Chapter 9

THE LAW OF TRUSTEE DISCLOSURE OBLIGATIONS IN CANADA: HAS IT COME FULL CIRCLE?

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Introduction

Historically, trustees have been regarded as having a duty of candour to the trust's beneficiaries and a duty to maintain confidentiality vis-à-vis strangers. However, as the law has evolved, the extent of these obligations has been questioned and the footing for Court intervention has shifted. Whereas the trustee's duties were historically understood to arise from beneficiaries' proprietary interests, modern authorities in Canada and other common law jurisdictions have adopted a more purposive approach to determining what information a trustee may or must share, and an emphasizing case-by-case discretionary intervention by the court. Modern decisions have eschewed cataloging factors to be considered by trustees or courts to guide their decisions. However, the historical cases can be understood through the lens of the modern approach and provide guidance to trustees and courts in considering disclosure issues.

In Search of a Principled Approach

Lord Wrenbury's speech in the 1920 decision of the House of Lords in *O'Rourke v. Darbishire*[1] is the traditional locus of an understanding that trustee's duties to disclose trust information to beneficiaries is based on the beneficiaries' proprietary right in trust documents:

> If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents, which he desires to inspect upon what has been called in the judgments in this case a proprietary right. 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

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[1] *O'Rourke v. Darbishire,* [1920] A.C. 581, [1920] All E.R. Rep. 1 (U.K. H.L.)

> action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents, which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries.[2]

Prior to *O'Rourke v. Darbishire* the courts had not articulated a clear basis for ordering disclosure.

The proprietary basis for access to trust documents, Lord Wrenbury noted, "has nothing to do with discovery". In a lawsuit, the trustee's disclosure obligations may change, but the proprietary interest has been used to require disclosure even without substantive litigation.

The proprietary approach was rejected in the Privy Council's 2003 decision in *Schmidt v. Rosewood Trust Ltd.*, which preferred to approach disclosure outside of litigation as an extension of the fiduciary duty to "keep the beneficiary informed and to render accounts"[3]while it rejected any absolute right to disclosure.[4] The court's role in considering disclosure disputes is not the protection of proprietary interests, but to exercise inherent jurisdiction to supervise trusts.[5]

Rosewood Trust is said to stand for the proposition "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."[6]

The historical authorities developed a framework for disclosure based on a proprietary right of beneficiaries to "trust documents". Thus, the concept of "beneficiary" defined the class to which disclosure was presumptively available, and the concept of "trust document" defined the scope of the available disclosure. Because this framework captured disclosure scenarios that the court found undesirable, limited exceptions were developed surrounding documents relating to the trustee's exercise of discretion, starting with *Londonderry's Settlement, Re*.[7]

Ultimately recognizing this analytical framework as unsatisfactory, in *Schmidt v. Rosewood Trust Ltd.* the Privy Council shifted the law onto a

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2 *Ibid* at pp. 626-627

3 *Schmidt v. Rosewood Trust Ltd.*, [2003] 2 A.C. 709, [2003] 3 All E.R. 76 (England P.C.) ("*Rosewood Trust*") at para. 52.

4 *Ibid* at para 67.

5 *Ibid* at para 51.

6 *MacPherson v. MacPherson* (2005), 46 C.C.P.B. 38, 15 R.F.L. (6th) 361 (B.C. S.C.) at para. 18

7 *Londonderry's Settlement, Re* (1964), [1964] 3 All E.R. 855, [1965] Ch. 918 (Eng. C.A.) ("*Londonderry's Settlement*")

new foundation in which it would conduct a balancing of interests. Because the court is exercising its supervisory role, and the purpose of disclosure is to ensure the proper administration of the trust, disclosure should be required as needed for effective supervision. As will be considered below, earlier cases which sought to define the scope of the categories – who is a beneficiary, and what constitutes trust documents – can be understood as efforts to achieve supervision of due administration of the trust, using the categories as proxies for the interests to be balanced under a *Rosewood Trust* approach.

The potential cost of the doctrinal shift in *Rosewood Trust* is greater uncertainty while the law continues to develop, since the Privy Council did not purport to provide an exhaustive list of factors which courts should consider in determining whether to exercise the inherent supervisory jurisdiction. The new foundation may provide greater doctrinal coherence in that the court's decisions will not require convoluted efforts to classify the litigants or objects of disclosure into specific categories or exceptions in order to reach the equitable result.

Canadian case law has not yet adopted a consistent doctrinal approach to disclosure. While the *Ballard Estate* decision[8] reviewed below may be seen as a rejection of the proprietary analysis predating *Rosewood Trust*, it did not articulate an alternative framework. Therefore, in *Barkin v. Royal Trust Co.*, also decided in Ontario before *Rosewood Trust,* Pitt J. returned to the proprietary right in *O'Rourke v. Darbishire*, drawing the citation from *Ballard Estate* but not carrying through the analysis in that case rejecting the proprietary right as the basis for disclosure.[9] More recent decisions suggest that the *Rosewood Trust* approach will find favour in Canada.

The Confidentiality Interest

The gatekeeping function of proprietary interest arises from the duty of confidentiality trustees owe when dealing with strangers to the trust. Their obligation to maintain confidentiality must be weighed against the interest of the claimant in the proper administration of the trust.

The concept of confidentiality,

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8 *Ontario (Attorney General) v. Ballard Estate* (1994), 119 D.L.R. (4th) 750, (*sub nom.* Ballard Estate, Re) 20 O.R. (3d) 350 (Ont. Gen. Div. [Commercial List]), additional reasons 1995 CarswellOnt 3572, [1995] O.J. No. 3885 (Ont. Gen. Div. [Commercial List]) per Lederman J. ("*Ballard Estate*")

9 *Barkin v. Royal Trust Co.* (2002), 45 E.T.R. (2d) 1, [2002] O.T.C. 138 (Ont. S.C.J.) at para. 15, additional reasons (2002), 45 E.T.R. (2d) 6, 2002 CarswellOnt 1399 (Ont. S.C.J.), additional reasons (2002), 45 E.T.R. (2d) 8, 2002 CarswellOnt 1237 (Ont. S.C.J.).

> "is a chameleon, taking different legal hues from the circumstances in which it is found. It may arise in respect of information because of the nature of the information itself, because of the nature of the relationship between the persons giving and receiving the information, or both. In some cases, confidentiality gives rise to an obligation resting on the recipient to maintain the secrecy in which the information was shrouded before it was communicated to the recipient."[10]

The trustee may have confidential information obtained from the settlor, resulting from the administration of the trust, or obtained from advisors to the trust. The circumstances in which the information arises will colour the analysis.

The settlor of an *inter vivos* trust, especially an offshore trust, may have secrecy as a primary motivating factor in structuring their affairs with a trust. As Waters observes, settlors often seek to free themselves of title to their assets while directly or indirectly retaining control of the ownership and distribution decisions and keeping from others the particulars of upon whom the wealth is to be conferred: "In short, he wants retained asset control and secrecy."[11]

The duty of confidentiality might arise simply from the private nature of the transaction. As Mahoney JA. wrote in *Hartigan Nominees Pty Ltd. v. Rydge*[12]:

> "it is important in my opinion to have regard to the essential nature of such discretionary trusts. Such a trust is not a mere commercial document in which the public may have an interest. It is a private transaction, a disposition by the settlor of his own property, ordinarily voluntarily, in the manner which he is entitled to choose. Special cases apart, it is proper that his wishes and his privacy be respected."

As explained by Steele, *Hartigan* stands 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."[13]

Once a trust is settled, the trustee's duty is to execute it according to its terms for the benefit of the beneficiaries, not the settlor, and so "respecting

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[10] *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24, 32 O.T.C. 321 (Ont. Gen. Div.) at para. 106, additional reasons (1997), 152 D.L.R. (4th) 102, 38 O.T.C. 345 (Ont. Gen. Div.)

[11] Waters, Donovan, "Reaching for the Sky: Taking Trust Laws to the Limit" in "Extending the Boundaries of Trusts and Similar Ring-Fenced Funds", David J. Hayton, ed., New York: Kluwer Law International, 2002 at p. 251.

[12] *Hartigan Nominees Pty Ltd. v. Rydge* (1992), 29 NSWLR 405

[13] Steele David A., "The Beneficiaries' Right to Know", (Paper delivered at the Fourth Annual Estates and Trust Forum, Toronto, Law Society of Upper Canada, 20 November 2001)

the wishes of the settlor" is not a sufficient basis for establishing confidentiality. It follows that the settlor cannot oust the beneficiaries' right to require the trustees to account.[14]

However, maintaining confidentiality may be for the benefit of the beneficiaries generally[15], and would then evidently be within the scope of the trustees' fiduciary duty toward them. The disclosure of confidential information might lead to discord among the beneficiaries. The right not to disclose trust information may promote the due administration of trusts. It may reduce the scope of litigation regarding rationality of exercise by trustees of their discretions. It encourages suitable candidates to accept the office of trustee by insulating their decisions from beneficiary scrutiny.[16]

In some offshore jurisdictions, the duty of confidentiality is prescribed by statute.[17] The fact that trust documents are automatically confidential is not universally held.[18] Canadian authorities start from the proposition that a trustee need not disclose information about the trust, except to the beneficiaries. Following the historical authorities, a claim for access necessarily started with a claim to be a beneficiary.

Establishing a Proprietary Interest

The "proprietary interest" Lord Wrenbury described acts as a proxy for the strength of the claimant's interest in the due administration of the estate. Therefore, a named beneficiary with a specific interest – for example, the child who is to receive particular heirlooms under a will – has an obvious claim to information regarding the trustee's dealings with that property.

The example of a specific bequest, however, illustrates one flaw in the proprietary interest doctrine: the named beneficiary who is to receive specific property has no particular interest in the administration of the other assets which form part of the trust.

A greater challenge in identifying who is a beneficiary arises when there is an ordering to the beneficiaries' interests or when the trustees are granted the authority to make use of the trust property on behalf of some persons within a larger class at their discretion.

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14 *Jones v. Shipping Federation of British Columbia* (1963), 37 D.L.R. (2d) 273, 41 W.W.R. 636(B.C. S.C.)

15 *Breakspear v. Ackland*, [2008] EWHC 220 (Ch) at para. 24.

16 O'Sullivan, John and Wong-Chong, Christine, "What Privilege Does a Trustee Enjoy?" (Paper delivered at the 13th Annual Estates and Trusts Summit, Law Society of Upper Canada, 18 November 2010) at pages 1-2.

17 E.g. The Cayman Islands' *Confidential Relationships (Preservation) Law (2015 Revision)*, and also the British Virgin Islands' *Banks and Trust Companies Act, 1990*

18 See e.g. *Re The Internine and the Azalia Trusts*, 2006 JLR 195, Jersey Court of Appeal

The leading Ontario case considering the issue of a beneficiary's entitlement to disclosure is *Ballard Estate*.[19] In that case, the plaintiff, on behalf of the residual legatee under a will and trust, sought disclosure of all communications concerning the management of the estate, including communications with the estate trustee's solicitors. Notably, the request for disclosure was made in the context of litigation over administration of the estate. Under the *Rules of Civil Procedure* relevant documents were to be produced in the litigation unless privileged.

The trustee claimed solicitor-client privilege, but conceded that it would not apply as between the trustees and beneficiaries claiming under the Will. It resisted disclosure to the plaintiffs on the basis that "beneficiary" in this context excluded someone with a contingent or residual interest which might ultimately amount to nothing. The trustees argued that the exception to privilege was founded upon the beneficiaries' proprietary interest, and that the authorities confirmed contingent or residual beneficiaries lacked a proprietary interest until there were ascertained assets forming part of the residue of the estate. As no residual properties had yet been ascertained, no proprietary interest arose.

In ordering disclosure, Lederman J. reviewed *O'Rourke v. Darbishire*'s foundation of the proprietary interest, but then rejected the literal interpretation of the language used in the decision as applying to exclude contingent beneficiaries on the grounds that they lacked a proprietary right.

> This analysis confuses "proprietary right" in the sense of its dictionary meaning, i.e., owning something as property akin to ownership in land (see Shorter Oxford Dictionary (Oxford: Clarendon Press, 1993)), with the right to information on the basis of commonality of interest. 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.

Lederman J.'s focus is not on property but on interests. This becomes clear in the following paragraphs of his Honour's decision, where the proper approach is said to be "to bear in mind the rationale for the solicitor-client privilege and whether it has any applicability to this kind of situation.... the privilege does not even arise as where the interests of the party seeking the information are the same as those of the 'client' who retained the solicitor in the first place."

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[19] *Ballard Estate*, *supra* note 8

Lederman J.'s decision can be understood as an unarticulated exercise of the guidance later developed in *Rosewood Trust* that the court should see to the proper administration of the trust regardless of whether the plaintiff has a proprietary interest or not. The residual beneficiary fell within the class of persons with a clear interest in the estate's due administration and, therefore, was a "beneficiary" entitled to disclosure.

In *Rosewood Trust*, restricting disclosure only to beneficiaries with proprietary interests was considered problematic. Mr. Schmidt had been one of several named beneficiaries under two trusts. After Mr. Schmidt passed away, his son brought the action seeking an accounting and information from the trustees, in his personal capacity and as administrator of his father's estate. The evidence did not establish that the son, in his personal capacity, had anything more than a strong moral claim to an interest in the trusts. In respect to the claim on behalf of the estate, the trustees argued that Mr. Schmidt had been the "mere object of a power who as such had no entitlement to trust documents or information." The terms of the trust permitted, but did not obligate, the trustees to make dispositions to Mr. Schmidt. He (or his companies) had received distributions from the trust during his lifetime. Thus, the Privy Council concluded it was appropriate for the requested disclosure to be made.

In *Rosewood Trust*, a proprietary right was found neither sufficient nor necessary.[20] The lack of a clear proprietary right, as in the case of discretionary beneficiaries, speaks to intensity of a beneficiary's interest in the due administration of the estate but that interest arises independently of the beneficiaries' vested interest in property.

Trust Documents

Lord Wrenbury stated in *Londonderry's Settlement* that the beneficiary's right was to see "all trust documents". Therefore, the definition of "trust document" became a means to limit the beneficiary's access to information about the trust. The definition of "trust document" became a proxy for the interests of other parties, including the trustees themselves and other beneficiaries, and a means of rolling back some of the disclosure granted by establishing status as a beneficiary.

The issue in *Londonderry's Settlement* is summarized in *Rosewood Trust* as being an inquiry into whether communications between trustees as to the exercise of their dispositive discretions, and in communications made to the trustees by other beneficiaries, were indeed trust documents.[21]

Londonderry's Settlement may be best understood today as an effort to balance interests of the sort contemplated in *Rosewood Trust* within the then-existing jurisprudential framework of proprietary rights expressed in

[20] *Rosewood Trust,* supra note 3 at para 54.
[21] *Rosewood Trust,* supra note 3 at para 49.

O'Rourke v. Darbishire. The underlying policy consideration driving the result in *Londonderry's Settlement* was to providing a "safe space" for trustees to consider in good faith the manner in which discretion is to be exercised, and that policy consideration will inform the balancing of interests a court will consider in exercising its supervisory role under the *Rosewood Trust* approach.

Lord Harman, who spoke first on behalf of the Court of Appeal cited the proprietary interest in trust documents from *O'Rourke v. Darbishire*, holding that the beneficiaries had no proprietary interest in the trustee's internal correspondence regarding the exercise of discretion and, therefore, that such documents were not trust documents. Correspondence with the trust's solicitors was documentation in which the beneficiaries had a proprietary interest. Without identifying if whether they were property of the beneficiaries generally, or "trust documents", Lord Harman declined to include letters to individual beneficiaries in the matters to be disclosed.

Instead of engaging in an exercise of classifying trust documents, Lord Danckwerts approached the question as one of whether the documents should be disclosed on policy grounds and in so doing rejected the proposition that all trust documents must necessarily be produced.

> 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, and I think the point was a good one which was taken in the affidavit of Lord Nathan, that 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. It seems to me that where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner. Of course, if a case is made of lack of bona fides, that is an entirely different matter.

Lord Salmon preferred to work within the requirement in *O'Rourke v. Darbishire* but restrict the category of trust documents.

> There is another possible approach to the present case. The category of trust documents has never been comprehensively defined. Nor could it be - certainly not by me. Trust documents do, however, have these characteristics in common: (l) 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. If any parts of a document contain information which the beneficiaries are not entitled to know, I doubt whether such parts can truly be said to be integral parts of a

> trust document. Accordingly, any part of a document that lacked the second characteristic to which I have referred would automatically be excluded from the document in its character as a trust document.

Lord Salmon's reference to "information which the beneficiaries are not entitled to know" is a reference to older authorities stating that the trustee need not explain how they exercised their discretionary powers.

All three Lords were in agreement that the trustees could resist disclosure at large, but were bound to produce the documents in litigation over the legitimacy of their discretionary decisions.

The use of "trust documents" as a gatekeeper is clear from the circularity of Lord Salmon's test: information about the trust which the beneficiaries are not entitled to know cannot be a trust document. Freed from their role as a limitation on presumptive disclosure to established beneficiaries, the policies articulated in the judgment and, explicitly, in Lord Danckwerts' speech can be considered as independent factors to be weighed in the *Rosewood Trust* balancing.

Disclosure in Litigation

The English authorities are consistent in that whatever the basis for disclosing or withholding information from beneficiaries outside of litigation, once an action is commenced questioning the administration of the trust, disclosure must be made. The balancing exercise called for in *Rosewood Trust* is no longer applicable.

Rule 30.06 of the *Ontario Rules of Civil Procedure* provides that, where a document may have been omitted from the Affidavit of Documents, or privilege improperly claimed, the court may order production of the document "if it is not privileged". Therefore, unless a claim for privilege can be made out, the ability of the trustees to resist disclosure evaporates.

A positive finding that no privilege applies must be made before the document can be ordered produced.[22] Cross-examination on the Affidavit of Documents may provide sufficient evidence for the court to rule a document not privileged, but if necessary, the procedure in Rule 30.04(6), for the court to review the documents, may be used to determine the validity of the claim.

Trustees have resisted disclosure of correspondence and opinions from counsel by relying on solicitor-client privilege. However, as demonstrated by *Ballard Estate*, the scope of that protection is limited: where the documents relate to the administration of the estate, both the trustees and residual beneficiary had the joint interest in the estate's proper administration. Therefore, following the Supreme Court's decision in *Goodman*

[22] *Bie Health Products v. The Attorney General of Canada et al.*, 2015 CarswellOnt 7757 (Ont. S.C.J.)

Estate v. Geffen[23] establishing the "joint interest" exception to privilege, no privilege was found to apply. However, solicitor/client privilege remains intact with regard to legal communications with a trustee that pertain to her protection from claims against her by beneficiaries.[24]

A difficult question arises where a trustee incurs legal expenses in conflict with a beneficiary, and the trustee is called to account for the expenses by the opponent beneficiary after the dispute settles. What disclosure must the trustee make to another beneficiary? In *Haydu v. Nagy*,[25] such a dispute occurred. The litigants were sisters. The trustee, Nagy, had not yet passed accounts for their parents' estate. The estate inherited litigation over the sale of a house belonging to the estate and as the pleadings evolved Haydu was drawn in as an adversary to the estate's interests. The action ultimately settled and the property sold. As a separate matter, Nagy alleged that Haydu had improperly withdrawn monies from their parents' account.

Nagy sought reimbursement from the estate for costs personally paid in these disputes. Haydu brought an application for production of the solicitor's' files to assess the claims. Ms. Nagy asserted solicitor-client privilege over all of the solicitors' files except for pleadings, correspondence with opposing counsel, expert files and accounts. The court considered whether litigation privilege or, alternatively, solicitor-client privilege applied to bar disclosure.

Ross J. held that litigation privilege could protect the documents relating to the banking issue, which was unresolved, but that it was spent in respect of the settled property action. Those matters in the property dispute for which Haydu and Nagy were not adverse in interest were not subject to solicitor-client privilege as between the trustee and beneficiary. The remainder was subject to privilege, but with a caveat. The court considered the situation to be analogous to where an order for special costs is made, which calls for an attendance before a taxing officer. In such cases, adverse parties were given the option to waive or maintain privilege. However, the election to maintain privilege carries the risk that the claim will be disallowed for lack of evidence making it out. This decision suggests that counsel for trustees should endeavor to separate the record of the work done from the actual advice provided, so as to simplify the trustee's later justification for the expense.

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[23] *Goodman Estate v. Geffen* (October 4, 1989), Doc. 21613, [1989] S.C.C.A. No. 337 (S.C.C.)

[24] *Chang v. Lai Estate*, [2014] 11 W.W.R. 206, 64 B.C.L.R. (5th) 430 (B.C. S.C.) at para. 20; *Prubant v. Society for Pastoral Counselling Research*, 2014 CarswellOnt 389, 236 A.C.W.S. (3d) 875 (Ont. S.C.J.); *Pothos Leasing Ltd. v. Headon*, [2003] O.T.C. 1066, 2003 CarswellOnt 4928 (Ont. S.C.J.), additional reasons (2004), [2003] O.T.C. 1066, 2004 CarswellOnt 1206 (Ont. S.C.J.).

[25] *Haydu v. Nagy* (2012), 42 B.C.L.R. (5th) 107, 84 E.T.R. (3d) 320 (B.C. S.C.)

Other class privileges are available to trustees in appropriate circumstances. In *Fillmore v. Trenholm Estate*[26] , the estate trustee sought to exclude as privileged, and therefore inadmissible, evidence tendered by the applicant regarding settlement discussions held with the estate. Applying the class privilege applicable to settlement communications set out in *Sable Offshore Energy Inc. v. Ameron International Corp.* the court held:

> "... all discussions and correspondence relating to settlement remain under settlement privilege. Provided further, all other documents or discussions which relate to the administration of the Trenholm Estate including legal advice are not subject to privilege and should be disclosed. Should any documents, correspondence or discussion relate to both categories, then they should be redacted so as to remove the settlement negotiations."[27]

These decisions make clear that the scope of privilege available to protect trustee's communications is limited. Any broader privilege must arise on a case-by-case basis.

Case by Case Privilege: A Last Resort

The "Wigmore criteria" for establishing a case-by-case privilege were referenced by McLachlin J. A. in *M. (A.) v. Ryan*:

> "First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation."[28]

Disclosure, it was noted, is not "all or nothing", but may be subject to conditions which govern who may see and copy documents and what non-essential material may be redacted.[29] The court may impose limits "aimed at permitting the opponent to have the access justice requires while preserving the confidential nature of the documents to the greatest degree possible."[30]

In *Ryan,* McLaughlin J.A. also noted that "fishing expeditions" in discovery were inappropriate.

Londonderry's Settlement created an exception to the general rule of disclosure. In order for the *exception* to apply once litigation has

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[26] *Fillmore v. Trenholm Estate* (2013), 1075 A.P.R. 50, 414 N.B.R. (2d) 50 (N.B. Q.B.)
[27] *Sable Offshore Energy Inc. v. Ameron International Corp.* (2013), 359 D.L.R. (4th) 381, [2013] 2 S.C.R. 623 (S.C.C.)
[28] *M. (A.) v. Ryan* (1997), 143 D.L.R. (4th) 1, [1997] 1 S.C.R. 157 (S.C.C.)
[29] *Ibid* at para 33.
[30] *Ibid* at para 37

commenced, it would have to rise to the level of a privilege. In *Ballard Estate,* and subsequently in *Rosewood Trust*, the exception was referred to as being dependent on circumstances. Therefore, it might provide guidance for a finding of a case-by-case privilege to protect confidential information in the trustee's hands.

Case-by-case privilege is difficult to establish. For example, a claim of privilege has been rejected where a party asserted it over materials from an arbitration subject to a confidentiality agreement, with Cameron J. holding:

> "The principle to be protected by such a privilege does not go to the heart of our adversarial system of justice or to Canadian Charter of Rights and Freedoms or other societal values. The recognized privileges are based on the need for frank disclosure of potentially prejudicial information for the purpose of obtaining proper advice or the need to preserve a socially important relationship."[31]

Londonderry's Settlement does suggest that there are socially desirable reasons to foster the confidential settlor-trustee or inter-trustee relationships. Certainly, if a zone of privacy is required in order to attract people to serve as trustees, case-by-case privilege may be required.

If, as said in *Hartigan*[32], the trust is a primarily private instrument, it is difficult to conceive of societal values which would justify the imposition of case-by-case privilege. The various trusts in the case law include those established on the eve of marital breakdown to shield assets from the spouse, or to establish tax shelters to shield the assets of the ultra-rich. Protecting the communications between the settlor and the trustee as to how these goals are to be achieved does not suggest a socially important relationship which requires preservation. Similarly, communication between trustees as to how to accomplish these goals is unlikely to be a relationship of the sort which the society will seek to "sedulously foster."

Voluntary Disclosure By Trustees

As a practical matter, the loss of confidentiality upon the commencement of a lawsuit means that pre-litigation *Rosewood Trust* balancing is unlikely to arise; where a potential beneficiary requires such information, a lawsuit over the administration of the trust is more likely. Therefore, trustees who cannot justifiably avail themselves of a privilege which will continue to protect them in litigation should consider making the disclosure sought, if it can be done without breaching fiduciary obligations

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[31] *Adesa Corp. v. Bob Dickenson Auction Service Ltd.* (2004), 247 D.L.R. (4th) 730, 73 O.R. (3d) 787 (Ont. S.C.J. [Commercial List]) at para. 56, additional reasons 2006 CarswellOnt 1910, [2006] O.J. No. 1261 (Ont. S.C.J.)

[32] *Hartigan Nominees Pty Ltd. v. Rydge* (1992), 29 NSWLR 405

to the beneficiaries considered as a whole and without prejudicing the trustee's ability to administer the trust.[33]

To the extent the trustee seeks to make voluntary disclosure to head off accusations of wrongdoing, some guidance may be taken from the Guernsey decision *In Re B*[34], where a trustee sought to make disclosure of trust information to foreign authorities over the objections of beneficiaries.

A banker acted as trustee for two trusts created by the settlor, for the benefit of his sons and grandchildren. The trustee had been summonsed by French authorities to give evidence in an investigation into money laundering and tax evasion. The underlying facts related to a complaint raised by the settlor's widow before she passed away.

On application, an initial order was made giving the trustee authority to make such disclosure as the trustees "reasonably consider necessary or desirable to protect the interests of the beneficiaries of the Trust, to secure the preservation of the trust property, or to protect the interest of the [trustee] personally in the context of an on-going criminal investigation."

The matter came before the Court of Appeal, but due to extensive new evidence, the Court of Appeal effectively conducted a *de novo* hearing. The trustee's proposed disclosure was opposed by a granddaughter, who had never benefitted from the trust, who agrued that the trustee's duty of confidentiality owed to the beneficiaries overrode the trustee's right to defend itself in criminal proceedings.

The parties agreed that the trustee had a common-law duty to keep the affairs of the trust confidential. The Court of Appeal agreed, with the caveat that disclosure may be necessary in connection with the proper administration of the trust, on the basis that it was similar, but not identical to the duty of confidentiality owed by a bank to its customers. The Court of Appeal held that the duty was "subject to the right to disclose such information when, and to the extent necessary, for the protection of the trustee's interest."[35]

The beneficiary argued that the French authorities sought the information for a collateral purpose; that is, to investigate certain members of the Settlor's family and not the trustee. It was also argued that the French authorities had disregarded the appropriate treaty procedure for issuing the summons. The Court of Appeal found insufficient evidence to make out these claims.

The Court of Appeal held that permitting disclosure required a balancing exercise to be carried out involving "an evaluation of .... the

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[33] *Patrick v. Telus Communications Inc.* (2005), 49 C.C.P.B. 305, 23 C.P.C. (6th) 219 (B.C. S.C.)

[34] Guernsey Judgment 35/2012, Court of Appeal, Civil Division 11th July 2012

[35] *Ibid* at para 40

nature, scope, quality and effect of the foreign order", but with regard to and in the context of the interests of the Respondent trustee and the beneficiaries, and having regard for the broader public interest.[36] Without answering the summons, the trustee faced travel restrictions and the risk of arrest. The beneficiaries identified the risk that the French authorities would disseminate the information obtained from the widow's estate, that the French tax authorities would seize trust assets based on the information obtained, or that new civil proceedings would follow. The Court of Appeal weighed these factors and held that the potential injustice to the trustee in that case "trumps other considerations" and the order permitting disclosure stood.

The decision in *Tournier v. National Provincial & Union Bank of England*[37] relied on by the Guernsey Court of Appeal has been cited with approval for its description of the law in Ontario and, therefore, it is likely that an Ontario court called upon to consider a trustee's proposed disclosure would similarly allow a trustee to make disclosure when the trustee's interests require it.

Clearly, as the law presently stands, each issue of disclosure by trustees will be considered on its own facts and in its own context to determine the trustee's rights and obligations.

Conclusion

In 1889, the Ontario Court of Appeal considered whether a trustee was obliged to give copies of accounts to a potential beneficiary and held: "every case depends on its own circumstances and must be governed by reason and common sense". Today, that statement, with all of the guidance it delivers, remains an excellent summary of the state of the law in this field.[38]

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[36] *Ibid* at para 42

[37] *Tournier v. National Provincial & Union Bank of England* (1923), [1923] All E.R. Rep. 550, 29 Com. Cas. 129 (Eng. C.A.)

[38] *Sandford v. Porter* (1889), 16 O.A.R. 565, [1889] O.J. No. 43 (Ont. C.A.)