discretions. It encourages suitable candidates to accept the office of trustee by insulating their decisions from beneficiary scrutiny.

In this paper the "privilege" a trustee enjoys refers to the trustee's right not to disclose trust information on the basis of confidentiality, and on the basis of legal privilege.

Writers on this subject[3] have identified three main types of information that beneficiaries may wish to have disclosed: (1) information about the existence of the trust, (2) information about the trust accounts, and (3) information about trustee's decisions, which could include, agendas for trustee meetings, copies of legal opinions obtained by the trustees, as well as certain written communications. What is the scope of the beneficiary's right to disclosure of this information? What is the trustee's duty?

This paper seeks to answer these questions. It concludes by offering some practical guidance for legal practitioners and trustees.

BENEFICIARIES' RIGHTS TO DISCLOSURE OF INFORMATION FROM A TRUSTEE

(A) CONFIDENTIALITY

The Traditional Rule: Beneficiaries have a Proprietary Right to Inspect Documents Relating to the Trust

The theoretical basis of the beneficiary's entitlement to inspect trust documents stems from *O'Rourke v. Darbishire*[4], where Lord Wrenbury explained that the beneficiary's right to inspect documents relating to the trust is founded on a "proprietary right" of the beneficiary to the documents themselves:

> The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with

[3] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Canada Limited, 2005) at 1068-1069.
[4] [1920] A.C. 581 HL (Eng) [*O'Rourke*].

> discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access documents which are your own.[5]

Thus, the beneficiary is entitled to see documents obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his or her duties as trustee. As David A. Steele commented in "Disclosure of Trust Documents Revisited"[6]:

"[d]ocuments connected with the trust's administration are said to be "trust documents" and, *prima facie*, are the property of the beneficiaries and, hence, available for their inspection."

The traditional proprietary right analysis has been criticised. For example, Steele has commented that in *Ontario (Attorney General) v. Ballard Estate*[7], Lederman J. in an analysis of a solicitor-client privilege dispute about access by beneficiaries, "concluded that Lord Wrenbury's use of the term "proprietary" in this context was intended to be colloquial rather than technical."[8] Justice Lederman stated as follows:

> When Lord Wrenbury used the phrase "proprietary right" he was saying no more than the documents in question are in a sense the beneficiary's and is therefore entitled to access them. They are said to belong to the beneficiary not because he or she literally has an ownership interest in them but, rather, because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust.[9]

Lederman J. noted deficiencies with a proprietary right analysis and cautioned against allowing a trustee to rely on the doctrine of privilege to deny access to information regarding the administration of a trust:

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[5] *O'Rourke v. Darbishir*e,[1920] A.C. 581 HL (Eng) [*O'Rourke*] at pp. 626-7.
[6] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 218 (HeinOnline).
[7] *Ontario (Attorney General) v Ballard Estate*, 6 E.T.R. (2d) 34, 119 D.L.R. (4th) 750, 1994 CarswellOnt 579 (Ct J (Gen Div) Commercial List) Lederman J. [*Ballard Estate*].
[8] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-15.
[9] *Ontario (Attorney General) v Ballard Estate*, 6 E.T.R. (2d) 34, 119 D.L.R. (4th) 750, 1994 CarswellOnt 579 (Ct J (Gen Div) Commercial List) Lederman J. [*Ballard Estate*] at para. 6.

> A property right analysis unfortunately leads one astray and to the illogical conclusion that a potential beneficiary has to wait until the completion of the administration of the estate and until there is specific property available to him or her before he or she can see information that the trustees have gathered. In a hypothetical case, it may be that in the end, the residual legatee will receive nothing because the executors or trustees have not acted in good faith or breached their fiduciary duty. It is untenable that in such circumstances, a trustee can invoke the doctrine of privilege merely because the residual legatee has received or will receive nothing under the trustee's administration when the reason for that outcome may be the trustee's own misconduct. The right to actual property therefore cannot be determinant of whether that individual is entitled to the information.[10]

With this analysis firmly in mind, Lederman J. held that in the circumstances of *Ballard Estate*, "beneficiary" includes one who merely has a contingent or residual interest under the will or trust.[11]

More recently, the Privy Council in *Schmidt v. Rosewood Trust Ltd*[12] rejected the property right analysis and replaced the proprietary test with a balancing of interests test. In *Schmidt*, their Lordships were in general agreement with the approach adopted in the judgments of Kirby P and Sheller JA in the Court of Appeal of New South Wales in *Hartigan Nominees Pty Ltd v Rydge* 29 NSWLR 405 where Kirby P, at pp. 421-422 of the decision, stated that the approach taken in *O'Rourke* is "unsatisfactory":

> Access should not be limited to documents in which a proprietary right may be established. Such rights may be *sufficient*; but they are not *necessary* to a right of access which the courts will enforce to uphold the cestui que trust's entitlement to a reasonable assurance of the manifest integrity of the administration of the trust by the trustees...The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right

[10] *Ontario (Attorney General) v Ballard Estate*, 6 E.T.R. (2d) 34, 119 D.L.R. (4th) 750, 1994 CarswellOnt 579 (Ct J (Gen Div) Commercial List) Lederman J. [*Ballard Estate*] at para. 13.
[11] *Ontario (Attorney General) v Ballard Estate*, 6 E.T.R. (2d) 34, 119 D.L.R. (4th) 750, 1994 CarswellOnt 579 (Ct J (Gen Div) Commercial List) Lederman J. [*Ballard Estate*] at para. 3.
[12] [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*].

> which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts. It is the extent of that duty that is in issue.[13]

In rejecting the proprietary right analysis, the Privy Council's decision in *Schmidt* has changed the general rule that a beneficiary's entitlement to trust information and documents is based on some form of proprietary right. As will be discussed below, from the cases that have considered or followed *Schmidt* thus far, it appears that the courts in Canada generally support the view that a balancing approach is required, and the nature of a beneficiary's interest will be one factor for consideration in determining whether or not it is appropriate to disclose information to that individual. However, the courts in Canada, have yet to let go of a proprietary right analysis in its entirety in determining whether a beneficiary is entitled to information or documents relating to a trust.

Exceptions to the Traditional Rule

The right of a beneficiary to inspect trust documents is not unqualified. In *Patrick v. Telus Communications Inc.*[14], Justice Rogers of the British Columbia Supreme Court at paragraph 35 of the decision considered *Rouse v. IOOF Australia Trustees Ltd.* (1999), 73 S.A.S.R. 484 (Australia S.C.), for standing as the proposition that a beneficiary does not have an absolute right to inspect trust documents. The Court said:

> The fact that the trust is one in which numerous beneficiaries have an interest, and the further fact that those beneficiaries may have differing views about the wisdom of the course of action being pursued by the trustee, only serve to emphasise, in my opinion, the need for the law to recognise some scope for a

[13] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*] at para. 52. The problems with the proprietary right approach were laid out by Kirby P at para. 52 of *Schmidt*:

> The equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust documents and those which are not; it casts doubt upon the rights of beneficiaries who cannot claim to have an equitable proprietary interest in the trust assets, such as the beneficiaries of discretionary trusts; and it may give trustees too great a degree of protection in the case of documents, artificially classified as trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents.

[14] 2005 BCSC 1762, 49 C.C.P.B. 305, [2006] B.C.W.L.D. 1265, 2005 CarswellBC 3086, [*Patrick*].

> trustee to refuse to disclose information on the grounds that it is confidential and on the further ground that the disclosure is not in the interests of the beneficiaries as a whole.

What follows is a survey of such "qualifications" or "exceptions" to the traditional rule with a view of offering some guidance to trustees as to when they can withhold information and documents from beneficiaries on the basis of confidentiality or legal privilege.

Trustees are not bound to disclose reasons for exercise of discretion (taken in good faith).

Londonderry's Settlement, Re; Peat v. Walsh,[15] stands for the proposition that while beneficiaries are entitled based on a proprietary right to inspect trust documents, they are not entitled to inspect documents bearing on the deliberations of trustees leading to their decisions, taken in good faith, which will reveal the basis for the exercise of their discretionary powers.[16]

Steele has written that *Londonderry's Settlement,* "exempts from disclosure the following types of documents: (i) documents that record the trustees' deliberations regarding the manner of exercising their discretions; (ii) documents that record behind the exercise of a particular discretion; and (iii) documents upon which such reasons were or might have been based."[17] The rationale for precluding such disclosure is that "[t]raditionally...to require a trustee to make such disclosure would render it too difficult for trustees to make sensitive

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[15] [1965] Ch. 918 (Eng. C.A.) [*Londonderry's Settlement*].

[16] In *Froese v Montreal Trust Co. of Canada*, 1993 CarswellBC 2482 (BC Master) [*Froese*], Master Joyce held at paragraph 22 of the decision, that *Londonderry's Settlement* stood for the exception to the general "proprietary right" rule:

> In that case it was held that the general rule that beneficiaries were entitled as a matter of proprietary right to inspect the trust documents did not encompass documents bearing on the deliberations of the trustees leading to their decisions, taken in good faith, as to the exercise of discretionary powers.

[17] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-18.

decisions."[18] In various offshore jurisdictions such as Jersey, Guernsey and the Turks and Caicos Islands, trust legislation has in fact codified this principle.[19]

The facts of *Londonderry's Settlement,* are briefly as follows: a beneficiary requested that the trustees release minutes of trustee meetings and correspondence between the trustees and other beneficiaries. The court concluded that because of the confidentiality which attached to the trustees' reasons for exercising their discretion in the way which they had, any document which would reveal such reasons should be barred from disclosure.

Steele noted that not only did the Court of Appeal in *Londonderry's Settlement* take the position that the beneficiary had no right to disclosure, all three judges of the Court of Appeal were of the view that the minutes and correspondence were not in fact "trust documents."[20] Essentially, the Court of Appeal preferred to base their decision on the principle that, whether or not any particular category were trust documents, the trustees' duty to keep certain decisions confidential trumped the prima facie right of the beneficiaries to production of them.

Danckwerts L.J., referring to *O'Rourke* stated that "it is quite a simple matter to make general observations on the right of beneficiaries to inspection of trust documents, but it does not carry one any further until one knows what is meant by "trust documents".[21] Salmon L.J.

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[18] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-17.

[19] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 218 (HeinOnline). Steele outlined that Article 25 of the *Trusts (Jersey) Law 1984* provides as follows:

> Subject to the terms of the trust and subject to any order of the court, a trustee shall not be required to disclose to any person, any document which-
> (a) discloses his deliberations as to the manner in which he has exercised a power or discretion or performed a duty conferred or imposed upon him; or
> (b) discloses the reason for any particular exercise of such power or discretion or performance of duty or the material upon which such reason shall or might have been based;or
> (c) relates to the exercise or proposed exercise of such power or discretion or the performance or proposed performance of such duty; or
> (d) relates to or forms part of the accounts of the trust,
> unless, in a case to which subparagraph (d) applies, that person is a beneficiary under the trust not being a charity, or a charity which is referred to by name in the terms of the trust as a beneficiary under the trust.

Similarly, Article 38 of the *Trusts (Guernsey) Law 2007*, provides a similar limitation on disclosure and additionally provides for the confidentiality of letters of wishes.

[20] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 225 (HeinOnline).

[21] *Londonderry's Settlement, Re; Peat v. Walsh,* [1965] Ch. 918 (Eng. C.A.) [*Londonderry's Settlement*] at p. 935.

provided the following definition of "trust documents", noting that "trust documents" have the following common characteristics: "(1) they are documents in the possession of the trustees as trustees; (2) they contain information about the trust which the beneficiaries are entitled to know; (3) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them."[22] Unfortunately, these characteristics do not offer much assistance in identifying a trust document.[23] For instance, Steele expressed that "To date, the case law does not provide a comprehensive definition of "trust documents" but one commentator has suggested that "trust documents" ought, in principle, to be all documents which relate either to the trust property or to the administration of the trust."[24] After the ruling in *Schmidt*, which will be discussed in greater detail below, one questions the necessity of such a definition as the Privy Council held that the true basis for ordering disclosure of trust information was the court's inherent jurisdiction to supervise; however, guidance on this issue would produce much needed certainty.[25]

Harman and Danckwerts LL.J. also observed that even if the documents at issue were trust documents, they should not be subject to inspection by the beneficiaries:

> It seems to me there must be cases in which documents in the hands of trustees ought not to be disclosed to any of the beneficiaries who desire to see them...to disclose such documents might cause infinite trouble in the family, out of all proportion to the benefit which might be received from the inspection of the same.[26]

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[22] *Londonderry's Settlement, Re; Peat v. Walsh,* [1965] Ch. 918 (Eng. C.A.) [*Londonderry's Settlement*] at p. 938

[23] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 226 (HeinOnline). Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Canada Limited, 2005) at 1072.

[24] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-15.

[25] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Canada Limited, 2005) at 1075: "Though trustees, with or without a previous request, always have a right to seek judicial advice and direction if they are in doubt whether they should disclose written information, this process means added costs and frequently delays, while a right rationale as to "trust documents" – somewhat nebulous though that term at present may be – does offer guidance to trustees and beneficiaries, and a level of certainty that the face value of *Ontario (Attorney General) v Ballard Estate and Schmidt v Rosewood Trust Ltd.* denies."

[26] *Londonderry's Settlement, Re; Peat v. Walsh,* [1965] Ch. 918 (Eng. C.A.) [*Londonderry's Settlement*] at 935-6.

Further, Harman J indicated that trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons activating them in coming to a decision but if they do give reasons, their soundness can be considered by the court:

> This is a long standing principle and rests largely, I think, on the view that nobody could be called upon to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he was not liable to have his motives or his reasons called in question either by the beneficiaries or by the court. To this is added a rider, namely that if trustees do give reasons, their soundness can be considered by the court.[27]

Londonderry's Settlement, was considered in *Ballard Estate*[28] where, as summarized by Steele, "Mr. Lederman observed that the tension between the principle of broad disclosure and the need to preserve the confidentiality of trustee deliberations "*is by no means static and the balancing of interests may well call for a different result depending on the circumstances*."[29] Steele has interpreted Mr. Justice Lederman's dictum as suggesting that *Londonderry's Settlement* "may not be interpreted in Canadian jurisdictions as a general statement of a blanket right of trustees to refuse to provide their written reasons for the exercise or non-exercise of a discretionary power; rather it may be read as a statement that, in certain circumstances, as, for example, where a discretion involves sensitive matters such as an assessment of the worthiness of particular individuals to benefit from an advancement, trustees *may* not be required to provide documents which evidence such deliberations to the beneficiaries. If this is the case, *Londonderry's Settlement* may provide very insubstantial protection for trustees in Canadian jurisdictions."[30]

Accordingly, while Canadian courts have considered and referred to the reasoning in *Londonderry's Settlement*, they have yet to explicitly follow and endorse its reasoning and

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[27] *Londonderry's Settlement, Re; Peat v. Walsh*, [1965] Ch. 918 (Eng. C.A.) [*Londonderry's Settlement*] at 928-9.
[28] *Ontario (Attorney General) v Ballard Estate*, 6 E.T.R. (2d) 34, 119 D.L.R. (4th) 750, 1994 CarswellOnt 579 (Ct J (Gen Div) Commercial List) Lederman J. [*Ballard Estate*].
[29] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 228 (HeinOnline).
[30] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 228 (HeinOnline).

policy, as Steele wrote in 2001, "The strength and extent of the *Londonderry's Settlement* principle is somewhat uncertain."[31] It remains so today.

Disclosure required if trustee's reasons could be relevant to question of whether discretion was exercised for an improper purpose.

If the beneficiary challenges the trustee's *bona fides* in the exercise of his or her discretion, the trustee may have to disclose trust documents. This proposition was explored by Salmon L.J. in *Londonderry's Settlement*, where he found that while the trustee was not bound to disclose the reasons for the exercise of discretion:

> The position is quite different where the beneficiary seeks disclosure of documents from the trustees in the air, as in this case, from the position where the beneficiary seeks discovery of documents in an action in which allegations are being made against the bona fides of the trustees. If the documents in question are in the possession or power of the trustees and are relevant to the issues in the action, they must be disclosed whether or not they are trust documents.[32]

The policy supporting such disclosure has been described by Master Joyce in *Froese v. Montreal Trust Co. of Canada*[33] as a means of enabling the plaintiff to determine the strength of a breach of trust claim from the outset of the action in order to promote efficiency and justice:

> In my view, to require the plaintiff to pursue and complete an action to determine this preliminary issue before documents relevant to the issue of the breach of the alleged trust can be produced would not promote the economical and expeditious resolution of disputes and would not be in the interests of justice.[34]

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[31] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-19.
[32] *Londonderry's Settlement, Re; Peat v. Walsh*, [1965] Ch. 918 (Eng. C.A.) [*Londonderry's Settlement*] at p. 938.
[33] *Froese v Montreal Trust Co. of Canada*, 1993 CarswellBC 2482 (BC Master) [*Froese*].
[34] *Froese v Montreal Trust Co. of Canada*, 1993 CarswellBC 2482 (BC Master) [*Froese*] at para. 26.

In *Ballard Estate*, the court compelled disclosure as the trustees' reasons could be relevant to the question of whether discretion was exercised for an improper purpose. Justice Lederman held "the cases have stated that, whatever approach to the claim of privilege is taken, in actions where the beneficiary is alleging lack of good faith or breach of fiduciary duty, this information is to be made available to him or her."[35]

Similarly, in *Barkin v. Royal Trust Co.*[36] the beneficiaries applied for the trust company to produce for inspection documents relating to the administration of estates upon discovering that a trust officer, while employed with the trust company was convicted of breach of trust in different estate matters, was actively involved in the administration of the deceased's estate. As explained in Widdifield on Executors and Trustees, 6th ed.[37]: "The court held that documents bearing on the deliberations of trustees leading to their decisions were available to be inspected by beneficiaries and explained that when a beneficiary alleges mala fides or breach of fiduciary duty, it would be unfair to require the beneficiary to first establish entitlement before disclosing information required to substantiate the beneficiary's claim."

In *Patrick,* Justice Rogers found that the plaintiffs' pleadings raised the *bona fides* of the defendant's exercise of discretion against them and accordingly, the documents sought were producible by the defendant even if they had to do with the defendant's exercise of that discretion. Justice Rogers explained that:

> Once a suit has been launched...the conventional rules of discovery engage and trust documents of whatever stripe must be produced provided they are relevant to an issue raised in the pleadings and are not subject to a legally recognized privilege.[38]

There is certainly merit behind the argument that supports the proposition that disclosure must be made to a beneficiary when a claim of breach of trust has been advanced in order for the beneficiary to be in a position to reasonably allege bad faith against the trustee.

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[35] *Ontario (Attorney General) v Ballard Estate*, 6 E.T.R. (2d) 34, 119 D.L.R. (4th) 750, 1994 CarswellOnt 579 (Ct J (Gen Div) Commercial List) Lederman J. [*Ballard Estate*] at para. 14.
[36] *Barkin v Royal Trust Co.*, 45 E.T.R. (2d) 1, 2002 CarswellOnt 669 at para 14 (Sup Ct J) Pitt J. [*Barkin*].
[37] Confidentiality of Trustee's Reasons, Widdifield on Executors and Trustees, 6th Ed. 8.9.
[38] *Patrick v. Telus Communications Inc.,* 2005 BCSC 1762, 49 C.C.P.B. 305, [2006] B.C.W.L.D. 1265, 2005 CarswellBC 3086, [*Patrick*] at para. 39.

However, if a beneficiary is entitled to disclosure "as of right" once a claim of breach of trust is made, this may produce an unfair result to the trustee or to the other beneficiaries. For instance, what if the beneficiary has a weak claim for breach of trust? If the court orders disclosure on a frivolous claim the harm will likely outweigh the benefit and result in confidential and/or commercially sensitive information being divulged and potential family discord. Although there is little case law directly on point on this issue, it appears that safeguards in the form of redactions or confidentiality agreements can be ordered by the court to protect misuse of such information.

Where the settlor has identified the information or documents as confidential or the express provisions of the trust instrument exempt disclosure.

(a) Information or documents identified as confidential

Canadian courts have yet to consider this issue directly, however some guidance can be found from other common law jurisdictions such as the New South Wales Court of Appeal decision of *Hartigan Nominees Pty Ltd. v. Rydge*[39]; which has been identified by Steele as standing for the "proposition that a trustee will not be compelled to disclose information or documents to a beneficiary where the settlor (or other instigator of the trust) has, expressly or impliedly, identified the information or documents as being confidential."[40]

In *Hartigan*, the issue was whether the beneficiaries or potential beneficiaries of a discretionary trust were entitled to access a letter of wishes[41] which the trustee had considered in carrying out the trust. In *Hartigan*, the principle set out in *Londonderry's Settlement* was affirmed in holding that a letter of wishes which was intended by the instigator to be confidential need not be disclosed if the result of the disclosure would be to reveal the reasons why a discretionary power had been exercised and would likely result in family disharmony.

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[39] (1992) 29 N.S.W.L.R. 405 (N.S.W.C.A.) [*Hartigan*].

[40] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-23.

[41] A letter of wishes has been defined by Mr. Justice Briggs in *Breakspear v Ackland*, [2008] EWHC 220 (Ch) at para. 5 of the decision, as a mechanism used for the communication by a settlor to a trustee of the settlement of non-binding requests by the settlor to take stated matters into account when exercising their discretionary powers. Typically, "wish letters are concerned with the exercise of dispositive discretions, but they may include wishes in relation to the exercise of powers of investment, or of other purely administrative powers."

Further, information given to a trustee that was identified as being confidential, would not be available for disclosure to the beneficiaries, even if they constitute trust property.[42]

Hartigan was considered and endorsed by the Royal Court of Jersey in *Re Rabaiotti's Settlements*[43]. In *Rabaiotti*, a beneficiary sought disclosure of certain trust documents, including trust deeds and accounts, and letters of wishes. Associate Law Professor, Tsun Hang Tey of the National University of Singapore, summarizes the findings in *Rabaiotti* as follows,

> Here, John Rabaiotti had been ordered in English matrimonial proceedings to disclose all letters of wishes in relation to any trusts of which he was a beneficiary. The trustees of four relevant settlements- two of which were governed by the law of Jersey – applied for directions to the court of Jersey on whether the trustees should disclose such relevant documents to him. The court held that the presumption is that letters of wishes should not be disclosed, with the burden on a beneficiary who seeks disclosure to make out a case for their disclosure. However, the court ordered that disclosure be made in the case as it feared that not doing so might result in the English court concluding that his interest in the four settlements was greater than it actually was.
>
> ...Although the court in *Rabaiotti* approved of the majority decision in *Hartigan* to respect the implied confidentiality requested by the settlor, *Rabaiotti* concluded that the court retained the discretion to order disclosure notwithstanding its confidentiality. This was based on the principle that:
>
> 'A court of Equity has a general supervisory jurisdiction over trusts...to ensure that the trustees are accountable to the beneficiaries on whose behalf they hold the assets. Indeed, trustees may surrender their discretion to the Court. In our judgement, it would be inconsistent with the general position of the Court if it did not have the power to order disclosure of a letter of wishes or other

[42] *Hartigan Nominees Pty Ltd. v. Rydge*, (1992) 29 N.S.W.L.R. 405 (N.S.W.C.A.) [*Hartigan*] at p. 436.
[43] [2000] W.T.L.R. 953 [*Rabaiotti*].

documents, which did not have to be disclosed on Londonderry principles, where it was satisfied that it was essential to do so.'.[44]

More recently, Mr. Justice Briggs of the High Court of England and Wales in *Breakspear v. Ackland*[45] was asked to consider whether to order disclosure of a wish letter written contemporaneously with the trust deed itself as well as the oral statements accompanying the wish letter. The trustees disclosed the trust deed but refused disclosure of the wish letter on the basis that the letter was confidential and that disclosure would lead to family discord. The Court, referring to both *Hartigan* and *Rabaiotti,* considered the issue of disclosure of the wish letter and details of the oral statement of wishes. The Court held that as wish letters were created for the sole purpose of serving an inherently confidential process, the *Londonderry* principle applied, at least in the context of family discretionary trusts and as such were prima facie confidential: "and that this confidentiality exists for the benefit of beneficiaries rather than merely for the protection of the trustees."[46] However, the Court held that while upholding the confidentiality of wish letters was important, wish letters are not immune from disclosure and that "the question whether disclosure should be refused, either by trustees or by the court, should be addressed primarily upon an assessment of the objective consequences, rather than by reference to the subjective purpose for which disclosure is alleged to be sought."[47] The Court allowed the claim for disclosure on the basis that the trustees intended to seek the court's sanction for a scheme of distribution of the trust fund and accordingly, the wish letter was a key document to be taken into account by the trustees and relevant to the court's approval of the scheme. The risk of family discord was outweighed by the requirement to give the claimants a proper opportunity to address the court on the question of sanction.

Thus, while the beneficiary of a trust is not normally entitled to inspect trust documents that serve an inherently confidential purpose, the court retains discretion to order disclosure of such documents, if it would not be in the best interests of the beneficiaries collectively for such disclosure to be denied or where there exists good reason and it is essential to do so.

[44] Tsun Hang Tey, "Letters of wishes and trustee's duties" (2008) 22(3) Tru. L.J. 126 at 133.
[45] [2008] EWHC 220 (Ch) [*Breakspear*].
[46] *Breakspear v Ackland*, [2008] EWHC 220 (Ch) [*Breakspear*] at para. 24.
[47] *Breakspear v Ackland*, [2008] EWHC 220 (Ch) [*Breakspear*] at para. 51.

(b) Disclosure prohibited by the trust instrument

What if the settlor has expressly provided that a beneficiary is not entitled to disclosure of certain trust documents by the terms of the trust instrument itself? Is the beneficiary effectively precluded from access? As Steele observed, "There appears to be little law directly on point. There is however, considerable consensus among commentators that a trust instrument may limit the trustee's usual duties to account and disclose, but may not eliminate these duties altogether.[48] An example of this proposition is found in *Jones v. Shipping Federation of British Columbia*,[49] which has been summarized by Timothy G. Youdan[50], quoting from *Waters' Law of Trusts in Canada*, 3rd edition, as follows:

> The issue arose in *Jones v. Shipping Federation of British Columbia* where a number of shipping companies, acting through the Federation, set up a non-contributory pension fund for their employees. In the terms of the trust agreement, referred to as the contract, appeared the term that 'no person other than the Federation may require an accounting or bring an action against the Trustee with respect to the said Plan or the Fund and/or its actions as Trustee'. A group of employees, acting through a union local, sought an accounting, only to be met with the response from the Federation that the cestui que trust were bound under the agreement to take the burden with the benefits, and they could not repudiate the conditions upon which the trustee had agreed to accept the trust. Brown J concluded that, as there were admitted trust funds in the trustee's hands, this term of the agreement sought to oust the jurisdiction of the court. Such an agreement, he said, is illegal and void on grounds of public policy..."[51]

Thus, *Jones* stands for the proposition that courts will not permit the settlor to deprive any beneficiary of the right to require an accounting from the trustee. This is consistent with the trustee's underlying fiduciary obligation to a beneficiary of the trust to act in their best interests. As Youdan explained "the exclusion of the trustees' obligation to account for their

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[48] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-28.
[49] (1963) 37 DLR (2d) 273 (BCSC) [*Jones*].
[50] Partner, Davies Ward Phillips & Vineberg LLP.
[51] Timothy G. Youdan, (Paper delivered at the National Judicial Institute, Family Law Seminar: Financial and Property Issues, Ottawa, 8-10 February 2006), at 23-4.

administration of the trust would be ineffective as it is of the essence of a trust that the trustee has a duty to exercise his or her powers for the benefit of the beneficiaries, and if the trustee had no obligation to account to the beneficiaries they would have no effective way to enforce such duty of the trustee."[52] In addition, a trust instrument that purports to deny beneficiaries access to relevant information regarding the trust may be subject to attack on the basis that the instrument itself is a "sham" trust and thus, invalid. Steele discussed that the Jersey Law Commission has examined this issue in a February 1998 consultation paper, "The rights of beneficiaries to information regarding a trust" and concluded:

> It should not, however, be thought that the settlor has complete freedom to do as he wishes. Whilst it may be possible by express provision in the trust instrument to confer on the beneficiaries completely unfettered access to all trust information in the hands of the trustees, it is necessary to be cautious at the other extreme. If a settlor attempted to deny beneficiaries any access to any information, there would be considerable danger of attack on the instrument on the basis that it had failed to create a viable trust.[53]

Thus, although the settlor has the freedom to set the terms of the trust as best as he or she sees fit, they cannot restrict disclosure in a manner that effectively prevents beneficiaries from holding trustees accountable under the trust. At a practical level, trust instruments that restrict disclosure may create special risks for trustees acting under them; as Turney P. Berry et al. acknowledged, trusts that restrict disclosure may expose trustees to the increased risk of a surcharge action, by preventing potentially ameliorative pre-litigation communication with beneficiaries, they may also prevent the trustee from taking advantage of risk management tools and obtaining beneficiary consents, releases, and ratifications.[54] Because of this increased exposure to risk, Turney P. Berry et al. caution trustees to "consider whether it is appropriate to serve as trustee under an agreement that restricts disclosure." [55]

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[52] Timothy G. Youdan, (Paper delivered at the National Judicial Institute, Family Law Seminar: Financial and Property Issues, Ottawa, 8-10 February 2006), at 23.
[53] David A. Steele, "The Beneficiary's Right to Know", (Paper delivered at the Fourth Annual Estates and Trusts Forum, Toronto, Law Society of Upper Canada, 20 November 2001), at Tab 5-28.
[54] Turney P. Berry, David M. English and Dana G. Fitzsimons Jr., "Disclose, Disclose! Disclose? *Longmeyer* Distorts the Trustee's Duty to Inform Trust Beneficiaries" Probate & Property, July/ August 2010 at 16.
[55] Turney P. Berry, David M. English and Dana G. Fitzsimons Jr., "Disclose, Disclose! Disclose? *Longmeyer* Distorts the Trustee's Duty to Inform Trust Beneficiaries" Probate & Property, July/ August 2010 at 16.

Access to trust information as a matter of discretion for the court.

In *Schmidt v. Rosewood Trust Ltd.*[56], the Privy Council held that access to trust information is in all cases a matter of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts.[57] The Privy Council rejected the traditional proprietary approach based on the classification of documents as trust documents or otherwise and questioned whether the beneficiaries have the right to "learn the reasons for the exercise of the power, and then be in a position to know whether he can reasonably allege fraud or bad faith,"[58] or whether the best interests of all beneficiaries will be met by withholding of information.[59] *Schmidt* clearly indicates that it is in the court's discretion to decide whether to provide the requested disclosure and that the nature of a beneficiary's interest is no longer sufficient to determine his or her right to information about the trust.

The facts of *Schmidt* are briefly as follows: Mr. Schmidt sought disclosure of trust accounts and other information from the trustees relating to two settlements of which his late father had been a co-settlor and under which he claimed discretionary interests both in his own capacity and as the administrator of his father's estate. The trustees opposed disclosure on the ground that Mr. Schmidt was not a beneficiary under the settlements and his father was never more than an object of a power and as such was not entitled to trust documents or information. An order for disclosure was made by the High Court of the Isle of Man but set aside on appeal to the Staff of Government Division. Mr. Schmidt appealed to the Privy Council which allowed the appeal expressing no view as to the merit of his claims but noting that Mr. Schmidt, as personal representative "seems to have a powerful case for the fullest disclosure."[60]

The key issue in *Schmidt* was whether a beneficiary's right or claim to disclosure of trust documents should be regarded as a proprietary right. The trustees relied on *Londonderry's Settlement*, in arguing that a discretionary beneficiary, in his capacity as personal representative for his deceased father, had no proprietary interest in the trust property and thus, the trust

[56] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*]
[57] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*] at para. 51.
[58] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Canada Limited, 2005) at 1074.
[59] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Canada Limited, 2005) at 1076.
[60] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*] at para. 68.

documents and information did not have to be disclosed. The Privy Council considered *O'Rourke* and *Londonderry's Settlements* and rejected the proprietary rights approach. Instead, the Privy Council considered that:

> ...the more principled and correct approach is to regard the right to seek disclosure of documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion.[61]

The Privy Council listed three areas in which the court may have to form a discretionary judgment at paragraph 54 of the decision: "whether a discretionary object (or some other beneficiary with only a remote or wholly defeasible interest) should be granted relief at all; what classes of documents should be disclosed, either completely or in a redacted form; and what safeguards should be imposed (whether by undertakings to the court, arrangements for professional inspection, or otherwise) to limit the use which may be made of documents or information disclosed under the order of the court."

In addition to holding that the beneficiary's right to seek disclosure of trust documents is best approached as one aspect of the court's inherent jurisdiction to supervise,[62] the Privy Council held that no beneficiary has a proprietary right to information concerning a trust and instead, the court must balance the competing interests of the parties in determining whether to grant disclosure:

> ...no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust

[61] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*] at para. 51.
[62] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*] at para. 66: "…a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts."

> document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards put in place.[63]

The implications of *Schmidt* are significant. For instance, Tey has noted that "This decision has a substantial impact on the character of the trust documents and information to which a beneficiary can claim access. Past decisions which confined access to trust documents, and generated guidelines as to what constitutes, or does not constitute, a trust document for this purpose are no longer applicable."[64] By rejecting the traditional idea that beneficiaries have a proprietary right to access trust information, *Schmidt* removed the requirement for a clear dividing line regarding who had the right to apply for disclosure of trust information and who did not. Thus, as Professor Tey explained, post-*Schmidt*: "all documents relating to the trust, and all information so held by the trustee, are part of the trust property, and a court may order that they be disclosed in appropriate circumstances. The question in every case is whether, in the particular circumstances, the legitimate requirement of the beneficiary to obtain access outweighs the competing interests and possible objections to disclosure of the trustees, the other beneficiaries and relevant third parties."[65] Professor Tey characterizes this shift in the law as one "from confidentiality to accountability", noting that such a shift to accountability "is consistent with the obligational theory of trusts. It also explains why trustees must disclose to the beneficiaries the content of documents with regard to the administration of trust. Only then can the beneficiaries be in any meaningful position to monitor and enforce the trustees' performance of their duties effectively."[66] It should be noted that in *Breakspear*, the court was not convinced that the judicial trend was towards disclosure[67]; however, since *Breakspear* dealt with disclosure of a letter of wishes and the confidentiality that ordinarily attaches to such letters, it is fair to say that in the context of other trust information, the trend is one towards disclosure if a balancing of the interests involved requires it to be disclosed.

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[63] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*] at para. 67.
[64] Tsun Hang Tey, "Letters of wishes and trustee's duties" (2008) 22(3) Tru. L.J. 126 at 130.
[65] Tsun Hang Tey, "Letters of wishes and trustee's duties" (2008) 22(3) Tru. L.J. 126 at 130.
[66] Tsun Hang Tey, "Letters of wishes and trustee's duties" (2008) 22(3) Tru. L.J. 126 at 139. As the Privy Council exclaimed in *Schmidt*, adopting the judgments of Kirby P and Sheller JA in the Court of Appeal of New South Wales in *Hartigan*, at paragraph 52 of the decision "The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts."
[67] *Breakspear v Ackland*, [2008] EWHC 220 (Ch) [*Breakspear*] at para. 62.

As the nature of a beneficiary's interest will no longer be sufficient in and of itself to determine any rights to information, *Schmidt* affirmed the trustee's right to assert confidentiality on broad grounds relating to the due administration of the trust. However, *Schmidt* also suggests that the fact that the document is, in and of itself confidential, is no longer sufficient for refusing to disclose it and the person requesting the information may not even be required to fall "within the current class of beneficiaries, or objects of a power, if he can show that it is reasonable to contemplate that at some time he will be so included, perhaps by exercise of a power of appointment or addition."[68] Accordingly, the court, when faced with a request for information, will then have to weigh all the relevant factors, including issues regarding personal or commercial confidentiality, (the nature of a beneficiary's interest being just one factor for consideration) before deciding whether or not to grant or refuse disclosure.

However, the salutary aspects of the *Schmidt* decision must be assessed along with the potential problems of a balancing approach, as was articulated and acknowledged in *Breakspear* (speaking in the context of wish letters):

> It is tempting to say that the infinitely variable weight to be given to those competing considerations in any particular case is best resolved by the exercise of discretion by the judge resorted to for the resolution of the impasse, rather than by the laying down of rules or even guidelines. But in my judgment this superficially attractive solution has real disadvantages...If the law is wholly uncertain as to whether wish letters are or ought generally to be disclosable, the resulting uncertainty will lead trustees regularly to have to seek the court's directions, at inevitable cost to the beneficiaries. Equally, if the answer is that the question depends in every case upon the exercise of a judicial discretion, rather than upon the exercise of discretion by the trustees themselves, then litigation (if only in the form of an application for directions) may be the inevitable consequence of nearly every request.[69]

[68] The Bedell Group, "Beneficiaries' Rights to Trust Information in the Light of Schmidt v. Rosewood Trust Limited", Bedell Cristin Jersey Briefing, February 2004.
[69] *Breakspear v Ackland*, [2008] EWHC 220 (Ch) [*Breakspear*] at para. 37.

Canadian cases that have followed or considered *Schmidt*

Schmidt has been considered and referred to in Canada. For instance, in *MacPherson,*[70] Justice Humphries referred to the "Rosewood Trust approach" in determining whether a trustee was required to disclose a solicitor's legal opinion related to a trust.

In *MacPherson*, the plaintiff wife sought production of a legal opinion obtained by counsel for the defendant husband to which she alleged she was entitled as a beneficiary of a trust arising out of an order made in 1984 (plaintiff and defendant were divorced in 1982) respecting the division of her husband's pension. The husband retired in 2000 and the husband's lawyer and wife's lawyer corresponded to finalize arrangements for securing the wife's share of pensions. The husband's lawyer was under the impression that the wife was not entitled to a certain amount and accordingly hired an expert in pensions to provide advice regarding various issues but refused to produce the expert's opinion to the wife. The wife requested the husband's expert opinion on the basis that it was sent to a trustee of a trust of which she is the beneficiary and that she is therefore entitled to it. The husband argued that all of the letters were generated in an adversarial context in which entitlement to pension benefits by both parties was in issue, and as such, all of it was covered by solicitor-client privilege. The letters mentioned for "settlement purposes" and were marked "without privilege".

The Court referenced *Schmidt*, holding that a beneficiary, simply by asserting a claim, does not have an entitlement as of right to disclosure; the strength of the claim must be assessed and balanced against competing interests such as personal or commercial confidentiality.[71] The Court stated that "Whether this creates a proprietary interest in the beneficiary or whether it is simply part of the good faith duty of a trustee, I am of the view that the opinion must be disclosed to the wife on any analysis contained in the cases to which counsel referred, including the balancing approach used in *Rosewood Trust*."[72]

[70] 2005 BCSC 207, [2005] B.C.W.L.D., 2005 CarswellBC 300, Humphries J [*MacPherson*].
[71] *MacPherson v MacPherson*, 2005 BCSC 207, [2005] B.C.W.L.D., 2005 CarswellBC 300, Humphries J [*MacPherson*] at para. 18.
[72] *MacPherson v MacPherson*, 2005 BCSC 207, [2005] B.C.W.L.D., 2005 CarswellBC 300, Humphries J [*MacPherson*] at para. 23.

> Under the *Rosewood Trust* approach, if a beneficiary cannot obtain documents merely by asserting a claim, then a trustee should not be able to resist disclosure merely by asserting that he questions the claimant's right to be considered a beneficiary, especially where the trust relationship was imposed upon unwilling parties. The circumstances should be looked at and the competing interests weighed. Here, in this limited context, the husband's position and duties as trustee are paramount to his status as a litigant with private interests.[73]

In *MacPherson*, the Court concluded that as the correspondence concerned putting to rest the pension issue under the *Family Relations Act*, in this limited context, the parties were no longer in an adversarial relationship, and accordingly, the trustee owed the beneficiary a duty of full disclosure in respect of opinions relating to the administration of the trust and the opinion was ordered to be produced, however, the court stated that if it was necessary to redact any of it, that this could be done through agreement or through the court and "insofar as the opinion covers other matters, it is subject to privilege and is not subject to production."[74]

In *Martin Estate, Re,*[75] the Court considered *Schmidt* in relation to a request for disclosure of information that was commercially sensitive which came into possession of trustees in their capacity as directors. In *Martin Estate,* the testator left a portion of his estate to four charities. The estate's major asset was the testator's corporate shares. The beneficiaries requested information related to the sale of the land by the corporation. The trustees informed the beneficiaries that they were not entitled to the information they sought as the information sought was within their knowledge or possession only in their capacity as directors of the companies and not in their capacity as executors and trustees. The trustees maintained that in their roles as trustees, the beneficiaries only have, and are only entitled to, the kind of information that is available to the shareholders of a company and since they are answerable to the beneficiaries only for the activities performed and information gained in their capacity as trustees, only the restricted information available to shareholders can be disclosed to the beneficiaries.

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[73] *MacPherson v MacPherson*, 2005 BCSC 207, [2005] B.C.W.L.D., 2005 CarswellBC 300, Humphries J [*MacPherson*] at para. 27.
[74] *MacPherson v MacPherson*, 2005 BCSC 207, [2005] B.C.W.L.D., 2005 CarswellBC 300, Humphries J [*MacPherson*] at para. 30.
[75] 2009 BCSC 1407, 53 E.T.R. (3d) 142, 2009 CarswellBC 2726, Reg. Blok [*Martin Estate*].

Citing *Lindholm v. Lindholm*[76] and *Schmidt*, the court recognized that questions of disclosure had to be answered by balancing the interests of the various parties involved. The Court noted that when the trust owns 100% of the shares of the subject company (as was the case in *Martin Estate*), complete ownership of the company by the estate "militates in favour of greater disclosure in favour of the trust beneficiaries, (in these circumstances, probably the fullest reasonable disclosure) as part of the balancing of interests described by the authorities."[77] The rationale for granting disclosure under such circumstances is that there is no concern that other shareholders who are not beneficiaries in the estate would not have access to documents or information that the beneficiaries would (or might) have given their enhanced rights as trust beneficiaries. Such a concern was present in *Butt v. Kelson*(1951), [1952] 1 All E.R. 167 (Eng. C.A.), yet the court still ordered disclosure on certain terms.

The Court concluded that it was satisfied that any risk to commercial interests could be adequately managed by the confidentiality agreements offered by the Charities and that "To hold otherwise might also invite mischief in that trustees in future cases could conclude that it is open to them to incorporate companies to carry on estate business in order to shield

[76] *Lindholm v. Lindholm*, 2000 BCSC 269, 76 B.C.L.R. (3d) 167, 2000 CarswellBC 322, Levine J [*Lindholm*]. In *Lindholm*, the plaintiff brought an application for an order specifying the terms of the trust to require certain disclosure from the defendant pertaining to the corporations and to detail the control she would have over their operations. The defendant argued that the plaintiff should be in no better position than any beneficial shareholder or contingent beneficiary of the trust and that disclosure would give her more than comparable beneficial owners are entitled to in law. The defendant also argued that he had access to these documents in his capacity as a director of the corporations and trustee of the estate, and not as a trustee of the trust for the plaintiff.
In determining whether or not disclosure should be granted, the court considered the comments made by D. Hughes, "Trust Principles and the Operation of a Trust-Controlled Corporation" (1980) 30 U.T.L.J. 151, where Mr. Hughes expressed the view that Canadian courts should follow American authority as favouring disclosure except where there is a real risk of harm to the corporation or the rights of outside shareholders. The rationale for this view was that "Beneficiaries who do not have access to corporate records, have no way of proving their requests for information are appropriate" (at para. 28). The court then looked at the interests of both parties in determining what was fair in the circumstances and concluded, that "it would not be commercially disruptive…and would be consistent with the plaintiff's right as a beneficiary to disclosure of trust documents" (at para. 33).
The defendant was ordered to deliver to the plaintiff annual copies of all communications between him and any of the Corporations, their subsidiaries or the LFL Trust, which affect the plaintiff's interest. It was further ordered that the defendant deliver to the plaintiff annually copies of all records, communications and documents which affect her interest and which have been reviewed or provided to other contingent residuary beneficiaries. However, the court cautioned that the plaintiff must "treat as confidential any information she receives concerning the Corporations, the LFL Trust and the Estate of Louis F. Lindholm; however, she may disclose it to her professional advisors, including lawyers and accountants, for the purposes of obtaining advice concerning her interest in the trust" (at para. 40).
[77] *Martin Estate, Re*, 2009 BCSC 1407, 53 E.T.R. (3d) 142, 2009 CarswellBC 2726, Reg. Blok [*Martin Estate*] at para. 32.

themselves from scrutiny by beneficiaries."[78] The Court also noted that the Charities do not have to allege wrongdoing before they can claim an entitlement to the information sought.[79]

(B) LEGAL PRIVILEGE

Joint or Common Interest Rule

The joint or common interest rule holds that a trustee cannot claim privilege over communications in whose subject matter the beneficiary has a joint interest. If the parties have a joint interest then there is no privilege between them at all. Steele has clearly defined the joint interest rule as follows: "the rule that no privilege attaches to communications between solicitor and client as against persons having a joint interest with the client in the subject matter of the communication."[80] Thus, legal opinions obtained by a trustee concerning the management or administration of trust property would not be privileged, neither would legal opinions obtained for the purpose of advising as to beneficiary rights.

The rationale for this rule has been inconsistent. For instance, in *Camosun College Faculty Assn. v. British Columbia (College Pension Board of Trustees),* [81] it was held that "production is not because of a proprietary interest but because there is a joint interest in the proper administration of the trust."[82] However, in *Samson Indian Nation and Band v. Canada*,[83] the court, relying on Mr. Justice Lederman's reasons in *Ballard Estate*, stated that the "basis of the trust principle...in cases of private trusts, that legal advice sought by the trustee belongs to

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[78] *Martin Estate, Re,* 2009 BCSC 1407, 53 E.T.R. (3d) 142, 2009 CarswellBC 2726, Reg. Blok [*Martin Estate*] at para. 35.
[79] *Martin Estate, Re,* 2009 BCSC 1407, 53 E.T.R. (3d) 142, 2009 CarswellBC 2726, Reg. Blok [*Martin Estate*] at para. 36.
[80] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 228 (HeinOnline). Duty to Provide Information, Widdifield on Executors and Trustees, 6th Ed. 13.2, summarized the following two cases which dealt with the joint interests rule:
In *Hicks v. Rothermel*, [1949] 2 W.W.R. 705 (Sask. K.B.), it was held that there is no privilege to solicitor-client communications against persons having a joint interest with the client in the subject matter of the communications, for example where a *cestui que trust* claims under a trust created by the client.
In *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), the Supreme Court of Canada dealt with the refusal by a trustee to provide documents on the basis of privilege and concluded that solicitor/client privilege does not apply where the interests of the parties seeking the information are the same as the interests of the party who first obtained the information.
[81] 2004 BCSC 941, 41 C.C.P.B., 2004 CarswellBC 1612, Vickers J [*Camosun*].
[82] *Camosun College Faculty Assn. v. British Columbia (College Pension Board of Trustees)*2004 BCSC 941, 41 C.C.P.B., 2004 CarswellBC 1612, Vickers J [*Camosun*] at para. 28.
[83] [1997] F.C.J. No. 1449, [1997] A.C.F. no 1449 (FCA) [*Samson*].

the beneficiaries "because the very reason that the solicitor was engaged and advice taken by the trustees was for the due administration of the estate and for the benefit of all beneficiaries who take or may take under the will or trust".[84]

Steele wrote that "*Ballard* confirms the proposition, usually associated with the English authority *Talbot v. Marshfield*[85], that a beneficiary is entitled to inspect the opinions of counsel procured by a trustee to guide him or her in the administration of the trust. Mr. Justice Lederman explained:

> [The trustee] is duty-bound to act in the best interests of the beneficiaries and the legal advice that the trustee sought and obtained from the lawyer was for the purpose of furthering their interests.
>
> Thus, there is no need to protect the solicitor-client communication from disclosure to those very persons who are claiming under the estate. The communications remain privileged as against third parties who are strangers or are in conflict with the estate...not those who are claiming under the estate. And that is because the trustee and beneficiary have a joint interest in the advice[86][emphasis is mine].

However, as Steele acknowledged, it is "not always the case that beneficiary and trustee will have such a "joint interest" in the advice of counsel."[87] Steele provides *Talbot* as an example. In *Talbot*, two legal opinions were sought by the trustees of a testamentary trust: (1) whether or not they should exercise a discretionary power to advance a portion of the trust capital for the benefit of certain beneficiaries and (2) their defence to a suit brought by the other beneficiaries to prevent the trustees from exercising their discretion in the manner

[84] *Samson Indian Nation and Band v. Canada*, [1997] F.C.J. No. 1449, [1997] A.C.F. no 1449 (FCA) [*Samson*] at para. 20.
[85] (1865), 2 Dr. & Sm. 549, 62 E.R. 728 [*Talbot*].
[86] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 221-222 (HeinOnline), quoting Lederman J. at para. 9 of *Ballard Estate*.
[87] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 222 (HeinOnline).

proposed. The court held that the beneficiaries were entitled to production of the first legal opinion but not to the second.[88] Steele explained:

> The first opinion was taken to assist the trustees in the administration of the trust and the expense of securing the opinion was payable out of the trust property, and all the beneficiaries were, accordingly, entitled to examine it. Vice-Chancellor Kindersley noted that the second opinion stood on a "totally different footing" as it was procured "not to guide the trustees in the execution of their trust; but, after proceedings had been commenced against them...[89]

Thus, it is settled law that when there is a trust relationship, no privilege attaches to communications in whose subject matter the beneficiary and trustee have a joint interest. However, in cases where the beneficiary and trustee do not have a joint interest, such as where the trustee and beneficiary are in an adversarial relationship and the documents were prepared for the trustee's own purposes, the trustee may decline disclosure of the documents on the basis of a legally recognized privilege, such as solicitor-client privilege or litigation privilege. This proposition was recently affirmed in *MacPherson v. MacPherson*[90], which will be discussed further below.

Information arising in the course of an adversarial relationship between the trustee and beneficiary.

The High Court of England and Wales in *Breakspear,* articulated the important distinction between privilege and confidence as follows: "The critical difference is that confidence may be overridden by the exercise of the court's discretion, whereas privilege may not."[91] In *Schmidt*, the petitioner sought fuller disclosure of trust accounts and information about the trust assets, not by way of discovery but by virtue of the discretionary interests or expectations to which the petitioner claimed that he had, or his late father had during his life, under the two settlements. The Privy Council recognized that the right to inspect trust

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[88] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 222 (HeinOnline).
[89] David A. Steele, "Disclosure of Trust Documents Revisited" (1995-1996) 15 Est. & Tr. J. 218 at 222 (HeinOnline).
[90] 2005 BCSC 207, [2005] B.C.W.L.D., 2005 CarswellBC 300, Humphries J [*MacPherson*].
[91] *Breakspear v Ackland*, [2008] EWHC 220 (Ch) [*Breakspear*] at para. 59.

documents "is entirely different from the right to discovery (or disclosure) of documents for the purposes of litigation" and that "[a] person claiming trust documents on that basis must first establish his position as a trust beneficiary before being given access to trust documents. He is not entitled to see trust documents on a mere assertion that he is a trust beneficiary or for the purposes of establishing that he is a trust beneficiary."[92] Thus, it appears that the balancing approach articulated in *Schmidt*, cannot override litigation production obligations, as the right of a litigant to disclosure of his opponent's documents (which is part of the law of civil procedure and evidence) is distinct from the right of a beneficiary arising under the law of trusts. This principle has been succinctly articulated by the British Columbia Supreme Court in *Patrick*:

> I think that the principle that arises from the cited authorities on this issue is this: A person who can demonstrate a prima facie beneficial interest in a trust has a prima facie proprietary right to trust documents and his trustee may not withhold those documents from him unless the documents relate to the exercise of discretion pursuant to the trust, or if disclosure would be contrary to the interests of the beneficiaries as a whole and would be prejudicial to the trustee's ability to discharge his trust obligations. All of that applies to a person who has not actually sued his trustee for breach of the trust conditions. *Once a suit has been launched, though, the conventional rules of discovery engage and trust documents of whatever stripe must be produced provided they are relevant to an issue raised in the pleadings and are not subject to a legally recognized privilege* [emphasis is mine].[93]

Waiver of Privilege

Although privilege may not be overridden by the court's inherent jurisdiction to supervise the administration of trusts, in certain circumstances, there may be an implied waiver

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[92] *Schmidt v Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All ER 76 (PC) [*Schmidt*] at p. 713.

[93] *Patrick v. Telus Communications Inc.*, 2005 BCSC 1762, 49 C.C.P.B. 305, [2006] B.C.W.L.D. 1265, 2005 CarswellBC 3086, [*Patrick*] at para. 39. See also *Ontario (Attorney General) v. Ballard Estate*, 6 E.T.R. (2d) 34, 119 D.L.R. (4th) 750, 1994 CarswellOnt 579 (Ct J (Gen Div) Commercial List) Lederman J. *[Ballard Estate]*
In *Breakspear*, at paragraph 13 of the decision, the Court held in the context of letters of wishes that where the question of disclosure arises in the context of existing litigation about an issue in respect of which the wish letter is alleged to be a relevant document: "In that context, disclosure of wish letters is merely an aspect of the general law and practice as to disclosure. Generally speaking, relevance and necessity are the governing criteria and confidentiality plays a very subordinate role."

of the privilege when the defendant trustee in responding to a breach of trust claim, pleads that it acted reasonably and honestly in connection with the administration of the trust or otherwise, by raising in its statement of defence the reliance on the legal opinion.

This is what occurred in *Froese*. In *Froese*, the plaintiff sought production of documents relating to advice sought and obtained by the defendant from its solicitors in connection with decisions made and actions taken by the defendant in respect of the administration of a pension plan. The defendant claimed solicitor-client privilege. The plaintiff argued that there was an implied waiver of privilege by the defendant in pleading that it acted reasonably and honestly in connection with the administration of the plan. The Court found that the state of mind of the defendant was clearly put in issue by the statement of defence and that it was reasonable to suppose that its state of mind would be influenced by the legal advice. Since the matter of the advice sought and obtained was put in issue by the defendant, the defendant was precluded from asserting privilege in respect of those communications. The decision of *Bank Leu AG v. Gaming Lottery Corp.*[94] succinctly explains when privilege may be waived:

> Privilege may be waived expressly or impliedly...When determining whether privilege should be deemed to have been waived, the court must balance the interests of full disclosure for purposes of a fair trial against the preservation of solicitor client and litigation privilege. Fairness to a party facing a trial has become a guiding principle in Canadian law. Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice*[95] [emphasis is mine].

Thus, in determining whether privilege is deemed to have been waived, fairness to a party facing a trial is a guiding principle. The fairness requirement will be balanced against the fundamental values underlying the legal privilege and the circumstances and, in particular, the

[94] (1999), 43 C.P.C. (4th) 73, 92 A.C.W.S. (3d) 270 (Ont. S.C.J.) [*Bank Leu*].
[95] *Bank Leu AG v. Gaming Lottery Corp.*, (1999), 43 C.P.C. (4th) 73, 92 A.C.W.S. (3d) 270 (Ont. S.C.J.) [*Bank Leu*] at para. 5.

pleadings to determine whether the trustee has put his or her state of mind in issue by relying on the legal advice provided, in such a way that it would be unfair to shield the legal communications from disclosure.

IS THERE A DIFFERENT TEST FOR INFORMATION REGARDING EXERCISE OF DISCRETIONS AND LEGAL COMMUNICATIONS?

The test for disclosure of information regarding the exercise of discretions is still that of *Londonderry's Settlement*: in the absence of bad faith, trustees are not bound to disclose to beneficiaries their reasons for exercising dispositive discretions or documents evidencing such reasons. Key to this holding and remaining important is the concept of confidentiality. In *Breakspear* it was held that while the basis upon which the court orders disclosure of trust documents was reformulated in *Schmidt*, the *Londonderry* case remains good law, noting that Lord Walker in *Schmidt* expressed the need to protect confidentiality as "one of the most important limitations on the right of disclosure of trust documents" and that Lord Walker commended the *Londonderry* case as an important case in the development of the principles regulating the exercise of discretion. However, since *Schmidt* suggests that the fundamental basis of the right to seek the court's intervention is the accountability of trustees to their beneficiaries, disclosure of trust documents may be ordered if countervailing considerations are found to outweigh the need for confidentiality, under the court's inherent jurisdiction to supervise the administration of trusts.

In terms of disclosure of legal communications, no privilege attaches to communications in whose subject matter the beneficiary and trustee have a joint interest. However, in cases where the beneficiary and trustee do not have a joint interest, such as where the trustee and beneficiary are in an adversarial relationship and the documents were prepared for the trustee's own purposes *(MacPherson*), the trustee may claim legal privilege over the communications at issue; unless an implied waiver of privilege is deemed to apply.

IS THERE A REQUIREMENT TO MINUTE TRUSTEE DECISIONS AND MEETINGS?

The duty owed by a trustee to beneficiaries is a fiduciary one. Accordingly, a trustee has a duty to account for trust assets and there is a general requirement to keep accurate records.

However, is there a corresponding requirement to record trustee deliberations in the form of minutes of meetings held by trustees, especially if the reasons outline the exercise of a trustee's discretion? Although a beneficiary is not ordinarily entitled to trustee minutes setting out the reasons for the exercise of a trustee's discretion (as per the *Londonderry* principle), Nigel Mifsud has written that in the United Kingdom, such a requirement has been held to be "common practice, particularly among professional trustees in International Finance Centres, for formal records of trustee deliberations to be kept, whether as minutes of meetings or written resolutions of the trustees. This is the accepted best practice against which professional trustees are measured."[96]

There has been some debate as to whether the content of trustee minutes should contain a full record of the trustee's deliberations or just the bare essentials "with the reasoning behind the decision-making process kept in separate, confidential file notes."[97] Mifsud noted that both approaches are correct, but cautioned that it would be prudent for trustee minutes to provide a full record of the trustee's deliberations for the simple reason that if faced with litigation, the trustee may have an obligation to provide the Court with "full and frank disclosure, and the Court will have access to the trustee's most intimate musings, it would find itself in a far better position if it can demonstrate its approach to the administration of the trust with clear and contemporaneous records."[98]

However, it must be kept in mind that if reasons are provided, their rationality may be scrutinized by the courts. In *Breakspear*, the trustees, in refusing to disclose the wish letter, made a general statement that disclosure of such letter would be divisive, and would lead to family discord. The court held that as the trustees have not remained entirely silent as to their reasons for declining to disclose, the court is not prohibited from an examination of the soundness of the reasons put forward, by reference if necessary to the contents of the wish letter itself.[99]

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[96] Nigel Mifsud, "A review of the requirement to minute trustee decisions and meetings having regard to beneficiaries' rights to disclosure of information" (STEP Journal, May 2010). Available online: http://www.stepjournal.org/journal_archive/2010/latest_tqr_2010_issue_2-1/a_review_of_the_requirement_to.aspx
[97] *Ibid.*
[98] *Ibid.*
[99] *Breakspear v Ackland*, [2008] EWHC 220 (Ch) [*Breakspear*] at para. 87.

CONCLUSION

There continues to be an inevitable tension regarding the advantages of a trustee withholding trust information on the basis of confidentiality and privilege on the one hand, and the advantages of disclosure to beneficiaries on the other hand. The onus remains on the claimant beneficiary to demonstrate why disclosure is justified. Access to confidential trust information is now in all cases a matter for the court's inherent supervisory jurisdiction over the administration of trusts. Accordingly, the court, when faced with a request for information will have to weigh all relevant factors, including issues regarding personal or commercial confidentiality, (the nature of a beneficiary's interest being just one factor for consideration) before deciding whether or not to grant or refuse disclosure. It is clear that in balancing the interests of the parties involved, the question of disclosure should be addressed primarily on an assessment of the objective consequences rather than by reference to the subjective purpose for which disclosure is sought.

However, while confidentiality may be overridden by the exercise of the court's discretion, legal privilege and production obligations may not be. In certain circumstances privilege may be lost through waiver.

TOWARDS A PROTOCOL FOR TRUSTEES

The post-*Schmidt* approach to the law concerning the trustee's duty to disclose information to trust beneficiaries creates special concerns and new risks for trustees. *Schmidt* makes it clear that although trustees have a duty to provide information to beneficiaries arising from the trustees' fiduciary obligation to account to the beneficiary of the trust property, no beneficiary is entitled as of right to disclosure of all of the trust documents. Instead, when faced with a request for information, the court will have to weigh all the relevant factors, including issues regarding personal or commercial confidentiality, before deciding whether or not to grant or refuse disclosure. Accordingly, a trustee, when faced with a request by a beneficiary for trust documents, must consider the same factors that a court would consider before deciding whether or not to disclose those documents. These factors include:

The nature of the beneficiary's interest: Express beneficiaries will have a stronger claim to disclosure of trust documents as they have a realistic expectation of benefit under the trust. In contrast, discretionary beneficiaries have a weaker claim as their interests under the trust are not fixed and may be residual or contingent.

The type of document requested: Although disclosure is no longer confined to documents that constitute "trust documents", and a court may order that any document relating to the trust be disclosed in appropriate circumstances, the nature of a document is still one factor to be weighed in determining whether or not the document should be disclosed to the beneficiary. Normally, a beneficiary is entitled to access all documents and information obtained or prepared by the trustee in the administration of the trust and in the course of the trustee carrying out his or her duties as trustee. The types of documents and information that a beneficiary will ordinarily be entitled access to include: financial statements and account information that describe how the trustee has dealt with those assets and copies of legal opinions and/or communications obtained for the purpose of furthering the interests of the beneficiary. If a request is made for such documents, trustees must have a good reason to refuse disclosure. On the other hand, a beneficiary is not ordinarily entitled to the following types of documents: documents which disclose the reasoning behind the trustee's exercise of discretion for decisions they have made in good faith, legal opinions obtained by a trustee concerning the defence of the beneficiary's claim against the trustee; and letters of wishes which are expressed as being confidential by the settlor or instigator of the trust.

The reason for the beneficiary's request: Disclosure has generally been granted if the trustee's reasons could be relevant to a question of whether the discretion was exercised for an improper purpose. If a beneficiary has grounds for a breach of trust claim, the court has ordered disclosure, however, in keeping with the balancing of interests approach, the court will now evaluate the claims of a beneficiary and the materials placed before it in determining whether to grant or refuse disclosure.

Any adverse consequences or impact on other parties of disclosure: Trustees need to consider whether there are any factors which might weigh against the provision of disclosure to a particular beneficiary, since their duty is to act in the best interests of all beneficiaries. In

addition, questions of disclosure may have to be answered by balancing the interests of the various parties involved, which may include the trustees themselves as well as third parties. Issues pertaining to personal or commercial confidentiality must be kept in mind and trustees should consider whether the risk of any adverse consequences can be safeguarded by arranging for professional inspection, producing the documents in a redacted form or managing the risks with confidentiality undertakings that limit the use of documents and the reach of exposure to third parties.

Other practical considerations: In addition to the above factors, a trustee should strongly consider keeping adequate records or notes and minutes of their decisions and meetings in case they should be called upon to provide complete disclosure by a court; keeping in mind that trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons activating them in coming to a decision but if they do give reasons, their soundness can be considered by the court. It may also be wise, particularly if there is any doubt as to whether the joint interest rule applies, and to avoid inadvertent waiver of privilege, for the trustee to consider obtaining independent legal advice, that is, to seek the services of a lawyer who has not also been advising the trustee on the administration of the trust matters. Finally, and as a last resort, if unsure of its obligation to disclose, the trustee can apply for judicial guidance in the form of an application for directions.